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

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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. Philosophical tort scholarship still tries to defend this common-sense view. Yet over the last generation, tort's moral pretensions have taken the academic equivalent of a drubbing. Even leading tort philosophers concede “frankly [that] the legal community has found various economic approaches more persuasive or compelling than those based on corrective justice,” the main philosophical approach to tort.¹

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

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

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

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

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

⁵ *Id.* at 356-57.

From a longer time horizon, however, this debate is surprising. People often assume that American tort law used to have content focused enough to be described as “individualistic”—that is, organized “to specify and protect individuals’ rights to bodily integrity, freedom of movement, reputation, and property ownership.”⁶ These generalizations would not make sense unless the moral theory informing the law was determinate enough to general predictably “individualistic” results. In addition, if economic criticisms are true, the various bodies of law that have now merged into the field of “tort” were incoherent for several centuries until economists came along and tidied them up. It may be naïve to say, but that claim seems a little presumptuous. So do contemporary comparisons of tort economics and philosophy fairly reflect the merits of tort doctrine, economics, and philosophy—or do they instead reflect 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*.⁷ *Social Cost* is the most-cited law review article ever.⁸ It contributed to many economists’ general impression that philosophical argument seems “rigid” in its attachment to a harm-benefit distinction, a “pristine idea of right colliding with wrong.”⁹ But *Social Cost* is especially useful here because tort economists now routinely use fact patterns involving cows, smokestack pollution, or train sparks to teach or to build on the main lessons of *Social Cost*.¹⁰ If

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

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

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

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

¹⁰ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.6, 3.8, at 50-52, 61-63 (7th ed 2007) (illustrating economic analysis of incompatible use disputes with sparks and smoke nuisance cases); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40 (1991) (calling cattle trespass “the

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.¹¹ 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.

If this comparison is an accurate indicator, the philosophy-versus-economics debate in tort has been off track for a generation, in at least three important respects. First, if philosophical tort scholarship suffers a bad rap for being mushy and indeterminate, to a large extent it has itself to blame. As the opening paragraph suggested, scholars and lawyers often equate “tort philosophy” generally with “corrective justice,” the species of ethical and political philosophy determining in what circumstances one person should repair a wrong to another’s rights. Corrective justice has much to teach about the institutional structure of tort—for example, why it pits an aggrieved “plaintiff” against an allegedly aggressive “defendant” in a suit to recover for “wrongs.” But, by itself, corrective justice does not supply the content of those wrongs—particularly the scope of the plaintiff’s rights, or the defendant’s duties in relation to those rights. That content comes not from corrective justice but from a primary theory of moral rights and

subject of Coase’s Parable of the Farmer and the Rancher”); Robert D. Cooter, *Coase Theorem*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 457, 458 (John Eatwell et al eds., 1997) (using train-sparks cases, “which Coase made famous,” as the sole example for illustrating the Coase Theorem).

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

duties. By focusing so heavily on corrective justice, philosophical tort scholarship has focused on the more diffuse and less determinate moral aspects of tort.

Second, philosophical scholarship has not done enough to learn how American natural-rights theory informs the moral content of particular torts. In many foundational areas of tort law, American natural-rights theory supplies the primary moral theory corrective justice needs. The basic land-use torts are such an area. Indeed, in those torts, not only does American natural-rights theory explain the doctrine, but it also anticipates and refutes standard economic criticisms associated with *Social Cost*. In the process, American natural-rights theory also helps dispel a more general impression—that all moral theories of rights and duties are indeterminate. Economic scholarship often suggests that only economics, and not philosophy, is capable of making tough-minded policy tradeoffs. American natural-rights theory makes those tradeoffs.

Finally, the Article explains and renders questionable the general perception that conventional economic tort analysis explains and justifies tort doctrine more effectively than theories of justice do. The case comparison offered here highlights a problematic aspect of standard economic tort analysis that is often overlooked: To explain tort doctrine as determinately as conventional wisdom supposes, economic tort analysis must make informed hunches more characteristic of political or ethical philosophy than of social science. In the words of one leading introductory law and economics casebook, where lawyers and judges decide legal issues “by consulting *intuition* and any available facts,” economists use “*scientific*” approaches including “mathematically precise theories (price theory and game theory and empirically sound methods (statistics and economics).”¹² But if the land-use torts provide an accurate point of contact, these generalizations are overdrawn. Conventional economic tort analysis can provide “mathematically precise” accounts of *parts* of land-use doctrines, but it cannot propound comprehensive rules of decision—at least, not without appealing on “intuitions” similar to those that inform practice and moral philosophy. If the land-use torts are representative, economic tort analysis can be scientific, and it can be relevant to doctrine, but it cannot be both. And if economic tort analysis opts to be relevant to doctrine, it starts suspiciously to resemble moral philosophy.

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

I. THE RIVALRY BETWEEN ECONOMICS VERSUS JUSTICE IN TORT

A. The Economic Indictment

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

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.”¹⁴ Later, when he restated the argument of *Social Cost* in a republication of it, Coase asserted that “there is no difference, analytically, between rights such as those to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke.”¹⁵ In other words, rather than employ traditional distinctions between benefits and harms, it is instead more constructive to portray a dispute as a resource conflict between competing and incompatible assets that inflict pairwise reciprocal externalities on one another.¹⁶ This framework calls into question how the common law treats not only rights and wrongs but also causation. If the parties are really inflicting pairwise reciprocal externalities on each other, both parties are necessary to and therefore jointly cause any economic losses.¹⁷

Third, these impressions are contributed to by “the Coase Theorem.” *Social Cost* is understood to teach, as Coase puts it, that “in perfect competition private and social costs are

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

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

¹⁵ Coase, *Firm, Market, Law* at 12.

¹⁶ 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”).

¹⁷ 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.”).

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

Finally, conventional tort economic scholarship prescribes what seems to be a more precise and quantitative method for resolving tort disputes than those advocated by doctrine or tort philosophy. For simplicity’s sake, we shall refer to the conventional tort economic approach as “accident law and economics.” Accident law and economics prescribes that tort accident disputes be resolved consistent with “productive efficiency.” 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.²¹

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.²² *Social Cost* is therefore interested primarily in “[t]he influence of the

¹⁸ 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 3rd ed 1966)).

¹⁹ A. Mitchell Polinsky, *An Introduction to Law and Economics* 12 (Little, Brown 2d ed 1989).

²⁰ Coase, *Social Cost* at 114 (cited in note CSC).

²¹ The phrase “productive efficiency” comes from Cooter & Ulen, *Law & Economics* supra note CU, at 12. 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.”).

²² See Coase, *Social Cost* at 95, 133 & n.35 (cited in note CSC) (citing A.C. Pigou, *The Economics of Welfare* 183 (Macmillan 4th ed. 1932)).

law on the working of the economic system”²³ and not vice versa. Yet at a minimum, *Social Cost* makes respectable the methodology of accident law and economics. 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.”²⁴ Coase praises American lawyers who “are aware . . . of the reciprocal nature of the problem” and “take . . . economic implications into account, along with other factors, in arriving at their decision.”²⁵ He also exhibits a measure of economic condescension toward the common law, by describing judicial reasoning as “a little odd.”²⁶ So, with possible apologies to Coase, let us focus here on the “Coasian Coase,” the general lessons that accident law and economists have taken away from *Social Cost*.²⁷

In addition, accident law and economics is a rough general category covering over many different specialized economic analyses of torts. No doubt, different tort economists can analyze and have analyzed differently the data relevant to productive efficiency. Productive efficiency is an analytical device. It provides a launching-off point for many different economic analyses. Economic life imposes transactions costs or other obstacles that stop the parties from pursuing productive efficiency. Productive efficiency highlights how the parties should or would rationally bargain if these obstacles did not exist; economic analyses can then focus on different obstacles and study their consequences.²⁸ Yet even though these analyses differ in many particulars, productive efficiency unifies their inquiries in important foundational matters.²⁹

²³ Coase, *The Firm, the Market and the Law* at 10 (cited in note CFML).

²⁴ Id [Coase, *Social Cost*] at 115.

²⁵ 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”).

²⁶ Id [Coase, *Social Cost*] at 146.

²⁷ See R.H. Coase, *Notes on the Problems of Social Cost*, in *The Firm, The Market, and the Law* 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).

²⁸ 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).

²⁹ 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”).

Finally, “accident law and economics” should not be understood to be a representative of or a proxy for economic tort analysis generally. It should not be confused with cheaper-cost-avoider economic tort analysis,³⁰ new institutional economics,³¹ behavioral law and economics,³² or other refinements or specialized applications of basic economic methodology. At the same time, in tort casebooks and introductory textbooks, accident law and economics is presented as hornbook economics.³³ 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.³⁴ In other words, at common law, a “harm” occurs whenever the defendant penetrates the boundaries of the plaintiff’s land—and even if the penetration does not damage the land.³⁵ Economically, there are two puzzles with this rule. *Social Cost* articulates the first: When a rancher’s cattle trespass on a farmer’s crops, it should not matter whether the rancher compensates the farmer for the crop damage.³⁶ This question is easy for accident law and economics to explain. *Social Cost* discusses the rancher-farmer conflict on the assumption that transaction costs are zero.³⁷ But the farmer has one stationary plot of land, while the ranchers have many mobile cows. Once transaction costs are put back in the picture, it is less costly for the ranchers to go bargain with the farmer than the other way around.³⁸

Trespass poses a second puzzle, however: Why does the prima facie case lack elements of causation or harm? There are few accident law and economic explanations for this rule, and

³⁰ See Guido Calabresi, *The Costs of Accidents* (Yale 1977) (2d ed).

³¹ fill in cites from Libecap

³² 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).

³³ See sources cited above in note 28; Grady & Farnsworth.

³⁴ See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 67 (West 2d ed 1984).

³⁵ 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).

³⁶ Coase, *Social Cost* at 97-104 (cited in note CSC).

³⁷ See id at 97 (“the operation of a pricing system is without cost”).

