

JEFFERSON MEETS COASE: LAND-USE TORTS,  
LAW AND ECONOMICS, AND NATURAL PROPERTY RIGHTS<sup>©</sup>

Eric R. Claeys\*

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. Although philosophical tort scholarship still tries to defend this common-sense view, it has taken the academic equivalent of a drubbing over the last generation. 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.<sup>1</sup>

This perception exists at least in large part because economic analysis claims it can explain the law more concretely and determinately than philosophical analysis. When tort cases appeal to moral terms like “right” or “wrong,” they make doctrine seem “mush—lacking in clear or persuasive guidelines for determining what counts as ‘wrongful.’”<sup>2</sup> The open nature of moral language also makes philosophical tort theory seem too diffuse to “milk . . . for its specific implications for legal doctrine” and “too limited to underwrite legal-doctrinal analysis.”<sup>3</sup> Economic methodology may suffer from its own limitations, but it does seem to explain doctrines in concrete terms. These specific explanations have impressed judges and scholars. As a result, as Jody Kraus surveys the debate, “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.”<sup>4</sup> Kraus probably says all this with his tongue planted in

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<sup>1</sup> Jules L. Coleman, *The Practice of Corrective Justice*, in David G. Owen ed, *Philosophical Foundations of Tort Law*, 53, 57 (Clarendon 1995).

<sup>2</sup> Ward Farnsworth & Mark F. Grady, *Torts: Cases and Questions*, at xlv (Aspen 2004).

<sup>3</sup> Richard A. Posner, *The Problems of Jurisprudence* 321, 322, 323, 328 (1990).

<sup>4</sup> Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 Va L Rev 287, 356-57 (2007).

his cheek—but only slightly. Economic analysis now seems more rigorous than doctrine or philosophical tort scholarship. Only economic analysis, it seems, can claim an “impressive level of fit with case outcomes” and a “comparatively high degree of determinacy.”<sup>5</sup>

From a longer time horizon, however, this debate is puzzling. People often assume that American tort law used to have content focused enough to be described as “individualistic” and organized “to specify and protect individuals’ rights to bodily integrity, freedom of movement, reputation, and property ownership.”<sup>6</sup> These generalizations would not make sense unless early American tort law’s moral underpinnings had some focused and determinate content. In addition, it seems more than a little presumptuous for one generation of academics to say that several centuries of law in their field were incoherent until they came along and tidied it up. The naïve observer may therefore justly wonder: Do contemporary comparisons of tort economics and philosophy fairly reflect the actual content of tort doctrine, economics, and philosophy—or do they instead reflect current academic prejudices?

Now, no single Article can pursue such a suspicion comprehensively across the entirety of tort, and this Article will not try. But this Article *can* suggest that the suspicion 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 building on a trespassory and accidental 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 provide an excellent point of contact because they cover all the chestnuts that Ronald Coase used to illustrate the lessons of his landmark article *The Problem of Social Cost*.<sup>7</sup> *Social Cost* is the most-cited law review article ever.<sup>8</sup> It did as much as any other scholarly work to lend respectability to tort law and economics. It also contributed to many economists’ general impression that philosophical argument seems “rigid” in its

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<sup>5</sup> Id at 357. See also id (“economic analysis provides traction on countless doctrinal puzzles on which other theories—and deontic moral theories in particular—provide little traction”).

<sup>6</sup> John C. Goldberg, *Twentieth-Century Tort Theory*, 91 *Geo L J* 513, 520, 518 (2003).

<sup>7</sup> 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*.

<sup>8</sup> See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 *Chi-Kent L Rev* 751, 759 (1996).

attachment to a harm-benefit distinction, a “pristine idea of right colliding with wrong.”<sup>9</sup> 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*.<sup>10</sup> 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 theory.” American natural-rights theory refers here to a theory of justice that informed American law and politics considerably from the United States’ founding until 1920, and to a lesser extent since. According to this theory of justice, 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 theory of justice is “Jeffersonian” in the sense that it is a well-articulated version of the theory of unalienable and natural rights set forth in the United States Declaration of Independence.<sup>11</sup> This theory explains basic features of trespass, nuisance, and land-use-related negligence better than “Coasian” economic tort analysis. In the process, Jeffersonian moral theory anticipates and highlights problematic features of Coasian economic analysis.

This comparative lesson contributes three important lessons to contemporary tort scholarship. First, this Article contributes to moral tort and property theory. This Article rehabilitates a substantial slice of American tort common law from standard economic criticisms associated with *Social Cost*. In the process, it shows that a theory of justice does a much better job explaining and justifying important doctrine than has previously been supposed. If American natural-rights theory can explain Coase’s favorite cases and defend the harm-benefit distinction

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<sup>9</sup> Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J Leg Stud 15, 30, 33 (1988).

<sup>10</sup> See, for example, Richard A. Posner, *Economic Analysis of Law* §§ 3.6, 3.8, at 50-52, 61-63 (Aspen 7<sup>th</sup> 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 (Harvard 1991) (calling cattle trespass “the subject of Coase’s Parable of the Farmer and the Rancher”); Robert D. Cooter, *Coase Theorem*, in John Eatwell et al eds, 1 *The New Palgrave: A Dictionary of Economics* 457, 458 (Macmillan Reference 1997) (using train-sparks cases, “which Coase made famous,” as the sole example for illustrating the Coase Theorem); Robert C. Cooter, *The Cost of Coase*, 11 J Leg Stud 1, 2-4 (1982) (introducing the Coase Theorem with a sparks dispute).

<sup>11</sup> 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.

from standard economic criticisms, those are important accomplishments, for American natural-rights theory specifically and for philosophical approaches to tort generally.

Second, this Essay also helps explain why recent philosophical tort theory has gotten a reputation for being mushy and indeterminate: Recent philosophical tort theory has not done enough to examine the relation between tort law and particular theories of distributive justice. When tort law draws on principles of justice, it draws on two complementary sources—corrective justice and distributive justice. At the risk of oversimplifying, distributive justice explains who has what rights and why, and corrective justice explains why the legal system should repair takings of rights. To date, much philosophical tort scholarship has focused more on the imperatives of corrective justice—like the fact that the tort system speaks in terms of “injuries,” “trespasses,” and “plaintiffs.” While such insights are necessary and important, they operate at a very high level of generality—or, one might say, mushily. To complete the picture, particular theories of distributive justice must fill in the content of “rights” and the other moral terms that undergird the reparative features of the tort system. In the land-use torts studied here, Jeffersonian natural-rights theory complements corrective justice—by filling in the distributive claims that give the relevant possessory interests and invasions their character and focus.

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. Conventional economic tort analysis claims it can predict tort rules using information far more specific than the information on which doctrine and ethical and political philosophy rely. It is not clear, however, that economic analysis can make good on that claim. Since that claim has helped law and economics achieve the prominence it now enjoys in tort scholarship, interested readers deserve to know that it is overdrawn and why.

## I. THE RIVALRY BETWEEN ECONOMICS VERSUS JUSTICE IN TORT

### A. The Economic Indictment

To set the stage, let us recount some of the general assumptions that tort scholars make about the rivalry between economics and philosophy in tort. Because *Social Cost* is frequently cited as an authority proving or illustrating these comparative impressions, we shall illustrate these impressions especially with relevant passages of *Social Cost*. First, as recounted in the

Introduction, theories of justice seem “mush” and “lacking in clear or persuasive guidelines” for tort.<sup>12</sup> This impression is self-explanatory.

Second, 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.”<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup> This 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.<sup>16</sup>

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.”<sup>17</sup> In Mitchell Polinsky’s paraphrase, “[i]f there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.”<sup>18</sup> On the Theorem’s assumptions, it does not really matter *how* the common law assigns liability in a simple trespass or nuisance case, because the parties will bargain around liability to the efficient result as long as transaction

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<sup>12</sup> Farnsworth & Grady, *Torts: Cases and Questions*, at xlv.

<sup>13</sup> Coase, *Social Cost*, at 114 (cited in note CSC).

<sup>14</sup> Coase, *Firm, Market, Law* at 12.

<sup>15</sup> See Steven Shavell, *Foundations of Economic Analysis of Law* 77 (Harvard 2004) (defining “externality” in the context of a land-use conflict to refer to any action that “influences, or 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”).

<sup>16</sup> See, for example, Coase, *Social Cost*, 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.”).

<sup>17</sup> Ronald H. Coase, *The Firm, the Market, and the Law*, in *The Firm, the Market and the Law* at 1, 13-15, 158 (cited in note CSC) (citing George J. Stigler, *The Theory of Price* 113 (Macmillan 3<sup>rd</sup> ed 1966)).

<sup>18</sup> A. Mitchell Polinsky, *An Introduction to Law and Economics* 12 (Little, Brown 2d ed 1989).

costs are not prohibitive. 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.”<sup>19</sup> 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.” Productive efficiency refers to an ideal state in which any change in the parties’ levels of production or precautions causes this difference to shrink. Ideally and in its simplest form, it refers to a subtraction formula: The joint value of the parties’ productive operations, minus their joint accident and precaution costs, and minus any additional transaction costs.<sup>20</sup>

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 may not necessarily 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.<sup>21</sup> *Social Cost* is therefore interested primarily in “[t]he influence of the law on the working of the economic system”<sup>22</sup> and not vice versa. Yet at a minimum, *Social Cost* makes respectable the methodology of accident law and economics. In it, Coase hypothesizes about the possibility that the “legal system” might 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.”<sup>23</sup> Coase praises American lawyers who “are aware . . . of the reciprocal nature of

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<sup>19</sup> Coase, *Social Cost* at 114 (cited in note CSC).

<sup>20</sup> The phrase “productive efficiency” comes from Robert Cooter & Thomas Ulen, *Law & Economics* 12 (Pearson Addison Wesley 3d ed 2000). See also Shavell, *Foundations of Economic Analysis of Law* at 81, 81-83 (cited in note SS) (assuming that “the social goal is to maximize the sum of parties’ utilities”); Polinsky, *Introduction to Law and Economics* at 13 (“the preferred legal rule is the rule that minimizes the effects of transaction costs”); Coase, *Social Cost* at 115 (cited in note CSC) (“One arrangement of rights may bring about a greater value of production than any other.”).

<sup>21</sup> See Coase, *Social Cost* at 95, 133 & n.35 (cited in note CSC) (citing A.C. Pigou, *The Economics of Welfare* 183 (Macmillan 4<sup>th</sup> ed. 1932)).

<sup>22</sup> Coase, *The Firm, the Market and the Law* at 10 (cited in note CFML).

<sup>23</sup> Id [Coase, *Social Cost*] at 115.

the problem” and “take . . . economic implications into account, along with other factors, in arriving at their decision.”<sup>24</sup> He also exhibits a measure of economic condescension toward the common law, by describing judicial reasoning as “a little odd.”<sup>25</sup> 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*.<sup>26</sup>

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 different obstacles and study their consequences.<sup>27</sup> Yet even though these analyses differ in many particulars, productive efficiency unifies their inquiries in important foundational matters.<sup>28</sup>

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,<sup>29</sup> new institutional economics, behavioral law and economics,<sup>30</sup> or other refinements or specialized applications of basic economic methodology. At the same time, in tort casebooks and introductory textbooks, accident law and economics is presented as

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<sup>24</sup> See Coase, *Social Cost* at 120 (cited in n CSC) (citing William L. Prosser, *Handbook of the Law of Torts* 398-99 (West 2d ed 1955), for the proposition that American nuisance law considers among other factors pollution’s “utility and the harm which results”).

<sup>25</sup> Id [Coase, *Social Cost*] at 146.

<sup>26</sup> See R.H. Coase, *Notes on the Problems of Social Cost*, in *The Firm, The Market, and the Law* at 157, 174 (cited in note CFML) (“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.”). See also Robert C. Ellickson, *The Case for Coase and Against ‘Coaseanism,’* 99 *Yale LJ* 611 (1989).

<sup>27</sup> See, for example, William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 29-38, 58-59 (Harvard 1987); Steven Shavell, *Foundations of Economic Analysis of Law* 177-206 (Harvard 2004).

<sup>28</sup> See, for example, Posner, *Economic Analysis of Law* 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, *Foundations of Economic Analysis of the Law* at 83-109 (cited in note SS) (comparing how polluter liability, bargaining, and legally mandated results each might maximize the parties’ joint net utility); Cooter & Ulen, *Law & Economics* at 82-98 (cited in note CU). See also Roy E. Cordato, *Welfare Economics and Externalities in an Open Ended Universe: A Modern Austrian Perspective* 95 (Kluwer 1992) (finding “more complicated analyses in the law and economics literature . . . still all, in one form or another, applications of Coase’s efficiency criteria”).

<sup>29</sup> See Guido Calabresi, *The Costs of Accidents* (Yale 1977) (2d ed).

<sup>30</sup> Kraus, *Transparency and Determinacy*, 93 *Va L Rev* at 359 (cited in JKTD); [last 2 pages]; see *The New Chicago School: Myth or Reality?*, 5 *U Chi L Sch Roundtable* 1 (1998).

hornbook economics.<sup>31</sup> Furthermore, accident law and economics deserves special focus because it especially claimed to bring determinacy to tort.

## B. Explanatory Doubts

Yet there is a huge irony in this impression. If one goes back and surveys the land-use torts on which Coase relied to illustrate the lessons of *Social Cost*, accident law and economics cannot explain some absolutely fundamental concepts in the law. First, a trespass occurs when a defendant makes an act that directly results in a physical invasion of the plaintiff's close.<sup>32</sup> 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 or any personalty on it.<sup>33</sup> 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.<sup>34</sup> This question is easy for accident law and economics to explain. *Social Cost* discusses the rancher-farmer conflict on the assumption that transaction costs are zero.<sup>35</sup> Once transaction costs are put back in the picture, it is less transaction-costly for 50 ranchers to find a farmer than it is for the farmer to find the ranchers.<sup>36</sup>

The *prima facie* case for 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."<sup>37</sup> 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."<sup>38</sup>

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<sup>31</sup> See sources cited above in note 28; Grady & Farnsworth.

<sup>32</sup> See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 67 (West 2d ed 1984).

<sup>33</sup> See *Longnecker v Zimmerman*, 267 P2d 543, 545 (Kan 1954); *Giddings v Rogalewski*, 158 NW 951, 953 (Mich 1916); *Dougherty v Stepp*, 18 NC 371, 371 (1835); Keeton et al, *Prosser and Keeton on the Law of Torts* § 13, at 75 (cited in note PK).

<sup>34</sup> Coase, *Social Cost* at 97-104 (cited in note CSC).

<sup>35</sup> See *id* at 97 ("the operation of a pricing system is without cost").

<sup>36</sup> See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 187 (Harvard 1991); Vogel, 16 J Leg Stud at 153-60 (cited in note KV).

<sup>37</sup> *Id* at 1438.

<sup>38</sup> Lee Anne Fennell, *Property and Half-Torts*, 116 Yale LJ 1400, 1437 (2007).

Assuming that Fennell's explanation is correct, it cannot explain why trespass law enforces boundary rules even when a risk of harm does not lead to a harmful accident.

The best recent case to illustrate is *Jacques v. Steenberg Homes*.<sup>39</sup> 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 (mistakenly) that a license would give the company a claim to adversely possess the field.<sup>40</sup> Steenberg Homes towed the home across their field anyway and caused no actual harm to the field.<sup>41</sup> 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 liability compensated by a reasonable one-time crossing fee. 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,<sup>42</sup> and the Wisconsin Supreme Court affirmed—specifically to deter trespassers from undermining the general principle that “actual harm occurs in *every* trespass.”<sup>43</sup> Fennell explains this result on the ground that the punitive-damage rule is meant *ex ante* to deter future boundary invasions.<sup>44</sup> But that only begs the question why the law should 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

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<sup>39</sup> 563 NW2d 144 (Wisc 1997). For treatments of *Jacque* in prominent property casebooks, see, for example, Jesse Dukeminier et al, *Property* 87-88 (Aspen 6th ed 2006); Joseph William Singer, *Property Law: Rules, Policies, and Practices* 116 (Aspen 4th ed 2006).

