

JEFFERSON MEETS COASE: LAND-USE TORTS, LAW AND ECONOMICS, AND NATURAL PROPERTY RIGHTS[©]

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ABSTRACT

In tort scholarship, conventional wisdom assumes that economic analysis explains doctrine more determinately than philosophical analysis. This Article challenges that assumption, using land-use torts as a point of contact. The Article studies cattle trespasses, pollution nuisances, train-sparks cases, and other basic rules of tort liability Ronald Coase popularized in The Problem of Social Cost. The Article compares standard economic analyses of these torts against an interpretation that follows from the natural-rights morality that informed the content of these torts when “tort” was forming into a single field of legal study. The “Jeffersonian” natural-rights morality predicts the contours of doctrine more determinately and accurately than “Coasian” economic analysis. It also anticipates and finesses a significant normative challenge to Coasian economic tort analysis—its tendency to demand that triers of fact process unrealistically volatile and fact-specific information to prescribe legal results.

The comparison teaches that conventional impressions about tort philosophy and economics have been misguided in at least three important respects. First, in a significant swath of doctrine, Jeffersonian natural-rights morality shapes the contours of tort quite determinately. Second, if philosophical tort scholarship has a bad reputation for being indeterminate, it does so at least in part because it has chosen to focus on the general corrective-justice architecture of tort—to the exclusion of specific theories of political morality shaping the rights wrongs to which tort corrects. Finally, standard economic tort analysis cannot prescribe determinate results without making simplifying assumptions more characteristic of moral philosophy than of social science.

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^{*} Associate Professor of Law, George Mason University. Early drafts of this paper have benefited from comments from workshops at George Mason University Law School, the University of St. Thomas-Minneapolis School of Law, the University of Chicago legal academia workshop, the University of Southern California Law Center, and the McGill University School of Law. This Article has benefited from many comments and criticisms, but I owe special thanks to Nestor Davidson, Greg Keating, Mark McKenna, Adam Mossoff, James Penner, and Todd Zywicki. I thank Joshua Newborn for his research assistance.

INTRODUCTION

Economic analysis has taken over tort law and scholarship. Before economic analysis came on to the scene, lawyers used to assume that tort law secured personal rights grounded in moral interests. Philosophical tort scholarship still tries to defend this common-sense view. Yet over the last generation, tort's moral pretensions have taken the academic equivalent of a drubbing. Even leading tort philosophers concede "frankly [that] the legal community has found various economic approaches more persuasive or compelling than those based on corrective justice," the main philosophical approach to tort.¹

This perception seems convincing, among other reasons, because economic analysis claims it can explain the law more determinately than philosophical analysis. When tort cases appeal to moral terms, economists say, their arguments seem "mush—lacking in clear or persuasive guidelines for determining what counts as 'wrongful.'"² The open nature of moral language also makes philosophical tort theory seem too diffuse to "milk . . . for its specific implications for legal doctrine."³ Only economic analysis, it seems, can claim an "impressive level of fit with case outcomes" and a "comparatively high degree of determinacy."⁴ As a result, "philosophers have marveled in contemptuous amazement as the apparently dead body of economic legal analysis took its seat at the head of the legal academy and reigned unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy."⁵

From a longer time horizon, however, this debate is surprising. People often assume that American tort law used to have content focused enough to be described as "individualistic"—that is, organized "to specify and protect individuals' rights to bodily integrity, freedom of movement, reputation, and property ownership."⁶ These observers assume that the morality that used to inform the law was determinate enough to generate predictably "individualistic" results. In addition, if economic criticisms are true, the various bodies of law that have now merged into the field of "tort" were incoherent for several centuries until economists came along and tidied them up. It may sound naïve to say, but that claim seems a little presumptuous. So do contemporary comparisons of tort economics and philosophy fairly reflect the merits of tort doctrine, economics, and philosophy—or do they instead reflect passing academic prejudices?

¹ Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, 53, 57 (David G. Owen ed., 1995).

² WARD FARNSWORTH & MARK F. GRADY, *TORTS: CASES AND QUESTIONS*, at xlv (2004).

³ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 321, 322, 323, 328 (1990).

⁴ Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 357 (2007).

⁵ *Id.* at 356-57.

⁶ John C. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 520, 518 (2003).

Now, no single Article can voice such a doubt comprehensively across the entirety of tort, and this Article will not try. But this Article *can* suggest that the doubt is well-grounded in reference to a fair point of contact—land-use torts. “Land-use torts” refer to the grounds for liability for trespass to land, nuisance, and negligence claims involving an accidental but trespassory invasion of land. They include cases about cattle trampling on crops; doctors building offices next to noxious baking machines; and trains emitting incendiary sparks onto crops or hay-stack fields.

In other words, land-use torts cover all the chestnuts that Ronald Coase used to illustrate the lessons of his landmark article *The Problem of Social Cost*.⁷ *Social Cost* is the most-cited law review article ever.⁸ It contributed to many economists’ general impression that philosophical argument seems “rigid” in its attachment to a harm-benefit distinction, a “pristine idea of right colliding with wrong.”⁹ But *Social Cost* is especially useful here because tort economists now routinely use fact patterns involving cows, smokestack pollution, or train sparks to teach or to build on the main lessons of *Social Cost*.¹⁰ If there is any set of cases where “Coasian” tort analysis should demonstrate its explanatory superiority, the land-use torts treated in *Social Cost* belong in that set.

It is thus big news to learn that economic tort scholarship does not explain foundational features of the rules regulating liability in trespass, nuisance, and land-use negligence. The relevant liability rules torts are better explained and justified as an application of “American natural-rights morality.” American natural-rights morality refers here to an amalgamated political morality that informed American law and politics considerably from the United States’ founding until 1920, and to a lesser extent since. According to this morality, the law’s overriding object is to secure to citizens the natural rights to which they are entitled by general principles of natural law. This morality is “Jeffersonian” in the sense that it is a tolerably well-articulated version of the theory of unalienable and natural rights set forth in

⁷ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 29-34 (1960), reprinted in R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 95, 133-42 (Chicago 1988). All further citations to *Social Cost* in this Essay are noted as “Coase, *Social Cost*” and cite to the version reprinted in *The Firm, the Market, and the Law*.

⁸ See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 759 (1996).

⁹ Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J LEG. STUD. 15, 30, 33 (1988).

¹⁰ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.6, 3.8, at 50-52, 61-63 (7th ed 2007) (illustrating economic analysis of incompatible use disputes with sparks and smoke nuisance cases); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40 (1991) (calling cattle trespass “the subject of Coase’s Parable of the Farmer and the Rancher”); Robert D. Cooter, *Coase Theorem*, in 1 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 457, 458 (John Eatwell et al eds., 1997) (using train-sparks cases, “which Coase made famous,” as the sole example for illustrating the Coase Theorem).

the United States Declaration of Independence.¹¹ This morality explains basic features of trespass, nuisance, and land-use-related negligence better than “Coasian” economic tort analysis. In the process, Jeffersonian morality anticipates and highlights problematic features of Coasian economic analysis.

If this comparison is an accurate indicator, the philosophy-versus-economics debate in tort has been off track for a generation, in at least three important respects. First, if philosophical tort scholarship suffers a bad rap for being mushy and indeterminate, this impression exists because too many onlookers conflate tort philosophy with corrective justice. Corrective justice is the species of practical moral philosophy determining in what circumstances wrongs to a victim’s rights should be annulled or rectified. Corrective justice has much to teach about the institutional structure of tort—for example, why it pits an aggrieved “plaintiff” against an allegedly aggressive “defendant” in a suit to recover for “wrongs.” But, by itself, corrective justice does not supply the content of those wrongs—particularly the scope of the plaintiff’s rights, or the defendant’s duties in relation to those rights. That content comes not from corrective justice but a controlling local political morality, specifying who has what rights in relation to whom. This Article therefore corrects an important misunderstanding.

Second, this Article then highlights an under-developed field of tort philosophy. Philosophical tort scholarship has not done enough to learn how American natural-rights morality informs the moral content of particular torts. In many foundational areas of tort law, American natural-rights morality supplies the primary moral theory corrective justice needs. The basic land-use torts comprise one such area. In the process, American natural-rights morality also helps dispel a more general impression—that all moral theories of rights and duties are indeterminate. Economic scholarship often suggests that only economics, and not philosophy, is capable of making tough-minded policy tradeoffs. American natural-rights morality makes those tradeoffs.

Finally, the Article explains and renders questionable the general perception that conventional economic tort analysis explains and justifies tort doctrine more effectively than theories of justice do. The case comparison offered here highlights a problematic aspect of standard economic tort analysis that is often overlooked: To explain tort doctrine as determinately as conventional wisdom supposes, economic tort analysis must make informed hunches more characteristic of moral philosophy than of social science. In

¹¹ Although Thomas Jefferson drafted the Declaration of Independence, Jefferson’s personal views on morality were not necessarily representative of American common political morality in all respects. Nevertheless, as drafter of the Declaration, Jefferson intended “[n]ot to find out new principles . . . but to place before mankind the common sense of the subject” and to present “an expression of the American mind.” Letter of Thomas Jefferson to Henry Lee, May 8, 1825. In this Article, “Jefferson” and “Jeffersonian” refer to that common sense.

the words of one leading introductory law and economics casebook, where lawyers and judges decide legal issues “by consulting *intuition* and any available facts,” economists use “*scientific*” approaches including “mathematically precise theories (price theory and game theory and empirically sound methods (statistics and economics)).”¹² But if the land-use torts provide an accurate point of contact, these generalizations are overdrawn. Conventional economic tort analysis can provide precise accounts of *parts* of land-use doctrines, but not of doctrines in their entirety. Or, if it *does* try to render accounts of entire doctrines, such analysis takes methodological shortcuts. Ironically, those shortcuts resemble the “intuitions” on which non-expert judges rely when they decide cases, or the “political opinions” foundational in practical moral philosophy. If the land-use torts are representative, economic tort analysis can be scientific, and it can be relevant to doctrine, but it cannot have it both ways.

I. THE RIVALRY BETWEEN ECONOMICS VERSUS JUSTICE IN TORT

A. The Economic Indictment

To set the stage, let us recount the general impressions that lead scholars to assume that economics is more determinate than common-sense morality or philosophy in tort. Because *Social Cost* is frequently cited as an authority proving or illustrating these impressions, we shall illustrate them especially with relevant passages of *Social Cost*. We have already identified one: Theories of justice seem “mush” and “lacking in clear or persuasive guidelines” for tort.¹³

Next, many lawyers assume with economists that tort common law is facile. When the common law distinguishes between distinctions between harms and benefits or rights and injuries, the assumption goes, it does so less subtly than economic analysis. *Social Cost* is often cited as an authority here: After reviewing a long line of nuisance cases, Coase commented that the judges relied often on distinctions “about as relevant as the colour of the judge’s eyes.”¹⁴ Later, when he restated the argument of *Social Cost* in a republication of it, Coase asserted that “there is no difference, analytically, between rights such as those to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke.”¹⁵ In other words, rather than employ traditional distinctions between benefits and harms, it is instead more constructive to portray a dispute as a resource conflict between competing and incompatible assets that inflict pairwise reciprocal externalities on one another.¹⁶ This

¹² ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 3 (3d ed. 2000) (emphasis added).

¹³ FARNSWORTH & GRADY, *supra* note 2, at xlv.

¹⁴ Coase, *Social Cost*, *supra* note 7, at 114.

¹⁵ Ronald H. Coase, *The Firm, the Market, and the Law*, in *THE FIRM, THE MARKET AND THE LAW*, *supra* note 7, at 1, 12.

¹⁶ See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 77 (2004) (defining “externality” in the context of a land-use conflict to refer to any action that “influences, or

framework calls into question how the common law treats not only rights and wrongs but also causation. If the parties are really inflicting pairwise reciprocal externalities on each other, both parties are necessary to and therefore jointly cause any economic losses.¹⁷

Third, these impressions are contributed to by “the Coase Theorem.” *Social Cost* is understood to teach, as Coase puts it, that “in perfect competition private and social costs are equal.”¹⁸ In Mitchell Polinsky’s paraphrase, “[i]f there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.”¹⁹ On the Theorem’s assumptions, it does not really matter *how* the common law assigns liability in a simple trespass or nuisance case. As long as transaction costs are not prohibitively high, the parties will bargain around liability to the efficient result. The Coase Theorem shifts the focus of analysis. As Coase puts it, “the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what.”²⁰ To economists, it seems more precise to ask “what shall be done by whom.”

Finally, conventional tort economic scholarship prescribes what seems to be a more precise and quantitative method for resolving tort disputes than those advocated by doctrine or tort philosophy. For simplicity’s sake, we shall refer to the conventional tort economic approach as “accident law and economics.” Accident law and economics prescribes that tort accident disputes be resolved consistent with “productive efficiency.” Accident law and economics tallies the gains each of the affected parties generates by its land uses. It then tallies all the relevant costs, including but not limited to: property damage or business impairment caused by a neighbor’s nuisance; payments to other parties under contracts not to inflict nuisances; damage payments, again not to commit nuisances; and transaction costs. Accident law and economics then focuses on the differences between the joint gains and joint losses. Productive efficiency refers to an ideal state in which any change in the parties’ levels of production or precautions causes this difference to shrink.²¹

may influence with a probability, the well-being of another person, in comparison to some standard of reference”); Louise A. Halper, *Why the Nuisance Knot Can’t Undo the Takings Muddle*, 28 IND. L. REV. 329, 343 (1995) (“[i]t is more than thirty years since Ronald Coase pointed out the absence of a coherent distinction between courts abating a nuisance on behalf of a neighbor’s use and providing an unpaid benefit to that neighbor”).

¹⁷ See, e.g., Coase, *Social Cost*, *supra* note 7, at 111 (“The judges’ contention,” in a case between a man using a fireplace and a man walling off smoke from the chimney over the fireplace, “that it was the man lighting the fires who alone caused the smoke nuisance is true only if we assume that the wall is the given factor.”).

¹⁸ Coase, *The Firm, the Market, and the Law*, in COASE, *supra* note 7, at 1, 13-15 (citing GEORGE J. STIGLER, *THE THEORY OF PRICE* 113 (3rd ed 1966)).

¹⁹ A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 12 (2d ed. 1989).

²⁰ Coase, *Social Cost*, *supra* note 7, at 114.

²¹ The phrase “productive efficiency” comes from COOTER & ULEN, *supra* note 12, at 12. See also SHAVELL, *supra* note 16, at 81-83 (assuming that “the social goal is to maximize the sum

It should go without saying that this portrait of economic tort analysis could be qualified in many respects. To begin with, accident law and economics as defined herein does not automatically follow from *Social Cost*. The article's main intention is to refute an assumption, conventional in 1960 among many economists, according to which the efficient response to pollution is always to make the polluter pay taxes or damages to internalize the externalities it inflicts on other parties.²² *Social Cost* is therefore interested primarily in "[t]he influence of the law on the working of the economic system"²³ and not vice versa. Yet at a minimum, *Social Cost* makes respectable the methodology of accident law and economics. Coase hypothesizes that the "legal system" may establish the "optimal arrangement of rights, and the greater value of production which it would bring," specifically by circumventing "the costs of reaching the same result by altering and combining rights through the market."²⁴ Coase praises American lawyers who "are aware . . . of the reciprocal nature of the problem" and "take . . . economic implications into account, along with other factors, in arriving at their decision."²⁵ He also lets slip some of the condescension many law and economists feel toward the common law, by describing judicial reasoning as "a little odd."²⁶ So, with possible apologies to Coase, let us focus here on the "Coasian Coase," the general lessons that accident law and economists have taken away from *Social Cost*.²⁷

In addition, accident law and economics is a rough general category covering over many different specialized economic analyses of torts. No doubt, different tort economists can analyze and have analyzed differently the data relevant to productive efficiency. Productive efficiency is an analytical device. It provides a launching-off point for many different economic analyses. Economic life imposes transactions costs or other obstacles that stop the parties from pursuing productive efficiency. Productive efficiency highlights how the parties should or would rationally bargain if these obstacles did not exist; economic analyses can then focus on

of parties' utilities"); POLINSKY, *supra* note 19, at 13 ("the preferred legal rule is the rule that minimizes the effects of transaction costs"); Coase, *Social Cost*, *supra* note 7, at 115 ("One arrangement of rights may bring about a greater value of production than any other.").