³⁸ 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).

those that do exist are not satisfying. For example, in a recent article, Lee Anne Fennell assumes that the whole “point of exclusion from boundaries is to facilitate the effective matching of inputs with outcomes.”³⁹ The inputs are productive activities, the outcomes include both the benefits from and the accidents that those activities occasionally but inevitably generate. Fennell concludes from this functional premise that trespass lacks causation or harm elements because “[b]oundary crossings . . . effectively puncture the containers that society has created for collecting risks and their associated outcomes.”⁴⁰ 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*.⁴¹ Steenberg Homes asked the Jacques for permission to tow a home across a vacant field they owned, while the public road was blocked by a snow drift, so the company could complete a delivery on time. The Jacques refused to grant permission under any circumstances, because they believed (mistakenly) that a license would help the company claim adverse possession.⁴² Steenberg Homes towed the home across their field anyway (intentionally) and caused no actual harm to the field.⁴³ In Fennell’s parlance, Steenberg Homes certainly punctured society’s risk-collecting boundary rules. But Steenberg Homes could not be blamed for the snowstorm, it was economically gainful for the company to perform its delivery contract, the Jacques had no serious reason for refusing passage, and their property was not damaged. A few different regimes might be productively efficient: No liability; liability compensated only by nominal damages; or maybe even 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,⁴⁴ and the Wisconsin Supreme Court affirmed—specifically to deter trespassers from undermining the general principle that “actual harm occurs in *every* trespass.”⁴⁵ Fennell explains this result on the ground that the punitive-damage rule is meant *ex ante* to deter future

³⁹ Id at 1438.

⁴⁰ Lee Anne Fennell, *Property and Half-Torts*, 116 Yale LJ 1400, 1437 (2007).

⁴¹ 563 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).

⁴² See *Jacque*, 563 NW2d at 157.

⁴³ *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.

⁴⁴ See *Jacque*, 563 NW2d at 632.

⁴⁵ Id at 160 (emphasis added).

boundary invasions.⁴⁶ 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 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.⁴⁷ 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.⁴⁸ The accident law and economic scholarship follows Coase in different ways. Some articles suggest that the earlier builder should be protected categorically,⁴⁹ others that the law should examine case by case which party acted less strategically.⁵⁰ These approaches have seeped into some cases.⁵¹ By and large, however, the cases categorically make the business liable even though it came to the neighborhood first.⁵²

The physical-invasion test also bars causes of action for aesthetic complaints and blockages of light.⁵³ 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.⁵⁴ Because accident law and economics scholarship typically defines “nuisance costs” to cover “harmful externalities” of all kinds, eyesores emit negative

⁴⁶ 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).

⁴⁷ 11 Ch. D. 852 (1879).

⁴⁸ See Coase, *Social Cost*, at 105-07 (cited in note CSC).

⁴⁹ See, for example, William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J L & Econ 1 (1973).

⁵⁰ See, for example, Landes & Posner, *Economic Structure of Tort Law* at 50-51 (cited in note LP); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 Mich. L. Rev. 601 (2001); Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance,”* 9 J L & Econ 557 (1980).

⁵¹ See, for example, *Jerry Harmon Motors, Inc v Farmers Union Grain Terminal Ass’n*, 337 NW2d 427 (ND 1983).

⁵² See, for example, *Kellogg v Village of Viola*, 227 NW2d 5 (Wis. 1975).

⁵³ See, for example, *Adams v. Cleveland-Cliffs Iron Co.*, 602 NW2d 215, 219 (Mich Ct App 1999).

⁵⁴ 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)).

externalities on neighbors on similar terms to factory smoke.⁵⁵ Some parts of doctrine support such an approach. Since the *Restatement (Second) of Torts* defines the plaintiff's use and enjoyment rights "in a broad sense," to cover "the pleasure, comfort, and enjoyment that a person normally derives from the occupancy of land," it provides doctrinal authority for a sight-nuisance cause of action.⁵⁶ Lateral-support law provides further authority; at common law, a homeowner commits a nuisance against a neighbor by excavating on his land in a manner that would cause hers to collapse in its natural state.⁵⁷ Nevertheless, common-sense attitudes remain strongly suspicious of economic conceptions of externalities. As Robert Ellickson explains, a "layman would regard a smokestack . . . as 'theft' of neighborhood enjoyment," but would "perceive quite differently . . . the demolition of an architectural landmark or the construction of a housing development on a beautiful vacant meadow."⁵⁸ 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."⁵⁹

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.⁶⁰ 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

⁵⁵ See, e.g., Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, CASE WESTERN L. REV. (forthcoming 2008), draft manuscript March 2008, at 5-7, 10-11 (defining the interference in nuisance in reference to physical invasions, without considering that economic-externality analysis applies equally to non-invasive negative externalities). See also COOTER & ULEN, *supra* note CU, at 40; Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA L Rev 1299, 1310 & Table (1977) (illustrating a general approach to economic nuisance analysis with a fact pattern involving light glares between a race track and a drive-in movie theater).

⁵⁶ RESTATEMENT (SECOND) OF TORTS, *supra* note RST, § 821D, cmt. b. See, e.g., *Tenn v. 889 Assocs., Ltd.*, 500 A.2d 366 (N.H. 1985); *Prah v. Maretti*, 321 N.W2d 182 (Wis. 1982).

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⁵⁸ Ellickson, *Alternatives to Zoning*, 40 U Chi L Rev at 728 (cited in note REAN).

⁵⁹ *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.").

⁶⁰ See, e.g., Hylton, *supra* note KH, manuscript at 8 ("strict liability is desirable only when the external costs of the actor's activity substantially exceed the external benefits associated with the actor's activity").

element that an interference with a land use be unreasonable.⁶¹ 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.⁶²

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.⁶³ A similar move happens in nuisance: When intent is an element of nuisance, it is usually construed to cover intent to use land substantially certain that the use will create pollution.⁶⁴ There certainly is negligence-based nuisance,⁶⁵ but the law clearly preserves a strict-liability theory of nuisance as a backstop.⁶⁶ 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."⁶⁷

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

⁶¹ 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.

⁶² See, for example, Hans-Bernd Schäfer & Andreas Schöenberger, *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).

⁶³ See *Burns Philp Food, Inc. v. Cavalea Contl. Freight, Inc.*, 135 F3d 526, 529 (7th 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).

⁶⁴ See, for example, *Morgan v High Penn Oil Co.*, 77 SE2d 682 (NC 1953).

⁶⁵ See *Restatement (Second) of Torts* § 822(b).

⁶⁶ See id §§ 822(a), 825(b).

⁶⁷ See, e.g., *Pestey v. Cushman*, 788 A.2d 496, 508 (Conn. 2002). To be fair, when economists suggest that nuisance incorporates balancing, they are describing in large part the way in which courts determine whether to enter an injunction abating the nuisance. See, e.g., Hylton, *supra* note KH, manuscript at 12-13 (discussing *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 871 (N.Y. 1970)). Nuisance does balance interests more than trespass at the remedy stage, though perhaps not as much as such economists suggest. But at the liability stage, nuisance tends to be resistant to interest balancing.

Contra Hylton, *supra* note KN, manuscript at

herself through some affirmative defense. Accident law and economics scholarship assumes that fault principles do and should inform plaintiffs'-misconduct defenses. For example, according to economic scholarship on train-sparks cases, liability payments do and should vary depending on whether land-owning plaintiffs take cost-justified precautions to keep their land uses protected against the risk of sparks fires.⁶⁸

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."⁶⁹ 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."⁷⁰

Similarly, courts sharply limit assumption of risk as a defense against trespassory torts. In the 1974 case *Marshall v. Ranne*, a homeowner was bitten while he was walking to his car, by an ornery boar that had threatened him on several previous occasions. This being Texas, the plaintiff knew how to shoot a gun. This being Texas, the defendant also argued that the plaintiff should have shot the boar in self-defense before it bit him. But *Marshall* holds that the plaintiff may not be deemed to have assumed the risk: "[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."⁷¹ Here, the court intuitively uses boundary principles to stop a trespasser from raising a plaintiffs'-misconduct defense. In common-sense terms, in that case the defense seems to make an inappropriate "your money or your life" argument. But other cases allow plaintiffs'-misconduct defenses when an owner is defending against a licensee. In these cases, the land owners make appropriate "take it or leave it" demands on the licensees.⁷²

⁶⁸ 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).

⁶⁹ 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.

⁷⁰ *LeRoy Fibre Co. v Chicago, M. & St. P. Ry. Co.*, 232 US 340, 349 (1914).

⁷¹ 511 SW2d 255, 260 (Tex. 1974).

⁷² See *Gibson v. Beaver*, 226 A.2d 273, 276 (Md. 1967).

There are other puzzles,⁷³ 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,”⁷⁴ 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.”⁷⁵

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 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

⁷³ 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”).

⁷⁴ Grady, 17 JLS at 30-33 (cited in note MG).

⁷⁵ Id [Kraus, 93 va l rev] at 357.

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.”⁷⁶ In one light, Perry’s claim is accurate. Corrective justice was certainly an element of pre-1950 tort law. Since the pre-1950 tort system presumed true and executed a theory of natural rights, individuals owed a corrective duty to rectify their wrongs to civil rights securing natural rights. But in another light, the claim illustrates a confusion in philosophical tort scholarship. By itself, corrective justice does not determine precisely which actions are wrongful and which are not. To that extent, corrective justice is derivative of or parasitic on a primary theory of morality delineating rights, duties, and the bearers of both.

Corrective justice refers to a class of ethical and political principles that obligate actors to rectify losses they cause when they inflict wrongs on others.⁷⁷ Jules Coleman, Ernest Weinrib, and others have used corrective justice to shift the terms of debate in tort—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.⁷⁸

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 potential when he assumes that “pure corrective justice” can explain pre-1950 American law; so does Jules Coleman when

⁷⁶ Perry, *supra* note SP1, at 382.

⁷⁷ See Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1311 (2006).

