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**The Moral Obligation to Obey Law[[1]](#footnote-1)**

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I. [464] It is often held that breaking the law, any law, is morally wrong, and in doing so one acts badly. Walter Berns writes, "[t]he law must not be understood to be merely a statute that we enact or repeal at our will, and obey or disobey at our convenience--especially not the criminal law.”[[2]](#footnote-2) John Finnis argues that the law has moral authority because we benefit from it as a whole. The law "presents itself as a seamless web. Its subjects are not permitted to pick and choose.”[[3]](#footnote-3) Something like a consensus has emerged on the part of legal and moral philosophers that this position is mistaken. A number of philosophers–Wasserstrom, Brandt, Simmons, Smith, Raz--have rejected the position that there is a prima facie moral obligation to obey law, some have defended selective disobedience, and M.B.E. Smith contends that most people would agree there is no such obligation: “[f]or most people, violation of the law becomes a matter for moral concern only when it involves an act which is believed to be wrong on grounds apart from its illegality.”[[4]](#footnote-4) My impression is that what Smith says here isn’t true, and that most people feel they ought to obey the law even if the law goes against what they think is right, and this impression is supported by some empirical data. In his book length study of why people obey law, Tom Tyler reports that 82% of 1,575 people interviewed agreed that people should obey even laws with which they disagree.[[5]](#footnote-5) That a large majority of people believe that I act badly in breaking a law regardless of the moral reason for the law I violate may have little bearing on the persuasiveness of the philosophical position, but it does add to my concern that proponents of the position that one may selectively disobey the law have not fully acknowledged its problematic nature. Which laws can we morally disregard? If behavior that violates a particular law is harmless, then perhaps the behavior should not be illegal, but shouldn’t the determination of whether it is harmless belong to the state, not to each individual?

It is one thing to show that there is no prima facie moral obligation or that it is weak and can be outweighed. This article takes the defense of selective disobedience further by turning to the evaluative process involved in weighing the force if any of the moral obligation. I shall discuss an example involving not a controversial law it is easy to think unjustified, the sort used by Brandt and others to disprove the claim that there is always a moral reason to obey a law just because it is law, but a law of a sort most people would agree is justified, and argue that the violator does not act badly. While the [465] philosophers who argue that one may selectively disobey the law may find this case persuasive, it is difficult to know for sure, since they may well evaluate the considerations in a particular instance of lawbreaking differently. Where previous philosophical discussions of obligations to obey the law are universally framed in general terms, this article takes seriously the view that whether one acts badly in breaking a law can be adequately answered only by weighing considerations unique to the particular act. In focusing on the particular act of lawbreaking and considerations relevant to it, we shall see that the considerations that most naturally come into play are connected to the general theories of obligation that articulate reasons for obeying law, but the force of these reasons–that doing so is required by fairness, or gratitude, or because we consented and have a promissory obligation, or for prudential reasons, is contingent on facts connected with the particular act of lawbreaking in question.

Bordering a university’s campus is a popular running path called 'the Dish', named for a large satellite antenna situated near the top of a hill on this university-owned land. A loop popular with runners begins on the campus, proceeds west up the northern side of the hill to a fence surrounding the satellite antenna and continues down the southern side of the hill back to the campus. Unknown to most runners and hikers are two trails that continue west from the Dish. Each of these trails extends downhill for about a mile, leading to one of two tunnels that go underneath a major freeway. There are signs at the entrances of each tunnel that read "Private Property. No Trespassing Permitted. Violators Will Be Prosecuted." On the other side of the tunnels is another large tract of land, with trails traversing some moderate hills and overlooking a lake. The land on this side of the freeway is leased out by the University. Not all runners, though, are unaware of the trails on the west side of the Dish, the tunnels, or the trails on the other side of the freeway. By running down the west side of the hill, through one of the tunnels, around the lake, through the other tunnel, and returning over the dish to campus, long-distance runners can enjoy a scenic and challenging trail run, by far the most exhilarating run for someone who lives on campus but has no access to a car-- for the only other comparable trail runs in the vicinity are too distant to reach on foot. Runners wanting to take this longer route face a dilemma, however: to do this run, they must ignore the "No Trespass" signs. They must break the law. Some do. When they do, do they act badly? If it is morally wrong to trespass here, why is it wrong?

It is important to note that I am concerned with the moral as opposed to the legal obligation to comply with the trespass law. The issue with which I am concerned is not whether the trespasser is subject to a legal rule, or whether if caught, she may rightly be subject to legal punishment. That there is a trespass law is sufficient reason to justify penalties for those who violate this law (see section IV). Nor is the issue whether there ought to be trespass laws. The issue I address is whether someone who violates this particular law acts badly.

Jane is a long-distance runner who lives on campus and has no access to the area's more distant hilly trails. Approaching the trespass sign in [466] front of one of the two tunnels, Jane has this choice: break the law and continue on a beautiful and quite challenging trail run which she looks forward to with great anticipation; or comply with the law and turn back. Jane does not decide what to do arbitrarily. She draws on various considerations, all of which seem relevant to her. Before turning to the general theories about the obligation to obey law, I shall examine the considerations that Jane takes into account. "Jane" is a pseudonym for an actual runner with whom I have consulted. The considerations listed below are the actual considerations of this runner.

Some considerations discourage Jane to trespass.

She knows that if she trespasses she breaks the law, and this fact seems to matter, although she is not sure how to weigh its importance.

She has heard stories from other runners about a runner who trespassed onto the leased land several years back having been shot at by an old man with a rifle. There is no mention of this in the local newspapers at that time, and Jane has her doubts about the story, though she repeats it to other runners.

Once when Jane was lost on one of the side-trails on the other side of the freeway, having strayed perhaps a quarter mile from the main trails, she neared a barn, and large threatening dogs began barking loudly, followed shortly thereafter by a woman who approached from behind the barn. Firmly, but without anger, the woman told Jane that she should not be here, that she was on private property. Shaking a bit from the barking dogs and her unexpected encounter with the woman, Jane apologized, and asked how she might find one of the tunnels. The woman told her, and Jane, after politely thanking her, headed straight for the tunnel.

Other considerations encourage Jane to trespass despite the risks, and despite the fact that by trespassing she breaks the law.

Jane has seen other runners go through the tunnel.