<sup>40</sup> See *Jacque*, 563 NW2d at 157.

<sup>41</sup> *Jacque*, 563 NW2d at 611. Steenberg Homes' assistant manager instructed employees: “I don't give a ---- what [Mr. Jacques] said, just get the home in there any way you can.” *Id.*

<sup>42</sup> See *Jacque*, 563 NW2d at 632.

<sup>43</sup> *Id.* at 160 (emphasis added).

<sup>44</sup> See Fennell, *Property and Half-Torts*, 116 Yale LJ at 1431 n 91 (citing *Jacque* to illustrate features of remedy law, without explaining its implications for underlying trespass liability).

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.<sup>45</sup> 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.<sup>46</sup> The accident law and economic scholarship follows Coase in different ways. Some articles suggest that the earlier builder should be protected categorically,<sup>47</sup> others that the law should examine case by case which party acted less strategically.<sup>48</sup> These approaches have seeped into some cases.<sup>49</sup> By and large, however, the cases categorically make the business liable even though it came to the neighborhood first.<sup>50</sup>

The physical-invasion test also bars causes of action for aesthetic complaints and blockages of light.<sup>51</sup> Economically, it is hard to explain why 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.<sup>52</sup> 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.<sup>53</sup> 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 would be quite easy doctrinally to import the economic viewpoint into doctrine.<sup>54</sup> Even so, 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

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<sup>45</sup> 11 Ch. D. 852 (1879).

<sup>46</sup> See Coase, *Social Cost*, at 105-07 (cited in note CSC).

<sup>47</sup> See, for example, William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J L & Econ 1 (1973).

<sup>48</sup> See, for example, Landes & Posner, *Economic Structure of Tort Law* at 50-51 (cited in note LP); Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J L & Econ 557 (1980).

<sup>49</sup> See, for example, *Jerry Harmon Motors, Inc v Farmers Union Grain Terminal Ass'n*, 337 NW2d 427 (ND 1983).

<sup>50</sup> See, for example, *Kellogg v Village of Viola*, 227 NW2d 5 (Wis. 1975).

<sup>51</sup> See, for example, *Adams v. Cleveland-Cliffs Iron Co.*, 602 NW2d 215, 219 (Mich Ct App 1999).

<sup>52</sup> See Coase, *Social Cost* at 104-05 (cited in note CSC) (citing *Fountainbleu Hotel Corp. v Forty-Five Twenty-Five, Inc.*, 114 So2d 357 (Fla 1959)).

<sup>53</sup> Ellickson, *Alternatives to Zoning*, 40 U Chi L Rev at 688 (cited in note REAN). See also Cooter & Ulen, *Law & Economics* at 40; George P. Smith & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 Harv Envtl L Rev 53 (1991); 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).

<sup>54</sup> *Restatement (Second) of Torts*, supra note RST, § 821D, cmt. b. For examples of cases following this suggestion, see *Tenn v. 889 Assocs., Ltd.*, 500 A2d 366 (NH 1985); *Prah v. Maretti*, 321 NW2d 182 (Wis 1982).

enjoyment,” but would “perceive quite differently . . . the demolition of an architectural landmark or the construction of a housing development on a beautiful vacant meadow.”<sup>55</sup>

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.”<sup>56</sup>

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.<sup>57</sup> In negligence, the element of breach of duty creates a doctrinal placeholder in which to conduct *B v pL* economic analysis; nuisance could import the same analysis through the element that an interference with a land use be unreasonable.<sup>58</sup> 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, the argument runs; in multi-party cases, negligence reduces the perverse incentives one party’s strict liability gives others not to take sensible precaution on their own.<sup>59</sup>

Yet in practice, trespass and nuisance employ strict liability categorically, without distinguishing between one- and multi-party accidents. Trespass is often defined as an intentional tort, but in practice courts water down the concept of “intent” to include intent to commit the act causing the trespass regardless of whether he knows it is a trespass.<sup>60</sup> A similar

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<sup>55</sup> Ellickson, *Alternatives to Zoning*, 40 U Chi L Rev at 728 (cited in note REAN).

<sup>56</sup> *Sher v Leiderman*, 226 Cal Rptr 698, 703 (Ct App 1986). See also *Wernke v Halas*, 600 NE2d 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.”).

<sup>57</sup> See, for example, Halper, *Untangling the Nuisance Knot*, at 115-16 (cited in HUNK); Richard A. Posner, *A Theory of Negligence*, 1 J Leg Stud 29 (1972).

<sup>58</sup> See, for example, Posner, *Economic Analysis of Law* § 3.8 at 63 (cited in note RPEAL) (“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*, 63 Va L Rev at 1316-31.

<sup>59</sup> See, for example, Hans-Bernd Schäfer & Andreas Schönenberger, *Strict Liability versus Negligence*, in 2 Encyclopedia of Law and Economics 597, 607 (Elgar 2000) (Boudewijn Bouckaert & Gerrit de Geest eds); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J Leg Stud 323 (1973). Mitchell Polinsky applies this framework to pollution cases in *An Introduction to Law and Economics* at 92-94 (cited in AMP).

<sup>60</sup> See *Burns Philp Food, Inc. v. Cavalea Contl. Freight, Inc.*, 135 F3d 526, 529 (7<sup>th</sup> Cir 1998); *Brown v. Dellinger*, 355 SW2d 742, 747 (Tex Civ App 1962); *Cleveland Park Club v. Perry*, 165 A2d 485, 488 (DC App 1960). *Restatement (Second) of Torts* § 158(a) (cited in note RST) (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 (New York: Aspen Publishers, 2004).

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.<sup>61</sup> There certainly is negligence-based nuisance,<sup>62</sup> but the law clearly preserves a strict-liability theory of nuisance as a backstop.<sup>63</sup> 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.”<sup>64</sup>

Of course, economic cost-benefit analysis could still inform land-use law indirectly—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 (also made famous by *Social Cost*<sup>65</sup>), 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.<sup>66</sup>

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.”<sup>67</sup> Most sparks cases have been litigated in negligence, and contributory negligence is usually a defense to negligence. Yet in sparks cases, the general rule has been to block 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.”<sup>68</sup> Similarly, courts sharply limit assumption of risk as a defense against trespassory torts. In the 1974 case *Marshall v. Ranne*, a neighbor’s ornery boar bit a homeowner while he was walking to

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<sup>61</sup> See, for example, *Morgan v High Penn Oil Co.*, 77 SE2d 682 (NC 1953).

<sup>62</sup> See *Restatement (Second) of Torts* § 822(b).

<sup>63</sup> See id §§ 822(a), 825(b).

<sup>64</sup> See, for example, *Pestey v Cushman*, 259 Conn 345, 362, 788 A2d 496, 508 (2002).

<sup>65</sup> See Coase, *Social Cost* at 133-42 (cited in note CSC).

<sup>66</sup> See, for example, Grady, *Strategic Behavior*, 17 J Leg Stud at 33-41 (cited in note MG); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal L Rev 1, 5-11 (1985).

<sup>67</sup> Susan Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J Leg Stud 25, 35 & n.20 (1989). Ackerman attributes this view to Horace Wood’s, *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.” Cited in Ackerman, *Dikes, Dams, and Vicious Dogs*, 18 J Leg Stud at 25, 35.

<sup>68</sup> *LeRoy Fibre Co. v Chicago, M. & St. P. Ry. Co.*, 232 US 340, 349 (1914).

his car on his own property. Assumption of risk did not go to the jury, and correctly so: “[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.”<sup>69</sup> The doctrine intuitively uses boundary rules to reject plaintiffs’-misconduct defenses by trespassers against owners and limit them to cases by owners against licensees. In common-sense terms, when trespassers raises such defenses, they are making inappropriate “your money or your life” demands; when landowners do, they are making appropriate “take it or leave it” demands.<sup>70</sup>

There are other examples,<sup>71</sup> but by now the main points should be clear. Accident law and economics should be able to predict the features of the basic land-use torts *Social Cost* made famous. It does not. Accident law and economic analyses often predict party-specific rules, but the doctrines consistently implement coarser boundary rules. These discrepancies are not isolated to one area of doctrine; they run through the defenses and all the ordinary elements of a standard torts prima facie case. Now maybe the common law at each point is “rigid,” missing “ambiguity,”<sup>72</sup> or any of many other synonyms for “normatively unpersuasive.” At this point, however, the important point is this: Accident law and economics’ track record with land-use torts is not strong enough to support an “impressive level of fit with case outcomes.”<sup>73</sup>

## II. AMERICAN NATURAL RIGHTS THEORY IN LAND-USE TORTS

### A. American Natural-Rights Theory

In this Article, I aim to show that “American natural-rights theory” 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 theory” refers to a common political morality that is an amalgamation of Anglo-American law and several different philosophical and religious theories of liberty. The amalgamated theory is restated explicitly and generally in the

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<sup>69</sup> 511 SW2d 255, 260 (Tex. 1974).

<sup>70</sup> For one use of “take it or leave,” see *Gibson v Beaver*, 245 Md 418, 422-23, 226 A2d 273, 276 (1967).

<sup>71</sup> For example, it is also puzzling why accident law and economics cannot explain restitution, the law for recouping positive externalities, as well as it claims to explain tort, the law for recouping negative ones. See, for example, Saul Levmore, *Explaining Restitution*, 71 Va L Rev 65 (1985) (concluding that restitution cannot be explained by any single economic rationale but rather by applying four specific economic factors as relevant in different contexts); Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 Va L Rev 1147, 1156 (2006) (concluding that Levmore’s “narrowly drawn, ad hoc explanation” arrives “at the point where economics must add epicycles”).

<sup>72</sup> Grady, 17 JLS at 30-33 (cited in note MG).

<sup>73</sup> Id [Kraus, 93 va l rev] at 357.

Declaration of Independence and many Founding Era state constitutions; I posit here that it served as a common political morality until the end of the first third of the twentieth century.

Generally, American natural-rights theory holds the law's primary object is to secure to individuals domains of practical discretion in which to pursue their self-preservation and their moral improvement. As applied to property torts, American natural-rights theory acts as a theory of distributive justice. It distributes to property owners discretionary domains in which to use their property selfishly but productively consistent with their own talents, needs, and ends. The common law land-use torts just canvassed reflect that domain—not only one by one but also as an integrated package. The possessory interests, the rules of causation and scienter, and the affirmative defenses all work together to protect owners' discretion to use and enjoy their land for a wide range of purposes. Accident law and economics has a hard time explaining the doctrines or the package, because it prefers to focus not on the domain of discretion but on particular property uses.

#### B. American Natural-Rights Theory and Distributive and Corrective Justice

At this point, one may reasonably wonder whether this claim has already been made in philosophical tort scholarship. For example, Stephen Perry has suggested that pre-1950 American tort law came “close . . . to instantiating pure corrective justice.”<sup>74</sup> All the same, philosophical tort scholarship has not sufficiently appreciated how American natural-rights theory imparts character and determinacy to American tort law. But to an extent, Perry's observation illustrates a confusion in philosophical tort scholarship that has tended to obfuscate the distinct role of American natural-rights theory.

Note that Perry suggests American tort law used to instantiate *corrective* justice. Even if that claim is necessary to understand pre-1950 tort law, it is not sufficient. American tort law in that period also instantiated *distributive* justice, and American natural-rights theory supplied the distributive commitments in at least a substantial body of torts. Roughly speaking, distributive justice refers to the moral principles that direct how property and other goods should be allotted among members of a society; corrective justice refers to the principles that obligate actors to rectify losses they cause when they take from others' distributions.<sup>75</sup> American natural-rights

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<sup>74</sup> Perry, *supra* note SP1, at 382.

<sup>75</sup> See Steven Walt, *Eliminating Corrective Justice*, 92 Va L Rev 1311, 1311 (2006). The definitions in text are quick and dirty because, as Walt points out, it is hard to define the two species of justice precisely in a manner that stops one from swallowing the other. See *id* at 1311-12, 1320-21.

theory is a distributive theory because it focuses on distributing with assets domains of moral discretion.

That focus makes American natural-rights theory distinct from the main focus of philosophical tort scholarship over the last generation--corrective justice. Jules Coleman, Ernest Weinrib, and other corrective-justice theorists have added a new criterion for judging the rivalry between economics and philosophy—"interpretive" fit.<sup>76</sup> According to this criterion, the ideal theory of law should not only predict and justify legal outcomes, but also do so by means of an "internal" point of view, a normative theory of practical reasoning inherent in the institutions and rules generating those outcomes.<sup>77</sup> According to this criterion, even assuming economic efficiency can explain particular doctrines, it is irrelevant to the law as long as the law's normative organizing principles pursue claims about morality.

Separately, corrective-justice theorists have refocused the terms of debate—away from explaining specific doctrines to explaining broader issues of legal form and architecture. They challenge economists to explain why tort speaks of "plaintiffs" and "defendants," and "rights" and "wrongs," and not "incompatible-resource users" and "externalities." In addition, at least where economic theory has not seeped into doctrine, tort law looks retrospectively to restore a *status quo* that existed between two parties before an alleged wrongful act. Economic analysis prefers to analyze the consequences of a rule prospectively, and on everyone whose behavior might be altered by the rule.<sup>78</sup>

These insights are important, and they have enriched our understanding of tort. At the same time, these insights can be taken too far. Perry illustrates this tendency when he assumes that "pure corrective justice" can explain pre-1950 American law; so does Jules Coleman when he assumes that corrective justice is "the point of the core, if not all, of our current tort

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<sup>76</sup> See H.L.A. Hart, *The Concept of Law* 82-91 (Oxford 2d ed 1994) (defining the internal point of view); Melvin A. Eisenberg, *The Theory of Contracts*, in *The Theory of Contract Law: New Essays* 208, 213 (Peter Benson ed, Cambridge 2001) (defining methodologies focusing on this perspective as "interpretive"). Jody Kraus and Stephen Smith refer to a similar criterion by the term "transparency." See Kraus, 93 Va L Rev at 289-90, 304 (cited in note JK) (citing Stephen A. Smith, *Contract Theory* 24-25 (Oxford 2004)).

<sup>77</sup> See Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* 8-9, 22 (Oxford 2001); Ernest J. Weinrib, *The Idea of Private Law* §§ 1.4 to -.7, at 8-21 (Harvard 1995); Jules L. Coleman, *Risks and Wrongs* 8-11, 432-35 (Cambridge 1992).

<sup>78</sup> See, for example, Coleman, *The Practice of Principle* at 13-63 (cited in note JCPP); Weinrib, *The Idea of Private Law* at 22-83 (cited in note EW); Jules L. Coleman, *Risks and Wrongs* at 303-85 (cited in note JCRW); Jules L. Coleman, *The Structure of Tort Law*, 97 Yale LJ 1233, 1246-53 (1988).

practice.”<sup>79</sup> As Gregory Keating explains, if one assumes that corrective-justice theory can explain tort without any other philosophical supplementation, one “puts the cart before the horse.” “The identification of those actions which require correction takes precedence over their correction.”<sup>80</sup> A full account of tort law presumes a fully developed account how the law distributes rights to life, liberty, property, reputation, and the other interests that tort law protects. These accounts are easy to assume and overlook in easy cases—say, a battery in which the defendant hits the plaintiff without any express consent or implied license and with intent to injure. But these accounts are crucial to make sense of the hard cases—say, a nuisance dispute about an ugly sculpture or blockage of sunlight.<sup>81</sup> As a matter of corrective justice, nuisance law will not warp the general design of tort law if it holds that an owner “harms” a neighbor by offending her artistic sensibilities or cutting off her light. But it would also accord to say that no cause of action exists, on the ground that the neighbor has no right to sunlight or artistic security. In that case, a cause of action would “harm” the owner by limiting his free use of his land. Distributive justice must distribute to the owner and the neighbor possessory interests taking into account how justice best promotes self-preservation, beauty, communal goals, and so forth.