⁷⁸ See, e.g., COLEMAN, *supra* note JCPP, [*The Practice of Principle*] at 13-63; WEINRIB, *supra* note EW, [*The Idea of Private Law*] at 22-83; COLEMAN, *supra* note JCRW, [RISKS AND WRONGS] at 374-85; Arthur Ripstein, *Tort Law in Liberal State*, 1 J. TORT L. (2007) (available at <http://www.bepress.com/jlt/vol1/iss2/art3>); Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1246-53 (1988).

he assumes that corrective justice is “the point of the core, if not all, of our current tort practice.”⁷⁹ These and other scholars have attempted to explain and prescribe specific rules of tort doctrine—like the scope of personal or property interests, or the choice between strict liability and negligence—more or less exclusively from general principles of corrective justice.⁸⁰

These various arguments all threaten to “put[] the cart before the horse.”⁸¹ As Gregory Keating has explained, “The identification of those actions which require correction takes precedence over their correction.”⁸² A full account of tort law presumes a fully developed primary theory of political morality. This theory must give an account whether and in what circumstances individuals are entitled to personal interests in security, reputation, or free locomotion, possessory interests in the control, use, or alienation of property in particular circumstances, or the other interests that tort law protects. Tort law can correct or rectify wrongs only after these interests have been delineated. In easy cases—say, a battery in which the defendant injures a plaintiff after hitting her intentionally and unconsentedly—the primary theory of morality is uncontroversial and easy to overlook. In these cases tort law seems to be mainly or even wholly corrective. But corrective justice seems more problematic in a hard case—say, a nuisance dispute about an ugly sculpture or blockage of sunlight.⁸³ Nuisance accords with corrective justice if it imposes on owner a duty to rectify “harm” to his neighbor caused by offending her artistic sensibilities or cutting off her light. But it also accords with corrective justice to say that no cause of action exists, on the ground that the neighbor has no right to sunlight or artistic security—in which case a cause of action would “harm” the owner by limiting his free use of his land in a case in which the limitation does not follow from any obligation to rectify a prior wrong. As Coleman himself recognizes, corrective justice “builds on, or is layered on, rights that already govern the relationship between the parties.”⁸⁴

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

⁸⁰ See, e.g., WEINRIB, [The Idea of Private Law], *supra* note --, at 145-203 (using the immanence of corrective justice to justify negligence and limit the scope of strict liability); COLEMAN, *RISKS AND WRONGS*, *supra* note --, at 303-85 (comparing the merits of strict liability and fault using general principles of corrective justice latent to tort practice); Ripstein, *supra* note – (explaining *Rylands v. Fletcher* strict liability and the necessity privilege to trespass in terms of the general corrective ends of tort).

⁸¹ Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOC. PHIL. 1, 11 (2006).

⁸² *Id.*

⁸³ See Hershovitz, *supra* note SH, [92 Va L Rev] at 1168 & n.56.

⁸⁴ Jules L. Coleman, *Corrective Justice & Property Rights*, in *Property Rights* 124, 133 (Ellen Frankel Paul et al. eds., 1994).

It is certainly important for tort philosophers to respect the relation between corrective justice and primary theories of political morality. Corrective justice explains many wide and shallow features about the common law; theories of political morality explain 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 justice and political morality, and they obscure the special role of political morality. 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.⁸⁵ But legally, and most relevant here, the over-claiming encourages the ridicule of theories of justice which this Article began.⁸⁶ If some species of law and economics can explain tort, corrective justice cannot by itself, and tort philosophers do not focus on how specific theories of political morality inform the law, then tort philosophy seems only to make empty generalities about tort.

Similar problems apply also to some distributive-justice criticisms of economic tort analysis. Distributive justice refers to the moral principles that direct how property and other goods should be allotted among members of a society.⁸⁷ Tort philosophers sometimes use distributive justice to 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.⁸⁸

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

⁸⁵ See Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 Wm & M L Rev 1773, 1774, 1785 (2007).

⁸⁶ 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”).

⁸⁷ 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.

⁸⁸ See, for example, Jeremy Waldron, *Does Law Promise Justice?*, 17 Ga St U L Rev 759, 780 (2001).

impression, tort scholarship needs to consider whether and to what extent some common political morality assigns particular rights or duties to individuals by virtue of their owning their persons or their property.

C. The Argument

Let us therefore restate the argument of the remainder of the Article. Part III explains why American natural-rights theory 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.

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.⁸⁹

Another claim of this Article is explanatory: 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 determinately by the theories of political morality most relevant to and influential on those doctrines. Different theories of political morality vary in how determinate they are. American natural-rights theory happens to prescribe determinate rules in land use. Generally, American natural-rights theory generally makes tough-minded choices how individual rights must cede to

⁸⁹ 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).

common moral interests and vice versa. In the specific case of use, American natural-rights theory generates especially determinate legal results because “use” rights in land map on to clear boundary rules. But these two conditions need not and may not be satisfied for every species of tort or every moral theory relevant to that tort.

Separately, contemporary judges do not follow American natural-rights theory in land-use cases 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.⁹⁰ 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.⁹¹ 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 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

⁹⁰ See Goldberg, *Twentieth Century Tort Law* at 706 (cited in note G20C).

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

could be leveled at American natural-rights theory or its individual ingredients,⁹² 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.”⁹³ This Article finessees 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 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,”⁹⁴ but that adjective does not

⁹² 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).

⁹³ 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”).

⁹⁴ Goldberg, *supra* note G20C, [91 geo l j] at 520.

explain the law's commitments except in easy cases. Richard Epstein has defended an individualistic approach to nuisance on the basis of corrective justice.⁹⁵ 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 common political morality.

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),”⁹⁶ and that “[t]he measure of property, nature has well set, by the extent of mens labour, and the conveniency of life.”⁹⁷ 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 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.”⁹⁸

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.”⁹⁹ 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

⁹⁵ See Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEG. STUD. 49, 50-53 (1979).

⁹⁶ 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.

⁹⁷ Locke, *Second Treatise* § 36, at 292 (cited in note JLTT).

⁹⁸ 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).

⁹⁹ Locke, *Second Treatise* § 40, at 296 (cited in note JLTT).

them ninety-nine hundredths are wholly to be put on the account of labour.”¹⁰⁰ (Shortly after, Locke ups the fraction again, to 999/1000.¹⁰¹)

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.¹⁰²

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 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.”¹⁰³

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

¹⁰⁰ Id.

¹⁰¹ See id § 43, at 298.

¹⁰² *The Federalist* No. 10, at 45, 46 (Penguin 1999) (Charles R. Kesler intro & Clinton R. Rossiter ed) (Madison).

¹⁰³ 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).

necessary consequences of original sin and man's inferiority to God.¹⁰⁴ 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."¹⁰⁵ 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."¹⁰⁶

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."¹⁰⁷ While this passage is often cited as anticipating public-choice economics,¹⁰⁸ 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 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

¹⁰⁴ 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).

¹⁰⁵ John Locke, *Essay Concerning Human Understanding* IV.12.10, at 645 (Oxford 1975) (Peter H. Nidditch ed) (1700) (emphases and upper-case lettering removed).

¹⁰⁶ 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").

¹⁰⁷ *The Federalist Papers*, No. 10 at 46 (cited in note FP) (Madison).

¹⁰⁸ 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).

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.”¹⁰⁹

This conception of property is often called a “right to exclude” in case law and in conceptual philosophy—consider for instance J.E. Penner’s definition of “property” as “a right to exclude others from things which is grounded by the interest we have in the use of things.”¹¹⁰ The “right to exclude” captures some of this conception—but it is misleading in important respects. At first blush, the “right to exclude” refers to a boundary-driven conception of property, an owner’s right to order non-owners to “keep off” of one’s property. Although Penner has criticized this view,¹¹¹ his formal definition of property seems to support it by making the core of property “a right to exclude others from things.” But strictly speaking, property does not give an owner a right to exclude from the thing; it gives him a right to exclude others from interfering with his moral discretion to determine the use, enjoyment, or disposition (subsequently, the “use”) of the thing.¹¹² To be sure, this definition begs hard questions how to delineate where one owner’s determinative discretion ends and another owner’s begins. Even so, the moral discretion to determine use is the core of property. For example, in one 1892 Anglo-American encyclopedia, “property” means “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.”¹¹³ In this definition, exclusion is used only “generally,” and only to the extent that exclusion secures the owner’s “indefinite right of user and disposition”—that is, discretion to determine the use, enjoyment, or disposition of property.

¹⁰⁹ James Kent, 2 *Commentaries on American Law* 265 (Da Capo 1971 (1826-30)).

¹¹⁰ *Id.* [Penner] at 71. See also J.W. HARRIS, PROPERTY AND JUSTICE 13, 141-142 (1996) (defining property as including interests protected by trespassory protections).

¹¹¹ See, e.g., J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 742 (1996) (defining property as “the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it”); *id.* at 743 (acknowledging that property is a “right of exclusion, . . . but it is not the right physically or by order or otherwise (say by putting up fences) to actually exclude others from one’s property”).

¹¹² See also Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003). Elsewhere, Penner describes property’s general subject matter as being the “interest in exclusively determining the use of things.” PENNER, *supra* note --, at 49. In important respects, this subject-matter description defines property better than his formal definition does.

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

This definition shows what is problematic in a simple, boundary-driven “right to exclude.” The simple right to exclude mistakenly suggests that the “formal essence” of legal property is the right to blockade others from the thing.¹¹⁴ In some cases, however, an owner cannot maximize his discretion to determine use without sacrificing the right to blockade others from the thing. In other cases, the right to blockade others is not strong enough to secure to the owner the greatest possible discretion to determine the use, enjoyment, or disposition of the thing. In those cases, “property” requires legal protection beyond a right to blockade. So a formal right to order others to “keep off” is neither sufficient nor necessary to establish property in the moral discretion to determine of the use of the thing.

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. 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.”¹¹⁵ 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.¹¹⁶ 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 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.¹¹⁷ An owner starts with a claim right to be free from unconsented physical invasions, and a reciprocal duty not to

¹¹⁴ PENNER, *supra* note --, at 71.

¹¹⁵ *Ashby v. White*, 92 Eng. Rep. 126, 137 (1703) (Holt, C.J., dissenting).

¹¹⁶ 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.

¹¹⁷ See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-38 (Walter Wheeler Cook, ed., 1978) (1919).

inflict unconsented physical invasions on others.¹¹⁸ 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.¹¹⁹ 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;¹²⁰ 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.¹²¹ The owner’s claim right and general liberty (and non-owners’ *in rem* duty to refrain from interfering with both) leave the owner with a wide realm of practical discretion in which to determine how his land is used.

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

signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil.¹²²

2. Trespass

This understanding explains the first puzzle identified in part I.B: why American land-use common law makes trespasses a trespass- or rights-based cause of action and not a harm-based cause of action. It is imprecise to say that trespass law endows owners with a right to exclude. The core of trespass lies in the possessory interest—a moral interest in controlling their land, in the further interest of determining the ends for which the land is used, enjoyed, and disposed of. The moral right shapes the content of the harm in tort. As Blackstone explains English law, “every entry therefore thereon without the owner’s leave, and especially if contrary to his

¹¹⁸ See *id.* [Hohfeld] at 38.