²² See Coase, *Social Cost*, *supra* note 7, at 95, 133 & n.35 (citing A.C. PIGOU, *THE ECONOMICS OF WELFARE* 183 (4th ed. 1932)).

²³ *Id.* [Coase, *Social Cost*] at 10.

²⁴ *Id.* [Coase, *Social Cost*] at 115.

²⁵ See *id.* [Coase, *Social Cost*] at 120 (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 398-99 (2d ed. 1955), for the proposition that American nuisance law considers among other factors pollution's "utility and the harm which results").

²⁶ *Id.* [Coase, *Social Cost*] at 146.

²⁷ See R.H. Coase, *Notes on the Problems of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW*, *supra* note 7, at 157, 174 ("The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave."). Accord Robert C. Ellickson, *The Case for Coase and Against 'Coaseanism'*, 99 YALE L.J. 611 (1989).

different obstacles and study their consequences.²⁸ Yet even though these analyses differ in many particulars, productive efficiency unifies their inquiries in important foundational matters.²⁹

Finally, “accident law and economics” should not be understood to be a representative of or a proxy for economic tort analysis generally. It should not be confused with cheaper-cost-avoider economic tort analysis,³⁰ new institutional economics,³¹ behavioral law and economics,³² or other refinements on or specialized applications of basic economic methodology. Nevertheless, in tort casebooks and introductory textbooks, accident law and economics is presented as hornbook economics.³³ Accident law and economics gets credit for bringing determinacy to tort. And it takes credit for exposing the indeterminacy that supposedly exists in doctrine and tort philosophy.

B. Explanatory Doubts

Yet it is surprisingly easy to puncture these impressions. One only needs to consult the land-use torts on which Coase relied to illustrate the lessons of *Social Cost*.

First, a trespass occurs when a defendant makes an act that directly results in a physical invasion of the plaintiff’s close.³⁴ In other words, at common law, a “harm” occurs whenever the defendant penetrates the boundaries of the plaintiff’s land—and even if the penetration does not damage the land.³⁵ Economically, there are two puzzles with this rule. *Social Cost* articulates the first: When a rancher’s cattle trespasses on a farmer’s crops, it should not matter whether the rancher compensates the farmer for the crop damage.³⁶ This question is easy for accident law and

²⁸ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 29-38, 58-59 (1987); SHAVELL, *supra* note 16, at 177-206.

²⁹ See, e.g., POSNER, *supra* note 10, at 53 (“efficiency is promoted by assigning the legal right to the party who would buy it . . . if it were assigned initially to the other party”); SHAVELL, *supra* note 16, at 83-109 (comparing how polluter liability, bargaining, and legally mandated results each might maximize the parties’ joint net utility); COOTER & ULEN, *supra* note 12, at 82-98. See also ROY E. CORDATO, *WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE* 95 (1992) (finding “more complicated analyses in the law and economics literature . . . still all, in one form or another, applications of Coase’s efficiency criteria”).

³⁰ See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (2d ed. 1977).

³¹ See, e.g., *HANDBOOK OF THE NEW INSTITUTIONAL ECONOMICS* (Claude Menard & Mary M. Shirley eds. 2005).

³² See, e.g., Kraus, *supra* note 4, [93 Va L Rev] at 359 (cited in JKTD); *The New Chicago School: Myth or Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1 (1998).

³³ See sources cited *supra* notes 28 and 29.

³⁴ See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 13, at 67 (2d ed. 1984).

³⁵ See *Longnecker v. Zimmerman*, 267 P.2d 543, 545 (Kan. 1954); *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916); *Dougherty v. Stepp*, 18 N.C. 371, 371 (1835); KEETON ET AL., *supra* note 34, § 13, at 75.

³⁶ Coase, *Social Cost*, *supra* note 7, at 97-104.

economics to explain. *Social Cost* discusses the rancher-farmer conflict on the assumption that transaction costs are zero.³⁷ But the farmer has one stationary plot of land, while the ranchers have many mobile cows. Once transaction costs are put back in the picture, it is less costly for the ranchers to come to the farmer to bargain than it is for the farmer to go find them.³⁸

Trespass poses a second puzzle, however: Why does the prima facie case lack elements of causation or harm? There are few accident law and economic explanations for this rule, and those that do exist are not satisfying. For example, in a recent article, Lee Anne Fennell assumes that the whole “point of exclusion from boundaries is to facilitate the effective matching of inputs with outcomes.”³⁹ The inputs are productive activities, the outcomes include both the benefits from and the accidents that those activities occasionally but inevitably generate. Fennell concludes from this functional premise that trespass lacks causation or harm elements because “[b]oundary crossings . . . effectively puncture the containers that society has created for collecting risks and their associated outcomes.”⁴⁰ Assume for the moment that Fennell’s explanation is correct. Why does trespass law enforce boundary rules even when a risk of harm does not lead to a harmful accident?

The best recent case to illustrate is *Jacque v. Steenberg Homes*.⁴¹ Steenberg Homes asked the Jacques for permission to tow a home across a vacant field they owned, while the public road was blocked by a snow drift, so the company could complete a delivery on time. The Jacques refused to grant permission under any circumstances because they believed that a license might expose them to adverse possession.⁴² (Under black-letter adverse possession law, they were almost certainly wrong.) Steenberg Homes towed the home across their field anyway, knowing that the Jacques objected, and caused no damage to the field.⁴³ In Fennell’s parlance, Steenberg Homes certainly punctured society’s risk-collecting boundary rules. But Steenberg Homes could not be blamed for the snowstorm, it was economically gainful for the company to perform its delivery contract, the Jacques had no serious reason for refusing passage, and their property was not damaged. A few different regimes might be productively efficient: No liability; liability compensated only by nominal damages; or maybe even

³⁷ See *id.* [Coase, *Social Cost*] at 97 (“the operation of a pricing system is without cost”).

³⁸ See ELLICKSON, *supra* note 10; Kenneth R. Vogel, *The Coase Theorem and Animal Trespass Law*, 16 J. LEG. STUD. 149, 153-60 (1987).

³⁹ Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1438 (2007).

⁴⁰ *Id.* [Fennell, 116 YLJ] at 1437.

⁴¹ 563 N.W.2d 144 (Wisc 1997). Prominent property casebooks give *Jacque* significant treatment, see JESSE DUKEMINIER ET AL, PROPERTY 87-88 (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 116 (4th ed. 2006).

⁴² See *Jacque*, 563 N.W.2d at 157.

⁴³ *Id.* [Jacque, 563 N.W.2d] at 611. Steenberg Homes’ assistant manager instructed employees: “I don’t give a [expletive] what [Mr. Jacque] said, just get the home in there any way you can.” *Id.*

liability compensated by a reasonable one-time crossing fee.⁴⁴ It would be productively *inefficient* to award the Jacques not only nominal damages but also \$100,000 in punitive damages. But that is what the jury did,⁴⁵ and the Wisconsin Supreme Court affirmed—specifically to deter trespassers from undermining the general principle that “actual harm occurs in *every* trespass.”⁴⁶ According to Fennell, *ex ante*, this holding deters future boundary invasions.⁴⁷ But her interpretation only begs the same basic question. In economic terms, why should the law deter a trespass when the owner does not suffer economic loss and the trespasser increases social product?

Next, consider how nuisance liability tracks the physical-invasion test. In some pollution cases, the common law assigns nuisance liability where accident law and economics predicts and prescribes no liability. The classic illustration is the “coming to the nuisance” fact pattern, in which a plaintiff develops previously unused land years after the defendant first started running a dirty but productive business nearby. English and American common law by and large hold that the business is liable regardless of how long it has operated in the neighborhood. Coase dissected this position using a case between *Sturges v. Bridgman*, a case between an early-moving baker and a late-developing doctor.⁴⁸ According to Coase, it did not matter whether or not the law held the baker to be harming the doctor, because the parties would bargain around legal liability as long as transaction costs were not too high.⁴⁹ The accident law and economic scholarship follows Coase in different ways. Some articles suggest that the earlier builder should be protected categorically,⁵⁰ others that the law should examine case by case which party acted less strategically.⁵¹ These approaches have seeped into some cases.⁵² By and large, however, the cases make the business liable even though it came to the neighborhood first.⁵³

The physical-invasion test also bars causes of action for aesthetic complaints and blockages of light.⁵⁴ Economically, it is hard to explain why

⁴⁴ On this last possibility, see Gideon Parchomovsky & Alex Stein...

⁴⁵ *Jacque*, 563 N.W.2d at 632.

⁴⁶ *Id.* [*Jacque*, 563 N.W.2d] at 160 (emphasis added).

⁴⁷ See Fennell, *supra* note 39, [116 Yale LJ] at 1431 n.91 (citing *Jacque* to illustrate features of remedy law, without explaining its implications for underlying trespass liability).

⁴⁸ 11 Ch. D. 852 (1879).

⁴⁹ See Coase, *Social Cost*, *supra* note 7, at 105-07.

⁵⁰ See, e.g., William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1 (1973).

⁵¹ See, e.g., LANDES & POSNER, *supra* note 28, at 50-51; Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001); Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance,”* 9 J.L. & ECON. 557 (1980).

⁵² See, e.g., *Jerry Harmon Motors, Inc v. Farmers Un. Grain Term. Ass’n*, 337 N.W.2d 427 (N.D. 1983).

⁵³ See, e.g., *Kellogg v. Village of Viola*, 227 N.W.2d 5 (Wis. 1975).

⁵⁴ See, e.g., *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 219 (Mich. Ct. App. 1999).

negative externalities should be sorted out by whether they follow from a physical invasion. In *Social Cost*, Coase assumed that his analysis applied the same way whether the defendant was emitting smoke onto or blocking sunlight from the plaintiff's land.⁵⁵ Because accident law and economics scholarship typically defines "nuisance costs" to cover "harmful externalities" of all kinds, eyesores emit negative externalities on neighbors on similar terms to factory smoke.⁵⁶ Some parts of doctrine support such an approach. Since the *Restatement (Second) of Torts* defines the plaintiff's use and enjoyment rights "in a broad sense," to cover "the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land," it provides doctrinal authority for a sight-nuisance cause of action.⁵⁷ Lateral-support law provides further authority. At common law, a homeowner commits a nuisance against a neighbor by excavating on his land in a manner that would cause hers to collapse in its natural state.⁵⁸

Nevertheless, common-sense attitudes remain strongly suspicious of economic conceptions of externalities. As Robert Ellickson explains, a "layman would regard a smokestack . . . as 'theft' of neighborhood enjoyment," but would "perceive quite differently . . . the demolition of an architectural landmark or the construction of a housing development on a beautiful vacant meadow."⁵⁹ Nuisance doctrine tracks common-sense perceptions. For example, in the course of rejecting a nuisance suit to protect a solar-powered house's access to sunlight, the California Court of Appeals contrasted "emissions of smoke affecting plaintiff's property" with "the plaintiffs' 'predicament,' which the court described as 'never [having] come under the protection of private nuisance law, no matter what the harm to plaintiff.'"⁶⁰

⁵⁵ See Coase, *Social Cost*, *supra* note 55, at 104-05 (citing *Fountainbleu Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fla. 1959)).

⁵⁶ See, e.g., Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, CASE WESTERN L. REV. (forthcoming 2008), draft manuscript March 2008, at 5-7, 10-11 (defining the interference in nuisance in reference to physical invasions, without considering that economic-externality analysis applies equally to non-invasive negative externalities). See also COOTER & ULEN, *supra* note 12, at 40; Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1310 & Table (1977) (illustrating a general approach to economic nuisance analysis with a fact pattern involving light glares between a race track and a drive-in movie theater).

⁵⁷ RESTATEMENT (SECOND) OF TORTS § 821D, cmt. b. (1977). See, e.g., *Tenn. v. 889 Assocs., Ltd.*, 500 A.2d 366 (N.H. 1985); *Prah v. Maretti*, 321 N.W.2d 182 (Wis. 1982).

⁵⁸ Cribbet casebook, 691-98 (9th ed. 2008) (citing *Noone v. Price*, 298 S.E.2d 218 (W. Va. 1982)).

⁵⁹ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land-Use Controls*, 40 U. CHI. L. REV. 681, 728 (1973).

⁶⁰ *Sher v. Leiderman*, 226 Cal. Rptr. 698, 703 (Ct. App. 1986). See also *Wernke v. Halas*, 600 N.E.2d 117 (Ind. App. 1992) ("It may be the ugliest bird house in Indiana, or it may be merely a toilet seat on a post. The distinction is irrelevant, however; [defendant's] tasteless decoration is merely an aesthetic annoyance.").

Consider also the roles that *scienter* and interest balancing play in trespass and nuisance. Some accident law and economic authorities recommend that nuisance employ principles of negligence.⁶¹ In negligence, the element of breach of duty creates a doctrinal placeholder in which to conduct *B v P* economic analysis. Nuisance could import the same analysis through the element that an interference with a land use be unreasonable.⁶² Other authorities prescribe strict liability for unilateral accidents and negligence for multi-lateral accidents. In simple cases, strict liability avoids the costs of inquiring into reasonable care; in multi-party cases, negligence reduces the perverse incentives one party's strict liability gives others not to take sensible precaution on their own.⁶³

In practice, however, trespass and nuisance employ strict liability categorically, without distinguishing between one- and multi-party accidents. Trespass is often defined as an intentional tort. In practice, however, courts water down the concept of "intent" to include intent to commit the act causing the trespass regardless of whether the actor knows it is a trespass.⁶⁴ A similar move happens in nuisance. When intent is an element of nuisance, it is usually construed to cover intent to use land substantially certain that the use will create pollution.⁶⁵ There certainly is negligence-based nuisance,⁶⁶ but the law also preserves a strict-liability theory of nuisance as a backstop.⁶⁷ Courts also resist surprisingly often the invitation to make nuisance's "reasonableness" element a place-holder for economic cost-benefit analysis. They prefer to focus on "the reasonableness of the interference and not on the use that is causing the interference."⁶⁸

⁶¹ See, e.g., Hylton, *supra* note 56, manuscript at 8 ("strict liability is desirable only when the external costs of the actor's activity substantially exceed the external benefits associated with the actor's activity").

⁶² See, e.g., Posner, *supra* note 10, § 3.8 at 63 ("The standard of reasonableness [in private nuisance] involves comparing the cost to the polluter of abating the pollution with the lower of the cost to the victim of either tolerating the pollution or eliminating him himself."); Rabin, *Nuisance Law*, *supra* note 56, [63 Va L Rev] at 1316-31.

⁶³ See, e.g., Hans-Bernd Schäfer & Andreas Schönenberger, *Strict Liability versus Negligence*, in 2 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 597, 607 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEG. STUD. 323 (1973). See also Polinsky, *supra* note 19, at 92-94 (applying this framework to pollution cases).