It is certainly important for tort philosophers to respect the relation between corrective and distributive justice. Corrective justice explains many wide and shallow features about the common law; distributive justice explains many narrower and deeper features. But tort philosophers create problems when they claim more of corrective justice than it can deliver. Conceptually, they confuse the relation between corrective and distributive justice, and they obscure the special role of distributive justice. Politically, if corrective justice cannot give a completely reasoned justification for tort law’s specific commands, then tort philosophy seems to fail the obligation to explain, in intelligible public reasons, why the law may legitimately coerce citizens to behave in ways they might otherwise prefer not to behave.<sup>82</sup> But legally, and most relevant here, the over-claiming encourages the ridicule of theories of justice which this Article began.<sup>83</sup> If some species of law and economics can explain sight nuisance law, corrective justice

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<sup>79</sup> See above note – and accompanying text; Coleman, *Risks and Wrongs* at 395 (cited in note JCRW)

<sup>80</sup> Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J Ethics & Soc Phil 1, 11 (2006).

<sup>81</sup> See Hershovitz, *Two Models of Tort (and Takings)*, 92 Va L Rev at 1168 & n56 (cited in note SH).

<sup>82</sup> See Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 Wm & M L Rev 1773, 1774, 1785 (2007).

<sup>83</sup> See, for example, Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *Philosophical Foundations of Tort Law* 99, 108-09 (David G. Owen ed Oxford 1995) (“when one turns to the detailed articulation of intentional-tort doctrine, the theory of corrective justice quickly runs out of steam . . . [a]nd with regard to unintentional torts . . . corrective justice has no thrust at all”).

cannot, and tort philosophers do not focus on how specific theories of distributive justice inform the law, then tort philosophy seems only to make empty generalities about nuisance without prescribing a specific answer to sight- nuisance disputes.

Some of these problems apply also to some distributive-justice criticisms of economic tort analysis. For example, tort philosophers often argue that Coasian economic analysis is distributively irrelevant. Again, the Coase Theorem holds that welfare economics is indifferent between two different allocations of entitlements whenever transaction costs are surmountable. In these cases, economic analysis provides no justification for assigning initial entitlements to one party or the other—but distributive justice does, and the parties can always make the economists happy by bargaining to a more efficient arrangement later.<sup>84</sup> This response has force. Yet, like corrective-justice theory, this argument identifies a general property about the Coase Theorem without explaining any particular legal doctrine. It therefore reinforces the impression that philosophical tort theory is mushy. To rebut that impression, tort scholarship needs to consider whether and to what extent common political moralities supply distributive content to the general corrective structure of tort law.

So contrary to Perry’s suggestion, American natural-rights theory does not really instantiate corrective justice; it is more helpful to say that American natural-rights theory *complements* corrective justice, by setting the distributive baseline by which corrective justice rectifies takings of rights. Tom Palmer has helpfully explained this baseline as follows: “From each according to what he chooses to do, to each according to what he makes for himself . . . and [hasn’t] yet expended or transferred.”<sup>85</sup>

### C. The Argument

Let us therefore restate the argument of the remainder of the Article. In Part III, I explain why a distributive claim like Palmer’s explains and predicts the contours of basic land-use law better than accident law and economics or corrective-justice theory in isolation. Part III also shows why American natural-rights theory’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 or the normative arguments imparted to the relevant law by American natural-rights theory.

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<sup>84</sup> See, for example, Jeremy Waldron, *Does Law Promise Justice?*, 17 Ga St U L Rev 759, 780 (2001).

<sup>85</sup> Tom G. Palmer, *Classical Liberalism and Civil Society: Definitions, History, and Relations*, in *Civil Society and Government* 48, 60 (Nancy L. Rosenblum & Robert C. Post eds Princeton 2002).

Before proceeding, let us dispel some possible confusions about the scope of this Article's theses. One claim of this Article is a claim about intellectual history: American natural-rights theory was one factor contributing substantially to the foundational torts cases that generated the harm-benefit distinction and the contours of liability in basic land-use torts. This historical claim, however, should be understood narrowly. This Article uses the harm-benefit distinction and land-use torts only as necessary to develop a point of contact between American natural-rights theory and contemporary accident law and economics. To get that focus, we must abstract away from important questions relevant to fully substantiated historical claims.<sup>86</sup>

Another claim of this Article is to explain existing property-tort doctrine: American natural-rights theory is one factor contributing substantially to explain why contemporary land-use tort liability rules rely heavily on boundary rules, coarse use rights, and a clear harm-benefit distinction. This explanatory claim also has important limits. This Article does not claim that all tort doctrines are explained by theories of distributive justice with the particularity or determinacy American natural-rights theory brings to land torts. And even in the land-use context, contemporary judges do not follow American natural-rights theory completely. Land-use law, like American law generally, follows trends in legal academic thought; it is therefore more instrumental, pragmatic, and skeptical of strong moral rights claims than it was a century ago.<sup>87</sup> When I claim that American natural-rights theory is influencing current law, I mean specifically that current law is still borrowing on moral interests informed by behavioral and prescriptive generalizations explicitly articulated in different sources of American natural-rights theory. There are important discrepancies, but I suspect most can be explained by a modified version of Chief Judge Harry Edwards' "disjunction" thesis.<sup>88</sup> When judges use terms of art about general terms like "property," or "rights," they follow contemporary legal academic theory as influenced by accident law and economics and other academic legal developments. When they focus on particular doctrinal questions raising focused policy issues, however, they ignore

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<sup>86</sup> See, for example, Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth Century America* (North Carolina Press 1997); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (North Carolina 1996); Lawrence M. Friedman, *A History of American Law* (Simon & Schuster 1985); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harvard 1977); J. Willard Hurst, *Law and the Conditions of Freedom: In the Nineteenth Century United States* (Wisconsin 1956). My instincts toward this scholarship accord with observations made by Mark Warren Bailey in *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910* (Northern Illinois 2004).

<sup>87</sup> See Goldberg, *Twentieth Century Tort Law* at 706 (cited in note G20C).

<sup>88</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich L Rev 34 (1992).

academic theory surprisingly often and follow instead draw on policies and behavioral generalizations already hardwired into the precedent.

Finally, this Article makes a mixed normative and interpretive claim: American natural-rights theory offers a plausible normative argument justifying the hard harm-benefit distinctions and liability rules one sees in the substantive law regulating foundational property torts; and this argument is especially attractive because it is internal to the rules of decision courts use. But these normative and interpretive arguments also have limits. The interpretive argument will be of interest only to those who believe that normative arguments that inform doctrine internally are superior to normative arguments that do not. More generally, this claim is hypothetical in an important respect: American natural-rights theory provides a convincing normative justification for the basic features of land-use liability law only *if* one presumes that American natural-rights theory is normatively convincing generally. Many comprehensive criticisms have been and could be leveled at American natural-rights theory or its individual ingredients,<sup>89</sup> and it would take several scholarly lifetimes to consider such criticisms. Yet many competent economic studies of law finesse similar criticisms of efficiency, by assuming: “To the extent that you care about efficiency as a value, you should pay attention to the following conclusions.”<sup>90</sup> This Article finesses general criticisms of American natural-rights theory, to focus on how it justifies doctrine in an important point of contact with modern law and economics.

At the same time, this Article does need to explain and justify American natural-rights theory well enough to make it minimally familiar. To strike a balance, the next Part focuses primarily on three particularly salient objections to American natural-rights theory. One type consists of doctrinal questions, which explain how moral natural-rights principles cash out into rules of legal decision relevant to trespassory land torts. Another type anticipates the objections of Coase and contemporary tort economists, and explains the common law’s policy responses in

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<sup>89</sup> For critiques of Lockean labor-desert theory, consider Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford 1995); Stephen R. Munzer, *A Theory of Property* 254-91 (Oxford 1990) (criticizing labor theory enough to make it only one of several components of a pluralist justification for property); Jeremy Waldron, *The Right to Private Property* 137-252 (Oxford 1988) (concluding that labor-desert theory can provide a specific but not a general right to property). For alternative theories of distributive justice, consider especially John Rawls, *Political Liberalism* 298 (Columbia 1992) (claiming that property rights should “allow a sufficient material basis for a sense of personal independence and self-respect,” but not “to include certain rights of acquisition and bequest” or “means of production”); John Rawls, *A Theory of Justice* 303-10 (Harvard 1971) (arguing that the sum of transfers and benefits from essential public goods should be arranged, with a few side constraints, to enhance the expectations of the least favored in society).

<sup>90</sup> Richard Craswell, *If Those are the Answers, then What is the Question?* 112 Yale LJ 903, 906 (2003) (internal quotations not replicated); see also *id.* (describing this type of argument as “necessarily contingent”).

the terms preferred by the leading cases. The last type consists of a fairly thin slice of philosophical questions—primarily category questions from political, ethical, or conceptual philosophy especially relevant to the issues under consideration here.

### III. LAND-USE TORTS AND NATURAL-RIGHTS REGULATION

#### A. The Natural Right to Property

When American trespass and nuisance common law define the possessory interests they protect and the invasions they proscribe, 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. Some scholars have described these jurists' approach as "individualistic,"<sup>91</sup> but that adjective does not explain the law's commitments except in easy cases. Richard Epstein has defended an individualistic approach to nuisance on the basis of corrective justice.<sup>92</sup> But as should be clear from part I.C, this argument claims more from corrective-justice theory than it can deliver without supplementation. It is fairer to say that, when pre-1900 tort law assigns control and use rights to privately-owned land, it uses a general framework of corrective justice to apply an individualistic theory of distributive justice.

The key is to understand the scope of the moral rights to "control" and especially to "enjoy" and "use" in American natural-rights theory. 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),"<sup>93</sup> and that "[t]he measure of property, nature has well set, by the extent of mens labour, and the conveniency of life."<sup>94</sup> As U.S. Supreme Court Justice William Patterson 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

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<sup>91</sup> Goldberg, *supra* note G20C, [91 geo l j] at 520.

<sup>92</sup> See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J Leg Stud 49, 50-53 (1979).

<sup>93</sup> John Locke, *Second Treatise of Civil Government*, in *Two Treatises of Government* § 34, at 291 (Peter Laslett ed Cambridge 1988) (1698). Throughout, quotations will remove uppercase lettering inconsistent with contemporary English usage.

<sup>94</sup> Locke, *Second Treatise* § 36, at 292 (cited in note JLTT).

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.”<sup>95</sup>

For judges like Patterson, “labor” or “industry” has focus because it has at least three characteristics. For one thing, labor has tremendous dynamic potential. Locke refutes the suggestion that it might seem “strange . . . that the property of labour should be able to over-balance the community of land.”<sup>96</sup> He insisted, nevertheless, 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.”<sup>97</sup> (Shortly after, Locke ups the fraction again, to 999/1000.<sup>98</sup>)

Separately, by focusing on man’s common tendencies to acquire, create, and work productively, the interest in “labor” tacitly abstracts from the specific use choices individual owners will make. In this respect, labor is a common selfish passion motivating heterogeneous individual purposes. James Madison makes this connection in an oft-overlooked passage of *Federalist 10*:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results.<sup>99</sup>

As Madison tells it, property rights are legal hedges that facilitate different people applying “diverse” talents and “different and unequal faculties” over similar assets. Human reason can discern that property is always tied to common human tendencies to acquire, work, create, and enjoy, but reason cannot say that any particular legitimate uses of property are intrinsically better than others. In the words of James Wilson, a member of the first Congress and an early U.S. Supreme Court Justice, 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 mechanicks; another, for architecture; one paints; a second

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<sup>95</sup> 2 US (2 Dall) 302, 310 (CCD Pa 1795). See also William H. Taft, *The Right of Private Property*, 3 Mich LJ 215, 220-22 (1894) (sketching a social-compact account of the right to labor).

<sup>96</sup> Locke, *Second Treatise* § 40, at 296 (cited in note JLTT).

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* § 43, at 298.

<sup>99</sup> *The Federalist* No. 10, at 45, 46 (Penguin 1999) (Charles R. Kesler intro & Clinton R. Rossiter ed) (Madison).

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.”<sup>100</sup>

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.<sup>101</sup> Similar limitations can be deduced from secular first principles, by observing, as John Locke does, that man operates in a “state of mediocrity,” in which he can learn only with “judgment and opinion,” not “knowledge and certainty.”<sup>102</sup> 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.”<sup>103</sup>

These concerns limit and guide property regulation. Consider again Madison’s justification for property rights in *Federalist 10*. This justification comes only after Madison observes 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.”<sup>104</sup> While this passage is often cited as anticipating public-choice economics,<sup>105</sup> in context it stresses how hard it is to regulate property given the limits of human knowledge. Man can know that different men have different talents for creating and using property, but man is unlikely to know which uses are best in a given context. In many cases, partisan selfishness certainly overwhelms rational inquiry. But perhaps more fundamentally, selfishness overwhelms rational inquiry because inquiry has little pure rational

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<sup>100</sup> 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 (Lorenzo 1804).

<sup>101</sup> 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 (Encounter 2002).

<sup>102</sup> John Locke, *Essay Concerning Human Understanding* IV.12.10, at 645 (Oxford 1975) (Peter H. Nidditch ed) (1700) (emphases and upper-case lettering removed).

<sup>103</sup> Locke, *Essay Concerning Human Understanding* IV.3.19, at 550 (cited in note ECHU). See also *The Federalist Papers*, No. 37 at 92, 196 (cited in note FP) (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”).

<sup>104</sup> *The Federalist Papers*, No. 10 at 46 (cited in note FP) (Madison).

<sup>105</sup> See, for example, Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 *Harv L Rev* 1328 (1994).

knowledge to work on. Politics operates not with hard scientific knowledge but with soft political “opinions.” In light of these constraints, better that the law as far as possible rely on the knowledge of the people with the closest 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 labor, most of the time the law must send owners a clear, unambiguous, and therefore simple message that may reap what they sow. 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.”<sup>106</sup> This description is helpful, provided that the modern reader understands that “disposition” refers not so much to the “getting rid of” an asset as to the “purposeful engagement” with an asset.<sup>107</sup>

Recently, some conceptual philosophers have described a similar understanding of property as a right to exclude. For example, legal philosopher J.E. Penner has concluded that the “formal essence” of property as a legal institution is “a right to exclude others from things which is grounded by the interest we have in the use of things.”<sup>108</sup> Practically, this definition often dovetails with American natural-rights theory’s. But conceptually, right-to-exclude conceptual theory defines active use and enjoyment out of the core of property. In Penner’s definition, an owner legal property is the right to exclude, but the exclusion is not necessarily for any specific interest. If a right to serves an owner’s interest in use, the use interest sounds in some theory of justice or welfare external to property law strictly construed. By contrast, American natural-rights theory makes moral interests in use and enjoyment the heart of the formal legal property interest. Consider how one 1892 legal encyclopedia defines “property,” as “that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others.”<sup>109</sup> The core of the “property” is the

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<sup>106</sup> James Kent, *2 Commentaries on American Law* 265 (Da Capo 1971 (1826-30)).

<sup>107</sup> J.E. Penner, *The Idea of Property in Law* 70 (Oxford 1997).

<sup>108</sup> Id [Penner] at 72. See also J.W. Harris, *Property and Justice* 13, 141-142 (Clarendon 1996) (defining property as including interests protected by trespassory protections).