¹¹⁹ See *id.* [Hohfeld] at 73-74.

¹²⁰ See *id.* at 38-39.

¹²¹ 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).

¹²² 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *209 (W.S. Hein & Co 1992) (1768) (emphasis added).

express order, is a trespass or transgression.” This rule is just because “much inconvenience may happen to the owner, before he has an opportunity to forbid the entry.”¹²³ Here, “inconvenience” is shorthand for “interference with the owner’s indefinite use, enjoyment, or disposition.” So in subsequent American law, “[e]very unauthorized intrusion upon the private premises of another is a trespass, and to unlawfully invade lands in his possession is ‘to break and enter his close’ and destroy his private and exclusive possession.”¹²⁴

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.”¹²⁵ 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. That approach focuses on the parties’ likely affirmative uses of their lots. From that perspective, the harm-benefit distinction makes no sense. Any benefit to one owner’s ongoing use cashes out as harm to the other’s. By contrast, the common law protects in each individual owner “use” in the form of a realm of free action to choose among multiple possible uses. From this perspective, the harm-benefit distinction makes sense. Even if the law stops the defendant from using his land in a certain way, it does so to protect the plaintiff’s “use” understood as an interest in choosing among a wide list of uses, and it still leaves the defendant with freedom to choose among a similar list of undifferentiated uses. These zones of free action transfer to each owner (not, as productive efficiency does, the trier of fact) discretion how to prioritize the values of her and her neighbors’ land uses to the extent they all hit her where she lives. In the process, it allows owners to rate intensely personal or subjective uses and enjoyments higher than monetary or fungible uses.

Trespass law illustrates the conceptual confusion that can follow from describing the core possessory interest as a “right to exclude.” A formal right to exclude cannot explain on its own why trespass lacks a harm requirement. Take *Jacque*. *Jacque* tacitly equates “the right to

¹²³ *Id.*

¹²⁴ *Giddings v Rogalewski*, 158 N.W. 951, 953 (Mich 1916). See also Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract* 64 (Rothman & Co 1993) (1880):

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 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.

¹²⁵ *Jacques v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wisc 1999).

exclude” with “exclusive substantive control and enjoyment rights.” *Jacque* affirms punitive damages as an appropriate response to “the loss of the individual’s right to exclude others from his or her property.”¹²⁶ This argument begs the question. 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.”¹²⁷ 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.¹²⁸

As the *Jacque* court reads this analogy, the eavesdropper’s wrong consists of “the loss of the individual’s right to exclude others from his or her property.”¹²⁹ This reading puts the cart before the horse. The eavesdropper’s halfpenny could be a liability-rule payment compensating the owner for losing his right to exclude. If it does not, it must be because a property rule is necessary. The property rule is necessary to discourage the eavesdropper’s disruption to the owner’s exclusive interest in determining how his land may be used and enjoyed.

3. Nuisance

The same understanding explains, as accident law and economics does not, why the possessory interest and the invasion at the core of private nuisance also follow boundary rules. For a variety of reasons, nuisance resists generalization and has a reputation for being an “impenetrable jungle,”¹³⁰ and our observations here will therefore not be exhaustive. Yet even with these constraints, most garden-variety nuisance disputes are informed by a principle of free use and enjoyment paralleling the conception of free control and enjoyment in trespass.

¹²⁶ *Id.* [Jacques, 563 NW2d] at 159.

¹²⁷ *Jacque*, 563 N.W.2d at 160 (quoting *Diana Shooting Club v. Lamoreux*, 89 N.W. 880 (1902)).

¹²⁸ *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.)).

¹²⁹ *Id.* [at 159].

¹³⁰ KEETON ET AL., *supra* note PK, § 86, at 616.

Consider three illustrations. First, most commentators recognize that a nuisance suit ordinarily requires some physical invasion.¹³¹ This requirement makes nuisance law draw on analogies to bodily cuffs much as trespass does. Even with qualifications, the possessory interest at the core of nuisance protects an owner's moral interest in freedom to determine the ends for which her land is used and enjoyed.

Second, in some of the more theoretically revealing nuisance cases, courts suggest that this domain of free use and enjoyment is for active and productive use, not passive or reflective use. 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, in principle, if nuisance law the developer's freedom to determine the future use of her land, she suffers a taking of rights as soon as the pollution starts. To be sure, coming to the nuisance doctrine complicates the picture because it postpones the developer's suit, until she starts developing. But these complications can be handled as long as the law secures the developer's entitlement and the factory owner's duties. 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.¹³²

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

¹³¹ See *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 220-21 (Mich. Ct. App. 1999) (suggesting that nuisance and not trespass is the proper doctrinal harbor for "indirect intangible invasions"); SINGER, *supra* note JS, § 4.4.1, at 271.

¹³² *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. The physical-invasion test protects different concurrent uses without rating them on their merits. By the same token, it protects uses that come to the neighborhood at different times without giving any owner priority "[j]ust because it happened that [he] arrived in the area first."¹³³

Coming to the nuisance also confirms how American natural-rights theory complements corrective justice theory in informing tort. 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. (Coase unwittingly conceded this point in *Social Cost* when he described *Sturges v. Bridgman* by saying that the baker's "machinery *disturbed* a doctor."¹³⁴) 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. If the cases prefer "compel" and "disturb" over "sandbag," it is because they endow possession of land with a substantive moral interest in determining the future use of land. 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 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

¹³³ *Kellogg v Village of Viola*, 227 NW2d 55, 58 (Wis 1975).

¹³⁴ 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.¹³⁵ 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 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.”¹³⁶ 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 achieve the same result by making specific utilitarian policy arguments tracking the how American natural-rights theory describes property. Some cases stress 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.”¹³⁷ 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 neighbors¹³⁸

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. Rather, courts assume that “property” endows owners with a right to determine how one’s own land is used. To get the right, owners must accept a correlative duty to abstain

¹³⁵ See RESTATEMENT (SECOND) OF TORTS, *supra* note RST, §§ 826(a), 827-28.

¹³⁶ *Sher v. Leiderman*, 226 Cal. Rptr. 698, 704 (Ct. App. 1986).

¹³⁷ *Green v. Castle Concrete Co.*, 509 P.2d 588 (Colo 1973).

¹³⁸ *Mohr v. Midas Realty Co.*, 431 N.W.2d (Iowa 1988).

from complaining about how others choose to use their own. Courts conclude that eyesight and light complaints restrain neighbors' free determination more than they enlarge the owner's free determination.

C. Causation

The same principles logically make causation unidirectional in trespass, nuisance, and land-based negligence. In each of these areas, the plaintiff's possessory interest is the interest in determining how her land is used or enjoyed. The core of the tort—the harm—is the interference with her discretion to determine the use or enjoyment of her land. Parties who contribute to that interference are deemed to cause the loss; parties who do not are not so deemed.

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.”¹³⁹ The brick maker is an active, causative, and culpable agent because he is diminishing a prior moral entitlement the plaintiff holds to determine how her land may be used or enjoyed. Accident law and economists complain that such arguments neither explain nor justify “any simple general theory of nonreciprocity, which is needed to define the limits of Coase.”¹⁴⁰ But the arguments they criticize make far more sense when understood in context of the moral 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.

Sparks cases illustrate the difference. In a sparks case, it is plausible in such cases to say that the plaintiff farmer should have moved his crops or haystacks away from a known risk of sparks coming from the train. Indeed, one nineteenth-century sparks case held, in anticipation of *Social Cost*, that “the burning of said hay was the result of the acts and omissions of *both* the plaintiffs and the defendant.”¹⁴¹ 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

¹³⁹ cite

¹⁴⁰ Vogel, *supra* note KV, at 152.

¹⁴¹ *Kansas Pacific Ry. v. Brady*, 17 Kan. 380, 386 (1877).

destruction of the property.”¹⁴² Both the farmer and the train contribute to the accident as a matter of simple fact and as part of productive-efficiency analysis. But the farmer enjoys discretion to use his land free from trespassory invasions, which might generate accidents, which in turn might limit his free action to determine the future use or enjoyment of his land. So *LeRoy Fibre* designates the “immediate” cause of injury the action of the party who acted outside the scope of its moral rights.¹⁴³

D. Scierter

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.¹⁴⁴ 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.”¹⁴⁵ 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.”¹⁴⁶

Many lawyers assume that English law favors strict liability as the dominant paradigm for accident cases¹⁴⁷ but American law does not.¹⁴⁸ Some of the foundational American cases

¹⁴² *LeRoy Fibre*, 232 U.S. at 348 (emphasis added).

¹⁴³ For more recent cases, consider *Zimmerman v. Stephenson*, 403 P.2d 343, 346 (Wash 1965).

¹⁴⁴ 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.

¹⁴⁵ *Cleveland Park Club*, 165 A.2d at 488.

¹⁴⁶ *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 652 (Wis. 1970) (quoting *Pennoyer v. Allen*, 14 N.W. 609, 613 (Wis. 1883)) (emphasis added).

¹⁴⁷ See, e.g., *Fletcher v. Rylands*, 159 Eng. Rep. 737 (Ex. 1865), aff’d, L.R. 1 Ex. 265 (1866).

¹⁴⁸ See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85-108 (1977); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973). I am grateful to Peter Wiedenbeck and Richard Epstein for encouraging me to consider the objection discussed in this paragraph.

opt for negligence over strict liability with natural-law and –rights arguments.¹⁴⁹ These cases anticipate contemporary scholarship, by corrective-justice theorists, concluding that strict liability is incompatible with the phenomenon of moral agency.¹⁵⁰ 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. 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 in different situations, different standards of legal scienter may track moral fault as determined by the prevailing common political morality.¹⁵¹ 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 to her free action to determine the use and enjoyment of her land. Without qualifications, that is enough to suspect that the defendant is morally more culpable than the plaintiff. To say otherwise is to conflate legal fault with moral fault.¹⁵²

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 follow *Rylands* in adopting employ strict liability.¹⁵³ The water holder is morally culpable merely for

¹⁴⁹ *Losee v. Buchanan*, 51 N.Y. 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.”).

¹⁵⁰ See, e.g. WEINRIB, *supra* note EW, at 175-96.

¹⁵¹ Cf. COLEMAN, [Risks and Wrongs], *supra* note JCRW, at 233 (“If causing a loss is a morally relevant fact about someone, then strict liability may be preferable to strict liability.”).