⁶⁴ See, e.g., *Burns Philip Food, Inc. v. Cavalea Contl. Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998); *Brown v. Dellinger*, 355 S.W.2d 742, 747 (Tex. Civ. App. 1962); *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (D.C. App. 1960); *RESTATEMENT (SECOND) OF TORTS*, *supra* note 57, § 158(a) (defining intent in trespass to cover intent to enter land in the possession of the plaintiff); JOHN C. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 756-57 (2004).

⁶⁵ See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (N.C. 1953).

⁶⁶ See *RESTATEMENT (SECOND) OF TORTS*, *supra* note 57, § 822(b).

⁶⁷ See *id.* [RST] §§ 822(a), 825(b).

⁶⁸ See, e.g., *Pestey v. Cushman*, 788 A.2d 496, 508 (Conn. 2002). To be fair, when economists suggest that nuisance incorporates balancing, they are describing in large part the way in which courts determine whether to enter an injunction abating the nuisance. See, e.g.,

Of course, economic cost-benefit analysis could still seep into land-use torts through the back door, by setting the legal standards determining whether a land-owning plaintiff has invited harm on herself through some affirmative defense. Accident law and economics scholarship assumes that fault principles do and should inform plaintiffs'-misconduct defenses. For example, according to economic scholarship on train-sparks cases, liability payments do and should vary depending on whether land-owning plaintiffs take cost-justified precautions to keep their land uses protected against the risk of sparks fires.⁶⁹ Yet in doctrine, the common law does not use affirmative defenses in this manner. Even making the necessary qualifications for exceptional cases and minority rules, it is "canonical" that "if you hold a property entitlement, then you should not be required to anticipate the possible wrongs or torts of another."⁷⁰ Most sparks cases have been litigated in negligence. Ordinarily, contributory negligence is a defense to negligence. Yet in sparks cases, the general rule has been to bar contributory negligence, on the ground "[t]hat one's uses of his property may be subject to the servitude of the wrongful use of another of his property seems an anomaly."⁷¹

Similarly, courts sharply limit assumption of risk as a defense against trespassory torts. In the 1974 case *Marshall v. Ranne*, Marshall was bitten while he was walking from his farm house to his car, by an ornery boar that had threatened him on several previous occasions. *Marshall* was a Texas case, and Ranne argued that Marshall assumed the risk of being bitten because he didn't shoot Ranne's boar when he had a chance. This argument was rejected: "[T]here was no proof that plaintiff had a free and voluntary choice, because he did not have a free choice of alternatives. He had, instead, only a choice of evils, both of which were wrongfully imposed upon him by the defendant."⁷² The opinion intuitively uses boundary principles to stop a trespasser from raising a plaintiffs'-misconduct defense. In common-sense terms, in that case the defense seems to make an inappropriate "your money or your life" argument. But other cases allow plaintiffs'-misconduct defenses when owners impose conditions on

Hylton, *supra* note 56, manuscript at 12-13 (discussing *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 871 (N.Y. 1970)). Nuisance does balance interests more than trespass at the remedy stage, though perhaps not as much as such economists suggest. But at the liability stage, nuisance tends to be resistant to interest balancing.

⁶⁹ See, e.g., Grady, *supra* note 9, [17 J Leg Stud] at 33-41; Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 5-11 (1985).

⁷⁰ Susan Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEG. STUD. 25, 35 & n.20 (1989). Rose-Ackerman attributes this view to HORACE WOOD, *LAW OF NUISANCE* § 435 (3d ed. 1893): "A party is not bound to expend a dollar or do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful act of another." Rose-Ackerman, *supra*, [18 J Leg Stud] at 35.

⁷¹ *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 349 (1914).

⁷² 511 S.W.2d 255, 260 (Tex. 1974).

licensees' entrance onto their land. In these cases, land owners make appropriate "take it or leave" demands on the licensees.⁷³

By now, the main points should be clear. Accident law and economics should be able to explain the basic land-use torts *Social Cost* made famous. It cannot. Now, accident law and economists might say that the common law at each point is "rigid," missing "ambiguity,"⁷⁴ or any of many other synonyms for "not as sophisticated as the approach one would take if one had learned more economics." Yet these reactions are also eerily reminiscent of the Laputian and European mathematicians from *Gulliver's Travels*. Those mathematicians could not stop themselves from "perpetually enquiring into publick Affairs" even though Gulliver "could never discover the least Analogy between" mathematics and politics.⁷⁵ To put the point more prosaically, accident law and economics misses the strictness and coarseness of land-use tort liability. The discrepancies are so systematic that they count as powerful evidence confirming the "growing disjunction" Chief Judge Harry Edwards noted between the interests of the legal academy and the needs of the bar.⁷⁶

II. AMERICAN NATURAL RIGHTS MORALITY IN LAND-USE TORTS

A. American Natural-Rights Morality

In this Article, I aim to show that "American natural-rights morality" explains and justifies the land-use torts just covered more effectively than accident law and economics does. For the purposes of this Article, "American natural-rights morality" refers to a common political morality that amalgamates Anglo-American law and several different philosophical and religious theories of liberty. The amalgamation is restated explicitly and generally in the Declaration of Independence and many Founding Era state constitutions; I hypothesize here that it served as a common political morality until at least the end of the first third of the twentieth century.

B. Political Morality and Corrective Justice

[Omitted.]

C. The Argument

Part III explains why American natural-rights morality explains and predicts the contours of basic land-use law better than accident law and economics or corrective-justice theory in isolation. (In the process, Part III shows why American natural-rights morality's account of land-use tort liability rules is at least plausible normatively.) Part IV then shows why accident law and economics does not adequately take account of the concepts

⁷³ See *Gibson v. Beaver*, 226 A.2d 273, 276 (Md. 1967).

⁷⁴ Grady, *supra* note 9, [17 JLS] at 30-33.

⁷⁵ JONATHAN SWIFT, *GULLIVER'S TRAVELS* bk. III, ch. 2.

⁷⁶ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

or the normative arguments imparted to the relevant law by American natural-rights morality.

[*The rest of this section is omitted.*]

III. LAND-USE TORTS AND NATURAL-RIGHTS REGULATION

A. The Natural Right to Labor

When American trespass and nuisance law define the possessory interests they protect, both presume a fairly clear and coarse harm-benefit distinction. That distinction protects a moral end, to secure to each owner a domain of practical discretion in which he may choose freely how to use his land. To appreciate this design, one must recover the intellectual context in which pre-1900 American jurists reasoned. [. . .]

The key is to understand the scope of the moral rights to “enjoy” and “use” in American natural-rights morality. The active use and enjoyment of property is one of several manifestations of the natural right of “labor” or “industry.” Thus, when John Locke traces the moral foundations of property in his *Second Treatise*, he insisted that God gave the world “to the use of the industrious and rational, (and labour was to be his title to it),”⁷⁷ and that “[t]he measure of property, nature has well set, by the extent of mens labour, and the conveniency of life.”⁷⁸ As U.S. Supreme Court Justice William Paterson explains in the 1795 case *Van Horne’s Lessee v. Dorrance*: “Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry.”⁷⁹

For judges like Paterson, “labor” or “industry” has focus because it has at least three characteristics. For one thing, labor is dynamic. Locke refutes the suggestion that it might seem “strange . . . that the property of labour should be able to over-balance the community of land.”⁸⁰ He insists that it would “be but a very modest computation to say, that of the products of the earth useful to the life of man nine tenths are the effects of labour: nay, if we will rightly estimate things as they come to our use . . . in most of them ninety-nine hundredths are wholly to be put on the account of labour.”⁸¹

Separately, the interest in “labor” abstracts from the specific use choices individual owners make. By focusing on man’s common tendencies to acquire, create, and work productively, natural-rights morality tacitly refrains from comparing different legitimate uses of property. James Wilson, a

⁷⁹ 2 U.S. (2 Dall.) 302, 310 (C.C.D. Pa. 1795).

⁸⁰ JOHN LOCKE, *Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT II.40, at 296 (Peter Laslett ed., 1988) (1698).

⁸¹ *Id.* Shortly after, Locke ups the fraction again, to 999/1000. See *id.* II.43, at 298.

Deleted: ridge 1988) (1698).
Throughout, quotations will remove
uppercase lettering inconsistent with
contemporary English usage.¶
§ 36, at 292 (cited in note JLTT).¶

member of the first Congress and an early U.S. Supreme Court Justice, amplifies a theme also in Locke and James Madison's justifications for property. Reason must acknowledge that different individuals are endowed with many

degrees [and] many . . . varieties of human genius, human dispositions, and human characters. One man has a turn for mechanics; another, for architecture; one paints; a second makes poems; this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character, is not easy; is, perhaps, impossible.⁸²

Last, the natural right to labor reflects a certain moderation, knowing what man can and cannot know. It may seem dogmatic or overly optimistic for a theory of politics to appeal to any "natural" claims of justice as if they can apply equally to all times, places, and cultures. Yet an account of man's "natural" obligations must start with and respect the natural impediments to bettering his condition. One can deduce these limitations from prominent religious teaching, as necessary consequences of original sin and man's inferiority to God.⁸³ Similar limitations can be deduced from secular first principles. Indeed, much of the pre-1800 canon of moral philosophy separated the study of moral affairs from the natural sciences for this very reason.⁸⁴ Locke stresses that separation. In his analysis man operates in a "state of mediocrity," in which he can learn only with "judgment and opinion," not "knowledge and certainty."⁸⁵ These limits on knowledge are especially pronounced in relation to moral ideas, which "are commonly more complex than those of the figures ordinarily considered in mathematics."⁸⁶

These concerns limit and guide property regulation. In *Federalist 10*, Madison assumes that a "connection subsists between [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."⁸⁷ While this passage is often cited as anticipating public-choice

⁸² JAMES WILSON, *Lectures on Law*, in 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.: LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 207 (1804). Accord LOCKE, *supra* note 80, § 48, at 301; THE FEDERALIST No. 10, at 45, 46 (1999) (Charles R. Kesler intro. & Clinton Rossiter ed.) (Madison).

⁸³ See THE BIBLE Gn 1:1, 26-28, 2:7-9, 3:16-22; MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING 35 (2002).

⁸⁴ See, e.g., Aristotle, *Nicomachean Ethics* bk. I ch. 3.

⁸⁵ JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING IV.12.10, at 645 (Peter H. Nidditch ed., 1975) (1700) (emphases and upper-case lettering removed).

⁸⁶ LOCKE, [echu] *supra* note 85, IV.3.19, at 550. See also THE FEDERALIST No. 37 at 92, 196 (Charles R. Kesler intro. & Clinton R. Rossiter ed., 1999) (Madison) (stressing a "necessity of moderating . . . our expectations and hopes from the efforts of human sagacity" in political science, because there "obscurity arises as well from the object itself as from the organ by which it is contemplated").

⁸⁷ THE FEDERALIST No. 10, *supra* note 82, at 46.

economics,⁸⁸ in context it stresses how hard it is to regulate property given the limits of human knowledge. In many cases, partisan selfishness certainly overwhelms rational inquiry. But perhaps more fundamentally, selfishness overwhelms rational inquiry because such inquiry has little pure knowledge on which to work. In practice, politics makes many basic decisions relying not on hard scientific knowledge but on soft political “opinions.” In light of these constraints, better that the law rely as far as possible on the knowledge of the people with the strongest interests in assets.

These prescriptions cooperate to make property seem simple—even “formal,” in the limited sense that simple forms are more useful. To encourage all citizens’ equal natural rights to labor, the law must design property to make citizens secure that they may recoup the products of their labor without outside interference. Property therefore consists not so much of specific entitlements as a general domain of practical discretion in relation to an external asset. That discretion protects in the owner free choice how actively to use and enjoy the asset in relation to his own individual needs. Chancellor James Kent refers to this domain by suggesting that “[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others.”⁸⁹

[*Omissions, on how labor theory as described here differs from “labor-desert” theory as conventionally understood by property scholars.*]

The property rights that follow from labor theory so understood are often called “rights to exclude” in case law and in conceptual philosophy.⁹⁰ [Nevertheless], as others⁹¹ and I⁹² have shown elsewhere, the conceptual property interest is better described as a right to determine exclusively the use of an external asset.⁹³ Consider a definition in an 1892 legal encyclopedia: “property” means “that dominion or indefinite right of user

⁸⁸ See, e.g., Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994).

⁸⁹ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (Da Capo 1971) (1826-30).

⁹⁰ JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1996). (“a right to exclude others from things which is grounded by the interest we have in the use of things”). See also J.W. HARRIS, PROPERTY AND JUSTICE 13, 141-142 (1996) (defining property as including interests protected by trespassory protections).

⁹¹ See, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TOR. L.J. 275 (2008); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

⁹² See Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007)).

⁹³ Penner uses a variation on the phrase in text (“the interest in exclusively determining the use of things”) to describe the normative interest underlying property, see PENNER, *supra* note 90, at 49. Law and social norms, he argues, then cash this right out into a right to exclude non-owners from things. See *id.* at 71 & *supra* note 90. For reasons too complicated to develop here, I suspect Penner is creating a distinction between normative interest and social/legal rights that does not exist in practice. See Claeys, *supra* note 92, at 631 n.67.

and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others.”⁹⁴ A “right to exclude” suggests that the owner enjoys a right to blockade non-owners from encroaching on the boundaries of her property. According to the 1892 definition, however, “exclusion” operates to bar non-owners from interfering with the domain of free choice over use – “dominion,”⁹⁵ or an “indefinite right of user and disposition.” As we shall see, in some cases, A’s right to exclude B from W is not necessary to protect A’s right to use W exclusive of B and others’ interference. In other cases, when the law says A has a right to exclude B from W, it really means, “B’s use violates A’s rights because it interferes with the domain of exclusive use determination the law assigns A.” [*Omissions on conceptual theory.*]

B. The Plaintiff’s Possessory Interest and the Defendant’s Harmful Act

1. Boundary Rules and the Rights to Use and Enjoy

The understanding of labor sketched in the previous section generates different rules of ownership, control, and use for different species of property. Legal property rights can range on a spectrum from (limited) rights of use to (unlimited) rights of possession and disposition.⁹⁶ Use rights endow an owner with a right to continue to enjoy the benefits of an asset she is using—only as long as she is using it, and without giving her a right to destroy the substance of the asset.⁹⁷ Water rights provide the prototypical example of use rights, and understandably so. Water is used for a narrower set of private uses than land is, and water is also used quite often for important public needs like navigation. In temperate jurisdictions, at least, water is also plentiful and can be acquired without strong property rights. In such jurisdictions, most sources of water are left in commons, and those that *may* be subject to privatization are subject to “use it or lose it” conditions and reasonable-use restrictions.⁹⁸

At the other end of the spectrum lie full rights of possession and disposition. These rights give owners the right to possess and dispose of things they own even if they are not actually and presently using those things.⁹⁹ Fast land is covered under such rights. In a society with any significant commerce, land can be deployed to a wide range of uses, and many are quite resource- or cooperation-intensive. To enlarge land owners’

⁹⁴ 19 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 284 (John Houston Merrill ed., 1892).

⁹⁵ *Accord* LOCKE, *supra* note 80, § II.25 (“nobody has originally a private domain exclusive of the rest of mankind”).

⁹⁶ *See* 2 *id.* at *2.

⁹⁷ *See, e.g.,* WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIA OF LAW 519 (1901) (definition of *jus utendi*).

⁹⁸ *See* JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 35-43 (2009); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *14 (W.S. Hein & Co. 1992) (1766).