<sup>109</sup> 19 *The American and English Encyclopedia of Law* 284 (John Houston Merrill ed., 1892).

“indefinite right of user and disposition.” Contrary to Penner, “exclusion” is helpful (and only “generally” so) in the ancillary role of securing user and disposition.<sup>110</sup>

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

### 1. Boundary Rules and the Rights to Use and Enjoy

These general principles generate different rules of ownership, control, and use for different species of property.<sup>111</sup> In the case of private land, they help explain why land-use tort law tracks the physical-invasion test. 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.”<sup>112</sup> 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.<sup>113</sup> In each case, that standard of freedom is subject to qualification and revision, as will be explained in section III.F. But the standard establishes an important distributive starting presumption. Qualifications are measured by how well they preserve or enlarge free action in relation to the free action the owner would enjoy by being completely untouched.

Let us recapitulate using Wesley Hohfeld’s taxonomy of legal rights.<sup>114</sup> An owner starts with a claim right to be free from unconsented physical invasions, and a reciprocal duty not to

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<sup>110</sup> Compare also *Eaton v. Boston, C. & M. R.R.*, 51 NH 504 (1871) (quoting *Wynehamer v. People*, 13 NY 378, 433 (1856) (Seldon, J.)) (““In a strict legal sense, land is not ‘property,’ but the subject of property. The term ‘property,’ although in common parlance frequently applied to a tract of land or a chattel, in its legal signification ‘means only the rights of the owner in relation to it,’” and above all the “essential quality” of the “the right of indefinite user.”).

<sup>111</sup> See, for example, *Evans v Merriweather*, 4 Ill 492 (1842) (justifying, in a temperate jurisdiction, a rule-of-reason approach to concurrent riparian rights on the basis of natural property rights); *Coffin v Left-Hand Ditch Co.*, 6 Colo 443 (1882) (justifying, in an arid jurisdiction, exclusive prior-appropriation riparian rights on the basis of natural property rights); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 Notre Dame L Rev 1839 (2007) (explaining how, in trademark law, natural-rights labor-desert principles generate a narrow property right in operating one’s business free from competitors in the same market passing off their goods as the trademark holders); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent ‘Privilege’ in Historical Context*, 92 Cornell L Rev 953 (2007) (explaining how, in patent law, natural-rights labor-desert principles entitle an inventor to exclusive control and use over an invention for a limited term).

<sup>112</sup> *Ashby v. White*, 92 Eng. Rep. 126, 137 (1703) (Holt, C.J., dissenting).

<sup>113</sup> 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.

<sup>114</sup> See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* 35-38 (Greenwood Press 1978) (1919) (Walter Wheeler Cook, ed).

inflict unconsented physical invasions on others.<sup>115</sup> 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.<sup>116</sup> Both 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;<sup>117</sup> 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 liberties chosen and used by the owner.<sup>118</sup>

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: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.<sup>119</sup>

English law goes further than Roman law in this regard because it "justly consider[s] that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry."<sup>120</sup>

## 2. Trespass

This understanding explains the first puzzle identified in part I.B: why American land-use common law makes trespasses actionable even when the trespass does not cause any actual damage. As Michigan Supreme Court Justice Thomas Cooley explains in his torts treatise:

Subject every man to the necessity of pointing out in what manner a trespass had caused him a pecuniary injury, and for many of the most vexatious there might be

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<sup>115</sup> See *id.* [Hohfeld] at 38.

<sup>116</sup> See *id.* [Hohfeld] at 73-74.

<sup>117</sup> See *id.* at 38-39.

<sup>118</sup> 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 as such a term. See, for example, 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1067466)).

<sup>119</sup> William Blackstone, 3 *Commentaries on the Laws of England* \*209 (W.S. Hein & Co 1992) (1768) (emphasis added).

<sup>120</sup> *Id.*

no redress and for the rights invaded no protection. Under such a rule the eavesdropper might with impunity invade the privacy of one's home, by listening at key-holes and playing the spy at windows, since acts like these, however annoying and reprehensible, could not in any manner tend to impoverish the family, or deprive them of food, or drink, or clothing, or diminish their current revenue."<sup>121</sup>

Trespass law therefore presumes that "[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."<sup>122</sup>

This understanding explains why courts continue to claim, as the Wisconsin Supreme Court has in *Jacque v. Steenberg Homes*, that "actual harm occurs in every trespass."<sup>123</sup> Accident law and economics presumes that the law ought to maximize the joint productive value of the parties' concurrent uses after discounting for all relevant costs. The common law, by contrast, aims in the first instance to protect in each individual owner a general domain of discretion for his own use and enjoyment. The possessory interest in trespass focuses not on the party's present use but on the free action over the land, which allows the owner to choose among many possible uses. This free action transfers to the 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. In the process, it allows owners to rate intensely personal or subjective uses and enjoyments higher than monetary or fungible uses.

One could argue that right to exclude theory justifies these rules of law as well as or better than American natural-rights theory. Yet if legal "property" consists of a formal right to exclude, that formal right is not sufficient on its own to explain why trespass is so hard-edged. Some normative theory external to property must determine whether exclusion extends to cases in which the plaintiff suffers no actual harm, or in which the plaintiff seeks punitive damages for an intentional trespass.

Indeed, when contemporary cases refer to a "right to exclude," they tacitly equate "the right to exclude" with "exclusive substantive control and enjoyment rights." For example, *Jacque* affirms punitive damages as an appropriate response to "the loss of the individual's right

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<sup>121</sup> Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract* 64 (Rothman & Co 1993) (1880).

<sup>122</sup> *Giddings v Rogalewski*, 158 NW 951, 953 (Mich 1916).

<sup>123</sup> *Jacques v Steenberg Homes, Inc.*, 563 NW2d 154, 160 (Wisc 1999).

to exclude others from his or her property.”<sup>124</sup> But this argument begs the question. The individual’s “right to exclude” could consist only of a liability rule (damages only for actual harm caused) or that rule and also a series of property rules (an injunction for ongoing trespasses, and punitive damages after the fact for intentional boundary invasions). *Jacque* insists on the property rule, but the “right to exclude” contributes to that conclusion only if it is imprecise shorthand for something like (in the words of one older case cited in *Jacque*) the “right to the exclusive enjoyment of his own property.”<sup>125</sup> Consider also 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.<sup>126</sup>

The *Jacque* court reads this analogy to confirm that the wrong lies “in the loss of the individual’s right to exclude others from his or her property.”<sup>127</sup> This reading puts the cart before the horse. The right to exclude *could* be compensated by the halfpenny in the example; if the halfpenny is inadequate, that is because the intentionality of the trespass sends the owner the message that he is not as secure in his control and enjoyment of his paddock as he deserves to be. The *Jacque* court is not quite precise about the concepts it is using, but it is using the “right to exclude” as crude shorthand for *Merest*’s idea of exclusive control and enjoyment.

### 3. Nuisance

The same understanding explains, as accident law and economics cannot, why the possessory interest and the invasion at the core of private nuisance also follow boundary rules. For a variety of reasons, nuisance resists generalization and has a reputation for being an “impenetrable jungle,”<sup>128</sup> 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 that parallels the conception of free control and enjoyment animating trespass. Consider three illustrations. First, most commentators recognize that a nuisance suit ordinarily requires

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<sup>124</sup> Id [Jacques, 563 NW2d] at 159.

<sup>125</sup> *Jacque*, 563 NW2d at 160 (quoting *Diana Shooting Club v Lamoreux*, 89 NW 880 (1902)).

<sup>126</sup> Id 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.)).

<sup>127</sup> Id [at 159].

<sup>128</sup> Keeton et al., § 86, at 616 (cited in note PK).

some physical invasion, smaller and less tangible than a trespass, offending an owner's senses or interfering with her land use.<sup>129</sup> Even with qualifications, nuisance law draws on analogies to bodily cuffs much as trespass does.

Second, in some of the more theoretically revealing nuisance cases, courts justify their decisions by appealing to a concept of active use and enjoyment. Coming to the nuisance is a fair test case, 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, doctrinally, if nuisance law follows the physical-invasion test, the developer suffers a taking of rights as soon as the pollution starts, not later, when she starts developing her lot. Coming to the nuisance doctrine complicates nuisance because it postpones the pollutee's suit until she starts developing, but these complications can be handled as long as the law is straight on the parties' substantive entitlements.

And substantively, the general rule protects in land owners development potential—a zone of choice how to use and enjoy presently undeveloped land in the future. 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.<sup>130</sup>

Again, where 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 choose, within her boundaries, "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, because until the developer develops she *has* no specific ongoing use—just the 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

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<sup>129</sup> See *Adams v. Cleveland-Cliffs Iron Co.*, 602 NW2d 215, 220-21 (Mich. Ct. App. 1999) (suggesting that nuisance and not trespass is the proper doctrinal harbor for "indirect intangible invasions"); Singer, *Property* § 4.4.1, at 271 (4th ed. 2006) (cited in note JS).

<sup>130</sup> *Campbell v Seaman*, 63 NY 568 (1876), quoted in *Ensign v Walls*, 34 NW2d 549, 554 (Mich 1948).

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 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 theory does, that different property uses are dynamic, heterogeneous, and all generally productive, better to protect equal concurrent use potential. As the physical-invasion test protects different uses without rating them on their merits, so it also protects them without giving any owner priority "[j]ust because it happened that [he] arrived in the area first."<sup>131</sup>

Coming to the nuisance also confirms how corrective justice informs tort only in cooperation with distributive justice. Note how the moral grammar runs in *Campbell*: The factory owner "measurably control[s] the uses to which his neighbor's land may in the future be subjected," and "compel[s] his neighbor to leave his land vacant, or to use it in such a way only as the neighboring nuisance will allow." To corrective-justice theorists, active verbs like "control" and "compel" confirm that the factory owner is a moral aggressor and the neighbor the moral victim—a point Coase unwittingly conceded by saying, of *Sturges v. Bridgman*, that the baker's "machinery *disturbed* a doctor."<sup>132</sup> But to skeptics of such arguments, this argument just confirms how empty and question-begging moral language is. Lay people who disagree with the general rule might say with equal plausibility that the plaintiffs in these cases "sandbag" the defendants by suing long after the latter's machinery is built and paid for. The moral content of language, and the corrective function of nuisance, prefer "compel" and "disturb" over "sandbag" because they distribute to the parties substantive rights shaped by American natural-rights theory. Because the developer or doctor has a right to choose "the uses to which [his] land may in the future be subjected," early pollution unjustifiably "controls" the free exercise of a focused moral right.

#### 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. Given current

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<sup>131</sup> *Kellogg v Village of Viola*, 227 NW2d 55, 58 (Wis 1975).

<sup>132</sup> Richard A. Epstein, *A Theory of Strict Liability*, 2 J Leg Stud 151, 165 (1973) (quoting Coase, *Social Cost* at 96 (cited in note CSC)). In fairness, Epstein has receded from this position and now holds that language cannot provide a focused account of legal rights without a thorough utilitarian justification for such rights. See Richard A. Epstein, *Causation—In Context: An Afterword*, 63 Chi-Kent L Rev 653, 657-58, 664-66 (1987).

doctrine, it would be quite easy for courts to encourage sight nuisances. The *Restatement of Torts* recasts nuisance law to make actions factor heavily the competing social values of the conflicting land uses of the plaintiff and the defendant.<sup>133</sup> Because the *Restatement* balances interests, it would be quite easy to declare eyesores noxious on the ground that they have negative social value.

But again, courts stubbornly refuse to do so—and when they refuse, they appeal to inchoate arguments about the character of labor as understood in American natural-rights theory. In one case about access to sunlight for passive solar heating, a court rejected an argument based on the *Restatement* by finding that the deciding policy value 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.”<sup>134</sup> The court paid lip service to utilitarian interest balancing, but it decided that a general libertarian policy of freedom of action outweighed all the specific policy interests hanging in the balance. Some courts make the same move by stressing that property facilitates concurrent heterogeneous individual uses: “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.”<sup>135</sup> Others 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 neighbors . . . .<sup>136</sup>

These arguments do not follow directly from corrective justice—which, as suggested in Part II.B, allows different communities to disagree about whether an ugly sculpture or house counts as a nuisance. Nor do they follow from accident law and economics, which, as part I.B suggested, logically applies the same analysis to visual externalities as it prescribes for pollution externalities. Courts assume that they can regulate complaints about smoke or vibrations in a more focused and predictable fashion than they can complaints about lights or sights. They assume that “property” distributes to owners not only a right actively to use one’s own but a duty

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<sup>133</sup> See *Restatement (Second) of Torts*, §§ 826(a), 827-28 (cited in note RST).

<sup>134</sup> *Sher v Leiderman*, 226 Cal Rptr 698, 704 (Ct App 1986).

<sup>135</sup> *Green v Castle Concrete Co*, 509 P2d 588 (Colo 1973).

<sup>136</sup> *Mohr v. Midas Realty Co.*, 431 N.W.2d (Iowa 1988).

to abstain from complaining about how others actively use their own. Boundary rules serve these functions.

### C. Causation

The principle of free use and enjoyment establishes the plaintiff's possessory interest, and it establishes a clear harm-benefit distinction around the idea that a "harm" occurs when a defendant diminishes a plaintiff's discretion to use and enjoy his own. Those principles logically make causation unidirectional. Causation then does not focus on how many parties contributed to an accident or an economic loss; it focuses on which parties contribute to any party's loss of the free use or enjoyment to which she is entitled.

While this relation is assumed in easy cases, it becomes explicit in theoretically revealing cases. *Campbell v. Seaman* confirms as much by portraying the defendant 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."<sup>137</sup> The brick maker is an active, causative, and culpable agent because he is diminishing a prior moral entitlement the plaintiff holds to moral discretion in relation to her land.

Accident law and economists have resisted such moral-grammar arguments, saying that such arguments neither explain nor justify "any simple general theory of nonreciprocity, which is needed to define the limits of Coase."<sup>138</sup> But the arguments they criticize make far more sense when understood in context of the distributive claims of American natural-rights theory. Conceptually, a two-party accident has joint causation if for no other reason than that there are two parties involved. 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 domains of moral discretion. In that context, cause focuses on the conduct of the party who takes another party's rights.

This discrepancy comes out in sparks cases, because 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. That fact makes powerful *Social Cost's* suggestion that causation is reciprocal. Indeed, one nineteenth-century sparks case anticipates Coase, limiting the plaintiff's right to recovery on the ground that "the burning of said hay was the result of the acts

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<sup>137</sup> cite

<sup>138</sup> Vogel, *supra* note KV, at 152.

and omissions of *both* the plaintiffs and the defendant.”<sup>139</sup> 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.”<sup>140</sup> 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 and accident-causing boundary invasions; the train does not. So *LeRoy Fibre* designates the “immediate” cause of injury the action of the party who acted outside the scope of its moral rights.<sup>141</sup>

#### D. Scienter

American natural-rights theory also explains why the basic land-use torts strongly prefer strict liability over negligence. Any trespassory invasion of the land—faulty, specifically intentional, or otherwise—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 need not plan.<sup>142</sup> 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, for “the purpose of civil law looks to compensation for the injured party regardless of the intent on the part of the trespass.”<sup>143</sup> 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.”<sup>144</sup>

These passages go against a general impression among lawyers that, although English law favors strict liability as the dominant paradigm for accident cases,<sup>145</sup> American law prefers

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<sup>139</sup> *Kansas Pacific Ry. v Brady*, 17 Kan 380, 386 (1877).

<sup>140</sup> *LeRoy Fibre*, 232 US at 348 (emphasis added).

<sup>141</sup> For more recent cases, consider *Zimmerman v. Stephenson*, 403 P2d 343, 346 (Wash 1965).

<sup>142</sup> 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.

<sup>143</sup> *Cleveland Park Club*, 165 A2d at 488.