¹⁵² On this basis Ripstein correctly explains why *Rylands v. Fletcher* is a case about fault even though it imposes a legal regime of strict liability. See Ripstein, *supra* note --, [Tort Law in a Liberal State]. Ripstein, however, does not distinguish enough between fault in doctrine, fault as conceived in corrective justice, and fault as prescribed by the prevailing common political morality explaining the content of rights and duties.

¹⁵³ Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 342-46, 362-68 (2000). Cite also http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998625

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 used to vary in sparks cases. Although sparks cases generally required negligence in the *prima facie* case,¹⁵⁴ many state courts instituted *res ipsa loquitur* or other doctrines to shift to the railroad the burden to prove it was not negligent.¹⁵⁵ When courts refrained from making this move, as James Ely has recounted,¹⁵⁶ legislatures often instructed their courts to use strict liability instead.¹⁵⁷ 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.¹⁵⁸

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. 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. In the former case, the plaintiff keeps free action to determine the use or enjoyment of his land. In the latter, the plaintiff’s free action is diminished, however slightly. A plaintiff may change her land use to avoid a risk of accident, or she may continue using her land and accept a risk of accident, but she cannot both determine her land and avoid a risk of accident. These implications help explain why courts refuse to accept that a plaintiff makes a “voluntary choice” when he is forced to

¹⁵⁴ See *LeRoy Fibre*, 232 U.S. at 340; *Kellogg*, 26 Wis at 233; *Philadelphia & R. R.R. Co. v Hendrickson*, 80 Pa 182 (1876).

¹⁵⁵ See, e.g., *St. Louis, Vandalia & Terre Haute R.R. Co. v. Funk*, 85 Ill 460 (1877); *Ruffner v Cincinnati, H. & D. R.R. Co.*, 34 Ohio St. 96 (1877); *Burlington & M. R.R. v. Westover*, 4 Neb. 268 (1876).

¹⁵⁶ See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 123-25 (2001).

¹⁵⁷ See, e.g., 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, *supra* note JE, at 123-24.

¹⁵⁸ *St. Louis & S.F. Ry. Co. v Mathews*, 165 U.S. 1, 26 (1897), cited in Ely, *supra* note JE, at 124.

choose between “facing [a] danger or surrendering his rights with respect to his own real property.”¹⁵⁹

Sparks cases highlight the policy concerns particularly clearly. In *LeRoy Fibre*, Justice McKenna calls it “an anomaly” to say “that one’s uses of his property may be subject to the servitude of the wrongful use of another of his property.”¹⁶⁰ The land owner’s free determination sets his entitlement; the trespassory sparks count as a “wrongful use” of that entitlement; and an affirmative defense therefore establishes the “servitude” ratifying the taking of the entitlement. This opinion also anticipates some of the difficulties that accident law and economic analysis creates when it prescribes solutions focusing on two parties’ concurrent uses. In *LeRoy Fibre* Justice Oliver Wendell Holmes prefers to treat contributory negligence as “a matter of degree,” better resolved through a case-by-case balancing test.¹⁶¹ 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?”¹⁶²

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. In simple cases, coarse boundary rules enlarge owners’ moral interest in their labor. In these cases, “labor” reflects a broad but shallow moral interest in being left alone, to determine how to apply one’s selfish and productive energies to satisfy one’s own reasonably useful needs. But in some situations, the law can help owners pursue different but concurrent property uses by ordering some features of ownership. For example, owners all have a common interest in a clear and orderly conveyancing system. Surveys and title fees may be expensive, and the conveyancing process stops an owner from selling how she chooses. But the formalities make title ownership more secure than it would otherwise be, no matter to what ends different owners plan to use their property.¹⁶³

¹⁵⁹ *Marshall v. Ranne*, 511 S.W.2d 255, 260 (Tex. 1974).

¹⁶⁰ *LeRoy Fibre*, 232 U.S. at 349.

¹⁶¹ *LeRoy Fibre*, 232 U.S. at 354 (Holmes, J., concurring).

¹⁶² *LeRoy Fibre*, 232 U.S. at 350.

¹⁶³ See 1 BLACKSTONE, COMMENTARIES, *supra* note BC, at *134 (explaining how natural principles of property justify specific “modifications” in local positive law for “translating it from man to man”).

At the same time, the natural right sets a moral baseline against which particular common-law modifications are measured. Before the common law replaces the coarse package of uses an owner gets from the *ad coelum* rule with a more focused package, law makers must be reasonably and practically certain that the focused package really enlarges the affected parties' interests. Conveyancing laws meet that standard. The U.S. Supreme Court used to articulate the standard, in substantive due process cases, by asking whether legislative property regulations "secur[ed] an average reciprocity of advantage."¹⁶⁴ Variations in trespass and nuisance may be justified if they secure to owners throughout the area as much or more freedom to use their property for their likely uses than uniform boundary rules do.

2. Nuisance

These principles go a long way in explaining why nuisance principles are more fine-grained than trespass rules. Nuisance differs from trespass in that the latter deals with substantial physical invasions, while the former usually deals with low-level, non-particulate physical invasions.¹⁶⁵ Nuisance is often defined as a direct interference with a land owner's use rights that causes harm and is unreasonable. Under this definition, nuisance requires the plaintiff to prove three more elements than trespass besides the direct invasion of a land right: causation, harm, and unreasonability. More generally, where *Jacque* and other cases make trespass protect subjective owner perceptions of control, use, and enjoyment, nuisance protects a more objectively defined, one-size-fits-all domain of free action and use determination.

These variations enlarge land owners' moral interest in determining freely the use and enjoyment of their land. To begin with, nuisance enlarges owners' use and enjoyment interests when it shifts from the model of a trespass- or rights-based tort to that of a harm-based tort. Ordinarily, unconsented smells, noise, and smoke do not threaten an owner's use or enjoyment of land as starkly as does an unconsented personal entry like the field crossing in *Jacque*. The harm element limits the reach of nuisance, so it focuses on smells and other disturbances that are sharp enough to feel to the owner like trespasses.¹⁶⁶ Conversely, by shrinking neighbors' formal

¹⁶⁴ Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

¹⁶⁵ 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).

¹⁶⁶ 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.

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 with an exposure to low-level smoke and a liberty to emit it than he would have been with a broader claim right to veto smoke from neighbors' property.

The “unreasonability” element of nuisance serves a similar function. Many authorities recommend that nuisance law scrutinize closely the conduct of the defendant—especially the *Restatement of Torts*, which recommends that nuisance law balance all the factors relating to the social value of the defendant's land use against all the factors relating to the social harm associated with the plaintiff's loss of enjoyment.¹⁶⁷ In practice, however, at least at the liability stage,¹⁶⁸ 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.”¹⁶⁹ 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.¹⁷⁰ This latter inquiry is fairly objective as things go. Unlike the boundary rule in *Jacque*, it keeps out of the doctrine plaintiff's subjective perceptions of the defendant's use. Where the *Restatement* encourages the trier of fact to consider the fairly political question which land use better fits local community values, *Pestey* encourages the trier to focus on the less political question whether physical pollution is higher than the customary level in the neighborhood. Of course, substantiality is just one of many factors relevant to unreasonability, which often requires all-the-circumstances balancing. But it is surprising how often substantiality trumps other factors in the balance. In one 1982 case, a New Jersey appeals court announces that nuisance law balances a wide range of factors, but then relies primarily on a finding that the noise pollution at issue was “louder than others” in the neighborhood.¹⁷¹

¹⁶⁷ See RESTATEMENT (SECOND) OF TORTS, *supra* note RST, §§ 827-28.

¹⁶⁸ The relative hardships are appropriately relevant after courts establish liability and proceed to consider whether to enjoin a nuisance. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); Jeff E Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 206 & nn.93-97 (1990).

¹⁶⁹ 788 A.2d 496, 508 (Conn. 2002).

¹⁷⁰ See, e.g., *Pestey*, 788 A.2d 496 at 508 (describing unreasonableness in terms of whether “the interference is beyond that which the plaintiff should bear, under all of the circumstances of the case, without being compensated”).

¹⁷¹ *Rose v. Chaikin*, 453 A.2d 1378, 1382 (N.J. Super. Ch. 1982).

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. Earlier, the delay frees the manufacturer to be productive in an area where fewer people will be harmed. Later, the delay aligns the developer's legal rights with his moral interest when that interest becomes especially valuable to him.¹⁷²

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.¹⁷³ As with the harm and substantiality element, these rules also narrow the formal right to exclude to enlarge the moral entitlement to use and enjoy property. Without such variations, the law would probably need to one single one-size-fits-all tolerance level for pollution. With them, the law can distinguish among the pollution levels characteristic of industrial, agricultural, commercial, and residential neighborhoods. Even so, the locality rules avoid use-specific interest balancing; they instead crudely 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.”¹⁷⁴ 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.”¹⁷⁵

These examples all confirm that the formal legal right to exclude is not sufficient to explain the property interests in nuisance. In *Jacque*, the formal right to exclude was not sufficient to justify why the right to exclude needs punitive protection. In nuisance, the right to exclude cannot by itself justify why nuisance abandons exclusion—by flipping from the rights-

¹⁷² See Claeys, *supra* note CRT, [88 Corn L Rev] at 1607-15.

¹⁷³ See, e.g., *Rose*, 453 A.2d at 1382; *Jewett v. Deerhorn Enterps., Inc*, 575 P.2d 164, 166-68 (1978); RESTATEMENT (SECOND) OF TORTS, *supra* note RST, §§ 827(d), 828(b).

¹⁷⁴ *Gilbert v. Showerman*, 23 Mich 448, 452-53, 1871 WL 5622.