Jane has reasons to doubt that so long as she stays on the main trails her trespassing bothers anyone. First, she has heard that some years ago there were no "No Trespass" signs, and that they went up because the University was concerned, not about runners, but about people swimming in the lake--and Jane has no intention of swimming in the lake. Second, she knows that if she stays on the main trails and does not get lost, she can complete the extended loop without seeing any signs of human habitation. No houses or other structures are in sight. Only twice has Jane encountered other human beings on the land opposite the freeway, not counting friends who sometimes join her on her runs, or other runners she sometimes sees. Once she passed an elderly man driving a pickup truck on one of the dirt trails; he waved at her in a friendly manner. The other time, she came across the woman with her dogs, but only after straying from the main trails, which Jane intends never to do again. Third, Jane is fairly certain that when she runs on the other side of the freeway she does no damage to the land or to anything else. She assumes that if it were hazardous to trespass on the land there would be a warning sign, or the openings to the tunnels would have been made completely inaccessible. As it is, one of the tunnels has no barrier at all other than a ‘No Trespass’ sign; the other is blocked by a gate, but a way is left for [467] humans, as opposed to grazing cows, to go around the side of the gate. Jane also can imagine a situation where the land’s owners would be grateful that she trespassed. She might spot and report a fire, thereby restricting its destructive path. Not long ago there was a large fire by the satellite dish; none of the nearby homes were damaged, thanks to a quick response by the fire department. The fire was first reported by a runner. Or Jane might deter swimmers, and thereby better promote what is perhaps the true purpose of the law.

Jane is not certain of the actual penalty for trespassing, but does not worry too much about actually being prosecuted. She thinks it unlikely that a police officer would be on the land on the other side of the tunnels, given its remoteness. Although a major freeway divides the two tracts of land, because of the land's topography runners are not visible from the freeway. Jane imagines that if she ever encountered the lessees there and, despite her apologies, they insisted on taking her name down so that she could be prosecuted, she would explain what it meant to her to run here and how she causes no harm and has no desire to swim in the lake; if they remained insistent, Jane, who feels queasy about lying, would comply. Even so, she imagines that upon hearing her reasons and her promise never to trespass there again, a judge would let her off with a warning or impose a nominal fine.

Finally, Jane sometimes gets upset that all of this beautiful land is privately possessed and off limits, and starts thinking vaguely about Marx's discussion of how private property contributes to human alienation.

These are the considerations Jane has taken into account at various times as she approaches the tunnel. Sometimes she decides to break the law. But many times she decides not to trespass. When she does trespass, she sometimes has an uncomfortable feeling, and it is hard for her to tell if it is a feeling of fear (of barking dogs and gun-toting old men), or of guilt at breaking the law. When she is running with friends and they trespass together, she does not have the uncomfortable feeling. Perhaps she is no longer afraid; or perhaps she no longer feels guilty--it is hard for her to say.

Should Jane trespass? When she does, is she acting badly? Should she feel guilty? In the next section I turn to various theories that offer reasons for obeying the law, to see how well they apply to Jane’s case.

II.

In this section I apply some general theories of why there is a prima facie moral obligation to obey law. To say we have a prima facie moral obligation to obey law is to say that the fact that a law proscribes x is itself a moral reason for not doing x. But it is not quite to say we morally ought to obey the law, for sometimes we morally ought not to do what we have a moral obligation to do.[[6]](#footnote-6) My purpose in turning to these theories is to decide not whether a prima facie moral obligation to obey the trespass law, however weak, exists at all but, rather, whether these theories provide a moral reason to obey this law, a reason that might lead us to conclude that the lawbreaker acts badly.

[468] One account of why we must obey law relies on what I call the conceptual argument: to call something a law *means* we must obey it. Because trespassing is against the law, this just *means* Jane must not trespass.[[7]](#footnote-7) The difficulty with this view is that the imperative to obey law is conceptual or grammatical, but it is not moral. The "must" of obeying law expresses an institutional obligation, and institutional obligations do not necessarily have moral force. We do not always act badly in failing to comply with institutional obligations. On the conceptual argument, we should say of Jane when she trespasses that she has done what a citizen must not do. But this is not to say that she has acted badly, not even badly as a citizen.[[8]](#footnote-8)

A more promising account of why we ought to obey law is the "contagion" argument. It holds that we ought to obey even laws with which we disagree because if people began selectively disobeying laws--any laws--disobedience would spread; if Jane disobeys this particular trespass law, others would break this as well as other laws and, the argument goes, widespread lawlessness and chaos might result.

Disobedience does sometimes spread by example. On the freeway dividing the two tracts of land in our example, most people drove at 65 m.p.h. or above when the law said that one must not exceed 55 m.p.h.. A flow is established at an illegal speed, and most people drive with the flow.[[9]](#footnote-9) The fact that some people break this law encourages some to disobey the speed limit who otherwise would not but who think it safest to stay within the flow of traffic. Here lawbreaking is contagious, but this fact does not provide a convincing reason to comply with the speed limit law. For if it is not wrong to drive with the flow of traffic at 65 m.p.h. even when the law sets a limit of 55 m.p.h., and absent evidence that seeing people violate the speed limit law encourages some drivers to engage in illegal activity that is objectionable, such as driving faster than the flow, weaving in and out of lanes, or tailgating, the spread of disobedience in this instance provides insufficient reason to obey the law. The case is different where awareness that some income tax evaders go unpunished encourages others to avoid paying all the tax they owe, thereby increasing the burden of all citizens to remedy the resulting deficit. In this case the spread of disobedience would be troublesome; avoiding it is a good reason to comply with income tax laws. Of course fear of a speeding ticket provides sufficient reason for some people strictly to comply with the speed limit law, but this motivation can be distinguished from a moral reason that would explain why the lawbreaker acts badly.

The contagion argument is a consideration that should have little force for Jane as she approaches the tunnel. Nobody who did not already trespass here would know she breaks the law unless she told them, or they saw her return from a tunnel as they approached it, and this has never happened.[[10]](#footnote-10) While other runners who do find out might now be encouraged to trespass here--as Jane herself was by observing other runners trespassing--it is unlikely this will lead to widespread disobedience, either of all laws, or of trespass laws in general. Knowing that Jane trespasses should not encourage others to use illegal drugs, violate the speed limit, steal, or even trespass elsewhere. I shall eventually argue that the considerations relevant in deciding whether it is wrong to trespass include the layout of the land, likelihood of [469] being observed or imitated, and potential harm trespassing might cause. If this argument is correct, then that someone may be justified in trespassing onto this property would not mean they are justified trespassing elsewhere.