<sup>144</sup> *Jost v Dairyland Power Coop.*, 172 NW2d 647, 652 (Wis 1970) (quoting *Pennoyer v Allen*, 14 NW 609, 613 (Wis 1883)) (emphasis added).

<sup>145</sup> See, for example, *Fletcher v Rylands*, 159 Eng Rep 737 (Ex 1865), aff’d, LR 1 Ex 265 (1866).

negligence.<sup>146</sup> Some of the foundational American cases even justify that preference with natural-law and –rights arguments.<sup>147</sup> These cases anticipate contemporary scholarship, by corrective-justice theorists, concluding that strict liability is incompatible with the phenomenon of moral agency.<sup>148</sup> Nevertheless, it is still fair to say that strict-liability principles govern in foundational land-use torts. Although the following treatment is not comprehensive, it does explain why it is plausible for basic land-use liability to use strict liability.

American natural-rights theory does not prescribe any one-size-fits-all rule regarding intent. Simple land-use conflicts present an area where strict liability is more appropriate. The *prima facie* cases for trespass and nuisance presume a situation in which the plaintiff is enjoying his land quietly and passively, and the defendant undertakes some trespassory act jeopardizing that enjoyment. Without any qualifications, there is no reason to think that the plaintiff benefits in any way that might offset the diminution she suffers to her enjoyment and free action. Again, without qualifications, the defendant is morally more culpable than the plaintiff. To say otherwise is to conflate legal fault with moral fault. General principles of natural law and corrective justice may certainly require the law to find moral fault before shifting the plaintiff’s loss to the defendant. But different standards of legal scienter may track moral standards of fault in different situations.

These observations help explain many subtle variations in land-use torts. It explains why fire-starting children and other trespassers are held strictly liable for their trespasses. It also explains why American flood cases buck the general preference for negligence and employ strict liability.<sup>149</sup> The water holder is morally culpable merely for creating the risk of flood. Strict liability captures this moral culpability better than negligence does. This approach also explains, as neither accident law and economics nor corrective-justice theory can, how scienter varied in

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<sup>146</sup> See, for example, Morton Horwitz, *The Transformation of American Law, 1780-1860*, at 85-108 (Harvard 1977); Lawrence M. Friedman, *A History of American Law* 409-27 (Simon & Schuster 1973). I am grateful to Peter Wiedenbeck and Richard Epstein for encouraging me to consider the objection discussed in this paragraph.

<sup>147</sup> *Losee v Buchanan*, 51 NY 476, 485 (1873) (“By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state.”).

<sup>148</sup> See, for example, Weinrib at 176-77 (cited in note EW); see generally *id* at 175-96.

<sup>149</sup> Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 Yale LJ 333, 342-46, 362-68 (2000). Cite also [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=998625](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998625)

sparks cases. Although sparks cases generally required negligence in the *prima facie* case,<sup>150</sup> many state courts instituted *res ipsa loquitur* or other doctrines to shift to the railroad the burden to prove it was not negligent.<sup>151</sup> When courts refrained from making this move, as James Ely has recounted,<sup>152</sup> legislatures often instructed their courts to use strict liability instead.<sup>153</sup> In 1897, the U.S. Supreme Court dismissed a constitutional property-rights challenge to one such law consistent with the passive-plaintiff/active-defendant logic just described:

When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments.<sup>154</sup>

#### 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, simply on the ground that the invasion diminishes his general discretion to choose among his many possible use-liberties. If the defendant may plead contributory negligence, that claim right is converted into an exposure, *in personam*, whenever reasonable prudence requires the plaintiff to minimize the risk of accident in relation to the defendant’s land use. 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.”<sup>155</sup>

Sparks cases highlight the policy concerns particularly clearly. When, in *LeRoy Fibre*, Justice McKenna calls it “an anomaly” to say “that one’s uses of his property may be subject to

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<sup>150</sup> See *LeRoy Fibre*, 232 U.S. at 340; *Kellogg*, 26 Wis at 233; *Philadelphia & R. R.R. Co. v Hendrickson*, 80 Pa 182 (1876).

<sup>151</sup> See, for example, *St. Louis, Vandalia & Terre Haute R.R. Co. v Funk*, 85 Ill 460 (1877); *Ruffner v Cincinnati, H & D RR Co.*, 34 Ohio St 96 (1877); *Burlington & M RR v Westover*, 4 Neb 268 (1876).

<sup>152</sup> See James W. Ely, Jr., *Railroads and American Law* 123-25 (Kansas 2001).

<sup>153</sup> See, for example, An act to revise the laws providing for the incorporation of railroad companies, no. 198, Laws of Michigan 1873 (shifting the burden); An act in addition to an act concerning railroad corporation, Ch. 85, Laws of Massachusetts, 1840, both cited in Ely, *Railroads and American Law* at 123-24 (cited in note --).

<sup>154</sup> *St. Louis & S.F. Ry. Co. v Mathews*, 165 US 1, 26 (1897), cited in Ely, *Railroads and American Law* at 124 (cited in note --).

<sup>155</sup> *Marshall v Ranne*, 511 SW2d 255, 260 (Tex 1974).

the servitude of the wrongful use of another of his property.”<sup>156</sup> The land owner’s moral discretion 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.<sup>157</sup> 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?”<sup>158</sup>

#### 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 theory allows such rules to be qualified. American natural-rights theory justifies property in terms of a moral interest in labor. In simple cases, coarse boundary rules enlarge that interest. In these cases, “labor” reflects a broad but shallow moral interest in being left alone, to apply one’s selfish and productive energies to satisfy one’s own reasonably useful needs. But as more information becomes available, the law may identify specific uses—or, more likely, common features of different uses—that track owners’ common interests. For example, owners all share a common interest in a clear and orderly conveyancing system. Surveys and title fees may be expensive, and the conveyancing process limits how an owner may sell, but the formalities make title ownership more secure than it would otherwise be. These formalities also manage to enlarge the security of all owners no matter to what purposes they plan to deploy their property. Thus, even if “[t]he original of private property is probably founded in nature,” as Blackstone suggests, natural law and rights justify certain “modifications,” specifically including the method “of translating it from man to man.”<sup>159</sup>

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<sup>156</sup> *LeRoy Fibre*, 232 US at 349.

<sup>157</sup> *LeRoy Fibre*, 232 US at 354 (Holmes, J., concurring).

<sup>158</sup> *LeRoy Fibre*, 232 US at 350.

<sup>159</sup> Blackstone, 1 *Commentaries* at \*134 (cited in note BC).

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 interest an owner gets from the *ad coelum* rule with a more focused interest, law makers must be reasonably and practically certain that the focused interest really enlarges the affected parties' interests. The U.S. Supreme Court used to use substantive due process to judge legislative property regulations by whether they "secur[ed] an average reciprocity of advantage."<sup>160</sup> Conveyancing laws secure such average reciprocity. In trespass and nuisance, if the law means to depart from the *ad coelum* rule, the variations are allowable only if they secure to owners throughout the area as much or more freedom to use their property for their likely uses than they would have under uniform entry and pollution standards.

## 2. Nuisance

These principles go a long way in explaining why nuisance principles are more fine-grained than trespass rules. 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. Nuisance also differs from trespass in that the latter deals with substantial physical invasions, while the former usually deals with low-level, non-particulate physical invasions.<sup>161</sup>

These variations enlarge land owners' moral interest in freely using and enjoying their land. While unconsented smells, noise, and smoke can seriously interfere with an owner's enjoyment of her land, ordinarily, they do not threaten her control or dominion as drastically as does an unconsented personal entry like the field crossing in *Jacque*. The harm and unreasonability elements focus nuisance law on smells and other disturbances that *do* threaten to dispossess owners as greatly as trespasses do.<sup>162</sup> Conversely, by shrinking neighbors' formal right 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

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<sup>160</sup> *Penn. Coal Co. v Mahon*, 260 US 393, 415 (1922).

<sup>161</sup> See, for example, *Adams v Cleveland-Cliffs Iron Co.*, 237 Mich App 51, 602 NW2d 215 (1999); *Smith v New England Aircraft Co.*, 270 Mass 511, 170 NE 385, 388 (1930).

<sup>162</sup> J.E. Penner suggests that substantial pollution nuisances are tantamount to dispossessions, in *Nuisance and the Character of the Neighborhood*, 5 J Envtl L 1, 21-22 (1993). American natural-rights theory conceives of the harm slightly differently. American natural-rights theory 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.

with an exposure to low-level smoke and a liberty to emit it than he would have been with a broader claim right. Here, as in *Jacque*, the formal legal right to exclude is not sufficient to explain the law by itself; it must be supplemented by a substantive legal interest in use and enjoyment. In the words of one prominent English opinion, nuisance hardwires into the law a “give and take, live and let live” regime, to enlarge mutually for all owners “the common and ordinary use and occupation of land.”<sup>163</sup>

This understanding is confirmed considerably by how the “unreasonability” element operates in practice. 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.<sup>164</sup> In practice, however, at least at the liability stage,<sup>165</sup> 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.”<sup>166</sup> 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.<sup>167</sup> The latter inquiry is easier to answer and less political than the former. Of course, substantiality is just one of many factors relevant to unreasonability, which often requires all-the-circumstances balancing. But it is surprising how often substantiality trumps other factors in the balance. In one 1982 case, a New Jersey appeals court

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<sup>163</sup> *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 based negligence suits follow general principles of negligence and not trespass, by requiring proof of actual harm. To enlarge their free use of their own lands, owners must sacrifice the right to challenge conduct that negligently threatens to create accidents disrupting their use and enjoyment without actually doing so.

<sup>164</sup> See *Restatement (Second) of Torts* §§ 827-28 (cited in note RST).

<sup>165</sup> 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.*, 26 NY2d 219, 257 NE2d 870 (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).

<sup>166</sup> See for example *Pestey v Cushman*, 259 Conn 345, 788 A2d 496, 508 (2002).

<sup>167</sup> See for example *Pestey*, 788 A2d 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”).

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.<sup>168</sup>

The same institutional logic also explains some of the more important variations on the basic nuisance cause of action. It explains why coming to the nuisance doctrine prevents a land developer from exercising his right to exclude until he imminently means to develop his undeveloped lot. The delay frees the manufacturer to be productive in an area where fewer people will be harmed, and it aligns the developer’s legal rights with his financial interests in actively developing his land.<sup>169</sup>

The same logic is illustrated most powerfully in 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.<sup>170</sup> As with the harm and substantiality element, these rules also narrow the 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 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.”<sup>171</sup> 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.”<sup>172</sup>

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<sup>168</sup> *Rose v Chaikin*, 187 NJ Super 210, 453 A2d 1378, 1382 (Super Ch 1982).

<sup>169</sup> See Claeys, 88 Corn L Rev at 1607-15 (cited in note CRT).

<sup>170</sup> See, for example, *Rose*, 453 A2d at 1382; *Jewett v Deerhorn Enterps, Inc*, 281 Or 469, 575 P2d 164, 166-68 (1978); *Restatement (Second) of Torts* §§ 827(d), 828(b) (cited in note RST).

<sup>171</sup> *Gilbert v Showerman*, 23 Mich 448, 452-53, 1871 WL 5622.

<sup>172</sup> *Id* at 454.

These moral principles can also justify departing from the *ad coelum* rule in the other direction—to make non-invasions nuisances in some cases. For example,<sup>173</sup> 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.<sup>174</sup> In such cases,

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.<sup>175</sup>

Spite-fence cases are important in another respect: Where trespass punitive-damage rules and nuisance locality rules show that the formal right to exclude is not sufficient to explain the property interests in land-use torts, spite-fence cases show that this right is not always necessary to legal property, either. Because legal property protects “user and disposition” primarily and “the exclusion of all others” only “generally,”<sup>176</sup> legal property may include an *in rem* right to be free from non-invasive but malicious disturbances to use or enjoyment. One might say that this interest cannot be a property right because it is not organized around a formal right to exclude. But conceptually, the right to exclude needs to be judged by how well it clarifies the structures foundational in doctrine, not the other way around. For spite fences, nuisance law makes a narrow exception: They “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.”<sup>177</sup> One might also say that spite-fence doctrine allows the owner to exclude spiteful behavior, but that would stretch traditional notions of exclusion so much as to make the right to exclude non-falsifiable.

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<sup>173</sup> Another practically important example comes in the law of lateral support. This doctrine secures to each land owner use and enjoyment of his own soil by imposing on each a duty not to undermine his neighbors' land in its natural state. Like spite-fence law, the use right is not protected by a right to exclude. Like coming to the nuisance, it refrains from giving early builders servitudes over late builders by refraining from imposing on the latter a duty to support the artificial structures of the former. See, for example, John E. Cribbet et al, *Property* 691-98 (Foundation 2008) (9<sup>th</sup> ed).

<sup>174</sup> See *Hullinger v Prahl*, 89 SD 443, 233 NW2d 584, 585 (1975); 1 *Am Jur 2d Adjoining Landowners* § 111 (West 2007).

<sup>175</sup> *Whitlock v Uhle*, 75 Conn. 423, 53 A 891, 892 (1903) (emphasis added), cited in *DeCecco v Beach*, 17 Conn 29, 381 A2d 543, 545 (1977).

<sup>176</sup> 19 *The American and English Encyclopedia of Law* at 284.

<sup>177</sup> *Burke v Smith*, 69 Mich 380, 37 NW 838, 842 (1888) (emphasis added); see also *Sundowner v King*, 95 Idaho 367, 509 P2d 785, 786 (1973) (describing *Burke* as representing “clearly the prevailing modern view”).

### 3. Trespass

Although trespass law preserves sharper boundaries than nuisance, on occasion even it allows qualifications to the *ad coelum* rule. 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 damage<sup>178</sup> or if the animal's owner specifically intends that the animal trespass.<sup>179</sup> These rules deviate from *Jacque*'s general presumption that "actual harm occurs in every trespass."<sup>180</sup> 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 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 the *ad coelum* rule. Some American jurisdictions reversed the *ad coelum* rule 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.<sup>181</sup> These rules operate similarly to nuisance's locality rules.<sup>182</sup> 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

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<sup>178</sup> See for example *Griffin v Martin*, 7 Barb 297 (NY 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); Prosser et al., *The Law of Torts* § 76, at 539 & nn. 8-13 (cited in note PK).

<sup>179</sup> See, for example, *Lazarus v Phelps*, 152 US 81 (1894); *Monroe v Cannon*, 61 P 863, 864-65 (Mont 1900).

<sup>180</sup> *Jacque v Steenberg Homes, Inc.*, 563 NW2d 144, 160 (Wisc 1997).

<sup>181</sup> See, for example, *Larson-Murphy v Steiner*, 303 Mont 96, 15 P3d 1205, 1213 (2000); *Garcia v Sumrall*, 58 Ariz 526, 121 P2d 640, 644 (1942); *Restatement of the Law (Third) of Torts* § 21 cmt c, at 330-33 (cited in note RTT).

<sup>182</sup> See, for example, *Griffin v Martin*, 7 Barb 297 (NY 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, xx (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).

may wish to cultivate.”<sup>183</sup> 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 contrary to right to exclude conceptual theory, control and enjoyment are necessary to predict when boundary invasions are or are not actionable. As with *Jacque*’s punitive-damage rule and nuisance’s locality rules, the right to exclude is not sufficient by itself.<sup>184</sup>

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.*,<sup>185</sup> the Massachusetts Supreme Court notes that air travel is valuable “as a means of transportation of persons and commodities.”<sup>186</sup> 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.”<sup>187</sup> 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.”<sup>188</sup>

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.<sup>189</sup> In context, this suggestion criticizes common law trespass case law for making rights claims that do not take sufficient account of the public consequences of legal rules. Coase assumes that public

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<sup>183</sup> *Smith v Bivens*, 56 F 352, 356 (CC 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,” and then examines whether the law secures him a reciprocity of advantage. *Id*; see *id* at 356-57.