⁹⁹ *See* SHUMAKER & LONGSDORF, *supra* note 97, at 515 (definition of *jus abutendi*).

interests in using land purposefully for their own plans, the law enforces exclusionary rights so “the [land] necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require.”¹⁰⁰

The law therefore organizes property rights in land in the first instance around boundary rights not tied directly to owners’ uses. As Chief Justice Holt put it in a seminal 1703 opinion: “So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.”¹⁰¹ In both the cuff and the riding, an unconsented touching is the law’s proxy for a moral principle, that it is wrong for one party to interfere with another party’s domain of free choice.¹⁰² In each case, that standard of freedom is subject to qualification and revision. But the standard still matters. It provides a simple and clear way to translate into real space the abstract moral principle “equal liberty of action to use property productively and purposefully for one’s own individual plans.”

Let us recapitulate using Wesley Hohfeld’s taxonomy of legal rights.¹⁰³ Once it has been determined that land should be reduced to full rights of possession and disposition, an owner has a claim right to be free from unconsented physical invasions and a reciprocal duty not to inflict unconsented physical invasions on others.¹⁰⁴ Both the claim right and the duty are *in rem* (in Hohfeld’s terminology, “multital” relations), which is to say that they attach to an indefinite class covering everyone who does not own the land.¹⁰⁵ To protect their claim rights, owners also enjoy Hohfeldian powers to eject trespassers and repel nuisances by self-help. The claim right, duty, and power, all reserve to individual owners a wide range of different land uses to which they may apply their land. Each of those uses counts as a liberty, a Hohfeldian privilege.¹⁰⁶ The owner also holds a more general liberty to choose among these various specific liberties. By contrast, each neighbor has an exposure, a Hohfeldian “no right,” inasmuch as he is powerless to veto objectionable but non-invasive liberty-uses chosen by the owner.¹⁰⁷ The claim right, the power, and (most of all) the general liberty

¹⁰⁰ SIMMONS, *supra* note **Error! Bookmark not defined.**, at 275.

¹⁰¹ *Ashby v. White*, 92 Eng. Rep. 126, 137 (1703) (Holt, C.J., dissenting).

¹⁰² Here and throughout, we abstract from qualifications imposed by private moral-nuisance law, public-nuisance law, the law of private servitudes, and other issues not directly implicated by a simple property-on-property dispute, sounding in private trespass, between two generally legitimate and productive uses of land.

¹⁰³ See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-38 (Walter Wheeler Cook, ed., 1978) (1919).

¹⁰⁴ See *id.* [Hohfeld] at 38.

¹⁰⁵ See *id.* [Hohfeld] at 73-74.

¹⁰⁶ See *id.* at 38-39.

¹⁰⁷ See *id.* at 39. Although Hohfeld assumed that there is “no single term available to express the . . . conception” of the absence of a claim right, *id.*, I assume that “exposure” is adequate

(and non-owners' *in rem* duty, liability, and exposures) recognize that the owner has a wide realm of practical discretion in which to determine how his land is used.

While Chief Judge Holt's *dictum* in *Ashby* presumes rather than demonstrates such an understanding, it is quite explicit in foundational English legal sources and in American common law. Consider how Sir William Blackstone defines trespass in *Commentaries of the Law of England*: It

signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil.¹⁰⁸

2. Trespass

This understanding explains the first puzzle identified in section I.B: why American land-use common law makes trespasses a trespass- or rights-based cause of action and not a harm-based cause of action. The core of trespass lies in the possessory interest—each owner's moral interest in controlling his land exclusively, consistent with neighbors enjoying like exclusive interests, all in the further interests of determining the ends for which their lands are used, enjoyed, and disposed of. The moral right shapes the possessory interest and the harm in tort. In Blackstone's restatement, "every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression." This rule is just because "much inconvenience may happen to the owner, before he has an opportunity to forbid the entry."¹⁰⁹ Here, "inconvenience" is shorthand for "interference with the owner's indefinite range of possible uses, enjoyments, or dispositions." So in subsequent American law, "[e]very unauthorized intrusion upon the private premises of another is a trespass, and to unlawfully invade lands in his possession is 'to break and enter his close' and destroy his private and exclusive possession."¹¹⁰

This understanding explains why courts continue to claim, as the Wisconsin Supreme Court has in *Jacque v. Steenberg Homes*, that "actual

as such a term. See, e.g., Antonio Nicita et al., "Towards an Incomplete Theory of Property Rights," at 16 (May 2007) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1067466).

¹⁰⁸ 3 BLACKSTONE, *supra* note 98, at *209 (1768) (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916). See also THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 64 (Rothman & Co. 1993) (1880) (justifying trespass's rights-based structure because a "pecuniary injury requirement" would allow "the rights invaded no protection" for "many of the most vexatious" trespasses").

harm occurs in every trespass.”¹¹¹ Accident law and economics focuses on the parties’ likely particular uses of their lots. If one party’s specific use diminishes the value of the other’s use, the former use automatically cashes out as a harm to the latter. By contrast, the common law protects in each individual owner “use” in the form of a realm of free action to choose among many possible uses. These zones of free action transfer to each owner (not, as productive efficiency does, the trier of fact) discretion how to prioritize the values of her and her neighbors’ land uses to the extent they all hit her where *she* lives. A judge with economic sensibilities might very well say the Jacques placed no meaningful value on a fallow field. Yet a judge with broader sensibilities might consider the possibility that the Jacques valued their privacy. Or, that the Jacques, or some substantial class of likely land owners, enjoy undeveloped land for motivations having to do with aesthetics, conservation, or relaxation. If the Jacques could not claim a right or a harm, it would be extremely difficult for the law to prevent interferences with these many legitimate uses and enjoyments of land.

Trespass law also illustrates the conceptual confusion that can follow from describing the core possessory interest as a “right to exclude.” The *Jacque* opinion affirms punitive damages as an appropriate response to “the loss of the individual’s right to exclude others from his or her property.”¹¹² Yet to support this proposition, the court cites an older case declaring an owner’s “right to the *exclusive enjoyment* of his own property.”¹¹³ Consider how *Jacque* interprets an analogy from an 1814 English punitive-damages precedent, *Merest v. Harvey*:

Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser permitted to say “here is a halfpenny for you which is the full extent of the mischief I have done.” Would that be a compensation? I cannot say that it would be.¹¹⁴

As the *Jacque* court reads this analogy, the eavesdropper’s wrong consists of “the loss of the individual’s right to exclude others from his or her property.”¹¹⁵ Technically, the eavesdropper did recognize that the paddock owner enjoyed a right to exclude; the half-penny confirms as much. If the halfpenny is insufficient, it must be because the “right to exclude” extends

¹¹¹ *Jacques v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wisc 1999).

¹¹² *Id.* [Jacques, 563 NW2d] at 159.

¹¹³ *Jacque*, 563 N.W.2d at 160 (quoting *Diana Shooting Club v. Lamoreux*, 89 N.W. 880 (Wis. 1902)).

¹¹⁴ *Id.* [Jacques, 563 NW2d] at 159 (quoting *McWilliams v. Bragg*, 3 Wis. 424, 428 (1854) (quoting *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (1814) (opinion of Gibbs, C.J.))).

¹¹⁵ *Id.* [Jacques, 563 NW2d at 159].

further to cover the owner's exclusive interest in using his paddock free from threats to his privacy.¹¹⁶

Accident law and economics holds that it is inefficient to endow the Jacques with such an indefinite interest. After all, Steenberg Homes was using the Jacques' land productively, in unusual circumstances created not by Steenberg Homes' aggression but by a snowstorm. Conventional labor-desert theory makes a similar criticism: Steenberg Homes was laboring with the Jacques' field more productively than the Jacques themselves were.¹¹⁷ Here, American natural-rights morality focuses not just on the joint welfare of the Jacques and Steenberg Homes, and not just the parties' comparative just deserts. *Jacque*'s holding about boundaries encourages owners to be secure that they may use their own land for their own plans free from outside interference—without being blindsided, say, by commercial developers.

The *Jacque* court thus enlarges all owners' concurrent moral interests in labor by an indirect consequentialist move. By making Steenberg Homes' conduct actionable and subject to punitive damages, *Jacque* stabilizes social norms protecting property (and reduces the risk of violence). If people (or, at least, a significant minority of people) "naturally" retaliate against intentional aggression, a contrary holding would increase the risk of extra-legal retaliation. *Jacque* instead channels that pre-political punitive impulse into the law,¹¹⁸ and it establishes in law a deterrent reinforcing property-respecting and incitement-loathing social norms. *Jacque* actually cites these rationales. By protecting the right to exclude, the opinion argues, it protects privacy¹¹⁹ and discourages violent self-help.¹²⁰ To rigorous social scientists, these arguments are mere assertions. To moral philosophers, however, [. . . i]n practice, it is extremely difficult to say in rigorous social-science fashion whether ruling for the Jacques will on the margins protect privacy or reduce the number of private venge feuds. So the *Jacque* court makes a reasonably educated practical judgment, and then rationalizes that judgment in instrumentalist window dressing.¹²¹

3. Nuisance

The same understanding explains, as accident law and economics does not, why the possessory interest and the invasion at the core of private

¹¹⁶ See Claeys, *supra* note 92, at 640-41; Katz, *supra* note 91, at 302-03.

¹¹⁷ Katz criticizes *Jacques* for similar reasons, *supra* note 91, at 302-03.

¹¹⁸ Cf. LOCKE, *supra* note 80, §§ II.7-8, -.87-.88, at 271-72, 323-25 (justifying civil society on the ground that a commonwealth executes the laws of nature more effectively than individuals can in the state of nature).

¹¹⁹ *Jacques*, 563 N.W.2d at 159.

¹²⁰ See *id.* at 160-61.

¹²¹ The *Jacques* court could have cited respectable "social norm" scholarship as partial corroboration for such a view. See, e.g., ELLICKSON, *supra* note 10, at 40-81 (documenting how rural neighbors voluntarily resolve cattle-trespass disputes to protect the victims of trespasses, regardless of whether legal entitlements are assigned to the trespass victims or the ranchers).

nuisance also follow boundary rules. For a variety of reasons, nuisance resists generalization and has a reputation for being an “impenetrable jungle,”¹²² and our observations here will therefore not be exhaustive. Yet even with these constraints, most garden-variety nuisance disputes are informed by a principle of free use and enjoyment paralleling the conception of free control and enjoyment in trespass.

To begin with, most commentators recognize that a nuisance suit ordinarily requires some physical invasion.¹²³ This requirement makes nuisance law draw on analogies to bodily cuffs much as trespass does. Coming to the nuisance is especially revealing here, because the common law’s position on against coming to the nuisance usually strikes lay people as unfair. The late-moving developer seems to have more flexibility to avoid the pollution than the early-building factory owner. Nevertheless, in principle, if nuisance law the developer’s freedom to determine the future use of her land, she suffers a taking of rights as soon as the pollution starts. Consider this passage from *Campbell v. Seaman*, a standard restatement of coming to the nuisance doctrine:

One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor’s land may in the future be subjected. . . . [H]e cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such a way only as the neighboring nuisance will allow.¹²⁴

Again, where accident law and economics focuses on the parties’ specific uses, the common law focuses first on assigning and then on securing to each owner a domain of practical discretion to determine “the uses to which [her] land may in the future be subjected.” Indeed, the coming to the nuisance fact pattern drives this point home dramatically. Until the developer develops, she *has* no specific ongoing use—just development potential.

In the process, the common law also challenges the way in which lay reactions and standard accident law and economics portray coming to the nuisance. Those views presume that, once the factory is built, after-the-fact nuisance liability inefficiently forces him to abandon sunk building costs and move. But the common law focuses attention on a parallel problem. Setting aside economic jargon, if there is no nuisance liability, at the time when the factory owner is deciding whether and how big to build, why doesn’t the

¹²² KEETON ET AL., *supra* note 34, § 86, at 616.

¹²³ See *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 220-21 (Mich. Ct. App. 1999) (suggesting that nuisance and not trespass is the proper doctrinal harbor for “indirect intangible invasions”); SINGER, *supra* note 41, § 4.4.1, at 271.

¹²⁴ *Campbell v. Seaman*, 63 N.Y. 568 (1876), *quoted in* *Ensign v. Walls*, 34 N.W.2d 549, 554 (Mich. 1948).

absence of nuisance liability encourage the factory owner to build a bigger factory than is consistent with similar choices by future neighbors later? If one presumes, as American natural-rights morality does, that different property uses are dynamic, heterogeneous, and all generally productive, better to protect equal concurrent use potential. The physical-invasion test protects different concurrent uses without rating them on their merits. By the same token, it protects uses that come to the neighborhood at different times without giving any owner priority “[j]ust because it happened that [he] arrived in the area first.”¹²⁵ [*Omissions on corrective justice.*]

4. Non-Nuisances

This understanding also helps explain the flip side of nuisance’s physical-invasion requirement—the law’s hostility toward sight, light, and aesthetic nuisances. Again, it would be quite easy for courts to encourage sight nuisances under current doctrine.

Yet courts refuse to make such extensions—and when they refuse, they appeal to inchoate arguments based on American natural-rights morality. In one light-blockage case, a court balanced utilities under the *Restatement of Torts*, but then held that the trump utility was “[a] landowner’s right to use his property lawfully to meet his legitimate needs,” which the court called “a fundamental precept of a free society.”¹²⁶ Some courts achieve the same result by making specific utilitarian policy arguments tracking how American natural-rights morality describes property. One case argues: “Given our [populous society’s] myriad disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for [aesthetic] complaints would cause inexorable confusion.”¹²⁷ This argument tracks Wilson, Locke, and Madison’s insistence that property accommodates “diversity” of faculties and needs.¹²⁸ Other cases appreciate that simple forms facilitate change:

Because every new construction project is bound to block someone’s view of something, every landowner would be open to a claim of nuisance. If the first property owner on the block were given an enforceable right to unobstructed view over adjoining property, that person would fix the setback line for future neighbors¹²⁹

These arguments do not follow directly from [. . .] accident law and economics, which, as section I.B suggested, logically applies the same analysis to visual externalities as it prescribes for pollution externalities. Rather, courts assume, if owners want a general right of free use determination for their land, they must accept a correlative duty to abstain

¹²⁵ *Kellogg v Village of Viola*, 227 N.W.2d 55, 58 (Wisc. 1975).

¹²⁶ *Sher v. Leiderman*, 226 Cal. Rptr. 698, 704 (Ct. App. 1986).

¹²⁷ *Green v. Castle Concrete Co.*, 509 P.2d 588 (Colo. 1973).

¹²⁸ See *supra* note 82 and accompanying text.

¹²⁹ *Mohr v. Midas Realty Co.*, 431 N.W.2d (Iowa 1988).

from complaining about how others choose to use their own. Otherwise each land owner would be subject to a dozen or more vetoes in land-use choices. [Omissions.]

C. Causation

Because property consists of a domain of free and exclusive use, it follows logically that causation should be unidirectional in trespass, nuisance, and land-based negligence. The core of the tort—the harm—is the interference an owner suffers to her discretion to determine the use or enjoyment of her land. Parties whose acts contribute to that interference are deemed to cause the harm. While this relation is assumed in easy cases, it becomes explicit in theoretically revealing cases. *Campbell v. Seaman* confirms as much by portraying the early-moving brick maker as the agent who “measurably controls” the future development of the plaintiff’s land, and who “compels” the plaintiff “to leave his land vacant.”¹³⁰

Accident law and economists complain that such arguments neither explain nor justify “any simple general theory of nonreciprocity, which is needed to define the limits of Coase.”¹³¹ But the arguments they criticize make far more sense when understood in context of American natural-rights morality. It makes sense to keep causation joint if one aims, as accident law and economists do, to maximize the joint value of the two parties’ conflicting uses. But causation takes a different focus if one aims to protect parallel domains of autonomy. In that context, cause focuses on the conduct of the party who takes another party’s rights.