Even if Jane’s trespass did encourage others to disobey trespass or other laws, the contagion argument fails to show why in trespassing Jane would be acting badly unless we could establish that Jane is morally accountable or responsible for these successive illegal acts. Jane may be warranted in thinking that in her instance of lawbreaking no moral wrong is involved--the contagion argument does not show a moral wrong is involved--and if she is, we should not say she acts badly simply because others may have unjustifiably been inspired by Jane's act to commit an act that is morally wrong, and for which they, and not Jane, are accountable.

It is more likely that Jane's trespassing onto the land opposite the freeway will encourage others to trespass onto this land. If this occurred, the contagion argument might provide a persuasive reason for objecting to Jane's act. But it might not. If, taking all relevant considerations into account, we think it justified for Jane to trespass onto this particular land, then assuming there is nothing special about Jane that would make it justified for her but not others to trespass, it should not be troubling to us if Jane's trespassing results in a few other runners also trespassing for the same reasons. Discriminate disobedience can be morally proper.[[11]](#footnote-11) In a particular situation we can think we need not obey a law, and that no one, in this situation, need obey the law; yet we still think people should generally obey law, and obey even this law if the situation were otherwise.

It could make a difference if Jane's trespassing encouraged lots of other people to trespass onto the land opposite the freeway, and I shall discuss why below. But because the particular act of trespassing we are considering requires a hiker or runner to go a considerable distance just to get to the point where she is faced with the "No trespass" sign, and the land is not that beautiful, it is unlikely that many people would ever trespass here.

The contagion argument often provides a good reason for obeying laws, but not in this case. It does not justify our saying that Jane acts badly when she trespasses.

Another reason to obey a particular law just because it is the law is that we have a political obligation to obey law. That we are a member of a political community from which we receive benefits or to which we've consented provides a moral reason for obeying the law, even particular laws we do not like. There are different versions of this argument.

In one version, the ground for political obligations is the principle of fairness. The receipt of public goods from which we benefit entails an obligation, derived from fairness, to contribute to the cooperative ventures that provide these goods so long as the benefits and burdens of these ventures are distributed fairly.[[12]](#footnote-12) In other words, it is unfair for me to benefit from the cooperative efforts of others without myself contributing, and so if everyone else obeys the law, I therefore have an obligation to obey the law. Not to obey or contribute to cooperative schemes from which I benefit, such as national defense, is to place an unfair burden on those who do. The paradigmatic [470] example of a cooperative venture to which the fairness argument applies is a potluck dinner. It is unfair to enjoy the benefits of everyone else’s efforts by free riding--eating the dishes they brought without you yourself contributing to the dinner. The argument from fairness is different than the contagion argument. It is not that if everyone else who accepted the benefits of the cooperative venture (who ate at the potluck dinner) did so without contributing (bringing food or drink), then the venture would collapse and no one would get any of its benefits. The fairness argument depends only loosely on consequences.[[13]](#footnote-13) It appeals to the generalized consequences of everyone being a free rider, but only as a prelude to its main point, that it is unfair for me to be treated differently than others. We can not have everyone free-riding, for the consequences would be disastrous and given this, it would not be fair for anyone in particular to free ride. Fairness precludes my having privileges that others do not have, unless there are morally relevant differences between us.

This is a broad interpretation of fairness that can be distinguished from a narrow "tit for tat" notion of fairness according to which I am obligated to another person only if that other person benefitted me; the obligation arises only if there is a direct reciprocal relation between two parties. For example, I should keep my promise to you only if in the past you have kept your promises to me. The broader interpretation of fairness, in contrast, generates an obligation in me if I've received benefits, not from a specific individual to whom I owe the obligation, but from a cooperative venture--for example, an obligation I have to keep a promise to a promisee from the fact that I have received benefits from the social practice of promising, not from the promisee having kept a promise to me in the past.

Is Jane being unfair when she trespasses? Consider this first with respect to the broader interpretation of fairness. Can those who obey the law convincingly claim that Jane, in breaking the law, is being unfair in the same way that those who pay their taxes justifiably judge tax evaders to be unfair? The tax evader is a free rider--accepting benefits which are provided only by the payment of taxes, without himself paying taxes. His free-riding creates an added burden on others who must make up the gap in revenues that results. While the consequences of one individual’s tax evasion in a large society is so insignificant that the other members of the society would not feel an additional burden, if we universalize the tax evader’s action, imagining what would happen if the tax evader *and everyone else* didn’t pay the taxes they owed, then the burden becomes overwhelming. Given this, it is unfair for the tax evader to treat himself as an exception, accepting benefits from a system to which he fails to contribute his due. Jane does not seem to be a free rider. She does not benefit from other people abiding by the law without herself "paying," for while she disobeys this particular trespass law, she still obeys other laws, and her disobeying the trespass law does not seem to place additional burdens on others in the way tax evasion does. Others, it would seem, do not have to obey laws any extra to make up some deficit in obedience caused by Jane's trespassing.

The defender of the fairness theory can respond in the following way. Let us define the relevant cooperative venture to which Jane contributes (or in [471] trespassing fails to contribute) as an ordered society. We can characterize the burdens of this venture as obeying the law and paying for protective measures to avoid unpleasantries caused by lawbreakers. The benefits of the cooperative venture include among other things peace, quiet, and the ability to walk the streets or enjoy one’s property safely without having to take private protective measures. Now suppose that by trespassing Jane causes the owners or lessees to expend resources by putting up more fences or hiring guard dogs. In this case Jane’s trespassing *would* impose increased burdens on the owners or lessees. I shall argue later that if Jane's actions do create the need to take such protective measures thiswould be a moral reason for her not to trespass, but only if it is objectively reasonable for the lessees to take the protective measures. If the lessees or owners were so disturbed by Jane’s trespassing as to take protective measures, they might claim that they have been forced to pay more than their fair share to obtain an ordered society because of Jane’s failure to contribute her share to the cooperative venture. In this event we may indeed say that Jane acts unfairly. She benefits from other people’s obedience to laws, for example, by being able to walk the streets at night without having to purchase a gun or hire a bodyguard, yet herself does not obey the law. She treats herself as an exception, accepting the benefits of a legal system to which she fails to contribute her share. At the same time, she imposes an identifiable added burden on the lessees. This seems unfair. If this argument holds, then the fairness argument is able to explain why Jane acts badly in trespassing, but only if Jane (or possibly those who follow Jane’s example), in trespassing on this land, creates a perception in the lessees or owners that they have been disturbed or harmed, and if it would be objectively reasonable for them to take protective measures to avoid this unpleasantry.