<sup>184</sup> See *Smith*, 56 F at 356.

<sup>185</sup> 270 Mass 511, 170 NE 385 (1930). See also *Restatement (First) of Torts* § 194 (1934); Harvey, 56 Mich L Rev 1313 (1958). Note that *Smith* uses state and federal altitude regulations to abrogate land owners’ claims in trespass, and then uses substantive due process “reciprocity of advantage” principles to limit the extent to which the regulations may abrogate property rights without compensation. The constitutional reciprocity of advantage principles promote in the constitutional law the moral interests normally protected in trespass law. See above notes – and accompanying text.

<sup>186</sup> *Smith*, 170 NE at 388.

<sup>187</sup> *Id* at 389.

<sup>188</sup> *Id* at 393.

<sup>189</sup> Coase, *Social Cost* at 128-32 (cited in note CSC). While Coase cites and treats other overflight cases, *Smith* provides the best point of contact with American natural-rights theory.

policy can efficiently promote specific, first-order 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 goal—the protection of individual citizens' free exercise of the discretionary choice they get from their rights. In theory, the law may still promote first-order goals, but only if it is reasonably and practically certain that doing so will not disrupt second-order goals. In practice, to ensure that the law does not make the best the enemy of the good, it needs to guarantee that first-order goals contribute to the interests protected by second-order liberty and property 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.<sup>190</sup> 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 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 lower and more solid terms than is usually presumed in “utilitarian” policy analysis.

#### 4. The Philosophical and Conceptual Bases for Qualifying Rights

These standards for qualifying rights are subject to many possible criticisms. For example, Robert Bone has portrayed pre-1900 nuisance law as oscillating between two extremes: Some cases claim that property rights are “absolute” and brook no qualifications, while others qualify rights heavily because all rights are “relative” to contextual social factors.<sup>191</sup> One must be careful here to avoid anachronisms. In some contexts, nineteenth-century legal discourse did use “absolute” and “relative” consistent with modern usage—the former being a synonym and the latter an antonym for “inalienable,” or “something which the government may forcibly transfer.”<sup>192</sup> In other contexts, however, nineteenth-century American law used “absolute” to

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<sup>190</sup> 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”).

<sup>191</sup> See Robert Bone, *Nineteenth-Century Nuisance Doctrine*, 59 S Cal L Rev 1101, 1106 (1985) (contrasting between “absolute” and “social and relational” rights).

<sup>192</sup> Compare for example *Eaton v Boston, C. & M. R.R.*, 51 NH 504 (1871) (quoting *Wynehamer v People*, 13 NY 378, 433 (1856) (Seldon, J.)) (“Then, he had an unlimited right; now he has only a limited right. His absolute

refer to a right that arises solely out of a person's own individual liberty and his self-regarding faculties--say, personal security or reputation. A "relative" right, by contrast, refers to a right that arises out of the social interactions of two or more people—say, marriage, or the legal consequences of an employment relation.<sup>193</sup> According to these definitions, property is a hybrid right. The natural right to labor is absolute, but labor cannot be secured without regulations establishing an owner's positive-law rights "relative" to neighbors in society.<sup>194</sup> Given this context, in simple pollution cases, the pollution threatens the plaintiff's "absolute" interests in use and enjoyment. But in locality-rule cases and other cases where qualifications are appropriate, the doctrines are made "relative" to enlarge neighbors' concurrent, free, and equal use of their property. These general distinctions explain the vast run of pre-1900 American nuisance law better than an approach that sorts jurisdictions out as "absolute" or "relative."

Separately, one could object that "natural law" and "natural rights" cannot allow forced transfers of legal rights without undermining the moral content of natural property rights.<sup>195</sup> Many legal scholars assume that moral theories of rights make sense only if justified in reference to deontological theories of morality.<sup>196</sup> Deontological theories hold that some actions are intrinsically wrong or right, with wrongness and rightness determined substantially independent from the consequences of the actions; they contrast with consequentialist theories, which generate policy prescriptions by comparing the general public consequences of various actions.<sup>197</sup> Many doubt that deontological theories of morality can justify qualifications on deontological rights claims. For instance, Richard Epstein has justified a regime of rights and qualifications similar to the regime sketched in this section. He justifies the *ad coelum* rule in reference to a general principle of "corrective justice"; he then relaxes strict boundary rights in

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ownership has been reduced to a qualified ownership.") with *Thompson v Androscoggin River Improvement Co.*, 54 NH 545 (1874) ("Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges.").

<sup>193</sup> See for example, Kent, 2 *Commentaries on American Law* at 1 (cited in KC) (defining "absolute" as "being such as belong to individuals in a single unconnected state" and "relative" as "being those which arise from the civil and domestic relations"); 2 *id* at 10-12, 33 (providing examples); Blackstone, 1 *Commentaries* at \*119-\*124 (cited in note BC); Burns, 54 U Cin L Rev 67, 71-73.

<sup>194</sup> See Blackstone, 1 *Commentaries* at \*134 (cited in note BC) (conceding that while "[t]he original of private property is probably founded in nature . . . certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society").

<sup>195</sup> I am grateful to Larry May and Dennis Tuchler for encouraging me to consider the objection in this section.

<sup>196</sup> See for example Weinrib, *Idea of Private Law* ch 4, at 84-113 (cited in note EW IPL) (grounding rights claims in a theory of right relying on Immanuel Kant, *The Metaphysics of Morals* (Cambridge 1991) (Mary Gregor, trans); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 Va L Rev 1391 (2006) (drawing on the political theory of Kant and Rawls to limn the relation between private rights and state action).

<sup>197</sup> See for example John Rawls, *A Theory of Justice* 24-30 (Harvard 1971).

locality-rule cases and other cases by using “utilitarian” limitations based on the principle of implicit in-kind compensation.<sup>198</sup> Epstein’s treatment seems to mix philosophical apples and oranges; perhaps American natural-rights theory suffers from one or more of these criticisms.

This criticism miscategorizes many theories of politics and ethics subsumed within American natural-rights theory. Not all theories of morality rest on deontological grounds. Some justify moral rules by their tendency to promote personal interests that conduce to human happiness, both individually and socially. This subject requires more elaboration than can be provided here. As a quick and dirty substitute for elaborate philosophical argument, however, consider the ridicule that deontological moral philosophy sometimes gets from virtue ethicists<sup>199</sup> or natural-law ethicists.<sup>200</sup> Such ethicists assume that political and ethical rules can be justified only by their tendency to increase human happiness; that such happiness cannot be understood without a well-developed account of human psychology that is both explanatory and normative; and that universal deontological claims are impoverished because they abstract from such psychology. In these respects, Locke<sup>201</sup> and many other progenitors of American natural-rights theory<sup>202</sup> are better understood (with appropriate qualifications) as consequentialists who judged moral claims by their tendency to enlarge man’s happiness.

By these standards, the natural right to property is a moral interest even if it is not a deontological claim right. Each person has an interest, which rationally considered is reasonable

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<sup>198</sup> See Epstein, 8 JLS at 57-58, 90-91 (cited in REN).

<sup>199</sup> See, for example, G.E. Anscombe, *Modern Moral Philosophy*, 23 *Philosophy* 1 (1958) (complaining that Kant’s deontological theory of political obligation is “useless without stipulations as to what shall count as a relevant description of an action with a view to constructing a maxim about it,” and that Kantian ethical philosophy is often not “equipped with a sound philosophy of psychology”).

<sup>200</sup> See, for example, Alasdair MacIntyre, *Hume on the ‘Is’ and the ‘Ought’*, in *Against the Self-Images of the Age* 109, 124 (Notre Dame 1978) (criticizing moral philosophy influenced by Kant for making “the autonomy of ethics . . . logically independent of any assertions about human nature,” and praising Hume and Aristotle because they “seek[] to preserve morality as something psychologically intelligible”).

<sup>201</sup> See, for example, Peter C. Myers, *Our Only Star and Compass: Locke and the Struggle for Political Rationality* 37-65, 137-77 (Rowman & Littlefield, 1998); John Colman, *John Locke’s Moral Philosophy* 195-96 (Edinburgh 1983). The conventional wisdom probably continues to hold that Locke is a deontologist. See, for example, Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke’s Political Thought* 102 (Cambridge 2002) (doubting that utilitarian theory can provide a competent theory of morality); id at 225 (claiming that “Locke sees divine sanctions as key to the whole enterprise of morality and natural law”). For scholarship criticizing this view, see Nomi M. Stolzenberg & Gideon Yaffe, *Waldron’s Locke and Locke’s Waldron: A Review of Jeremy Waldron’s God, Locke, and Equality*, 49 *Inquiry* 186, 197-202 (2006); Eric R. Claeys, *The Private Society and the Public Good in John Locke’s Thought*, *Soc Phil & Pol’y* (forthcoming 2008).

<sup>202</sup> See, for example, Kent, 2 *Commentaries on American Law* at 257 (“The sense of property is graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. . . . [Property] leads to the cultivation of the earth, the institution of government, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce . . .”).

and useful, in using his selfish energies to preserve himself and enlarge his free action as a moral agent.<sup>203</sup> Natural property rights are moral rights because each owner owes an obligation to respect this interest in others for the sake of the common good, which in turn is understood as the concurrent exercise by individuals of their free and equal rights.<sup>204</sup> In basic land-use torts, owners' interest in the active use and enjoyment of their land normally requires clear boundary rules. But the rules may be varied when residential patterns, cattle use patterns, air travel, or other land-use patterns suggest that more qualified rules may better advance the underlying moral interests. This approach need not be a mishmash of deontology and utility; it may appropriately be understood as a consequentialist approach promoting the exercise of freedom in the service of human happiness reasonably understood.

#### IV. ACCIDENT LAW AND ECONOMICS RECONSIDERED

##### A. The Tension Between Private Ordering and Expert Supervision

So American natural-rights theory certainly does not generate mush. All the same, a theory of law may be wrong even if it is not mushy. So let us consider whether accident law and economics makes up for its explanatory deficiencies with normative criticisms not adequately considered in American natural-rights theory. Before proceeding, let us consider some of the limits of the following normative comparison. Some were sketched in part II.C. There is also another complicating factor, that “labor,” “use,” and “enjoyment” may or may not be commensurable with “wealth,” “utility,” “efficiency,” and other key foundational concepts in law and economics. Even with these reservations, American natural-rights theory and accident law and economics differ in important ways along another continuum—the extent to which a theory of regulation relies on expert-driven regulation or private ordering.

This difference, it should be added, is *not* a difference between economics generally and philosophy generally. Different economic methodologies do differ intramurally about the choice between expertise and ordering, and so do different theories of justice. Here, general accounts of human behavior and psychology matter more than whether such accounts are being used to analyze ethics or social welfare. As Jules Coleman explains, “[o]nce we realize that welfare is

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<sup>203</sup> See, for example, Wilson, 1 *Lectures on Law* at 293 (cited in note JW) (describing man's natural “propensity to store up the means of his subsistence” as “essential, in order to incite us to provide comfortably for ourselves, and for those who depend on us”); Locke, *Two Treatises* at I.86, at 205 (cited in JLTT) (suggesting that property is “founded in [man's right] to make use of those things, that [a]re necessary or useful to his Being”).

<sup>204</sup> See, for example, Wilson, 1 *Lectures on Law* at 302 (cited in note JW) (describing “the wisest and most benign constitution of a rational and moral system” as one in which “the degree of private affection, most useful to the individual, is, at the same time, consistent with the greatest interest of the system” and vice versa).

connected to a person's interest—what is good for him, and not merely to what he desires or to his gratification or joy—it should be clear that whatever it is in that account that explains the value of welfare explains as well the importance of the law's regulating human affairs according to various principles of justice and fairness."<sup>205</sup> When American natural-rights theory explains why the natural right to "labor" is a useful and moral interest, it does so in large part by relying on behavioral generalizations that can inform economic analyses of property as well.

There is an irony here. American natural-rights theory 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.<sup>206</sup> That general perception helped to justify approaches to legal and social planning more centralized than seems realistic within American natural-rights theory. Yet even as that theory was being replaced, scholars who had no reason to know about it started to raise serious doubts about centralized planning. They did so relying on generalizations about human behavior strikingly similar to American natural-rights theory'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."<sup>207</sup> 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."<sup>208</sup> 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 discrepancy. 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 theory. The decisive break between American natural-rights theory 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 theory and propounded in its

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<sup>205</sup> Coleman, 112 Yale LJ at 1543 (cited in note XX).

<sup>206</sup> See for example Goldberg, 91 Geo LJ at 519 (cited in note JG20C).

<sup>207</sup> See F.A. Hayek, *The Use of Knowledge in Society*, 35 Am Econ Rev 519, 520 (1945).

<sup>208</sup> Id.

place new theories of democracy and administration.<sup>209</sup> 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.<sup>210</sup>

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.<sup>211</sup> William Landes and Richard Posner approvingly cite tort scholarship from this period as “protoeconomic,” and as important “antecedents of the positive economic theory of law.”<sup>212</sup>

### C. 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 a “bundle of rights” package first articulated by prominent Legal Realists.

While Legal Realism is difficult to pin down,<sup>213</sup> 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

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<sup>209</sup> See, for example, Charles Edward Merriam, *A History of American Political Theories* 307 (A.M. Kelley 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* (Transaction 2005) (John A. Rohr ed) (1900); Woodrow Wilson, “The Study of Administration,” in *Woodrow Wilson: The Essential Political Writings* 231 (Rowman & Littlefield 2005) (Ronald J. Pestritto ed) (originally published in 2 Pol Sci Q 201 (1887)).

<sup>210</sup> See for example Goodnow, at 18, 88 (cited in note FG); Wilson at 240-45 (cited in note WWPA). See also Dennis J. Mahoney, *Politics and Progress: The Emergence of American Political Science* (Lexington 2004); David A. Ricci, *The Tragedy of Political Science: Politics, Scholarship, and Democracy* (Yale 1984); Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 3-114 (Kentucky 1972); John Marini, *Progressivism, Modern Political Science, and the Transformation of American Constitutionalism*, in *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* 221-51 (Rowman & Littlefield 2005) (John Marini & Ken Masugi eds).

<sup>211</sup> Ernest Weinrib, *Understanding Tort Law*, 23 Valparaiso U L Rev 485, 485-88 (1989).

<sup>212</sup> Landes & Posner, *Economic Structure of Tort Law* at 4 & nn 9-11 (cited in note LP) (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)).

<sup>213</sup> 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).

expounded in *Van Horne's Lessee*:<sup>214</sup> “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.”<sup>215</sup> The Realists therefore needed to replace the “lay” view of property that informed cases like *Van Horne's Lessee* with a theory that facilitated greater “scientific” supervision of property.<sup>216</sup>

Different Realists propounded different theories. One is now known as the “bundle of rights” approach. Wesley Hohfeld developed the taxonomy of legal obligations used in Part III.B—including correlative claim rights and duties, and correlative liberties and exposures.<sup>217</sup> As applied to property, Hohfeld used this taxonomy to recast *in rem* rights of exclusive use into clusters of *in personam* permissions, to use or alienate assets for specific purposes, in relation to particular claimants on the asset.<sup>218</sup> Although Hohfeld never used the phrase “bundle of rights” himself,<sup>219</sup> Hohfeld’s contemporaries did and gave him attribution.<sup>220</sup> 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.”<sup>221</sup>

Realist bundle of rights theory is now the standard conceptual lens through which prominent judges and academics view property—especially so in post-Coasean tort law and economics. In the sparks case *LeRoy Fibre*, Justice Holmes anticipated this theory by reducing a plaintiff-landowner’s arguments on contributory negligence from a categorical ban to minor

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<sup>214</sup> See note xx and accompanying text.