¹⁷⁵ *Id.* at 454. Although space prevents a full explanation, similar principles also explain why nuisance law protects owners only against what the land user of ordinary sensibilities deems pollution—not what the eggshell plaintiff deems pollution. See, e.g., PROSSER & KEETON, *supra* note PK, § 88, at 628.

based to the harm-based model of tort, by excusing low-level intrusions generally, or by excusing more significant intrusions in undeveloped or industrial neighborhoods. In all these cases, exclusion is reconfigured to fit and secure the owner's moral interest to determine how to use or enjoy his land for a wide range of active or productive ends. In the words of one prominent English opinion, nuisance hardwires into the law a "give and take, live and let live" regime, to enlarge for all owners "the common and ordinary *use* and occupation of land."¹⁷⁶

The same 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, 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.¹⁷⁷ 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.¹⁷⁸

Another and important example in practice comes in the law of lateral support. Lateral-support doctrine makes a land-owner liable for subsidence only when the plaintiff can show that the digging would have caused the land to collapse in its natural state if his buildings had not been on it.¹⁷⁹ This rule follows from a basic right to free use and enjoyment, and it and the variations on it all reconfigure that right for the common advantage. Each owner starts with an entitlement to "the use of his land for ordinary and legal purposes"¹⁸⁰—that is, to a domain of free development potential like the domain protected by coming to the nuisance rules. The law enlarges common interests, however, by restraining that potential with reciprocal servitudes barring anyone from undermining land in its natural state. For digging that does *not* threaten to subside the land in its natural state, the law still promotes the common advantage by imposing

¹⁷⁶ Bamford v. Turnley, 3 B. & S. 67, 122 Eng. Rep. 27, 33 (1862) (opinion of Bramwell, B.) (emphasis added).

Similar principles explain why land-use negligence suits follow the harm-based and not the trespass-based approach.

¹⁷⁷ See Hullinger v. Prahl, 233 N.W.2d 584, 585 (S.D. 1975); 1 AM JUR 2D ADJOINING LANDOWNERS § 111 (2007).

¹⁷⁸ Whitlock v. Uhle, 53 A. 891, 892 (Conn. 1903) (emphasis added), cited in DeCecco v. Beach, 381 A.2d 543, 545 (Conn. 1977).

¹⁷⁹ See, e.g., Noone v. Price, 298 S.E.2d 218, 221-22 (W. Va. 1982); C.J.S.2D ADJOINING LANDOWNERS § 9 (West 2008).

¹⁸⁰ Winn v. Abeles, 10 P. 443, 447 (Kan. 1886), cited in Sanders v. St. Hwy. Comm'n, 508 P.2d 981, 987 (Kan. 1983).

tort duties on the digger, to give advance notice and to dig with reasonable care.¹⁸¹ But the law does not go further, by giving the neighbor a property right to veto the digging absolutely. The building owner “cannot, by being prior in point of time, prevent his [digging] neighbor from building there also.”¹⁸² These rules secure a reciprocity of advantage: They are “simply the recognition and adjustment of court action to that which is so obviously just, fair, and reasonable that the parties themselves generally accommodate themselves to it without controversy.”¹⁸³

Spite-fence and lateral-support cases are also extremely revealing because they show why the “right to exclude” is not a precise enough conceptual definition of property in use rights. If property is organized around a boundary-driven right to exclude, spite-fence and lateral-support rules should not establish property rules. These rules may represent *in personam* tort complements to property, the argument goes, but they cannot establish property rights without excluding outside penetrations. Yet the right to exclude needs to be judged by how well it fits the cases rather than the other way around. In the cases, spite fences “injure and destroy the peace and comfort, and . . . damage the *property*, of one’s neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful.”¹⁸⁴ In other words, a spite-fence plaintiff has property in excluding not only a boundary penetration but also a spiteful interference with her exclusive determination over her land’s use and enjoyment. Similarly, the right to lateral support for land in its natural state is deemed a “‘*property right*’ . . . which accompanies the *ownership* and *enjoyment* of the land itself.”¹⁸⁵ By contrast, for land threatened in its artificial state, the right to be free from careless excavation is a tort duty—not *in rem* but *in personam*, and not strict but only negligent.¹⁸⁶ So a plaintiff in a lateral-support case has property in excluding not only boundary penetrations but also non-invasive interference with determining the use or enjoy of his land in its natural state. Even more telling, in each doctrine, the moral property right encourages not passive but active and productive conceptions of use and enjoyment. In lateral-

¹⁸¹ See, e.g., *Walker v. Strosnider*, 67 S.E. 1087, 1090-95 (W. Va. 1910).

¹⁸² *Id.* at 447.

¹⁸³ *Walker*, 67 S.E. at 1095.

¹⁸⁴ *Burke v. Smith*, 37 N.W. 838, 842 (Mich. 1888) (emphasis added); see also *Sundowner v. King*, 509 P.2d 785, 786 (1973) (describing *Burke* as representing “clearly the prevailing modern view”).

¹⁸⁵ *Sanders v. St. Hwy. Comm’n*, 508 P.2d 981, 987 (Kan. 1973) (quoting 2 THOMPSON ON REAL PROPERTY § 415, at 640 (1961)); *id.* at 990. (Emphases added.) See also *Walker*, 67 S.E. at 1091.

¹⁸⁶ See *Walker*, 67 S.E. at 1090-91.

support law, for example, owners retain “complete dominion and power over their own land” as long as they do not dig deeply enough to undermine soil in its natural state.¹⁸⁷

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 damage¹⁸⁸ or if the animal’s owner specifically intends that the animal trespass.¹⁸⁹ These rules deviate from *Jacque*’s general presumption that “actual harm occurs in every trespass.”¹⁹⁰ 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.¹⁹¹ These rules operate similarly to nuisance’s locality rules.¹⁹² 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

¹⁸⁷ *Id.* at 1090.

¹⁸⁸ *See, e.g.,* *Griffin v. Martin*, 7 Barb. 297 (N.Y. Supr. Ct. 1849); *Stackpole v. Healy*, 16 Mass. 33 (1819); RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 21 (Proposed Draft No. 1, April 6, 2005); PROSSER ET AL., *supra* note PK, § 76, at 539 & nn.8-13.

¹⁸⁹ *See, e.g.,* *Lazarus v. Phelps*, 152 U.S. 81 (1894); *Monroe v. Cannon*, 61 P. 863, 864-65 (Mont. 1900).

¹⁹⁰ *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 144, 160 (Wis. 1997).

¹⁹¹ *See, e.g.,* *Larson-Murphy v. Steiner*, 15 P.3d 1205, 1213 (Mont. 2000); *Garcia v. Sumrall*, 121 P.2d 640, 644 (Ariz. 1942); RESTATEMENT OF THE LAW (THIRD) OF TORTS, *supra* note RTT, § 21 cmt c, at 330-33.

¹⁹² *See, e.g.,* *Griffin v. Martin*, 7 Barb. 297 (N.Y. Supr. Ct. 1849) (“In agricultural districts, and especially in new countries, the public benefit resulting from permitting cattle, horses, and sheep to run at large, in highways, probably overbalances the increased expense of acquiring a title to the road.”); *see also* *Myers v. Dodd*, 9 Ind. 290 (1857) (justifying a fence-out regulation ““as a kind of police regulation in respect to cattle, founded on their well known propensity to rove”). *But see* *Woodruff v. Neal*, 28 Conn. 165 (1859) (declaring a similar law to inflict a regulatory taking and distinguishing *Griffin* on the ground that the right-of-way condemnation at issue in *Griffin* clearly dedicated grazing rights to the public).

increases the burdens of the freeholders within the inclosure, who make objection that their lands are to be turned into a public pasture” unless they “fence any portion of their lands which they may wish to cultivate.”¹⁹³ Contrary to *Social Cost*’s treatment of cattle trespasses, owners’ control and enjoyment provide sufficient reason to choose between fence-in and fence-out regimes. And, in some tension with “right to exclude” accounts of property, the right to exclude is not sufficient by itself to predict when trespass relaxes boundaries in these manner.¹⁹⁴ The formal right to exclude does not acquire focus without drawing on a substantive account of owners’ interests in determining the use and enjoyment of their land.

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.*,¹⁹⁵ the Massachusetts Supreme Court notes that air travel is valuable “as a means of transportation of persons and commodities.”¹⁹⁶ 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.”¹⁹⁷ 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.”¹⁹⁸

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.¹⁹⁹ 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

¹⁹³ *Smith v. Bivens*, 56 F. 352, 356 (C.C. S. Car. 1893) (declaring a new state fencing out statute unconstitutional as a regulatory taking). In *Smith*, the fence-out law was especially objectionable because it seems to have been passed largely at the prompting of a small number of cattle ranchers who wanted continued cheap access to one owner’s pasturage. See *id.* at 353. Nevertheless, the court’s reasoning does not rely on the special-interest politics. The court begins by protecting the pasture owner’s “complete possession and use of his own land,” and then examines whether the law secures him a reciprocity of advantage. *Id.*; see *id.* at 356-57.

¹⁹⁴ See *Smith*, 56 F. at 356.

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

¹⁹⁶ *Smith*, 170 N.E. at 388.

¹⁹⁷ *Id.* at 389.

¹⁹⁸ *Id.* at 393.

¹⁹⁹ Coase, *Social Cost*, *supra* note CSC, at 128-32. While Coase cites and treats other overflight cases, *Smith* explains the case law most clearly in terms of the moral interests of American natural-rights 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.²⁰⁰ 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 more pessimistic and social terms than is often presumed in instrumentalist public-interest 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.²⁰¹ 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

²⁰⁰ 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”).

²⁰¹ See Robert Bone, *Nineteenth-Century Nuisance Doctrine*, 59 S Cal L Rev 1101, 1106 (1985) (contrasting between “absolute” and “social and relational” rights).

transfer.”²⁰² In other contexts, however, nineteenth-century American law used “absolute” to 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.²⁰³ 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. 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.²⁰⁴ Many legal scholars assume that moral theories of rights make sense only if justified in reference to deontological theories of morality.²⁰⁵ 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.²⁰⁶ Many assume that theories of morality must be deontological to be moral, and they are accordingly skeptical of theories of morality that vary the content of moral rights. Richard Epstein’s corrective-justice treatment of nuisance could be criticized on these grounds. On one

²⁰² 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 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.”).

²⁰³ See, e.g., 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); 1 BLACKSTONE, *supra* note BC, at *119-*124; Burns, 54 U Cin L Rev 67, 71-73.

²⁰⁴ I am grateful to Larry May and Dennis Tuchler for encouraging me to consider the objection in this section.

²⁰⁵ See for example WEINRIB, *supra* note EWIPL, at 84-113 (grounding rights claims in a theory of right relying on IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., 1991)); 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).