This is an uneasy application of the fairness theory. It compares Jane to someone who feasts at a potluck dinner without having brought food or drink. This analogy weakens when we recognize the many ways in which one contributes to the cooperative venture of an ordered society. To argue that Jane acts badly because she acts unfairly is to assume that all violations of law have the same burden on society. But the effect of singular instances of lawbreaking vary tremendously. A serial murderer who obeys all laws except laws against homicide undermines the cooperative venture far more than a runner who trespasses. The argument ignores the fact that Jane herself abides by virtually all laws. It assumes this is not sufficient payment for the benefits Jane receives from having an ordered society. Jane may well contribute her fair share by generally obeying laws even though she occasionally disobeys a particular law, or by contributing in other ways to an ordered society.

In defining the cooperative venture which Jane supposedly does not do her fair share to support as “obeying the law,” which means obeying all laws, the argument that Jane acts unfairly presupposes what we are trying to establish, that the law is a seamless web and that we cannot treat some laws differently than others. Why not instead define the cooperative venture as obeying this trespass law? Doing this, we can conclude that Jane does not act unfairly in trespassing because she never accepts benefits from people generally refraining from violating this law.

[472] We might also think Jane is not acting unfairly because she is not demanding that she be treated as an exception to the rule that one must not trespass here. Garrett Cullity has noted that one indication of unfairness is that one seeks objectively preferential treatment.[[14]](#footnote-14) This is not so of Jane. Jane is not claiming a liberty for herself that she would not allow others also to claim. The liberty she is claiming is not the liberty to disobey any law. It is the liberty to trespass on the land opposite the freeway; and Jane is perfectly willing to have other runners travail the same paths. She would welcome the company. But Jane’s willingness to have others enjoy the land she enjoys is not in itself the determinant of whether she acts unfairly. The morality of her lawbreaking does not depend on the contingency of whether she is or isn’t willing to have others join her. Assume that trespassing on the land in question does not unduly burden the land’s occupants. In principle, Jane’s act of trespass could be universalized. To invoke Kant’s language, she *could* will as a universal law the maxim that one may trespass on the land opposite the freeway. In trespassing she would not be doing anything that could not reasonably be done by anyone. If Jane were unwilling to have others run where she does, perhaps because if lots of other people ran there she would no longer enjoy the solitude of the run, Jane would be unreasonable, for she would be demanding that she be treated differently than others similarly situated. But Jane’s unreasonableness would not in itself make her act of trespass unfair. Seeking preferential treatment is an indication of unfairness because the results of such preferential treatment could result in an undue burden on others. So long as Jane’s trespassing does not in fact unduly shift the distribution of benefits and burdens, her trespassing would not become unfair merely were she to hold an unreasonable opinion.

Even if a reasonable person could conclude that Jane’s trespassing deprives someone of a real benefit of the cooperative venture, the burden to her of not running on this land may exceed this benefit. The fairness argument works only if the benefits of the venture are worth the burdens.[[15]](#footnote-15) The burden of generally obeying the law is worth the benefit of having everyone else generally obey the law. But once we free ourselves from the constraint that the law must be treated as a seamless web–and neither the contagion nor the fairness arguments provide a convincing reason to adhere to this constraint when we think about our particular example– then we can ask instead whether the burden of obeying *this* law is worth the benefit of obeying *this* law.

There is another way in which we might say Jane were acting unfairly by trespassing on the lessee's land: if the lessees themselves ran on Jane's private property and Jane took action against them while still enjoying the benefits of running on their land. In this case Jane might violate a narrow "tit for tat" idea of fairness. In fact Jane is not a property owner, and never has the opportunity to deny to the lessees the sort of benefit which she involuntarily extracts from them.

If Jane’s trespassing does indeed disturb the occupants of the land to the point where they feel the need to take protective measures, and it were objectively reasonable for them to feel this way, then Jane does act badly. But, I shall argue below, the fairness argument is not the best way to characterize [473] the reason for saying she acts badly. The argument that Jane acts unfairly assumes that the nature of the criminal’s wrong (the murder as well as the trespass) is that the criminal takes an unfair advantage of others. While this is an often repeated characterization of the essence of a crime, it strikes me as less apt a characterization than one that sees the wrong of a crime as the causing of unjustified harm.

Another theory holds that political obligations are obligations of gratitude for benefits received from the state. According to one proponent of this argument, obligations of gratitude require, among other things, that we avoid harming our benefactor or acting contrary to her interests, and comply with her reasonable requests, and because the state is our benefactor, we owe it this. Every citizen who has received benefits from the state owes the state an obligation of gratitude not to act contrary to the state's interests, and this means, among other things, complying with the law. Those who receive no benefits have no debt of gratitude and no obligation to comply with the law.[[16]](#footnote-16) This argument has little force for Jane as she approaches the tunnel. Jane may indeed be grateful to the state for all it does, but there is no reason to think her debt of gratitude must be paid by not trespassing, rather than in some other way. As one critic of the argument from gratitude has noted, even if we do owe gratitude, there is no prima facie obligation to show it in a particular way, for example, by obeying the laws of the state.[[17]](#footnote-17) Assuming Jane did have a debt of gratitude, she would fail to repay it merely by not trespassing: her restraint would not be interpreted as a sign of gratitude. It may be that conventionally debts of gratitude are regarded literally as debts so that to pay them back we must transfer resources (our wealth, our time) to our benefactor, as we do when we pay taxes or serve in the military. No such transfer is involved by refraining from trespassing.

According to a third theory, political obligations arise from consent. On this view, as a citizen I have consented to the laws of the state and agreed to be punished for their violation. Just as when I promise to meet you tomorrow at noon I must meet you then, because I promised, so too I must obey the law because, the argument is, I promised I would. I consented.

Has Jane consented in any sense to the specific prohibition against runners using the trails opposite the freeway? At first glance it would seem not. The trespass law constraining Jane arose through the common law, inherited from England, and was not subject to legislative deliberations, so Jane never had the opportunity to consent to it. Nor would she consent to the prohibition in question. Jane might agree that it is good in general to have trespass laws, or that there should be a sign restricting people from swimming in the lake, or that there should be a "No Trespass" sign that would be enforced only against swimmers, or people harming the land or invading the reasonable expectations of privacy of the lessees. But she thinks it pointless to prevent runners from enjoying the trails opposite the freeway so long as they cause no damage, and are unlikely to be seen or to disturb anyone. Jane doesn’t merely not consent to this law; she positively opposes it.