Sparks cases illustrate the difference. In a sparks case, it is plausible in such cases to say that the plaintiff farmer should have moved his crops or haystacks away from a known risk of sparks coming from the train. Indeed, one nineteenth-century sparks case held, in anticipation of *Social Cost*, that “the burning of said hay was the result of the acts and omissions of *both* the plaintiffs and the defendant.”¹³² But *LeRoy Fibre*, a leading statement of the general approach, assumes as a matter of fact that “[t]he negligence of the railroad was the *immediate* cause of the destruction of the property.”¹³³ Both the farmer and the train contribute to the accident as a matter of simple fact and as part of productive-efficiency analysis. But the farmer enjoys discretion to use his land free from trespassory invasions, which might generate accidents, which in turn might limit his free action to determine the future use or enjoyment of his land. So *LeRoy Fibre* designates the “immediate” cause of injury the action of the party who acted outside the scope of its moral rights.¹³⁴

¹³⁰ cite

¹³¹ Vogel, *supra* note 38, at 152.

¹³² *Kansas Pacific Ry. v. Brady*, 17 Kan. 380, 386 (1877).

¹³³ *LeRoy Fibre*, 232 U.S. at 348 (emphasis added).

¹³⁴ For more recent cases, consider *Zimmerman v. Stephenson*, 403 P.2d 343, 346 (Wash. 1965).

D. Scierter

American natural-rights morality also explains why the basic land-use torts strongly prefer strict liability over negligence. Any trespassory invasion of the land—faulty, intentional, or strict—threatens an owner’s entitlement to a domain of choice for secure use and enjoyment. When a land owner plans to build a house, she deserves security that the law will rectify any accident that follows from such an invasion. In principle, the mere trespass creates a risk of accident against which the owner should not need not plan.¹³⁵ So, in trespass, if two boys trespass onto a vacant house and accidentally burn it down, neither their youth nor their lack of intent specifically to commit arson excuses them from responsibility. “[T]he purpose of civil law looks to compensation for the injured party regardless of the intent on the part of the trespass.”¹³⁶ Similarly, in nuisance, certain kinds of pollution can be noxious without proof of fault. In these cases, “it is no defense to show that [the polluting] business was conducted in a reasonable and proper manner It is the *interruption of such enjoyment and destruction of such comfort* that furnishes the ground of action, and it is no satisfaction to the injured party to be informed that it might have been done with more aggravation.”¹³⁷

[*Omissions, on how tort law can use strict liability without running afoul of corrective justice, and on some subtle legal applications of the principles sketched above.*]

E. Affirmative Defenses

The moral interest in free use and enjoyment also explains why the law presumes and enforces a distinction between “take it or leave it” defenses and “your money or your life” defenses. In Hohfeldian terms, the plaintiff is ordinarily entitled to an *in rem* claim right to be free from trespassory invasions and a liberty to make use choices within the parameters of that claim right. If, however, the defendant may plead contributory negligence, the plaintiff’s claim right is then qualified by an exposure, *in personam*, whenever reasonable prudence requires the plaintiff to minimize the risk of accident in relation to the defendant’s land use. A plaintiff may change her land use to avoid a risk of accident, or she may continue using her land and accept a risk of accident, but in either case her free use determination is diminished. These implications help explain why courts refuse to accept that a plaintiff makes a “voluntary choice” when he is forced to choose between “facing [a] danger or surrendering his rights with respect to his own real property.”¹³⁸

¹³⁵ This explanation differs from George P. Fletcher’s in *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972), in that the present analysis requires reciprocity in risks to rights.

¹³⁶ *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (D.C. App. 1960).

¹³⁷ *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 652 (Wis. 1970) (quoting *Pennoyer v. Allen*, 14 N.W. 609, 613 (Wis. 1883)) (emphasis added).

¹³⁸ *Marshall v. Ranne*, 511 S.W.2d 255, 260 (Tex. 1974).

Sparks cases highlight the policy concerns particularly clearly. In *LeRoy Fibre*, Justice McKenna calls it “an anomaly” to say “that one’s uses of his property may be subject to the servitude of the wrongful use of another of his property.”¹³⁹ The land owner’s free determination sets his entitlement; the trespassory sparks count as a “wrongful use” of that entitlement; and an affirmative defense therefore establishes the “servitude” ratifying the taking of the entitlement. This opinion also anticipates some of the difficulties that accident law and economic analysis creates when it prescribes solutions focusing on two parties’ concurrent uses. In *LeRoy Fibre* Justice Oliver Wendell Holmes prefers to treat contributory negligence as “a matter of degree,” better resolved through a case-by-case balancing test.¹⁴⁰ But this approach is impractical in a world with many owners with many heterogeneous uses: Is each plaintiff’s use one “which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why?”¹⁴¹

F. Rights-Securing Qualifications

1. Qualifications and the Interest in Labor

The principles sketched thus far explain why trespass, nuisance, and land-based negligence generally track bright-line boundary rules without qualification. However, within limits, American natural-rights morality allows such rules to be qualified. In simple cases, coarse boundary rules enlarge owners’ concurrent moral interests in labor. In these cases, “labor” reflects a broad but shallow moral interest in many different owners’ being left alone, to determine how to apply their selfish and productive energies to reasonably useful and productive but sharply-different needs. But in some situations, the law can help owners pursue different but concurrent property uses by ordering some features of ownership—say, titling and conveyancing rules.¹⁴²

At the same time, the natural right sets a moral baseline against which particular common-law modifications are measured. Before the common law replaces the coarse package of uses an owner gets from the *ad coelum* rule with a more focused package, law makers must be reasonably and practically certain that the focused package really enlarges the affected parties’ interests. The U.S. Supreme Court used to articulate the standard, in substantive due process cases, by asking whether legislative property regulations “secur[ed] an average reciprocity of advantage.”¹⁴³ Variations in trespass and nuisance may be justified if they secure to owners throughout

¹³⁹ *LeRoy Fibre Co. v Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 349 (1914).

¹⁴⁰ *Id.* [*LeRoy Fibre*, 232 U.S.] at 354 (Holmes, J., concurring).

¹⁴¹ *Id.* [*LeRoy Fibre*, 232 U.S.] at 350.

¹⁴² See 1 BLACKSTONE, *supra* note 98, at *134 (explaining how natural principles of property justify specific “modifications” in local positive law for “translating it from man to man”).

¹⁴³ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

the area as much or more freedom to use their property for their likely uses than uniform boundary rules do.

2. Nuisance

These principles go a long way in explaining why nuisance principles allow for more variation than trespass rules. Nuisance differs from trespass in that the latter deals with substantial physical invasions, while the former usually deals with low-level, non-particulate physical invasions.¹⁴⁴ Nuisance is often defined as a direct interference with a land owner's use rights that causes harm and is unreasonable. Under this definition, nuisance requires the plaintiff to prove three more elements than trespass besides the direct invasion of a land right: causation, harm, and unreasonability. More generally, where *Jacque* and other cases make trespass protect subjective owner perceptions of control, use, and enjoyment, nuisance protects a more objectively defined, one-size-fits-all domain of free action and use determination.

To begin with, nuisance enlarges owners' use and enjoyment interests when it shifts from the model of a trespass- or rights-based tort to that of a harm-based tort. Ordinarily, unconsented smells, noise, and smoke do not threaten an owner's use or enjoyment of land as starkly as does an unconsented personal entry like the field crossing in *Jacque*. The harm element limits the reach of nuisance, so it focuses on smells and other disturbances that are sharp enough to feel to the owner like trespasses.¹⁴⁵ Conversely, by shrinking neighbors' formal rights to exclude, the law frees owners to generate similar smells, noise, and smoke of their own in the course of using and enjoying their land. Each owner is freer to use and enjoy his own land with an exposure to low-level smoke and a liberty to emit it than he would have been with a broader claim right to veto smoke from neighbors' property.

The "unreasonability" element of nuisance serves a similar function. Many authorities recommend that nuisance law scrutinize closely the conduct of the defendant—especially the *Restatement of Torts*, which recommends that nuisance law balance all the factors relating to the social value of the defendant's land use against all the factors relating to the social harm associated with the plaintiff's loss of enjoyment.¹⁴⁶ In practice,

¹⁴⁴ See, e.g., *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. App. 1999); *Smith v. New England Aircraft Co.*, 170 N.E. 385, 388 (Mass. 1930).

¹⁴⁵ J.E. Penner suggests that substantial pollution nuisances are tantamount to disposessions in *Nuisance and the Character of the Neighborhood*, 5 J. ENVTL. L. 1, 21-22 (1993). American natural-rights morality conceives of the harm slightly differently. American natural-rights morality emphasizes, as Penner does not, property in "use." The former therefore conceives of the injury as a taking of use, distinct from a dispossession of control but still severe enough to parallel such a dispossession.

¹⁴⁶ See RESTATEMENT (SECOND) OF TORTS, *supra* note 57, §§ 827-28.

however, at least at the liability stage,¹⁴⁷ courts resist such inquiries surprisingly often. That is why, in the 2002 decision *Pestey v. Cushman*, the Connecticut Supreme Court insists that the “crux of a common-law private nuisance cause of action is on the reasonableness of the interference and not on the use that is causing the interference.”¹⁴⁸ When the law focuses on the use, it second-guesses the merits of the parties’ competing land uses. When it focuses on the defendant’s interference, it focuses instead on the question how the interference compares to other pollution in the neighborhood.¹⁴⁹ This latter inquiry is more objective than any of the other realistic doctrinal possibilities. The *Restatement* encourages the trier of fact to consider the fairly political question which land use better fits local community values. Productive efficiency encourages the trier of fact to amass party-specific information about the money and subjective values of the relevant uses and costs in play. By contrast, *Pestey* encourages the trier to focus on a simpler and more apolitical question, whether physical pollution is higher than the customary level in the neighborhood.

Of course, substantiality is just one of many factors relevant to unreasonability, which often requires all-the-circumstances balancing. Yet it is surprising how often substantiality trumps other factors in the balance. In one 1982 case, a New Jersey appeals court announces that nuisance law balances a wide range of factors, but then relies primarily on a finding that the noise pollution at issue was “louder than others” in the neighborhood.¹⁵⁰

The same institutional logic also explains some of the more important variations on the basic nuisance cause of action. Take the locality rule. The locality rule makes the character of a neighborhood an important factor among the many factors informing the “unreasonability” of pollution. Noise and fumes that would be reasonable in an industrial district are unreasonable in a residential district.¹⁵¹ As with the harm and substantiality element, these rules also narrow the formal right to exclude to enlarge the moral entitlement to use and enjoy property. Without such variations, the law would probably need to one single one-size-fits-all tolerance level for pollution. With them, the law can distinguish among the pollution levels characteristic of industrial, agricultural, commercial, and residential neighborhoods. Even so, the locality rules avoid use-specific interest balancing; they instead crudely

¹⁴⁷ The relative hardships are appropriately relevant after courts establish liability and proceed to consider whether to enjoin a nuisance. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); Jeff E Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 206 & nn.93-97 (1990).

¹⁴⁸ 788 A.2d 496, 508 (Conn. 2002).

¹⁴⁹ See, e.g., *id.* [*Pestey*, 788 A.2d] 496 at 508 (describing unreasonableness in terms of whether “the interference is beyond that which the plaintiff should bear, under all of the circumstances of the case, without being compensated”).

¹⁵⁰ *Rose v. Chaikin*, 453 A.2d 1378, 1382 (N.J. Super. Ch. 1982).

¹⁵¹ See, e.g., *id.* [*Rose*, 453 A.2d] at 1382; *Jewett v. Deerhorn Enterps., Inc.*, 575 P.2d 164, 166-68 (1978); RESTATEMENT (SECOND) OF TORTS, *supra* note 57, §§ 827(d), 828(b).

allow different uses within each neighborhood as long as the pollution levels are appropriate. Justice Cooley explains why this regime accords with natural property rights: Even though “every man has a right to the exclusive and undisturbed enjoyment of his premises . . . [o]ne man’s comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his neighbors.”¹⁵² The locality rule, accepts that “the tastes, desires, judgments, and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others.”¹⁵³

These examples also confirm that property’s right to exclude is parasitic on owners’ normative interests in exclusive use determination. In the words of one prominent English opinion, nuisance hardwires into the law a “give and take, live and let live” regime, to enlarge for all owners “the common and ordinary *use* and occupation of land.”¹⁵⁴ By itself, the right to exclude does not predict when and in what circumstance one owner may exclude another’s pollution. Exclusion is tailored to accord with and enlarge regulated owners’ likely interests in productive use.

The same moral principles can also justify departing from boundary rules in the other direction—to make non-invasions nuisances in some cases. Lateral-support doctrine defies boundary-driven conceptions of exclusion in trespass and nuisance.¹⁵⁵ Lateral-support doctrine makes a land-owner liable for subsidence only when the plaintiff can show that the digging would have caused the land to collapse in its natural state if his buildings had not been on it.¹⁵⁶ This rule protects land owners enlarges each land owner’s security that she may enjoy “the use of his land for ordinary and legal purposes.”¹⁵⁷ Similarly, although the law normally refrains from making eyesores nuisances, it makes an exception when a neighbor builds the eyesore maliciously and without productive benefit to himself.¹⁵⁸ In such cases,

¹⁵² *Gilbert v. Showerman*, 23 Mich. 448, 452-53 (1871).

¹⁵³ *Id.* at 454. Although space prevents a full explanation, similar principles also explain why nuisance law protects owners only against what the land user of ordinary sensibilities deems pollution—not what the eggshell plaintiff deems pollution. See, e.g., *KEETON ET AL.*, *supra* note 34, § 88, at 628.

¹⁵⁴ *Bamford v. Turnley*, 3 B. & S. 67, 122 Eng. Rep. 27, 33 (1862) (opinion of Bramwell, B.) (emphasis added). Similar principles explain why land-use negligence suits follow the harm-based and not the trespass-based approach.

¹⁵⁵ See Claeys, [M&S book review], *supra* note --.

¹⁵⁶ See, e.g., *Noone v. Price*, 298 S.E.2d 218, 221-22 (W. Va. 1982); C.J.S.2D ADJOINING LANDOWNERS § 9 (West 2008).

¹⁵⁷ *Winn v. Abeles*, 10 P. 443, 447 (Kan. 1886), cited in *Sanders v. St. Hwy. Comm’n*, 508 P.2d 981, 987 (Kan. 1983).

¹⁵⁸ See *Hullinger v. Prah*, 233 N.W.2d 584, 585 (S.D. 1975); 1 AM. JUR. 2D ADJOINING LANDOWNERS § 111 (2007).

the real evil consists in the occasional subjection of a landowner to the impairment of the value of his land by the erection of a structure which substantially serves, and is intended to serve, no purpose but to injure him in the *enjoyment* of his land; and so a new exception is made to the absolute power of disposition involved in the ownership of land, as well as to the absolute submission involved in that ownership to the chances of damage incident to the use by each owner of his own land.¹⁵⁹

In other words, in lateral-support and spite cases, neighbors are not excluded from the landowner's close. Instead, the landowner enjoys a domain of free use and enjoyment exclusive of outside interference. Now, exclusion theorists might argue that spite-fence and lateral-support rules are not *in rem* property rules but *in personam* tort complements to property. Yet cases hold that spite fences "injure and destroy the peace and comfort, and . . . damage the *property*, of one's neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful."¹⁶⁰ Similarly, the right to lateral support for land in its natural state is deemed a "'*property right*' . . . which accompanies the *ownership* and *enjoyment* of the land itself."¹⁶¹ By contrast, for land threatened in its artificial state, the right to be free from careless excavation is a tort duty—not *in rem* but *in personam*, and not a strict but only fault-based duty.¹⁶²

3. Trespass

Although trespass law preserves sharper boundaries than nuisance, on occasion even it allows qualifications to boundary rules. For example, when a domestic animal enters a neighbor's close without permission, the neighbor suffers a trespass only if the animal causes actual property damage¹⁶³ or if the animal's owner specifically intends that the animal trespass.¹⁶⁴ These rules deviate from *Jacque*'s general presumption that "actual harm occurs in every trespass."¹⁶⁵ As *Social Cost* suggests in its treatment of the rancher and the farmer, it is hard for accident law and economics to explain why the law

¹⁵⁹ *Whitlock v. Uhle*, 53 A. 891, 892 (Conn. 1903) (emphasis added), cited in *DeCecco v. Beach*, 381 A.2d 543, 545 (Conn. 1977).