²⁰⁶ See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 24-30 (Harvard 1971). [cite also Broad, *Five Types of Ethical Theory*].

hand, when Epstein (incompletely) defends the corrective-justice foundations of use rights, he insists: “Individual rights do not rest upon foundations so insecure that any fresh wave of empirical research may displace them.”²⁰⁷ Yet he then proceeds to relax the strict boundary rules he draws from corrective justice by using “utilitarian” limitations based on the principle of implicit in-kind compensation.²⁰⁸ Epstein’s treatment seems to mix philosophical apples and oranges; perhaps American natural-rights theory suffers from one or more of these criticisms.

Although this subject requires more elaboration than can be provided here, it is fair to say here that the general criticism is not relevant to American natural-rights theory. A theory is not necessarily deontological because it is moral; a theory of morality can be consequentialist and remain moral. A theory is “moral” if it obligates a subject to promote the good of the community in situations in which his individual good, conceived narrowly, points toward a different course of conduct. Some theories of morality define the “good” of the individual and the community not in deontological terms but in terms of individual and civic happiness. Consider the criticisms that deontological moral philosophy sometimes takes from virtue²⁰⁹ or natural-law ethicists.²¹⁰ When such ethicists criticize deontological theory, they assume: 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 not satisfying because they abstract from such psychology. In other words, ethical rules are judged by their tendency to enlarge the happiness of the individual and the community, where “happiness” is understood as a complete, mature, and excellent state of human satisfaction.

One must be careful before generalizing about which lawyers or jurists subscribe to what moral-philosophical foundations. That said, many of the philosophers and jurists who considered the foundations of Declaration-style natural-law and –rights theory used

²⁰⁷ Epstein, *supra* note REN, at 75.

²⁰⁸ See Epstein, *supra* note REN, [8 JLS] at 57-58, 90-91.

²⁰⁹ See, e.g., 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”).

²¹⁰ See, e.g., ALASDAIR MACINTYRE, *Hume on the ‘Is’ and the ‘Ought’*, in *AGAINST THE SELF-IMAGES OF THE AGE* 109, 124 (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”).

consequentialist terms. Locke did so,²¹¹ and so did prominent American jurists who restated the law in teleological terms.²¹² In these accounts, each person has an interest, which rationally considered is reasonable and useful, in using his selfish energies to preserve himself and enlarge his free action as a moral agent.²¹³ Each owner owes other owners (the account continues) a moral obligation to respect this interest in others for the sake of the common good, which in turn is understood as owners' concurrent exercise of their equal domains of productive freedom.²¹⁴ In practice, owners' particular uses vary enough that clear boundary rules best approximate all owners' moral interest in free action. But the law may learn that residential patterns, cattle use patterns, air travel, or other patterns give owners' common interests in some respects. In those cases, legal rights should be reconfigured, consequentially to enlarge owners' underlying moral interests in active and productive use of their own assets for their own ends.

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; it explains many general features and specific rules in land-use torts that accident law and economics gets wrong. All the same, a theory of law may be wrong even it is not mushy. Perhaps accident law and economics makes up for its explanatory deficiencies with normative criticisms not adequately considered in American natural-rights theory. Of course, this comparison will be incomplete in many respects. Among other complications, "labor," "use," and "enjoyment" may or may not be commensurable with "wealth," "utility," "efficiency," and other key foundational concepts in

²¹¹ See, e.g., PETER C. MYERS, *OUR ONLY STAR AND COMPASS: LOCKE AND THE STRUGGLE FOR POLITICAL RATIONALITY* 37-65, 137-77 (1998); JOHN COLMAN, *JOHN LOCKE'S MORAL PHILOSOPHY* 195-96 (Edinburgh 1983) (both describing Locke's political philosophy as having hedonistic foundations); 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) (both citing John Locke's understanding of morality to explain why Locke's political and ethical philosophy are not deontological but consequentialist).

²¹² See, e.g., 2 KENT, *supra* note JK, 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 . . .").

²¹³ See, e.g., 1 WILSON, *supra* note JW, at 293 (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, *supra* note JLTT, § I.86, at 205 (suggesting that property is "founded in [man's right] to make use of those things, that [a]re necessary or useful to his Being").

²¹⁴ See, e.g., 1 WILSON, *supra* note JW, at 302 (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).

law and economics. Even with these reservations, the comparison is extremely revealing in another dimension: the extent to which different normative theories of social control assume that expert-driven regulation can regulate economic life.

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 private 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 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.”²¹⁵ 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 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.²¹⁶ 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, social scientists who had no reason to know about it started to raise serious doubts about centralized planning--relying to a large degree on generalizations about human behavior strikingly similar to American natural-rights 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.”²¹⁷ 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.”²¹⁸ It is fair to wonder whether accident law and economics makes refinements of the type that worried Hayek.

²¹⁵ Coleman, *supra* note --, [112 Yale LJ] at 1543.

²¹⁶ See, e.g., Goldberg, 91 Geo LJ at 519 (cited in note JG20C).

²¹⁷ See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945).

²¹⁸ *Id.*

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 place new theories of democracy and administration.²¹⁹ 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.²²⁰

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.²²¹ 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.”²²²

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

²¹⁹ 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)).

²²⁰ See for example Goodnow, at 18, 88 (cited in note FG); Wilson at 240-45 (cited in note WWP). 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).

²²¹ Ernest Weinrib, *Understanding Tort Law*, 23 Valparaiso U L Rev 485, 485-88 (1989).

²²² 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)).

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,²²³ many important projects associated with the Realists can be understood as efforts to apply the general lessons of 1900-era political and social science to American law. Realist property theory can certainly be understood as such a project. For example, Realist economist Richard Ely says of the labor theory of property expounded in *Van Horne’s Lessee*:²²⁴ “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.”²²⁵ 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.²²⁶

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.²²⁷ As applied to property, Hohfeld used this taxonomy to recast *in rem* claim rights of exclusive use determination into clusters of *in personam* privileges, to use or alienate assets for specific purposes, in relation to particular claimants on the asset.²²⁸ Although Hohfeld never used the phrase “bundle of rights” himself,²²⁹ Hohfeld’s contemporaries did and gave him attribution.²³⁰ 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

²²³ 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).

²²⁴ See note xx and accompanying text.

²²⁵ 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”).

²²⁶ 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”).

²²⁷ 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).

²²⁸ See Hohfeld, *Fundamental Legal Conceptions As Applied in Legal Reasoning II*, in *id* at 65, 74-82.

²²⁹ 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.

²³⁰ 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”).

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.”²³¹

Realist bundle of rights theory is now the standard conceptual lens through which prominent judges and academics view property in property torts. In the sparks case *LeRoy Fibre*, Justice Holmes argued that the law should not categorically block contributory negligence from going to the jury but rather weigh the defense by balancing minor “differences of degree” depending on where the plaintiff’s flax stacks were in relation to the defendant’s train.²³² 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.²³³ 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.”²³⁴ 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*.”²³⁵

This shift transforms American tort common law in the guise of explaining it.²³⁶ In Hohfeldian terms, American natural-rights theory hardwires into the relevant common law an assumption that “use” refers to *in rem* claim rights,²³⁷ which protect in owners a liberty to choose among many possible liberties how to use their land. Although the interest-balancing tests just mentioned vary in different ways, all of them frame resource disputes as entitlement-allocation decisions that could go either way. The land owner who otherwise enjoys a claim right has the same liberties to use his land for single purposes, but now subject to exposure that outside pollution or trespasses may disrupt those use-liberties. The various shifts described above thus pit one liberty, corresponding to the owner’s current use, against another, corresponding to the neighbor’s current use. The liberties that correspond to land uses not currently practiced are

²³¹ Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 Colum L Rev 209, 214 (1922).

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

²³³ 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).

²³⁴ Coase, *Social Cost* at 155 (cited in note CSC).

²³⁵ Cooter & Ulen, *Law & Economics* at 74-75.

²³⁶ *Accord Penner, supra JEPN*, [5 J Env't L] at 17 (after canvassing standard accident law and economics treatments of nuisance, concluding that, “as an analysis of the orders judges actually make, this is really very strained”).

²³⁷ Bounded, of course, by correlative *in rem* duties not to make unjustified boundary invasions on neighbors’ property.

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,²³⁸ 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.²³⁹ In reality, however, that *in rem* “right to exclude” can be understood in several different ways. The natural-rights approach illustrated in Part III uses exclusion often but not always to protect owners' substantive interest in determining how they may productively use or enjoy their property. That 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; exclusion *may* further productive use; but exclusion need not further productive use or any other particular substantive interest.²⁴⁰ Merrill and Smith's account compresses the differences between these alternatives and favors the Realist one.²⁴¹

Because the Realists' conception of exclusion is formal, it severs the connection in natural-rights theory between property and exclusive use or enjoyment. The simplest illustration comes from the topic that mattered most to the Realists—rate regulation. Note that the Hale article quoted above revised the “property concept” to loosen constitutional limitations

²³⁸ 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). For other scholarship identifying the same conceptual connection, see J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1078-80 (1996).

²³⁹ See Merrill & Smith, 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).

²⁴⁰ See Cohen, 13 Cornell L Q at 12 (cited in MCPS) (“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”).

²⁴¹ 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).

preventing the government from regulating rates.²⁴² If property consists of a right to determine the use, enjoyment, or disposition of property free from others' interference, the rights to sell, lease, and price assets are all property. Yet if property requires merely *some* formal right of exclusion, then an owner may not be able to claim property in the rights to determine whether to sell, at what price, or with what restrictions. In Hale's factory example, as long as the law endows the owner with *in rem* rights to exclude others from trespassing or polluting on his factory, he still has formal property, and he may not complain that rate regulations take any property rights in disposition rights. In this spirit, when Realist Morris Cohen defined the "essence of private property [as] always the right to exclude others,"²⁴³ 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."²⁴⁴

Although Cohen and other similar Realists used the formal right to exclude to tease commercialization rights out of property, the compromises they made in property theory can confuse sound conceptual analysis of property. Such confusion is evident in Merrill and Smith's analysis of trespass and nuisance. When Merrill and Smith speak of exclusion, both assume that exclusion refers to a formal interest in property,²⁴⁵ defined by an *in rem* claim right to blockade some set of boundary invasions.²⁴⁶ These definitions approximate the general character of trespass and nuisance, but strictly speaking they do not precisely fit the conceptions of "property" latent in the cases. Trespass seems to be organized around a formal and boundary-driven right to exclude—but not in animal or overflight cases, and the formal right needs supplementation to explain why remedies vary between accidental and intentional trespasses.²⁴⁷ Nuisance also seems organized around a right to exclude—except less so than trespass, not in spite-fence or ground-support cases, and only sometimes in pollution cases.²⁴⁸

²⁴² See, e.g., *Block v. Hirsh*, 256 U.S. 131 (1926) (upholding a local rent-control scheme against federal constitutional challenges).