The consent theorist might respond that Jane consents not to particular applications of particular laws, nor even to particular laws, but to all applications of all laws enacted and enforced by the political system to which she [474] consents. Since trespass laws are state or local laws, the argument would be that Jane consented to the state constitution or to the existence of police powers that authorize local government to enact and enforce trespass laws. Again the argument here would be that the law is a seamless web, and one consents not to particular strands but the whole system.

This argument, too, has little force for Jane as she considers whether to trespass. First, Jane never expressly consented to obey a seamless web of laws. But perhaps Jane has tacitly promised to obey all the laws passed by state and local authorities. Perhaps we should say that by voluntarily receiving the benefits provided by the state, or by not leaving, or by engaging in activity implying consent, such as voting, Jane tacitly consents to the process for making laws, so that even if Jane had voted against those elected, she has consented to whatever laws are passed by the representatives chosen by the majority, and to extant laws that, in not being repealed, can be said to reflect the present will of the people. By tacitly consenting in any of these ways she exhibits a commitment to the law, and trespassing would be a betrayal of this commitment, would be flouting a political process to which she has consented.

There are numerous problems, many of which have been pointed out by others, with inferring from the fact that one accepts benefits, does not leave, or votes, that one has undertaken a voluntary obligation to obey the law.[[18]](#footnote-18) Jane may well consent to having a legal obligation to comply with laws. She agrees that if she is caught and duly convicted of violating the law she must pay the penalty. But she rightly would protest any inference that by accepting citizenship she undertakes a moral obligation to obey a particular law. Not all contractual obligations are moral obligations and one does not necessarily act badly in breaching a contract. Whether one does depends on the contract. The assumptions that, first, Jane’s indirect actions or omissions (failure to leave the country) constitute a promise, second, that a promise to comply with the law or face punishment involves a moral obligation, and third, that such a promise to comply with law necessarily must treat the law as a seamless web and thereby require one to comply with every particular law all are questionable, and this explains why we should not accept the counterintuitive claim that in trespassing here Jane breaks a promise to do what she thinks it unjustified to do–refrain from trespassing.[[19]](#footnote-19)

III.

There are reasons for not violating the law prohibiting trespassing apart from the reasons found wanting in the previous section, that it is a law and that it is morally wrong to break any law, just as there are reasons not to steal, rape, or murder apart from the reason that doing any of these things is against the law.

By trespassing Jane is violating someone's property rights, one of which is the right to exclude others. It might be argued that this fact in itself sufficiently establishes that Jane acts badly in trespassing. In this section I want to move beyond this argument, for it is just a variation of the argument that was found wanting in the previous section. We should want to know why it is morally wrong to violate one's property rights. Without appealing uncriti-[475]cally to a general dictum that it is morally wrong to violate property rights, can we find a reason why it is morally wrong of Jane to violate property rights by trespassing where she does? Again, the question is not whether it is legally wrong to violate property rights. It is, by definition. The question is whether this legal wrong is necessarily a moral wrong–the question is whether Jane acts badly.

One reason why we might think it wrong to violate property rights has to do with their economic function. Richard Posner has us imagine a society without property rights, consisting of a farmer and her neighbor. The farmer plants seeds, fertilizes and irrigates the land, erects scarecrows, but the neighbor appropriates the food. Without property rights that prevent the neighbor from expropriating the value of the farmer's labor, the farmer will soon stop working and society will revert to a more primitive mode of production. Posner's point is that the legal protection of property rights has an economic function: it promotes investment in productive technologies and encourages efficient use of resources.[[20]](#footnote-20)

According to this argument from economic efficiency, it is wrong for Jane to trespass insofar as her act diminishes the net economic value of the land to the lessee or owner. It is unlikely that Jane’s clandestine, occasional trespassing would be considered a claim of right adverse to the owner of the land that, according to the legal doctrine of prescriptive easement, might create a continued right to use the property over the owner’s objection, thereby decreasing its value. To establish a right of prescriptive easement, one’s use must be open (or visible), continuous, and notorious, which means that the user has done all that can be expected so that all who are interested will know about it. Any claim Jane might make to a right to run on the land opposite the freeway would be weakened by the facts that she runs clandestinely, the owner posted signs and raised a gate, and the lessee told Jane she should not be there the one time they met. But there are other ways in which Jane’s trespassing might effect the land’s value to the lessee or owner. It may cause the lessee to take extra measures to make it harder to trespass on the land. Perhaps the occupant now has to hire a guard, or set up more secure fencing, or more forbidding signs. Or perhaps the real reason for the "No Trespass" sign is that the occupant wants to waive liability for injuries occurring on the land, thereby avoiding the costs of restraining dogs or otherwise minimizing the risk of injury to trespassers. Enforcing trespass laws, one might argue, is more efficient than having the occupant incur these costs, or of having society incur the costs of a lawsuit should a trespasser be injured. If Jane's trespassing did occasion such expenditures, then we might have good reason to say she should not trespass. But we haven't yet a reason to say that by trespassing she acts badly, for failing to promote economic efficiency is not a reason to incur this moral judgment.[[21]](#footnote-21)

There is another interpretation of why we have property rights that better supports moral criticism of a trespassing Jane. If the lessee felt it necessary to take precautions against further trespassing, this would indicate that trespassing offends or violates the occupants. Promoting economic efficiency is not the only reason for protecting property rights. One of the rights to property is the right to exclude others and be left alone to enjoy one's property in [476] private. The more compelling reason for regarding Jane's act of trespass as wrong independent of the fact that it is a transgression of the law is that by trespassing Jane may be invading the privacy of the occupants. By violating their property rights, she may be violating them.

To feel (and be) violated in this way, the occupants would have to know that their rights were being violated. They would have to observe the trespass, or some indication of it. This is not true for all invasions of privacy. If I am in a store dressing room or the toilet stall of a public restroom and a police officer observes me through a hole in the ceiling without my knowledge, my privacy has been violated even though I never find out about the invasion. One of the ways in which privacy has been invaded in such a case is that information about me has been revealed, and this occurs whether or not I am aware it occurs. The way in which privacy is most likely invaded by trespassing in our example is not by exposing information, but by disturbing the occupant's peace, and this cannot occur without the occupant's knowledge.

Even if Jane herself is not observed, her act of trespass may encourage others to trespass, and these other people may not stay on the main trails, and might be observed, in which case Jane would be contributing to the invasion of privacy. This is why it might make a difference if Jane's trespassing encourages lots of other runners to trespass.