¹⁶⁰ *Burke v. Smith*, 37 N.W. 838, 842 (Mich. 1888) (emphasis added); see also *Sundowner v. King*, 509 P.2d 785, 786 (1973) (describing *Burke* as representing "clearly the prevailing modern view").

¹⁶¹ *Sanders v. St. Hwy. Comm'n*, 508 P.2d 981, 987 (Kan. 1973) (quoting 2 THOMPSON ON REAL PROPERTY § 415, at 640 (1961)); *id.* at 990. (Emphases added.) See also *Walker*, 67 S.E. at 1091.

¹⁶² See *Walker*, 67 S.E. at 1090-91.

¹⁶³ See, e.g., *Griffin v. Martin*, 7 Barb. 297 (N.Y. Supr. Ct. 1849); *Stackpole v. Healy*, 16 Mass. 33 (1819); RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 21 (Proposed Draft No. 1, April 6, 2005); KEETON ET AL., *supra* note 34, § 76, at 539 & nn.8-13.

¹⁶⁴ See, e.g., *Lazarus v. Phelps*, 152 U.S. 81 (1894); *Monroe v. Cannon*, 61 P. 863, 864-65 (Mont. 1900).

¹⁶⁵ *Jacques v. Steenberg Homes, Inc.*, 563 N.W.2d 144, 160 (Wisc 1997).

presumes trespasses in some cases but not in others. All the same, the animal trespass rules do for trespass what the harm and unreasonability elements do for nuisance. In a community in which owners own both land and cattle, the exceptions enlarge owners' free action to use their cattle in cases in which the cattle do not seriously threaten their free action in relation to their land.

By contrast, when cattle ownership ceases to overlap with land ownership, the same principles may justify relaxing boundary rules. Some American jurisdictions reversed such rules early in the nineteenth century, by giving animal owners an affirmative defense against trespass if the plaintiff did not protect his land with a fence in good working order. Many western states still have such "fence out" regimes because there are many public lands and ranching is prevalent.¹⁶⁶ These rules operate similarly to nuisance's locality rules.¹⁶⁷ But if and when a substantial number of local land owners cease to own and use productively roaming animals, the rationale for the locality rule vanishes. A fencing-out regime then "manifestly increases the burdens of the freeholders within the inclosure, who make objection that their lands are to be turned into a public pasture" unless they "fence any portion of their lands which they may wish to cultivate."¹⁶⁸ Contrary to *Social Cost's* treatment of cattle trespasses, owners' control and enjoyment provide sufficient reason to choose between fence-in and fence-out regimes. And, in some tension with "right to exclude" accounts of property, the right to exclude is not sufficient by itself to predict when trespass relaxes boundaries in these manner.¹⁶⁹ The formal right to exclude does not acquire focus without piggybacking on a substantive account specifying whether ranging or farming with give local owners more use out of their land.

¹⁶⁶ See, e.g., *Larson-Murphy v. Steiner*, 15 P.3d 1205, 1213 (Mont. 2000); *Garcia v. Sumrall*, 121 P.2d 640, 644 (Ariz. 1942); RESTATEMENT OF THE LAW (THIRD) OF TORTS, *supra* note 163, § 21 cmt c, at 330-33.

¹⁶⁷ See, e.g., *Griffin v. Martin*, 7 Barb. 297 (N.Y. Supr. Ct. 1849) ("In agricultural districts, and especially in new countries, the public benefit resulting from permitting cattle, horses, and sheep to run at large, in highways, probably overbalances the increased expense of acquiring a title to the road."); see also *Myers v. Dodd*, 9 Ind. 290 (1857) (justifying a fence-out regulation "as a kind of police regulation in respect to cattle, founded on their well known propensity to rove"). But see *Woodruff v. Neal*, 28 Conn. 165 (1859) (declaring a similar law to inflict a regulatory taking and distinguishing *Griffin* on the ground that the right-of-way condemnation at issue in *Griffin* clearly dedicated grazing rights to the public).

¹⁶⁸ *Smith v. Bivens*, 56 F. 352, 356 (C.C. S. Car. 1893) (declaring a new state fencing out statute unconstitutional as a regulatory taking). In *Smith*, the fence-out law was especially objectionable because it seems to have been passed largely at the prompting of a small number of cattle ranchers who wanted continued cheap access to one owner's pasturage. See *id.* at 353. Nevertheless, the court's reasoning does not rely on the special-interest politics. The court begins by protecting the pasture owner's "complete possession and use of his own land," *id.*, and then examines whether the law secures him a reciprocity of advantage, see *id.* at 356-57.

¹⁶⁹ See *id.* [*Smith*, 56 F.] at 356.

For similar reasons, trespass law does not protect owners against high-altitude overflights. For example, in the 1930 opinion *Smith v. New England Aircraft Co.*,¹⁷⁰ the Massachusetts Supreme Court notes that air travel is valuable “as a means of transportation of persons and commodities.”¹⁷¹ Those benefits enlarge owners’ interests more than their interests are restrained by losing the control of the air column over their lands and above the 500-foot regulatory minimum, because “the possibility of [the land owner’s] actual occupation and separate enjoyment” of that air column “has through all periods of private ownership of land been extremely limited.”¹⁷² By contrast, overflights below 500 feet threaten owners’ “possible effective possession” and “create in the ordinary mind a sense of infringement of property rights which cannot be erased.”¹⁷³

In *Social Cost*, Coase uses overflight cases like *Smith* to emphasize that all legal rights and responsibilities are products of policy choices intended to enlarge the public welfare.¹⁷⁴ In context, this suggestion criticizes common law trespass case law, on the ground that it makes rights claims that do not take sufficient account of the public consequences of legal rules. Coase assumes that public policy can efficiently promote specific, first-order act-utilitarian policy goals—like the efficient development and consumption of air travel.

If one were to cash out *Smith*’s moral principles in instrumentalist terms, the public welfare is better understood in terms of a more general, second-order, indirect consequentialist goal—the protection of individual citizens’ free exercise of the discretionary choice they get from their rights. So in overflight cases, the law may be reformed to encourage air travel, but only if it is reasonably and practically certain that the reforms will confer on land owners more free action from new air travel and commerce than they would otherwise have from using the slices of their air columns at cruising altitudes.¹⁷⁵ This proviso serves many purposes, but one of them is to hardwire into law some skepticism. If the general society is so certain it can accurately forecast the specific policies its citizenry will want, it will not

¹⁷⁰ 170 N.E. 385 (Mass. 1930). See also RESTATEMENT (FIRST) OF TORTS § 194 (1934). *Smith* uses state and federal altitude regulations to abrogate owners’ claims in trespass, and then uses substantive due process “reciprocity of advantage” principles to determine whether and at what altitudes those regulations regulate or take property rights.

¹⁷¹ *Smith*, 170 N.E. at 388.

¹⁷² *Id.* [*Smith*, 170 N.E.] at 389.

¹⁷³ *Id.* [*Smith*, 170 N.E.] at 393.

¹⁷⁴ Coase, *Social Cost*, *supra* note CSC, at 128-32. While Coase cites and treats other overflight cases, *Smith* explains the case law most clearly in terms of the moral interests of American natural-rights morality.

¹⁷⁵ See, for example, *Bamford v. Turnley*, 122 Eng. Rep. 27, 33 (1862) (opinion of Bramwell, J) (“whenever a thing is for the public, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site”).

object to compensating the individuals whose individual rights will be disrupted by that policy. On this view, the rules of trespass are structured to consider public consequences—but they conceive of “public consequences” in more pessimistic terms than is often presumed in instrumentalist public-interest policy analysis.

4. The Philosophical Bases for Reordering Civil Property Rights

[*Omissions, on the nature of “absolute” and “relative” moral rights, and on whether the rights presented here count as deontological or consequentialist moral rights.*]

IV. ACCIDENT LAW AND ECONOMICS RECONSIDERED

A. The Tension Between Private Ordering and Expert Supervision

So American natural-rights morality [. . .] certainly does not generate mush. It explains many general features and specific rules in land-use torts that accident law and economics gets wrong. Yet we have not considered accident law and economics on its normative merits. Perhaps accident law and economics makes normative criticisms not adequately considered in American natural-rights morality.

Obviously, we cannot cover this possibility exhaustively. That said, there are two central issues. It would be reasonable to suspect that the core issue is how the two approaches conceive of normative value, in such terms as individual utility or the general welfare. Surprisingly, however, for most practical purposes, this difference matters little, and we shall postpone discussion of it until the last section of this Part.

For practical purposes, the central issue is how the two approaches handle the challenges that arise when triers of fact and lawmakers lack complete information. Different normative theories of social control disagree about how much expert-driven regulation can regulate economic life. This difference is *not* a difference between economics generally and philosophy generally. American natural-rights theory keeps legal regulation to a minimum, but other theories of justice may prescribe that judges assign entitlements on a case-by-case basis to promote justice or to do justice.¹⁷⁶ A similar debate plays out in economics.

There is an irony here. American natural-rights morality fell into desuetude in large part as lawyers gradually assumed that its prescriptions were too simple to apply to the complex industrial economy the United States developed in the early twentieth century.¹⁷⁷ That general perception

¹⁷⁶ Compare, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009), and Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (both promoting fine-grained virtue-based approaches to property law), with Claeys, *supra* note **Error! Bookmark not defined.**, and Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009) (both challenging such approaches and preferring private ordering instead).

¹⁷⁷ See, e.g., Goldberg, *supra* note 6, [91 Geo LJ] at 519.

helped to justify approaches to legal and social planning more centralized than seems realistic within American natural-rights morality. Yet even as that morality was being displaced, social scientists who had no reason to know about it started to raise serious doubts about centralized planning—relying to a large degree on generalizations about human behavior strikingly similar to American natural-rights morality’s. For example, Friedrich Hayek concluded economics should focus on the fundamental “problem how to secure the best of use of resources known to any of the members of society, for ends whose relative importance only these individuals know.”¹⁷⁸ And Hayek worried especially that the “character of the fundamental problem has . . . been rather obscured than illuminated by many of the recent refinements of economic theory, particularly by many of the uses made of mathematics.”¹⁷⁹ It is fair to wonder whether accident law and economics makes refinements of the type that worried Hayek.

B. The Historical Pedigree of Accident Law and Economics

There are at least three ways to appreciate the problem. One is genealogical. Accident law and economics’ account of its own origins locates itself in the period when academics were sweeping away American natural-rights morality. In academia, the decisive break between American natural-rights morality and the instrumentalist and utilitarian approaches that inform American law now took place between roughly 1880 and 1920. In this period, prominent political and social scientists discredited American natural-rights morality and propounded in its place new theories of democracy and administration.¹⁸⁰ Most scholars who subscribed to this consensus agreed on a more interventionist theory of government. They assumed that government was supposed to implement the general will of the electorate, and they then examined how law, administration, and other tools of social control might implement that will most efficiently and rationally.¹⁸¹

These trends influenced the academic study of tort at leading law schools. During this period, social-science- trained legal academics started to reconsider tort law in what Ernest Weinrib has described as “instrumentalist” terms, by using policy-driven interest-balancing tests to give specificity to tort’s general moral claims.¹⁸² William Landes and Richard Posner approvingly cite tort scholarship from this period as

¹⁷⁸ See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945).

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 307 (1924) (describing an emerging consensus in which “the individualistic ideas of the ‘natural right’ school of political theory, indorsed in the Revolution, are discredited and repudiated); accord FRANK J. GOODNOW, POLITICS AND ADMINISTRATION (John A. Rohr ed., 2005); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 201 (1887), reprinted in WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231 (Ronald J. Pestritto ed., 2005).

¹⁸¹ See, e.g., GOODNOW, *supra* note 180, at 18, 88; WOODROW WILSON, *supra* note 180, at 240-45.

¹⁸² Ernest Weinrib, *Understanding Tort Law*, 23 VALPARAISO U. L. REV. 485, 485-88 (1989).

“protoeconomic,” and as important “antecedents of the positive economic theory of law.”¹⁸³

C. Conceptual Property Theory

Another way to appreciate the shift is to compare the assumptions doctrine and accident and law and economics both make about property. While the doctrine assumes that property refers to a wide and integrated package of control, use, and disposition rights, accident law and economics presumes that property consists of a “bundle of rights,” and specifically a bundle that facilitates nominalist analysis of property.

While Legal Realism is difficult to pin down,¹⁸⁴ many important projects associated with the Realists can be understood as efforts to apply the general lessons of 1900-era political and social science to American law. Realist property theory can certainly be understood as such a project. For example, Realist economist Richard Ely says of the labor theory of property expounded in *Van Horne’s Lessee*:¹⁸⁵ “It rests upon an unscientific eighteenth century social philosophy of natural rights existing prior to the formation of society and of a compact whereby men left a state of nature . . . All of this has been totally discredited by science.”¹⁸⁶

The Realists therefore needed to revise property conceptual theory for substantive political reasons. The political assumptions informing their conception of social science led them to believe that resource uses could and needed to be managed by experts applying “scientific” conceptions of social efficiency.¹⁸⁷ If the concept “property” is a nominalist term--that is, if “property” refers to “that which the law happens to call property in a particular case”--the term would allow experts to manage particular uses of

¹⁸³ LANDES & POSNER, *supra* note 28, at 4 & nn. 9-11 (uppercase lettering removed) (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 94-96 (1881); James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 92 (1908); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915)).

¹⁸⁴ For one contemporaneous attempt by a Realist to explain the core tenets of Realism, see Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

¹⁸⁵ See note 79 and accompanying text.

¹⁸⁶ 1 RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTIONS OF WEALTH* 107 (1914). See also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 21 (1927) (complaining that, “because law has become more interested in defending property against attacks by socialists, the doctrine of natural rights has remained in the negative state and has never developed into a doctrine of the positive contents of rights”).

¹⁸⁷ See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26-27 (1977) (contrasting “lay” and “scientific” understandings and suggesting it would be better “to purge the legal language of all attempts to identify any particular person as ‘the’ owner of a piece of property”).

property in particular resource disputes without needing to worry overmuch that the conceptual structure of property might limit their efforts.¹⁸⁸

Different Realists propounded different theories. Some Realists reconceived of property as a nominalist “bundle of rights.” To be sure, the “bundle of rights” metaphor predated the Realists and is not necessarily tied to their political agenda. John Lewis used it in an eminent-domain treatise, for example, to explain why any restraint on the free control, use, or disposition of property counted as a taking.¹⁸⁹ Leading Realists, however, used the bundle metaphor as an apologetic conceptual tool for political tendencies opposite Lewis’s. These Realists appropriated Wesley Hohfeld’s conceptual taxonomy (recounted in part III.B), to recast *in rem* claim rights of exclusive use determination into clusters of *in personam* privileges, to use or alienate assets for specific purposes, in relation to particular claimants on the asset.¹⁹⁰ Thus, in a policy analysis of rate making, Realist economist Robert Hale recasts the general “right of ownership in a manufacturing plant [into], to use Hohfeld’s terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all of the rights of ownership in the products.”¹⁹¹ Implicitly, if the state significantly limited the owner’s last power, it still did not take property if it left the owner with the first three privileges and rights.