<sup>215</sup> Richard T. Ely, 1 *Property and Contract in Their Relations to the Distributions of Wealth* 107 (MacMillan 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”).

<sup>216</sup> 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”).

<sup>217</sup> Hohfeld, *Some Fundamental Legal Conceptions*, in *Fundamental Legal Conceptions as Applied in Legal Reasoning and other Essays* at 23, 35-37 (cited in note WH).

<sup>218</sup> See Hohfeld, *Fundamental Legal Conceptions As Applied in Legal Reasoning II*, in *id* at 65, 74-82.

<sup>219</sup> See Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, at 319 & n.24 (Chicago 1997). See generally *id* at 333-50.

<sup>220</sup> See for example Arthur R. Corbin, *Taxation of Seats on the Stock Exchange*, 31 *Yale L J* 429, 429 (1922) (concluding that “‘property’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities”).

<sup>221</sup> Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 *Colum L Rev* 209, 214 (1922).

“differences of degree,” to be resolved by jury interest balancing.<sup>222</sup> 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.<sup>223</sup> 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-owner in fact possesses is the right to carry out a circumscribed list of actions.”<sup>224</sup> 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*.”<sup>225</sup>

This shift transforms American tort common law in the guise of explaining it. In Hohfeldian terms, American natural-rights theory hardwires into the relevant common law an assumption that “use” refers to *in rem* claim rights,<sup>226</sup> 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. They 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,<sup>227</sup> 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 bundle of rights—a conception of property organized around an *in rem* right to exclude.<sup>228</sup> In reality, however, that *in rem* “right to exclude” can be understood in several different ways. The theory illustrated in

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<sup>222</sup> *LeRoy Fibre Co. v Chicago, M. & St. P. Ry. Co.*, 232 US 340, 353 (1914) (Holmes concurring).

<sup>223</sup> See 4 *Restatement of the Law of Torts* §§ 826-28 (1939); see also Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb L Rev 189, 210-12 (1990).

<sup>224</sup> Coase, *Social Cost* at 155 (cited in note CSC).

<sup>225</sup> Cooter & Ulen, *Law & Economics* at 74-75.

<sup>226</sup> Bounded, of course, by correlative *in rem* duties not to make unjustified boundary invasions on neighbors’ property.

<sup>227</sup> 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).

<sup>228</sup> See Merrill & Smith, *What Happened to Property in Law and Economics?* 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). See also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm & Mary L Rev 1849, 1854 (2007) (defining property in relation to “universal in rem duties of abstention”).

Part III uses exclusion often but not always to protect owners' substantive interest in actively using and enjoying their property. This approach differs from a negative and formal *in rem* right of exclusion, associated especially with another line of Realists. According to this approach, property requires some minimal level of *in rem* exclusion, but exclusion does not need to be in the service of any particular substantive interest. Merrill and Smith's account compresses the differences between these alternatives.<sup>229</sup>

To appreciate the difference, consider the test case that was most urgent politically to the Realists—rate regulation. Note that the Hale article quoted above revised the “property concept” to loosen constitutional limitations preventing the government from regulating rates.<sup>230</sup> The law does not need to shift entirely to the bundle of rights view to facilitate rate regulation. In Hale's factory example, the law may treat the owner's power to profit from the plant's production either as another property right belonging to him or as the source of an entitlement assigned to customers to insist on reasonable rates. But as long as the law endows the owner with *in rem* rights to exclude others from his factory, he has property in the factory even if he does not in disposition rights relating to pricing and sales.<sup>231</sup> In this spirit, Realist Morris Cohen defined the “essence of private property [as] always the right to exclude others.”<sup>232</sup> And his main illustrations distinguished between a landlord's quiet possession and “the right to collect rent,” and between a railroad's property to quiet possession of its tracks and “the right to make certain charges.”<sup>233</sup> In his occasional context, Cohen's conception contributed as much as bundle of rights theory to help sever selling and renting from ownership of the assets sold or rented.<sup>234</sup> But going forward,

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<sup>229</sup> See Merrill & Smith, 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). For a more comprehensive diagnosis of the limitations of right to exclude theory, see Mossoff, 45 Ariz L Rev at 375-76, 408 & n150 (cited in note AMWP); see also id at 407-39 (recounting how right to exclude theory cannot explain important aspects of the law of acquisition, eminent domain, or intellectual property); Adam Mossoff, “Patents, Property, and Property Theory” (unpublished manuscript).

<sup>230</sup> See, for example, *Block v Hirsh*, 256 US 131 (1926) (upholding a local rent-control scheme against federal constitutional challenges). cite also *Germantown Ins Co and Brandeis' dissent in New State Ice Co v. Liebmann*.

<sup>231</sup> See Hale, *Rate Making and the Revision of the Property Concept*, 22 Colum L Rev at 214.

<sup>232</sup> Cohen, 13 Cornell L Q at 12 (cited in MCPS).

<sup>233</sup> Id [Cohen, 13 Cornell L Q] at 13 (cited in note MCPS).

<sup>234</sup> See Cohen, 13 Cornell L Q at 12 (cited in MCPS) (As Cohen explained, “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) (citing Holmes and Ely to conclude 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”); Ely, 1 *Property and Contract in Their Relations to the Distributions of Wealth* at 101 (defining property as an “the exclusive right of a private person to control an economic good). Oliver Wendell Holmes, *The Common Law* 246 (42d ed Little,

conceptions like Cohen's recast property into a hypothetical formal interest. This conception encourages the law to vary the substance of property to a greater degree than American natural-rights theory does.

Now, in the context of areas like trespass and nuisance, Merrill and Smith's theory of property differ from a use-based substantive theory of property only in the same particulars as Penner's theory—spite-fence cases on one side, and the lines between trespasses and nuisances and non-liable activities on the other. Generally, Merrill, Smith, Penner, and American natural-rights theory all contrast with accident law and economics and highlight how it systematically undervalues the extent to which the law relies on exclusion.<sup>235</sup> But rhetorically, Merrill and Smith score points by portraying post-Coasian economic analysis as an unknowing carrier of Realist property theory.<sup>236</sup> For those keeping score, points should be deducted by the extent to which their account of the "right to exclude" suffers from the same criticism.

To say the same thing substantively, it is important to understand that Merrill and Smith's contributions are not conceptual. Although Merrill, following Penner, has called exclusion the "sine qua non" of property, he does not mean that "property requires a certain quantum of exclusion rights."<sup>237</sup> He means only "that to the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property."<sup>238</sup> Merrill's definition (and Merrill and Smith's scholarship) do not explain the common law in its own terms when it comes to spite-fence law and other non-invasive areas of nuisance not covered here, like lateral-support doctrine.<sup>239</sup> Those areas protect property in use rights, but not with a right to exclude. Merrill's definition, again like Penner's, is also under-determinate in trespass and nuisance. Trespass seems to be organized around a right to exclude—until it isn't, in animal or overflight cases, or until it varies the remedies for invasions,

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Brown & Co 1946) (1881) (defining property as the right "to exercise [one's] natural powers over the subject-matter uninterfered with, and [being] more or less protected in excluding other people from such interference").

<sup>235</sup> See also Penner, *Nuisance and the Character of the Neighborhood*, 5 J Envt 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").

<sup>236</sup> See Merrill and Smith, *What Happened to Property in Law and Economics?* 111 Yale L J at 366 ("although early law and economics scholars questioned the realists' faith in government, they did not question the realists' conception of property as a contingent bundle of rights").

<sup>237</sup> Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb L Rev 730, 730, 753 (1999) (describing the right to exclude as the "sine qua non" of property)

<sup>238</sup> See id [Merrill, *Property and the Right to Exclude*, 77 Neb L Rev] at 753.

<sup>239</sup> See supra section III.F.2.

between accidental and intentional trespass.<sup>240</sup> Nuisance also seems organized around a right to exclude—except less so than trespass, not in spite-fence cases, and only sometimes in pollution cases.<sup>241</sup>

To be sure, Merrill and Smith explain these variations in their individual scholarship. Merrill explains American trespass law in terms of coarse exclusionary rules and then interprets American nuisance law to flip to party-specific interest balancing.<sup>242</sup> Smith reads nuisance law to be more trespassory than Merrill does, but in Smith's read nuisance still flips to a party-specific governance strategy when the benefits of joint property management outweigh the judicial costs of supervising of unwilling parties.<sup>243</sup> The important point here is: Conceptually, *in rem* exclusion rights are not necessary to either explanation. Both explanations predict that property law relies often on exclusion, but only when exclusionary rights are efficient. Since efficiency is the touchstone in both explanations, both must be judged not on their conceptual merits but on their economic merits.

Nevertheless, Merrill and Smith are on the mark when they suggest that accident law and economics has a hard time explaining basic land-use torts because it relies substantially on Realist bundle of rights property theory.<sup>244</sup> Because it presumes that economic policy makers can resolve resource disputes by maximizing productive efficiency, accident law 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.<sup>245</sup> But generally speaking, productive efficiency may be attractive in theory and

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<sup>240</sup> See sections III.B.2, III.F.3.

<sup>241</sup> See section III.F.2.

<sup>242</sup> See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J Leg Stud 13 (1985).

<sup>243</sup> See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va L Rev 965, 975-1007, 1021-45 (2004).

<sup>244</sup> See, for example, Merrill and Smith, *What Happened to Property in Law and Economics?* 111 Yale L J at 391-92 (explaining law and economics' "causal agnosticism").

<sup>245</sup> 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

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 theory 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.<sup>246</sup> 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.<sup>247</sup>

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 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,<sup>248</sup> 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.<sup>249</sup> Perhaps the neighbor at the bottom of the shaft should consider

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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).

<sup>246</sup> See, for example, Cordato, *Welfare Economics and Externalities in an Open-Ended Universe* at 4 (cited in note RCWE) (“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. But in practice, American natural-rights theory presumes until proven clearly otherwise that individual uses and needs vary too much to allow for party-specific regulation.

<sup>247</sup> See, for example, 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”).

<sup>248</sup> See Rose-Ackerman, *Dikes, Dams, and Vicious Hogs*, 18 J Leg Stud at 31-32 & Table 1 (cited in note SRA). See also Landes & Posner, *Economic Structure of Tort Law* at 38 & Table 2.2 (assuming railroad profits and farmer damages in a sparks case depending on whether the farmer leaves a firebreak).

<sup>249</sup> See Polinsky, *Introduction to Law and Economics* at 18 (cited in note AMP); Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J Leg Stud 589 (1983).

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,<sup>250</sup> but the scholarship does not come to any single resolution.<sup>251</sup> 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.<sup>252</sup> But it expects much from a jury or judge to expect them to consider all the relevant short-run factors, let alone then to 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.<sup>253</sup> These sorts of examples usually presume that the fact finder can know each party's production function accurately and instantaneously.<sup>254</sup> 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 input prices."<sup>255</sup>

Separately, "productive efficiency" is usually construed to assume perfect competition.<sup>256</sup> 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.<sup>257</sup> 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

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<sup>250</sup> See sources cited in note – (Polinsky, Brown, Schaefer).

<sup>251</sup> Compare Landes and Posner, *Economic Structure of Tort Law*, 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, 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).

<sup>252</sup> See Anderson, 2007 Utah L Rev at 260-61.

<sup>253</sup> See Coase, *Social Cost*, at 139-42 (cited in note CSC). See also Polinsky, *Introduction to Law and Economics* at 17 & Table 1 (presenting hypothetical data about party profits and damages in a pollution-nuisance case).

<sup>254</sup> See Hayek, *The Use of Knowledge in Society*, 35 Am Econ Rev at 521-22 (suggesting that economic methodology undervalues "the knowledge of particular circumstances of time and place").

<sup>255</sup> E.C. Pasour, Jr., *Monopoly Theory and Practice—Some Subjectivist Implications: Comment on O'Driscoll*, in Israel M. Kirzner ed, *Method, Process, and Austrian Economics* 215, 218 (Lexington 1982).

<sup>256</sup> See for example Coase, *Social Cost* at 101, 139 (cited in note CSC).

<sup>257</sup> See Coase, *Social Cost*, at 97 (cited in note CSC).

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, that assumption may be and often is inaccurate.<sup>258</sup> Accident law and economic scholarship does recognize the problem of subjective valuation. Some scholarship worries that damage rules short-change subjective values,<sup>259</sup> while others worry that subjective valuation encourages parties to hold out<sup>260</sup> and expect that liability rules circumvent this danger.<sup>261</sup> 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. This possibility becomes even more concerning if economic life is dynamic and the parties change their valuations in response to changing economic conditions.

Recall that productive efficiency formula sets an ideal standard; it sets the stage to focus on likely transaction costs. Robert Ellickson has helpfully subdivided transaction costs into get-together costs, execution costs, and information costs.<sup>262</sup> 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 there are other serious sources of transaction costs. 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. Such costs counsel strongly in favor of assigning liability in the manner most likely to circumvent the coordination costs. Thus, in a dispute between one factory and a thousand residents, the law may circumvent possible free-riding by residents by making the factory liable to the residents, and then circumvent possible holding out by limiting the residential owners to a damage remedy.<sup>263</sup>

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<sup>258</sup> See, for example, Cordato, *Welfare Economics* at 6-7, 58, 97 (cited in --); F.A. Hayek, 2 *Law, Legislation & Liberty* 113 (University of Chicago 1976). D. Bruce Johnsen, *Wealth Is Value*, 15 *J Leg Stud* 263, 269 (1986).

<sup>259</sup> See, for example, Epstein, *Property Rules and Liability Rules*, 106 *Yale L J* at 2093.

<sup>260</sup> See, for example, Cooter, *The Cost of Coase*, 11 *J Leg Stud* at 13.

<sup>261</sup> See, for example, Polinsky, *Introduction to Law and Economics* at 21-23 (cited in note AMP).

<sup>262</sup> Ellickson, 99 *Yale L J* at 614-16 (cited in note RECC).

<sup>263</sup> See Lloyd Cohen, *Holdouts and Free Riders*, 20 *J Leg Stud* 351 (1991); Calabresi & Melamed, *Property Rules*, 85 *Harv L Rev* at 1115-19 (cited in note --).

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.<sup>264</sup> Sparks cases presumed railroads liable and limited plaintiffs'-misconduct defenses to avoid such complications along railroad lines; the same 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.<sup>265</sup> 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.<sup>266</sup> 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.<sup>267</sup> Although coming to the nuisance cases highlight these informational challenges vividly, the challenges exist in principle in any changing neighborhood.

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."<sup>268</sup> One

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<sup>264</sup> See Merrill & Smith, *What Happened to Property in Law and Economics?* 111 Yale L J at 394-97.

<sup>265</sup> See Cooter & Ulen, *Law & Economics* at 86 (cited in note CU).

<sup>266</sup> See William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J L & Econ 1 (1972). For a more qualified and nuanced defense of a similar position, consider Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J Leg Stud 557 (1980).

<sup>267</sup> 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).

<sup>268</sup> Ellickson, *Alternatives to Zoning*, 40 U Chi L Rev at 689.

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.<sup>269</sup> In doing so, it assumes that legal doctrine does not shape the parties' preferences for market bargaining. The more that nuisance doctrine tries to replicate market bargaining, the more it encourages polluters or residents to litigate rather than avoid negotiate for pollution servitudes. These 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,<sup>270</sup> but in principle they are equally 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 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 and realistically. 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.”<sup>271</sup> 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

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<sup>269</sup> See Cooter, *The Cost of Coase*, 11 J Leg Stud at 14-27.

<sup>270</sup> See, for example, Thomas Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 88 (1986).