That the land’s occupant feels violated is not yet sufficient cause for concluding that Jane commits a wrong in trespassing. A property owner's expectation of privacy might be unreasonable. I might have the expectation when I am in my home that nobody outside make any noise that I can hear, or knock at my door; but this subjective expectation of privacy is not one our society regards as objectively reasonable. Assuming there is a subjective expectation of privacy on the part of the residents of the land opposite the freeway, we need to ask whether that expectation is one society recognizes as reasonable. The idea that expectations of privacy can be reasonable or unreasonable is central to interpretation of the U.S. Constitution's Fourth Amendment. A search by government that does not infringe on reasonable expectations of privacy needn't be authorized by a warrant or be based on probable cause.[[22]](#footnote-22)

Consider a different act of trespass: A stranger enters my home unseen, with the intention of trespassing, does not disturb anything, and then leaves. Let us assume that in this case, as in the case where Jane runs through the tunnels, no damage is done to the trespassed property. We should regard the entering of my home in this way as unreasonably invasive. Should we think any differently about Jane's trespassing onto the land opposite the freeway?

Expectations of privacy vary between societies, and among individuals within the same society. Some property owners might have greater expectations than others, or see expectations as reasonable that non-property owners find unreasonable. Our society recognizes a greater expectation of privacy in one's home than in open fields, or in fields enclosed by fences.[[23]](#footnote-23) Unlike Jane, the person entering the home may uncover information that can reasonably be expected to remain private. In addition, entering my home without permission is more threatening than running on land you have title to but which is out of sight of your home. Presumably someone entering a home without consent has an intent to steal, harm, or search private documents, [477] and anyone of these activities is a further wrong. Even though in our hypothetical case none of these added harms occurs, the subjective sense of violation that would be experienced upon discovery of the invasion of one's home is associated with the intent usually involved in such intrusions. Jane's act of trespass onto the land on the other side of the freeway, in contrast, is not reasonably associated with other threatening acts. She looks as if she is running for exercise or enjoyment, and her intent should be obvious and unthreatening.

There are some reasons to think that Jane's trespassing does not violate reasonable expectations of privacy. The land opposite the freeway is not barricaded, and no significant structures or other signs of occupancy are visible from the main trails. The land does not appear to be part of a 'home', and it is not foreseeable that trespassing onto it would be as invasive to a reasonable person as would entering the curtilage of a home. When Jane trespasses, so long as she remains on the main trails and does not get lost, she is almost always out of sight of people and structures. The one time she was seen on a main trail the response was friendly, not hostile. She is on the land a short time; she is not picnicking, leaving litter, or making noise. Her running may have no effect on the occupant's enjoyment of the land or on its value, and there is no indication that the occupant has spent even a penney as a result of Jane's or other runners' trespassing.

There is evidence, then, that there is no subjective expectation that people not run on the trails. Even if there were a subjective expectation, and the property owners did spend money to protect this expectation, it is still possible to conclude that their expectation is unreasonable. If this is the case, then we might conclude that they are free to spend money as they like, but Jane cannot be faulted for their incurring this expense. There is precedent for the principle that a plaintiff’s subjective feeling of violation may be objectively unreasonable even when a legal right was violated. In Jacob and Youngs v. Kent, the plaintiff was to build a house for the defendant. A contract stipulated that the plaintiff use "standard pipe of Reading manufacture" for plumbing, and included a clause allowing for the defendant to reject all work not meeting the specifications laid out in the contract. As it turns out, not all of the pipe was of the specified type, although the pipe used was of similar quality. The defendant refused to pay and the plaintiff sued. The defendant had an expectation that Reading pipe be used, and now demanded that the walls be torn down so that the proper pipe could be put in. Judge Cardozo, for the majority, ruled in favor of the plaintiff, in effect saying that this expectation was unreasonable. Cardozo noted that in deciding the case "we must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence."[[24]](#footnote-24) The dissent disagreed, implying that the defendant's expectation was reasonable because it was written into the contract. The case is important in this way: the property owner in our trespass example has a legal claim to privacy, just as Kent had a legal claim to the use of Reading pipe. But in both situations a case can be made that it is unreasonable to be guided solely by the legal claim.

If someone has a reasonable expectation of privacy in their land, and Jane violates this expectation either directly, or perhaps even indirectly by [478] encouraging other runners to trespass--runners who do invade the occupants' reasonable expectation of privacy--then we do have good reason to say that Jane acts badly in trespassing. Whether Jane acts badly in trespassing depends on whether in trespassing she harms the occupants of the land by invading their reasonable expectation of privacy. One could plausibly argue that Jane is not morally responsible for the harm to the occupants caused by other runners who were encouraged to trespass by Jane's example and therefore that Jane does not act badly so long as she does not herself directly disturb the occupants, just as Jane would not be morally responsible if her trespassing encouraged others to engage in activity that was morally objectionable. Yet I am inclined to argue otherwise. In the case where Jane herself is not observed trespassing, but encourages the trespassing of others who are observed and who do invade the occupants' reasonable expectation of privacy, it is just a piece of moral luck that Jane does not unreasonably cause harm, and we might think that whether someone acts badly is not contingent on luck. If it is foreseeable that by trespassing Jane could violate reasonable expectations of privacy, Jane acts badly in trespassing even if she herself never happens to be observed. However, if Jane was in the habit of trespassing only at the crack of dawn, it might be reasonable to assume she would not invade reasonable expectations of privacy; and if other runners learned about the trails on the private land by observing Jane at this hour, and, not normally being early birds, they then began to trespass at a later hour, and if it were foreseeable that trespassing at the later hour would violate reasonable expectations of privacy, Jane would not be morally responsible for the objectionable behavior of her late-sleeping imitators.

Were the layout of the land different, were Jane's experiences in encountering the land's occupants otherwise, in short, were the facts different, then we might come to other conclusions about whether trespassing runners violate reasonable expectations of privacy. My point is that facts unique to the particular case of trespass are essential in making a moral judgment about that trespass. It is not essential to this argument that we agree about what the reasonable expectations of privacy of the occupants of the land opposite the freeway actually are.