This Realist bundle of rights conception is now the standard conceptual lens through which prominent judges and academics view property in property torts. In the sparks case *LeRoy Fibre*, Justice Holmes argued that the law should not categorically block contributory negligence from going to the jury but rather weigh the defense by balancing minor “differences of degree” depending on where the plaintiff’s flax stacks were in relation to the defendant’s train.¹⁹² Two decades later, the authors of the First Restatement of Torts restated nuisance law to suggest it turns on a balancing of the social policy values promoted by the parties’ land uses.¹⁹³ Coase assumed a similar view in *Social Cost*, as suggested by this passage: “We may speak of a person owning land and using it as a factor of production but what the land-

¹⁸⁸ See, e.g., Walton H. Hamilton & Irene Till, *Property*, in 11 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (1959) (defining property as “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth”).

¹⁸⁹ JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 55, at 43 (1888) (“The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.”). On the earliest reference to the bundle metaphor, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* 455 n.40 (1997).

¹⁹⁰ See HOHFELD, *supra* note 103, at 65, 74-82.

¹⁹² *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 353 (1914) (Holmes concurring).

¹⁹³ See 4 *RESTATEMENT OF THE LAW OF TORTS*, *supra* note 163, §§ 826-28; see also Lewin, *supra* note 147, at 210-12.

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owner in fact possesses is the right to carry out a circumscribed list of actions.”¹⁹⁴ This viewpoint is now typical in accident law and economics. For example, in *Law & Economics*, Robert Cooter and Thomas Ulen define property as follows: “From a legal viewpoint, property is a *bundle of rights*.”¹⁹⁵

This shift transforms American tort common law in the guise of explaining it.¹⁹⁶ In Hohfeldian terms, American natural-rights morality hardwires into the relevant common law an assumption that “use” refers to *in rem* claim rights,¹⁹⁷ which protect in owners a liberty to choose among many possible liberties how to use their land. Although the interest-balancing tests just mentioned vary in different ways, all of them frame resource disputes as entitlement-allocation decisions that could go either way. The land owner who otherwise enjoys a claim right has the same liberties to use his land for single purposes, but now subject to exposure that outside pollution or trespasses may disrupt those use-liberties. The various shifts described above thus pit one liberty, corresponding to the owner’s current use, against another, corresponding to the neighbor’s current use. The liberties that correspond to land uses not currently practiced are transferred to the trier of fact or the regulator. So is the policy control marked off by the owner’s claim right, and the owner’s liberty to choose among different use-liberties.

Thomas Merrill and Henry Smith have traced this reliance in previous scholarship,¹⁹⁸ and their survey is instructive in many respects. At the same time, Merrill and Smith’s survey is misleading to the extent it suggests there is only one alternative to the Realists bundle of rights—a conception of property organized around an *in rem* right to exclude.¹⁹⁹ The bundle conception and Hohfeld’s taxonomy can be understood apolitically, as a specification jargon, as they were just used in the preceding paragraph.²⁰⁰ They can also be used apologetically to support a broad substantive

¹⁹⁴ Coase, *Social Cost*, *supra* note 7, at 155.

¹⁹⁵ COOTER & ULEN, *supra* note 12, at 74-75.

¹⁹⁶ Accord Penner, *supra* note 145, [5 J Env’t L] at 17 (after canvassing standard accident law and economics treatments of nuisance, concluding that, “as an analysis of the orders judges actually make, this is really very strained”).

¹⁹⁷ Bounded, of course, by correlative *in rem* duties not to make unjustified boundary invasions on neighbors’ property.

¹⁹⁸ See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 363-65 (2001) (tracing the genesis of bundle of rights theory); *id.* at 366-75 (documenting how Coase assumed bundle of rights theory as his working conception of property). Accord J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1078-80 (1996).

¹⁹⁹ See Merrill & Smith, *supra* note 198, at 394 (describing land rights as a “right to exclude a range of intrusions”); *id.* at 395-96 (describing trespass and some aspects of nuisance law as taking an “exclusionary” approach).

²⁰⁰ See Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36, 45-46 (Stephen R. Munzer ed., 2001).

conception of property, as John Lewis did and Richard Epstein does now.²⁰¹ On the other hand, the *in rem* “right to exclude” can also be understood in several different ways, some of which have the same Realist apologetic tendencies as the Realists’ rendition of the bundle conception. One is a right to exclude, they meant an owner’s substantive interest in determining exclusively how her property could and would be used. Some Realists reconceived of property as a negative and formal *in rem* right of exclusion. According to this approach, property requires some minimal level of *in rem* exclusion. As long as the owner is endowed with some general right to blockade most strangers from some aspect of his control or use of his asset, he has property even if the state limits his control, use, or disposition in relation to other individuals with claims on the asset.²⁰²

Merrill and Smith’s account compresses the differences between these alternatives and favors the Realist one.²⁰³ As relevant to the land-use torts covered in this Article, the formal right to exclude guarantees an owner property in the right to exclude strangers from trespassing. But it does not guarantee him property-rule protection against the trespass, and it does not guarantee him exclusive use of his property through doctrines of nuisance and negligence.²⁰⁴ If the right to exclude is understood too formalistically, it explains easy trespass cases, but not animal or overflight cases, and not why remedies vary between accidental and intentional trespasses.²⁰⁵ A formal right to exclude explains why nuisance protects against heavy pollution, but not perfectly, and it cannot explain spite-fence or ground-support cases.²⁰⁶

Nevertheless, Merrill and Smith make a sound conceptual criticism when they suggest that Realist bundle of rights property theory causes accident law and economics to misunderstand the “property” features of property torts.²⁰⁷ Because it presumes that economic policy makers can resolve resource disputes by maximizing productive efficiency, accident law

²⁰¹ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 35-158 (1985).

²⁰² See Cohen, *supra* note 186, [13 CORNELL L. REV. at] 12 (“The law does not guarantee me the physical or social ability of actually using what it calls mine. . . . But the law of property helps me directly only to exclude others from using the things which it assigns to me.”). See also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370 (1954) (concluding that “ownership is a particular kind of legal relation in which the owner has a right to exclude the non-owner from something or other”).

²⁰³ See Merrill & Smith, *supra* note 198, [111 YALE L.J.] at 362-64 & nn 13, 14, 19, 20, 27, 28 (treating the substantive theories of property as understood by Blackstone and Adam Smith as functionally interchangeable with the right to exclude view adopted by Realists Ely, Morris Cohen, and Felix Cohen).

²⁰⁴ For more comprehensive diagnoses of the limitations of right to exclude theory, see Claeys, *supra* note -- [M-S book review]; Mossoff, *supra* note **Error! Bookmark not defined.**, [45 AzLRev] at 375-76, 408 & n.150 (cited in note AMWP).

²⁰⁵ See *supra* sections III.B.2, III.F.3.

²⁰⁶ See *supra* section III.F.2.

²⁰⁷ See, e.g., Merrill and Smith, *supra* note 198, [111 YALE L.J.] at 391-92 (criticizing law and economics’ “causal agnosticism”).

and economics assumes that property control and use rights refer to individualized use claims by competing resource users. This conceptual theory recasts the common law in the guise of interpreting it.

D. Normative Assumptions about Social Control

These conceptual issues point back to the fundamental normative question: whether accident law and economics prescribes normatively more desirable results in land-use torts than does the common political morality internal to the cases. The following discussion will not be exhaustive.²⁰⁸ But generally speaking, productive efficiency may be attractive in theory and unattainable in practice. On paper, factors like party profits and accident or precaution costs certainly seem relevant, concrete, and likely to generate determinate legal rules. But in practice, it may be impossible to gather the information needed to generate those rules. American natural-rights morality presumes that labor facilitates dynamic growth; that personal talents, industriousness, and needs differ widely; and that economic knowledge is limited but often concentrated in those closest to assets. Curiously, students of Hayek and other Austrian economists, make similar behavioral generalizations.²⁰⁹ According to both of these traditions, productive efficiency often requires information too costly or volatile to use in practice, and it often abstracts away from other factors important in property regulation.²¹⁰

Let us start with precaution and accident costs. It is quite often hard in advance to predict what accident loss L that will follow if no one takes precautions, and harder to predict how much any precaution will reduce the risk of accident p at the margins. In a *Rylands*-style case about a mine shaft full of water, the mine owner has wide discretion what kinds of material to use to build a dam, how high to build the dam, and so forth. In advance, it is hard to forecast precisely how much different constructions, shapes, and

²⁰⁸ Among many other complications, some of the issues discussed below bleed into remedy questions that exceed the scope of this Article. For different treatments, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075 (1980); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091 (1997).

²⁰⁹ See, e.g., CORDATO, *supra* note 29, at 4 (“1) market activity should be analyzed as a dynamic, disequilibrium process; 2) the concepts of value and utility are strictly subjective and therefore unobservable and unmeasurable (radical subjectivism); 3) knowledge of market phenomena . . . is always imperfect”). In theory, item (2) in Cordato’s list makes personal value more subjective than most sources in the American natural-rights tradition would probably allow. In practice, the two approaches are quite close. American natural-rights morality presumes that individual uses and needs vary too much to allow for party-specific regulation, and reverses that presumption only when land uses strongly suggest otherwise as explained *supra* section III.F.

²¹⁰ See, e.g., Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 642 (1980) (suggesting that standard law and economic claims for common law efficiency make “information requirements . . . well beyond the capacity of the courts or anyone else”).

heights will flood-proof the mine, or how much extra overflow different dams will prevent. A regulator can posit that there only two possible dam designs and then plug in assumed p and L figures for these dams,²¹¹ but these assumptions are just simplifying assumptions. Then, since the parties are selfish and each can respond to the other's behavior, the regulator must then forecast how each party may react strategically to precautions by the other.²¹² Perhaps the neighbor at the bottom of the shaft should consider moving her house or building a break-water; but perhaps she builds a bigger house after the mine owner builds a better dam. Most accident law and economists agree that the resolution of these problems varies on many factors specific to the parties,²¹³ but the scholarship does not come to any single resolution.²¹⁴ It may not be possible to identify any level of precautions on both sides that simultaneously minimizes excessive precaution spending in the short term and moral hazards in the long term.²¹⁵ But it expects much from a jury or judge to expect them to consider all the relevant short-run factors, let alone balance the short-run ones with the long-run ones.

Turn to the parties' production functions. Many accident law and economic treatments illustrate general principles with charts or tables showing how much each extra increment of production by one party increases that party's profits and the other party's likely losses. In *Social Cost*, Coase refutes Pigou by drawing out the consequences that follow when one daily train generates \$150 revenue at \$50 cost, and a second \$100 additional revenue at \$50 additional cost.²¹⁶ These sorts of examples usually presume that the fact finder can know each party's production function accurately and instantaneously.²¹⁷ Yet E.C. Pasour suggests that "[t]he real world never contains an entity corresponding to the marginal-cost curve, since the amount of product that a firm will try to produce at any given price depends on many factors including length of run, technology, and expected

²¹¹ See Rose-Ackerman, *supra* note 70, [18 J Leg Stud] at 31-32 & Table 1. See also LANDES & POSNER, *supra* note 28, at 38 & Table 2.2 (assuming railroad profits and farmer damages in a sparks case depending on whether the farmer leaves a firebreak).

²¹² See POLINSKY, *supra* note 19, at 18 (cited in note AMP); Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J LEG. STUD. 589 (1983).

²¹³ See *supra* note 63 and sources cited therein.

²¹⁴ Compare LANDES & POSNER, *supra* note 28, at 90 (cited in note LP) (suggesting, on the facts of a sparks case, that the farmer should not be forced to take precautions except when the railroad's sparks are "very conspicuous") with Grady, *supra* note 9, [17 J Leg Stud] at 16-17 (suggesting that sparks cases be sorted by the extent to which different parties fall into each of six different precaution traps).

²¹⁵ See Anderson, 2007 Utah L Rev at 260-61.

²¹⁶ See Coase, *Social Cost*, *supra* note 7, at 139-42. See also POLINSKY, *supra* note 19, at 17 & Table 1 (presenting hypothetical data about party profits and damages in a pollution-nuisance case).

²¹⁷ See Hayek, *supra* note 178, [35 Am Econ Rev] at 521-22 (suggesting that economic methodology undervalues "the knowledge of particular circumstances of time and place").

input prices.”²¹⁸ So whenever economic analysis presents such cost-revenue functions, the lawyer should discount them substantially to account for the slippage between economic hypothetical and the uncertainty of a real-life lawsuit.

Separately, “productive efficiency” is usually construed to assume perfect competition.²¹⁹ When the rancher’s cattle trample the farmer’s crops, Coase assumes the first causes \$1 marginal extra annual crop damage, the second \$2, the third \$3, and the fourth \$4.²²⁰ For the purposes of developing his economic critique of Pigou, Coase’s numbers and market assumptions are not controversial. But when Coase’s analysis is turned around to study legal entitlements, it is very controversial for Coase to assume that the extra crop damage per steer may be accurately described by one number and not two or three. To be comprehensive, a regulator would need to discern how the rancher values the crop damage, how the farmer values it, and maybe also what figure the market sets as a replacement price for crops. Coase’s function assumes that the farmer and the rancher value the crop damage at the market price. In practice, it is possible if not likely that the farmer and rancher value the crops extremely differently from each other and the market-replacement price.²²¹ Accident law and economic scholarship does recognize the problem of subjective valuation. Some scholarship worries that damage rules short-change subjective values,²²² while others worry that subjective valuation encourages parties to hold out²²³ and expect that liability rules circumvent this danger.²²⁴ But if heterogeneous property uses are the norm and not the exception, the law should worry far more about the former possibility than the latter.

Thus far we have identified important information gaps in productive efficiency—but then recall that economic analysis also considers likely transaction costs. Robert Ellickson has helpfully subdivided transaction costs into get-together costs (the search costs of finding a bargaining or disputing partner), execution costs (the costs of consummating a bargain), and information costs.²²⁵ The party-valuation problems just described can create substantial execution costs, and empirical uncertainty about the parties’ production functions and costs can generate information costs. But

²¹⁸ E.C. Pasour, Jr., *Monopoly Theory and Practice—Some Subjectivist Implications: Comment on O’Driscoll*, in *METHOD, PROCESS, AND AUSTRIAN ECONOMICS* 215, 218 (Israel M. Kirzner ed., 1982).

²¹⁹ See, e.g., Coase, *Social Cost*, *supra* note 7, at 101, 139.

²²⁰ See *id.* [Coase, *Social Cost*] at 97.

²²¹ See, e.g., Cordato, *supra* note 29, at 6-7, 58, 97; 2 F.A. HAYEK, *LAW, LEGISLATION & LIBERTY* 113 (University of Chicago 1976); D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEG. STUD. 263, 269 (1986).

²²² See, e.g., Epstein, *supra* note 208, [106 Yale L J] at 2093.

²²³ See, e.g., Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 13 (1982).

²²⁴ See, e.g., POLINSKY, *supra* note 19, at 21-23.

²²⁵ Ellickson, *supra* note 27, [99 Yale L J] at 614-16.

there are other serious sources of transaction costs—particularly associated with third parties.