<sup>271</sup> Posner, *Economic Analysis of Law*, § 3.1, at 32, 34 (6th ed.).

expect that a trier of fact can simultaneously secure investment in property and then maximize welfare in property. The tough-minded choice is then to limit the project of welfare improvement substantially, and use the property torts to push policy control down to the individuals who have the most localized knowledge and the selfish incentives to use it productively.<sup>272</sup>

Boundary-like protections serve this goal in tort.<sup>273</sup> 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.<sup>274</sup> Seen in reverse, those rules also modify the 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

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<sup>272</sup> See Hayek, *The Use of Knowledge in Society*, 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”).

<sup>273</sup> 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.

<sup>274</sup> This security cannot be complete without the right remedial rules, a full discussion of which (again) exceeds the scope of this Article.

which one makes “empirical” claims by observing, often anecdotally, a wide range of phenomena about human behavior and then drawing a few comprehensive generalizations. Political and ethical philosophy, the branch of theology focused on human affairs, and serious literature all presume that such soft empirical claims have validity.<sup>275</sup> Austrian economics makes generalizations on a similar basis. But the underlying generalizations are falsifiable and may not be correct.

But this possibility applies equally to any mode of law and economic analysis.<sup>276</sup> 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 interfering general societal concerns about investment effects, information-cost problems, or the responsiveness of markets and politics to legal entitlements. Accident law and economic analysis may consider these more systematic issues as part of an all-the-circumstances analysis. But the party-specific factors are likely to seem concrete and immediate, while the social factors are more likely to seem diffuse and remote. An all-the-circumstance analysis thus assumes implicitly but empirically 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 human behavior.<sup>277</sup> In important 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 precise answers, but they do focus economic analysis on some questions but not others. 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 that make accident law and economics seem most determinate at first blush.

## V. Conclusion, and Ramifications for the Debate Between Philosophy and Economics

That insight, more than anything else, helps us to appreciate why conventional perceptions of tort philosophy and tort economics are overdrawn. Again, the common law land-

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<sup>275</sup> See above notes --. [notes about Locke & moderation & Federalist 37]

<sup>276</sup> See, for example, Epstein, *A Clear View of the Cathedral*, 106 Yale L J at 2095 (cited in note REC) (“As are all assertions of this sort, the claims here are implicitly empirical but not capable of precise justification.”).

<sup>277</sup> I am grateful to Lloyd Cohen for suggesting this phrase.

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, the land-use torts do provide a fair point of contact.

American natural-rights theory and accident law and economics are both muddling. Both are trying to prescribe practical rules of conduct for owners, strangers, and neighbors in a world of dispersed information and rapid change. American natural-rights theory approaches property by confessing and avoiding what it doesn't know about human desires and interests. Once it identifies the few general interests about which it *can* generalize, it prescribes a few comprehensive rules which enlarge the practical discretion of individuals to pursue those interests. On the surface, accident law and economics seems more scientific and determinate because it claims to know more. It focuses on information that seems more concrete and relevant to the most relevant parties. The catch is that the concrete information may not be the most relevant, and the most relevant information may not be very concrete.

The reader might reasonably wonder why these contrasts have not been discussed in significant detail in previous legal scholarship. There are surely a number of answers. One is that American natural-rights theory has been in desuetude for a long time. Although American natural-rights theory may not influence other areas of tort as much as it has the basic land-use torts, it can teach revealing lessons about those torts it has influenced.

Another answer relates to the interest of tort philosophers in recent scholarship. At least at a high level of generality, philosophical tort scholarship has focused less on distributive justice than on corrective justice. Corrective-justice scholarship sheds light on features about the tort system that are surely revealing by philosophical standards. But by the standards of judges and non-philosophical academics—that is, by lawyers who prize determinacy—the focus on corrective justice has reinforced a general impression that philosophy is too indeterminate to resolve disputes in practice. As this Article has illustrated, however, economists and lawyers are holding corrective justice to a standard it cannot and should not be expected to meet. Corrective justice can explain why land-use torts speak in terms of “rights” and “trespasses.” But it takes a specific theory of distributive justice to explain why both are organized to secure to owners a domain of discretion in which to use their own land productively, free from disturbances or second-guessing by their neighbors.

The remaining answers relate to ambiguities in economic tort analysis. As this Article has suggested, some segments of economic tort scholarship view resource disputes through a conceptual framework that makes expert-driven policy analysis seem feasible and attractive. That framework relies in important ways on an understanding of social and political science established in opposition to American natural-rights theory. Institutionally, this earlier science assumed that human behavior could be studied more empirically and mathematically than American natural-rights theory had assumed. Because judges and lawyers prize determinacy, there is a pent-up demand for explanations that make the law seem as predictable as math. Accident law and economics satisfies that demand.

Yet if the land-use torts are any guide, accident law and economics suffers from a tension that Eric Posner has observed in relation to economic contract scholarship. On one hand, when accident law and economics propounds “determinate models,” they seem wanting because they “omit important variables.” On the other, when accident law and economics takes more variables into account, its explanations seem “indeterminate . . . or . . . unrealistic, because they place too great a burden on courts.”<sup>278</sup>

This tension does not make accident law and economics useless or irrelevant. Far from it. But it does mean that the attentive reader must judge the claims of accident law and economics scholarship very carefully. First, the attentive reader must take care to ask whether he can verify the functional explanations accident law and economics gives for different rules of law. Accident law and economics scholarship often analyzes a problem by focusing on a few factors relevant to efficiency, in isolation from the totality of circumstances relevant to efficiency. The reader can certainly test whether the cases are decided as the partial explanation predicts. But as if 101 different factors could plausibly contribute to a complete explanation of efficiency, and the explanation focuses only on one or two, the reader must ask whether the explanation provides “a formally adequate functional explanation” or a mere “Just So Story.”<sup>279</sup> For example, when William Landes and Richard Posner explain why nuisance is less strict than trespass, they argue that the potential victim “is not so helpless in an economic sense” from pollution or vibrations “as he would be to prevent damage . . . from mere [trespassory] debris.”<sup>280</sup>

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<sup>278</sup> Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 Yale LJ 829, 834 (2003).

<sup>279</sup> Coleman, *Practice of Principle* at 26-27 (cited in note JCPP).

<sup>280</sup> Landes & Posner, *Economic Structure of Tort Law* at 114 (cited in note LP).

To draw this conclusion, Landes and Posner must assume implicitly among other things that, if the law encourages the pollution victim to minimize the harmful effects of the pollution, it will not encourage the polluter to over-pollute and it will not chill likely pollution victims from investing in their land uses. Elsewhere, however, Landes and Posner also conclude that nuisance law does not allow a polluter to use the plaintiff's coming to the nuisance as a defense. If the law were to recognize this defense, Landes and Posner explain, "land uses would often be frozen into a pattern that was optimal when the defendant arrived at the scene but had become inefficient" later, and defendants would be likely to "overinvest from a social standpoint."<sup>281</sup> In theory, it is possible to reconcile these two conflicting explanations. Even so, it is vexing that precaution and accident costs do most of the work in one explanation, while investment consequences do most of the work in the latter.

Second, accident law and economics can also hard to falsify because "utility" and "efficiency" can be quite open-ended. Take simple nuisance conflicts. Standard accident law and economic accounts of nuisance try to order the parties' conflicting land uses to the level that they would bargain to but for transaction costs.<sup>282</sup> Merrill employs a similar approach for nuisance, but a much more exclusionary one in trespass to avoid transaction costs associated with entitlement delineation.<sup>283</sup> In contrast with these approaches, Henry Smith thinks nuisance law remains exclusionary until, in high-stakes cases like water or mineral cases, the utility of fine-grained governance exceeds its administrative and third-party transaction costs.<sup>284</sup> In these three different explanations, it helps that utility, efficiency, and transaction costs provide a common language. This language allows scholars to articulate and compare different explanations for the same legal regime. But by the same token, the more supple these terms, the less internal meaning they carry. The less internal meaning, the greater the danger that the terms can be defined tautologically. In each explanation of nuisance just mentioned, "utility" and "transaction costs" are defined so that nuisance always maximizes the difference between the former and latter.

Now, sound economic method avoids tautologies, by testing empirically competing accounts of a legal regime. But Eric Posner's concerns apply to empirical analysis as well as to

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<sup>281</sup> Landes & Posner, *Economic Structure of Tort Law* at 50.

<sup>282</sup> See Polinsky, *An Introduction to Law and Economics* at 92-97 (cited in AMP); Cooter & Ulen, *Law & Economics* at 82-85 (cited in note CU).

<sup>283</sup> See Merrill, *Trespass and Nuisance*, 14 J Leg Stud at 25-26.

<sup>284</sup> See Smith, *Nuisance*, 90 Va L Rev at 981-87.

theory: If an empirical study tries to cover all the factors listed in part IV.D, it is unlikely to generate clear results. When studies stay within the limits of sound method, their results are likely to be modest and incremental even in aggregation. Now, to circumvent these problems, economists studying tort may and often do use case law as a weak substitute for complete empirical information.<sup>285</sup> But if conclusions from case-testing are treated as conclusive proof, they create the dangers of “Just So” stories similar to those mentioned above.

In that context, this Article highlights another challenge that is not sufficiently appreciated: The more economic analysis relies on doctrine as weak empirical evidence of efficiency, the more it runs the risk of making itself parasitic on political philosophy. To be careful, this possibility may not happen often—only when American natural-rights theory or some other political theory explains a particular doctrine as determinately land-use torts are explained here. But if a common political morality *does* explain doctrine, historically and internally, then case-testing will tend to favor economic explanations that most closely track the commitments of the political theory shaping the doctrine.

Consider Henry Smith’s account of trespass and nuisance. Notwithstanding a few exceptions like spite fences, Smith’s account challenges accident law and economics and defends the exclusionary tendencies of property torts as much as any comprehensive economic explanation available.<sup>286</sup> To do so, Smith stresses Austrian themes: the problems in measuring economic data in a changing environment;<sup>287</sup> the subjectivity of owner value;<sup>288</sup> and information asymmetries among owners, neighbors, and courts.<sup>289</sup> But to this extent Smith is critiquing post-Coasian economic theory with more economic theory. This theoretical debate ultimately reduces to empirical issues, Smith recognizes, for which “we do not have the empirical data to give an exact or even remotely certain answer.”<sup>290</sup> But as a tiebreaker, Smith appeals to “the widespread,

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<sup>285</sup> See, for example, Merrill, *Trespass, Nuisance*, 14 J Leg Stud at 26 (cited in note --) (testing an economic prediction using common law doctrine as the only practicable substitute for “devising some method of sampling the underlying universe of disputes directly”).

<sup>286</sup> The other economic explanation that rivals Smith’s belongs to Richard Epstein, after his break from corrective-justice theory. See, for example, Richard A. Epstein, *Torts* (Aspen 1999). What is said in text of Smith applies equally to the post-corrective justice Epstein.

<sup>287</sup> 79 NYU L Rev at 1763-67.

<sup>288</sup> See Smith, *Property and Property Rules*, 79 NYU L Rev at 1770-72, 1776-78; Smith, *Nuisance*, 90 Va L Rev at 985-87.

<sup>289</sup> See Smith, *Property and Property Rules*, 79 NYU L Rev at 1755-63, 1774-76, 1778-84; Smith, *Nuisance*, 90 Va L Rev at 978-80 & 984.

<sup>290</sup> Smith, *Nuisance*, 90 Va L Rev at 1040.

though often unacknowledged, use of exclusion in ours and other legal systems.”<sup>291</sup> But what if exclusion is an important and clearly-articulated feature of American land-use common law because Anglo-American political theory made it so? One might reasonably answer that economics and distributive-justice theory can complement one another in explaining the law. But one might also reasonably wonder whether how valuable the most convincing positive economic explanation of nuisance is, if its main claim to validity is that it replicates in economic language a theory of morality already internal to the doctrine.

To avoid that trap, economic tort analysis has two main responses. One is to reconsider the criteria for success in less “tort” and more “economic” terms. This process has happened explicitly in economic contract scholarship. When Eric Posner raised the doubts quoted above in relation to economic contract scholarship, Ian Ayres suggested that Posner attacked “a straw man” and “serious[ly] misread[] the aims of modern scholarship” by assuming that serious economic analysts ever had a positive intention.<sup>292</sup> Richard Craswell also suggested in response that economic analysis is properly understood as an incremental series of “partial contributions,” each of which rationalizes contract law with explanations made “limited and contingent” by their choice to focus on one or two relevant factors and abstract away from dozens of others.<sup>293</sup> A similar evolution has probably taken place in economic tort analysis. But if economic legal analysis is most defensible in tort when it is “merely provisional,” then its claims to superior determinacy and explanatory power must always have been provisional, too. If Craswell’s generalization applies to economic tort analysis, then economic tort analysis is not useful as a specific doctrine predictor—it is a useful clarifying heuristic for tackling small parts of practical legal rules.

The other response is for economic tort analysis to continue to make prescriptions for practical legal tort problems in their entirety—but to do so admitting that it relies heavily on academically informed opinions to fill in the gaps where theory and empirics are not

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<sup>291</sup> Smith, *Nuisance*, 90 Va L Rev at 1040-41. See also Smith, *Property and Property Rules*, 79 NYU L Rev at 1723-24 (critiquing economic scholarship favoring damages remedies over injunction remedies on the ground that the scholarship does not fit the case law).

<sup>292</sup> See Ian Ayres, *Valuing Contract Scholarship*, 112 Yale L J 881, 881-82 (2003).

<sup>293</sup> Craswell, *If Those are the Answers, Then What is the Question?* 112 Yale LJ at 911, 913, 924 (cited in note RC). See also *id.* at 912 (rejecting the possibility that economic contract analysis requires a “full-blown analysis that incorporates every relevant factor and leads ineluctably to a definite conclusion”).

informative.<sup>294</sup> But even if those opinions are academic and informed, they are still opinions. Recall that the limits of opinion are one of the factors that make American natural-rights theory so pessimistic that the law can regulate property in a case-specific way.<sup>295</sup> In that case tort economics still seems to muddle as much as political and ethical philosophy.

Coase assumed in *Social Cost* that “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”<sup>296</sup> Welfare economics tends to focus more on questions that lend themselves to mathematical analysis, while aesthetics and morals tend to focus on questions that in practice must usually be answered by intuition, hunches, or opinion.<sup>297</sup> That difference gives welfare economics more concreteness and determinacy in its sphere than aesthetics and morals have in theirs. The important question here for law and economics is whether it can export the welfare economics’ determinacy to law without bogging the former down with the problems that plague law, aesthetics, or morals. Austrian economists tend to doubt it. Welfare economics is “unattainable in principle” in law, they worry, and comprehensive legal questions must therefore remain “grounded in ethical considerations.”<sup>298</sup> Accident law and economics is more optimistic that it can reform the law without getting bogged down. That optimism has created an impression that law and economics explains tort more precisely and determinately than other approaches to the law. But if the land-use torts are a fair indication, these rumors of superior explanatory power are greatly exaggerated.

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<sup>294</sup> To be fair to Henry Smith, his work recognizes this limitation. See note – and accompanying text. [quote about absence of empirical information]

<sup>295</sup> See notes – and accompanying text. [Locke on limits of human knowledge, and Fed 10].

<sup>296</sup> Coase, *Social Cost* at 154 (cited note CSC).

<sup>297</sup> See, for example, Cooter & Ulen, *Law & Economics* at 3 (cited in note CU) (contrasting analysis by practicing lawyers, “by consulting intuition and any available facts”) with economics, “a scientific theory” including “mathematically precise theories (price theory and game theory and empirically sound methods (statistics and economics”).

<sup>298</sup> O’Driscoll & Rizzo, *The Economics of Time and Ignorance* at 142 (cited in note OR); Cordato, *Welfare Economics and Externalities in an Open-Ended Universe* at 100 (cited in note RCWE).