Property owners might wonder whether someone supporting the reasonableness of Jane's trespassing would allow that it is ever reasonable for them to expect that no one trespass, or what measures they would have to take to express the expectation of privacy that they have: must they build barricades? Or put up signs saying "No Running--the mere possibility that they might see you disturbs the Occupants"? Would putting up such a sign be enough to let us conclude that if Jane trespassed she would be acting badly, or could we say that despite the sign, it is unreasonable of the occupants to be bothered by runners? Suppose we agree the sign would be enough to make it immoral for Jane to trespass: why should the property owners have to put up the sign?[[25]](#footnote-25) Isn't the fact that the land is theirs sufficient to justify the expectation that others not invade their land, without having to incur the added expense of advertising this expectation? There are no easy answers to these questions. There are cases in which most of us would regard it as uncontro-[479]versial that it is reasonable to trespass. A runner spots a man attacking a young girl on the land opposite the freeway and trespasses in order to stop the attack. There are also cases in which most of us would agree it is unreasonable to trespass: a man trespasses in order to collect wood for his fireplace; or to swim where swimming is forbidden. Other cases will not bring about agreement. A hiker trespasses to take a shortcut to a park adjacent to the land opposite the freeway, thereby avoiding a five mile section on heavily traveled roads. Jane trespasses to do a run that brings her great pleasure. People will disagree about where they draw the line of reasonableness. Where I draw the line for Jane's case probably will depend on whether I run, or own property. The question of when expectations of privacy are reasonable is a difficult issue that has not received much attention, even as it arises in 4th Amendment adjudication. I suspect the answer to this question depends in part on social norms which may vary among communities, but that even within a fairly homogeneous community people will come to different conclusions about where to draw the line.

IV.

By thinking through our trespassing problem, I believe we are led to the conclusion that many of the standard moral arguments for obeying law do not provide convincing reasons for obeying our trespass law. The contagion argument, and the arguments from fairness, gratitude, and consent, do not have much force for Jane as she approaches the tunnel and must decide whether to obey the law. This is not to say that theorizing is unhelpful. In practical reasoning about whether to obey this particular trespass law, we deliberate by considering reasons for and against complying with the law, and in this situation at least, some general theories do not provide convincing reasons for obeying the law. They do provide convincing reasons in other situations. But the persuasiveness of some general theories about why we should obey law is best evaluated by reflecting on particular applications of the theory.

There is another point to which I want to call attention. Only a few of Jane's considerations support a decision not to trespass. I have argued that one of these--that doing so is breaking the law--has little or no weight apart from the other considerations. It is not surprising, then, that Jane does, at times, decide to trespass. Some may wonder why she ever decides not to. But waver she does. Rather than making a single decision, after rational deliberation, which she regards as the right decision and sticks to on all occasions, each time she approaches the tunnel she hesitates, thinks through the considerations, and tries to weigh them. She is always torn, and her decisions are always made at the last moment. When she decides to enter the tunnel and is alone, she feels uneasy. When she decides not to enter, she feels disappointed. The fact that there are good reasons for either of two conflicting decisions, and that she never settles on one decision, reflects, I think, a truth about some of the moral decisions we have to make. That Jane acts inconsistently--sometimes trespassing, sometimes not--does not mean she is not being rational or clear-thinking.

[480] Even though Jane equivocates she often decides to trespass, and some people might think this is the wrong decision, and will be troubled by its implications. Does this mean it isn't wrong for people to disobey the law if they disagree with the law, or think they'd derive enough pleasure in breaking the law to offset any pain their disobedience would cause? By morally sanctioning Jane's trespassing aren't we led down a slippery slope to anarchy?

For those who dislike teetering on slippery slopes it is crucial to see that reasonableness is not a subjective standard: it refers not simply to what the lawbreaker believes is reasonable, but to what is reasonable. It is not enough to have a subjective conviction that it is reasonable to break a particular law: one must be able to convince others if we are to say it is reasonable. Laws proscribing actions generalize about the reasonableness of those actions. Some acts are never reasonable. But some acts, unreasonable in one context, may be reasonable in another. Laws are useful guides to reasonable conduct in general, and the argument for selective disobedience in no way implies we need not have law.

It is also crucial to see that the argument that it may be morally justified to break a particular law in some circumstances does not imply that people who break the law should not be punished. If Jane is caught trespassing, and is duly convicted, she must pay the penalty--I do not dispute that.[[26]](#footnote-26) We can think I should not obey a particular law, yet still agree that lawbreakers should be punished, even if the law they broke was in general a bad law, or even bad when applied to a particular situation.[[27]](#footnote-27) As a society we need laws that generalize, even though generalizations (such as that it is wrong to trespass) lead to injustices in particular cases. Society would not work without legal obligations resting on generalizations. But the moral question of whether one acts badly in breaking a law is another matter. Were I a judge, I would punish Jane for breaking the law against trespass. Had I discretion in sentencing and if I believed the sentence should closely reflect moral culpability, I would fine Jane nominally and encourage her and the lessees or property owners to work out a mutually satisfactory arrangement. For the purpose of law is not to expose and punish all rule-violators, but to promote the well being of everyone in society.

It is reasonable in general to have trespass laws, but if it is not unreasonable to trespass on the land opposite the freeway, and if Jane thinks she can do so at no great risk to herself, what should hold her back? One of the reasons Jane hesitates as she approaches the tunnels is that she is not entirely confident about whether she is violating a subjective expectation of privacy. This is why Jane does not simply ask permission of the occupants or owners to trespass on the land opposite the freeway. They might say no. By asking permission she now calls attention to an invasion that may not otherwise have been offensive. The invasion of property rights in the abstract may offend someone. Jane thinks it is silly to be offended for no other reason than that one's abstract rights are being violated. But she sees no reason to create a subjective expectation of privacy where it may have been lacking, which Jane might do by asking permission, even if she also believes that subjective expectation of privacy would be objectively unreasonable.

[481]Property owners are likely to think Jane is out of line. Why must she run here--there are lots of other places to run. Run on the streets! Run on a track! Do the dish loop twice! But don't tread on other people's property. Jane, on the other hand, derives great pleasure and a sense of accomplishment from doing a long trail loop, and cherishes the feeling of solitude she has when she runs opposite the freeway. This is not a feeling she can get running around a track or on the streets. She looks forward to her early morning runs, and doing them brings her happiness. If she were unable to run this loop, something important in her life would be lost.

Property owners who are not runners will have a difficult time understanding the importance to Jane of running where she does. Jane, who owns no real property, has a difficult time understanding the importance to property owners of controlling access to land that is out of sight and sound. Moral judgments need to take into account both parties' concerns. Blanket moral dictums won't do.