To this point, we have assumed, as Coase’s hypotheticals all do, that the economist is trying to maximize wealth in a bilateral dispute between two present and established land users. As more owners become parties to a resource dispute, they increase holding out and free-riding. These coordination costs can simplify economic analysis. In some circumstances, such costs counsel strongly in favor of assigning liability in the manner most likely to circumvent the coordination costs.²²⁶ At the same time, multiplicity creates other complications if one zooms away from the immediately affected parties to strangers who need to live under the precedents set by particular cases. Among other things, as Merrill and Smith have shown, society must suffer significant third-party information costs if basic property liability doctrines are fine-grained. Strangers to property must then process all the data specific to individual assets to know their rights and liabilities.²²⁷ Sparks cases presumed railroads liable and limited plaintiffs’-misconduct defenses to avoid such complications along railroad lines. Similar concerns are equally important in most simple trespass and pollution-nuisance fact patterns.

The relevant liability rules must also consider how land-use decisions made in one year will affect planning in the neighborhood twenty years later. On a coming to the nuisance fact pattern, it is cost-prohibitive for a factory owner to find all the likely residents in the neighborhood twenty years later. Maybe he can find and bargain with their current predecessors in interest. But in a world of scarce information, the present owners’ forecasts may be haphazard. The more often neighborhood conditions change, the more frequently later parties will need to renegotiate.²²⁸ Economic analysis *could* suggest that the efficient response is to let the factory establish a footprint in the neighborhood and clarify everyone’s rights in the process.²²⁹ It could suggest that, *ex ante*, there is no one-size-fits-all efficient solution.²³⁰ But it could also suggest that, because the early parties cannot bargain with the highest value users likely to appear twenty years later, “*ex ante* anonymity” may encourage them excessively to discount the interests of late-comers and overinvest in polluting activities.²³¹ Although coming to the nuisance cases highlight these informational challenges vividly, the challenges exist in principle in any changing neighborhood.

²²⁶ See Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEG. STUD. 351 (1991); Calabresi & Melamed, *supra* note 208, [85 Harv L Rev] at 1115-19.

²²⁷ See Merrill & Smith, *supra* note 198, [111 Yale L J] at 394-97.

²²⁸ See COOTER & ULEN, *supra* note 12, at 86.

²²⁹ See Baxter & Altree, *supra* note 50; Wittman, *supra* note 51.

²³⁰ See, e.g., Bebchuk, *supra* note 51, [100 Mich. L. Rev.] at 632.

²³¹ See Rohan Pitchford & Christopher M. Snyder, *Coming to the Nuisance: An Economic Analysis from an Incomplete Contracts Perspective*, 19 J.L. ECON. & ORG. 491 (2003).

Thus far, we have considered the ways different informational ambiguities may make it hard to identify the productively-efficient outcome. But to measure social welfare really comprehensively, a policy maker must also subtract from net social welfare administrative costs, “the public and private costs of getting information, negotiating, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures.”²³² One such administrative cost relates to the robustness of markets. By and large, productive-efficiency analysis anticipates what a market would do, discounts for transaction costs, and either nudges the parties toward a bargain or replicates the bargain they should have attained.²³³

In doing so, productive-efficiency analysis assumes that legal doctrine does not shape the parties’ preferences for market bargaining. Here is another assumption that can be reasonably questioned. Take train-sparks cases. The rule barring contributory negligence seems harsh, for it seems to encourage farmers to plant as close as they want to tracks. The authorities that favor contributory negligence on this ground²³⁴ assume the law can maximize the joint value of the farmer’s crops and the railroads operations without destabilizing general perceptions about property rights, markets, and litigation. Perhaps. But if contributory negligence typically goes to the jury, the law discourages railroads from settling up front. It encourages them instead to run their spark-emitting trains, make farmers litigate, and then settle at a discount. So perhaps contributory negligence decreases social welfare in the long run even if it increases joint party welfare in the short run. Or, even if contributory negligence increases social welfare in both the short and long runs in sparks cases, perhaps it confuses the tort system generally about how boundaries work in land-use torts like nuisance. So perhaps precedents that balance competing uses in sparks cases encourage judges to use balance in nuisance, and such balancing in turn encourages polluters to litigate rather than negotiate for pollution servitudes. These various economic costs are considered more explicitly in economic scholarship on the public use doctrine in eminent domain and the choice between property and liability rules.²³⁵ But in principle, they are also relevant to the basic rules of liability in the common law land-use torts.

Finally, if parties shift from bargaining to litigating or lobbying, they seek rent, and the costs of rent dissipation need to be subtracted from net social welfare as well. Maybe land-owning parties will seek rent in legislative and administrative settings no matter how basic common law liability rules are assigned. But maybe individual economic behavior, while

²³² Ellickson, *supra* note 59, [40 U Chi L Rev] at 689.

²³³ See Cooter, *supra* note 223, [11 J Leg Stud] at 14-27.

²³⁴ See, e.g., RICHARD A. EPSTEIN, TORTS § 13.1, at 336 (1999).

²³⁵ See, e.g., Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 88 (1986).

basically selfish, is at least partially teachable. Then different legal regimes may encourage litigation, lobbying, or interest-group politics to different degrees. A comprehensive account of social efficiency must therefore determine with practical certainty to what extent different legal regimes encourage gainful production or rent dissipation.

E. A Simpler Alternative?

Take all these factors together, and it is plausible to wonder whether the concrete factors most relevant to productive efficiency require information too particular, volatile, and costly to be available to triers of fact regularly. The informational demands seem even more severe when one recalls that productive-efficiency analysis focuses, as section IV.C showed, on individualized use liberties. In *Economic Analysis of Law*, Richard Posner presumes, on one hand, that property law can and should first “parcel[] out mutually exclusive rights to the use of particular resources,” and then, on the other hand, that tort and other bodies of law can reconfigure those rights when “giving someone an exclusive right to a resource may reduce rather than increase efficiency.”²³⁶ But suppose that land is used in conditions of uncertainty, with diverse and selfishly-driven uses, in which temporary resolutions of use conflicts can change suddenly. If these generalizations are tolerably accurate, it is unrealistic to expect that a trier of fact can simultaneously secure investment and maximize welfare in property. The tough-minded choice is then to limit the project of welfare improvement substantially. The basic land-use torts should then push policy control down to the individuals who have the best localized knowledge and incentives to use it productively.²³⁷

Boundary-like protections serve this goal in tort.²³⁸ Of course, boundary rules do not overlap perfectly with an owner’s control over his land use—think of cars on blocks and other non-actionable sight-nuisance complaints. All the same, boundary rules elegantly serve several functions at once. The boundary rules (and strict liability, and the choice to limit plaintiffs’-misconduct defenses) guarantee in a clear and determinate way that owners will have some security that their chosen uses will not be disrupted in the likeliest invasive ways.²³⁹ Seen in reverse, those rules also modify the

²³⁶ Posner, *supra* note 10, § 3.1, at 32, 34 (6th ed.).

²³⁷ See Hayek, *supra* note 178, [35 Am Econ Rev] at 524 (“If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them”).

²³⁸ I assume here that the theoretical differences between negligence and strict liability, discussed *supra* part III.C, do not matter practically. If negligence law focuses entirely on the railroad’s conduct, the focus of the inquiry and the burden-shifting presumptions available in negligence will tend to make the railroad liable in cases where the railroad cannot prove it took reasonable precautions.

²³⁹ This security cannot be complete without the right remedial rules, a full discussion of which (again, see *supra* note 208) exceeds the scope of this Article.

behavior of owners in their capacities as neighbors looking to hijack or blockade their neighbors' land uses.

These rules give property torts determinacy, but they also may focus and stabilize market and government processes. Because such control and use rights make it easier for each party to predict its rights and duties without inquiring or bargaining with neighbors, they simplify future planning by one owner and bargaining among many owners. And when disputes go to court, triers of fact need not make predictions about precaution technology, production functions, or strategic interactions between the parties. Instead, they can focus on less information-costly and politically-charged questions: whether one party invaded the other space in a way that exceeds the local tolerance level for such invasions. That simplicity reduces the number of cases that go to court, discourages rent-seeking, and reduces the costs of deciding the cases that do go to court.

Of course, one may fairly question the behavioral generalizations that lie under this alternative. These generalizations are empirical, but in an extremely soft sense: the sense in which one makes "empirical" claims by observing, often anecdotally, a wide range of phenomena about human behavior and then drawing a few comprehensive generalizations. The philosophical tradition in which Locke and *The Federalist* operated presumed that such generalizations were the most one could know about human "nature."²⁴⁰ That is why these and other contributors to American natural-rights morality resisted the temptation to explain law and politics with reference to mathematics. Austrian economics makes generalizations on a similar basis. But the underlying generalizations are falsifiable. They are extremely hard to test in a definitive way, but they may not be correct.

But this possibility applies equally to any mode of law and economic analysis. When accident law and economics focuses on the most concrete and party-specific factors, it assumes implicitly but empirically that law and economics can maximize the joint product of the parties and social welfare generally without seriously threatening investment, creating information-cost problems, encouraging rent-seeking, or demoralizing markets. Accident law and economic analysis may consider these more systematic issues as part of an all-the-circumstances analysis. In an all-the-circumstances analysis, however, the party-specific factors are likely to seem concrete and immediate, while the social factors are more likely to seem diffuse and remote. In operation, such an analysis assumes that the party-specific factors should weigh about as much as the more systematic factors, and it assumes the risk that the latter do not end up deserving to count more than the former.

The important point here is that these various assumptions are empirical, and they are foundational "meta-economic" assumptions about

²⁴⁰ See *supra* notes 85-86 and accompanying text. [moderation notes]

human behavior.²⁴¹ In crucial respects, these meta-assumptions do more work than concrete numbers or productive-efficiency equations do in accident law and economic analysis. These assumptions do not provide definitive answers, but they do focus economic analysis on questions capable of definitive answers. Important here, these meta-assumptions resemble the broad generalizations that ethical and political philosophy and Austrian economics make about human nature more than they do the more concrete numbers and production functions on which accident law and economics purports to focus. Until accident law and economics defends those meta-assumptions, no one can say convincingly that it operates on foundations sound enough to justify its reputation for determinacy.

F. The Natural Law Foundations of Utility and Welfare

As section I.B and Part III showed, American natural-rights morality explains land-use torts better than accident law and economics. As sections IV.B-E have shown, it is extremely unlikely that accident law and economics can prove the approach internal to the land-use torts ought to be abandoned. The informational difficulties are just too significant. Yet some readers may reasonably wonder whether other approaches to law and economics do better. Although this topic runs up against the limits of our focus, a few words are in order.

On one hand, to a considerable extent, law and economics *can* replicate many of the results prescribed by natural-rights morality. In his mature scholarship, Richard Epstein does so using utilitarian theory.²⁴² Notwithstanding differences laid out in section IV.C, Henry Smith approximates many of the rules explained in this Article using information-cost economics inflected with an Austrian accent.²⁴³ Contributions like Epstein and Smith's confirm what Smith has already noted, "that utilitarian and libertarian or corrective justice accounts of nuisance law [are] closer to each other than previously thought."²⁴⁴

On the other hand, inquiring tort philosophers may want to reserve judgment, for at least two reasons. One challenge is positive: Philosophers may fairly wonder what economic analysis adds to the morality internal to the cases. Scholars like Epstein and Smith may use economics with Austrian priors to state hypotheses about how land-use torts ought to look. In candor, however, such scholars must concede that, by economic criteria, such hypotheses "are implicitly empirical but not capable of precise

²⁴¹ I am grateful to Lloyd Cohen for suggesting this phrase.

²⁴² See, e.g., RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* (1998).

²⁴³ See Henry E. Smith, *Exclusion and Property Rules in Nuisance*, 90 VA. L. REV. 965 (2004).

²⁴⁴ *Id.* at 1049.

justification.”²⁴⁵ At the end of the day, “there may be only one way of testing” such hypotheses, namely “to examine the common-law rules” relevant to the economic hypotheses in question.²⁴⁶ If so, then economic tort analysis has what economists call a confounding-factor problem. If American natural-rights morality explains land-use tort common law, when economists test hypotheses against the common law they actually test against American natural-rights morality. If an approach to economics gets whatever verification it has by piggy-backing on a theory of morality internal to the case law, non-economists may reasonably wonder why they should prefer the piggy-backer over the original.

The second challenge is normative: To justify an economic approach to the land-use torts, economists may need to interpret “utility” and “social welfare” in ways that implicitly piggy-back on the natural law. To replicate the results reached by American natural-rights morality, economists must hypothesize that social welfare will be maximized if the law steers to owners zones of policy control that maximize each owner’s control over the use of her land. In other words, economists the highest quantity of social welfare attainable is an aggregation of the individual utility profiles of all owners. The highest possible aggregation of individual profiles, in turn, comes from an assignment of property rights that leaves every owner with a zone of policy control proportionate to his land.

Empirically, this is simply not a realistic account of the way most owners perceive their utilities. Given the choice, many owners would place utility on making their neighbors conform to their own preferred land uses and on escalating property values by restricting access to new lots.²⁴⁷ To get around this fact, economists must hypothesize that the way to maximize utility is not to satisfy what natural-law theorists would call owners’ “own private good[s],”²⁴⁸ whatever they may be, but instead to “direct[]” them, as “free and intelligent Agent[s] to their proper Interest[s].”²⁴⁹ When economists start distinguishing between low- and high-class, or base and noble, or spurious and serious sources of utility, they are backing into natural-law modes of reasoning.

²⁴⁵ Epstein, *supra* note 208, [106 Yale L J] at 2095. Accord Smith, *supra* note 243, at 1025 (acknowledging that the choice between coarse exclusion rules and fine-grained governance rules is “primarily an empirical question”).

²⁴⁶ Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEG. STUD. 12, 25-26 (1985).

²⁴⁷ We know as much from the demands homeowners place on zoning. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 33 A.2d 713 (N.J.), *appeal dismissed & cert. denied*, 423 U.S. 808 (1975).

²⁴⁸ LOCKE, *supra* note , § I.57, at 181.

²⁴⁹ *Id.* § II.57, at 305.

V. CONCLUSION

Coase assumed in *Social Cost* that “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”²⁵⁰ Welfare economics tends to focus more on questions that lend themselves to mathematical analysis, while aesthetics and morals tend to focus on questions shot through with opinion. That difference gives welfare economics more concreteness and determinacy in its sphere than aesthetics and morals have in theirs. Over the last generation, however, law and economists have tried to export the determinacy of welfare economics into law, and particularly parts of law raising issues properly in the province of morality. The most important question about that project is whether law and economics can have it both ways—whether it can keep all the determinacy of welfare economics without bogging the economics down in the indeterminacy of the parts of human life caught up in moral opinion.

Of course, the common law land-use torts represent just one slice of cases, and the following generalizations must be kept in context to avoid all the mistakes illustrated in the fable about the five blind men feeling the elephant. All the same, if and to the extent that the land-use torts are representative, law and economics has overstepped its bounds.

Readers may reasonably wonder why these contrasts have not been discussed in significant detail in previous legal scholarship. There are surely a number of answers. First, American natural-rights morality has been in desuetude in the American legal academy for a long time. Second, at a high level of generality, philosophical tort scholarship has focused more on the ways in which the tort system instantiates corrective justice than on the ways in which it borrows on political morality to inform rights and duties. Most important, mainline segments of economic tort scholarship view resource disputes through a conceptual framework that makes expert-driven policy analysis seem feasible and attractive. These segments have created an impression that law and economics explains tort more determinately than other approaches to the law. But if the land-use torts are a fair indication, these rumors of superior determinacy are greatly exaggerated.

²⁵⁰ Coase, *Social Cost*, *supra* note 7, at 154.