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2. "The Morality of Anger," in Hugo Bedau, ed., The Death Penalty in America, 3rd. edition (Oxford: Oxford University Press, 1982), p. 339. [↑](#footnote-ref-2)
3. "The Authority of Law in the Predicament of Contemporary Social Theory," Notre Dame Journal of Law, Ethics and Public Policy, vol. 1 (1984), pp. 118-20. [↑](#footnote-ref-3)
4. M.B.E. Smith, “Is there a prima facie obligation to obey the law?” Yale Law Journal 82:950-976 (1973), p. 975; Richard Wasserstrom, “The Obligation to Obey the Law,” UCLA Law Review 10:791-93 (1963); Richard Brandt, “Utility and the Obligation to Obey the Law,” in Sidney Hook, ed. Law and Philosophy (New York: NYU Press, 1963), p. 46; Joseph Raz, “The Obligation to Obey: Revision and Tradition,” Notre Dame Journal of Law, Ethics and Public Policy 1:139-155 (1984). [↑](#footnote-ref-4)
5. Tom R. Tyler, Why People Obey the Law (New Haven: Yale University Press, 1990), p. 46. For criticism of Tyler’s study, see Leslie Green, “Who Believes in Political Obligation,” in John T. Sanders and Jan Narveson, eds., For and Against the State (New York: Rowman and Littlefield, 1996), pp. 11-14. [↑](#footnote-ref-5)
6. See Richard Brandt, "The Concepts of Obligation and Duty," Mind, vol. 73 (1964), p. 391; Richard Flathman, Political Obligation (New York: Atheneum, 1972), pp. 34-39; and A. J. Simmons, Moral Principles and Political Obligation (Princeton: Princeton University Press, 1979), pp. 7-9. [↑](#footnote-ref-6)
7. See Hanna Pitkin, “Obligation and Consent I and II,” American Political Science Review 59:990-99 (December 1965) and 60:39-52 (March 1966). [↑](#footnote-ref-7)
8. See Simmons, pp. 39-43. [↑](#footnote-ref-8)
9. The state of California conducted a survey, at a time when the speed limit on most freeways was 55 m.p.h., showing that nearly 75% of drivers speed and that many people showed no embarrassment admitting that they speed. The report noted that the average flow of freeway traffic was 67 m.p.h.. See San Jose Mercury News, February 19, 1993, p. 3B. [↑](#footnote-ref-9)
10. Cf. Joseph Raz, "The Obligation to Obey: Revision and Tradition," p. 149, noting that the contagion argument assumes publicity of the crime, but often offenses are not made public. [↑](#footnote-ref-10)
11. Cf. Richard Wasserstrom, "The Obligation to obey the law," pp. 791-93. [↑](#footnote-ref-11)
12. George Klosko, The Principle of Fairness and Political Obligation (Lanham, MD: Rowman and Littlefield, 1992); H.L.A. Hart, "Are there any Natural Rights?", Philosophical Review 64:2 (April 1955), 175-191; and John Rawls, "Legal Obligation and the Duty of Fair Play," in Sidney Hook, ed. Law and Philosophy (New York: NYU Press, 1964), pp. 9-10. [↑](#footnote-ref-12)
13. See George Klosko, “The moral force of political obligations,” American Political Science Review 84:4 (December, 1990). [↑](#footnote-ref-13)
14. Garrett Cullity, "Moral Free Riding," Philosophy and Public Affairs 24:1 (Winter 1995), pp. 22-23. [↑](#footnote-ref-14)
15. See George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," Philosophy and Public Affairs 16:3 (Summer 1987). [↑](#footnote-ref-15)
16. A.D.M. Walker, "Political Obligation and the Argument from Gratitude," Philosophy and Public Affairs 17:3 (Summer 1988), pp. 192, 205, 207. [↑](#footnote-ref-16)
17. M.B.E. Smith, "Is there a prima facie obligation to obey the law?", pp. 953-54. See also George Klosko, "Political Obligation and Gratitude," Philosophy and Public Affairs 18:4 (Fall 1989), pp. 354-58 (but see Walker's response, "Obligations of Gratitude and Political Obligation," Philosophy and Public Affairs 18:4 [Fall 1989], pp. 363-64); and Simmons, pp. 166-68, 170-71, 175, 185, 187-90. [↑](#footnote-ref-17)
18. See Simmons, pp. 76-100, especially pp. 92-3. [↑](#footnote-ref-18)
19. Another theory claiming to explain why we have a moral obligation to obey law is the natural duty theory, most convincingly articulated by Jeremy Waldron in “Special Ties and Natural Duties,” Philosophy and Public Affairs 22:1 (Winter 1993). For criticism of this theory see Mark Tunick, “The Scope of Our Natural Duties,” Journal of Social Philosophy 29: 87‑96 (Fall 1998). [↑](#footnote-ref-19)
20. Richard Posner, “A Theory of Primitive Society, with Special Reference to Law,” Journal of Law and Economics 23:1-53 (April, 1980). [↑](#footnote-ref-20)
21. One of the leading theorists among those providing economic explanations of the law distinguishes his account from accounts of the moral rationale for laws. See Richard Posner, "An Economic Theory of the Criminal Law," Columbia Law Review 85:6 (October 1985). [↑](#footnote-ref-21)
22. See Mark Tunick, Practices and Principles: Approaches to Ethical and Legal Judgment (Princeton, New Jersey: Princeton University Press, 1998), chapter 5. [↑](#footnote-ref-22)
23. In Oliver v. U.S., the Supreme Court upheld a search where police, without a search warrant, discovered marijuana after trespassing onto the defendant’s private property and inspecting an open field about a mile from the defendant’s house. 'No Trespassing' signs were posted. The Court ruled that there is no reasonable expectation of privacy against government searches of one's private property beyond the curtilage of one's home (466 U.S. 170, 1984). In U.S. v. Dunn (480 U.S. 294, 1987), the Court upheld a search where D.E.A. agents crossed several barbed wire fences to observe a barn. The Court ruled that the barn was not part of the curtilage of the home. [↑](#footnote-ref-23)
24. 230 NY 239, 129 NE 889 (1921). [↑](#footnote-ref-24)
25. See Oliver v. U.S., 466 U.S. at 193, Justice Marshall in dissent: "a homeowner need not post a 'Do Not Enter' sign on his door in order to deny entrance to uninvited guests." [↑](#footnote-ref-25)
26. There are other costs of breaking the law that might enter into Jane's decision. For example, if Jane were running for political office exposure of her trespassing might cost her some votes. [↑](#footnote-ref-26)
27. Cf. J.D. Mabbott, "Punishment," Mind vol. 49 (1939), pp. 152-67. Mabbott argues that just because someone has broken a law, even an unjust or silly law, they must be punished; but, he adds, we needn't "rub it in." [↑](#footnote-ref-27)