²⁴³ Cohen, *supra* note MCPS, [13 Cornell L Q] at 12.

²⁴⁴ *Id.* [Cohen, 13 Cornell L Q] at 13.

²⁴⁵ See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 978 (2004) ("Property gives the right to exclude the rest of society from a thing," enforceable against everyone else); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730, 753 (1999) ("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").

²⁴⁶ See, e.g., Smith, *supra* note HSN, at 978 ("keep out").

²⁴⁷ See *supra* sections III.B.2, III.F.3.

²⁴⁸ See *supra* section III.F.2.

To say the same thing in reverse: The formal right to exclude is under-determinate; it is consistent with many general accounts of trespass and nuisance, but it does not precisely lead to any single one. Indeed, Merrill and Smith can use the same formal conception of property to generate different accounts of nuisance. Merrill explains American trespass law in terms of coarse exclusionary rules, but he reads nuisance law to employ not exclusion but party-specific interest balancing.²⁴⁹ Smith breaks from Merrill because he reads nuisance law to be exclusionary in its main features. But in Smith's read, nuisance still abandons exclusion and flips to party governance when the benefits of joint property management outweigh the judicial costs of supervising of unwilling parties.²⁵⁰ Conceptually speaking, since a formal right to exclude is consistent with both Merrill and Smith's account, that right is not determinate enough to explain fully what property is. So both explanations must be judged not on their conceptual merits but on the basis of what completes their explanations: their economic analyses of nuisance.

Nevertheless, Merrill and Smith make a sound conceptual criticism when they suggest that Realist bundle of rights property theory causes accident law and economics to misunderstand the "property" features of property torts.²⁵¹ 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.²⁵² But generally speaking, productive efficiency may be attractive in theory and

²⁴⁹ See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEG. STUD. 13 (1985). Accord Hylton, *supra* note KH, manuscript at 12.

²⁵⁰ See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 975-1007, 1021-45 (2004).

²⁵¹ See, e.g., Merrill and Smith, *What Happened to Property in Law and Economics?* 111 YALE L.J. at 391-92 (criticizing law and economics' "causal agnosticism").

²⁵² Among many other complications, some of the issues discussed below bleed into remedy questions that exceed the scope of this Article. For different treatments, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1106-07 (1972); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 Stan L Rev

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.²⁵³ 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.²⁵⁴

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,²⁵⁵ 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.²⁵⁶ Perhaps the neighbor at the bottom of the shaft should consider moving her house or building a break-water; but perhaps she builds a bigger house after the mine

1075 (1980); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 Yale L J 2091 (1997).

²⁵³ 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.

²⁵⁴ 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”).

²⁵⁵ 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).

²⁵⁶ 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).

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,²⁵⁷ but the scholarship does not come to any single resolution.²⁵⁸ 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.²⁵⁹ But it expects much from a jury or judge to expect them to consider all the relevant short-run factors, let alone balance the short-run ones with the long-run ones.

Turn to the parties' production functions. Many accident law and economic treatments illustrate general principles with charts or tables showing how much each extra increment of production by one party increases that party's profits and the other party's likely losses. In *Social Cost*, Coase refutes Pigou by drawing out the consequences that follow when one daily train generates \$150 revenue at \$50 cost, and a second \$100 additional revenue at \$50 additional cost.²⁶⁰ These sorts of examples usually presume that the fact finder can know each party's production function accurately and instantaneously.²⁶¹ 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."²⁶² So whenever economic analysis presents such cost-revenue functions, the lawyer should discount them substantially to account for the slippage between economic hypothetical and the uncertainty of a real-life lawsuit.

Separately, "productive efficiency" is usually construed to assume perfect competition.²⁶³ 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 \$4.²⁶⁴ 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

²⁵⁷ See sources cited in note – (Polinsky, Brown, Schaefer).

²⁵⁸ 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).

²⁵⁹ See Anderson, 2007 Utah L Rev at 260-61.

²⁶⁰ 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).

²⁶¹ 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").

²⁶² 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).

²⁶³ See for example Coase, *Social Cost* at 101, 139 (cited in note CSC).

²⁶⁴ 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, it is possible if not likely that the farmer and rancher value the crops extremely differently from each other and the market-replacement price.²⁶⁵ Accident law and economic scholarship does recognize the problem of subjective valuation. Some scholarship worries that damage rules short-change subjective values,²⁶⁶ while others worry that subjective valuation encourages parties to hold out²⁶⁷ and expect that liability rules circumvent this danger.²⁶⁸ But if heterogeneous property uses are the norm and not the exception, the law should worry far more about the former possibility than the latter.

Thus far we have identified important information gaps in productive efficiency—but then recall that economic analysis also considers likely transaction costs. Robert Ellickson has helpfully subdivided transaction costs into get-together costs (the search costs of finding a bargaining or disputing partner), execution costs (the costs of consummating a bargain), and information costs.²⁶⁹ 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—particularly associated with third parties.

To this point, we have assumed, as Coase's hypotheticals all do, that the economist is trying to maximize wealth in a bilateral dispute between two present and established land users. As more owners become parties to a resource dispute, they increase holding out and free-riding. These coordination costs can simplify economic analysis. In some circumstances, such costs counsel strongly in favor of assigning liability in the manner most likely to circumvent the coordination costs.²⁷⁰ At the same time, multiplicity creates other complications if one zooms

²⁶⁵ 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).

²⁶⁶ See, for example, Epstein, *Property Rules and Liability Rules*, 106 *Yale L J* at 2093.

²⁶⁷ See, for example, Cooter, *The Cost of Coase*, 11 *J Leg Stud* at 13.

²⁶⁸ See, for example, Polinsky, *Introduction to Law and Economics* at 21-23 (cited in note AMP).

²⁶⁹ Ellickson, 99 *Yale L J* at 614-16 (cited in note RECC).

²⁷⁰ 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 --).

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.²⁷¹ Sparks cases presumed railroads liable and limited plaintiffs'-misconduct defenses to avoid such complications along railroad lines. Similar concerns are equally important in most simple trespass and pollution-nuisance fact patterns.

The relevant liability rules must also consider how land-use decisions made in one year will affect planning in the neighborhood twenty years later. On a coming to the nuisance fact pattern, it is cost-prohibitive for a factory owner to find all the likely residents in the neighborhood twenty years later. Maybe he can find and bargain with their current predecessors in interest. But in a world of scarce information, the present owners' forecasts may be haphazard. The more often neighborhood conditions change, the more frequently later parties will need to renegotiate.²⁷² 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.²⁷³ It could suggest that, *ex ante*, there is no one-size-fits-all efficient solution.²⁷⁴ 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.²⁷⁵ 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,

²⁷¹ See Merrill & Smith, *What Happened to Property in Law and Economics?* 111 Yale L J at 394-97.

²⁷² See Cooter & Ulen, *Law & Economics* at 86 (cited in note CU).

²⁷³ See William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1 (1972). For a more qualified and fact-specific 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).

²⁷⁴ See, e.g., Bebchuk, *supra* note LB, [100 Mich. L. Rev.] at 632.

²⁷⁵ 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).

policing agreements and rules, and arranging for the execution of preventive measures.”²⁷⁶ One such administrative cost relates to the robustness of markets. By and large, productive-efficiency analysis anticipates what a market would do, discounts for transaction costs, and either nudges the parties toward a bargain or replicates the bargain they should have attained.²⁷⁷

In doing so, productive-efficiency analysis assumes that legal doctrine does not shape the parties’ preferences for market bargaining. Here is another assumption that can be reasonably questioned. Take train-sparks cases. The rule barring contributory negligence seems harsh, for it seems to encourage farmers to plant as close as they want to tracks. The authorities that favor contributory negligence on this ground²⁷⁸ assume the law can maximize the joint value of the farmer’s crops and the railroads operations without destabilizing general perceptions about property rights, markets, and litigation. Perhaps. But if contributory negligence typically goes to the jury, the law discourages railroads from settling up front. It encourages them instead to run their spark-emitting trains, make farmers litigate, and then settle at a discount. So perhaps contributory negligence decreases social welfare in the long run even if it increases joint party welfare in the short run. Or, even if contributory negligence increases social welfare in both the short and long runs in sparks cases, perhaps it confuses the tort system generally about how boundaries work in land-use torts like nuisance. So perhaps precedents that balance competing uses in sparks cases encourage judges to use balance in nuisance, and such balancing in turn encourages polluters to litigate rather than negotiate for pollution servitudes. These various economic costs are considered more explicitly in economic scholarship on the public use doctrine in eminent domain and the choice between property and liability rules.²⁷⁹ But in principle, they are also relevant to the basic rules of liability in the common law land-use torts.

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

²⁷⁶ Ellickson, *Alternatives to Zoning*, 40 U Chi L Rev at 689.

²⁷⁷ See Coater, *The Cost of Coase*, 11 J Leg Stud at 14-27.

²⁷⁸ See, e.g., RICHARD A. EPSTEIN, TORTS § 13.1, at 336 (1999).

²⁷⁹ See, for example, Thomas Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 88 (1986).

social efficiency must therefore determine with practical certainty to what extent different legal regimes encourage gainful production or rent dissipation.

E. A Simpler Alternative?

Take all these factors together, and it is plausible to wonder whether the concrete factors most relevant to productive efficiency require information too particular, volatile, and costly to be available to triers of fact regularly. The informational demands seem even more severe when one recalls that productive-efficiency analysis focuses, as section IV.C showed, on individualized use liberties. In *Economic Analysis of Law*, Richard Posner presumes, on one hand, that property law can and should first “parcel[] out mutually exclusive rights to the use of particular resources,” and then, on the other hand, that tort and other bodies of law can reconfigure those rights when “giving someone an exclusive right to a resource may reduce rather than increase efficiency.”²⁸⁰ But suppose that land is used in conditions of uncertainty, with diverse and selfishly-driven uses, in which temporary resolutions of use conflicts can change suddenly. If these generalizations are tolerably accurate, it is unrealistic to expect that a trier of fact can simultaneously secure investment 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.²⁸¹

Boundary-like protections serve this goal in tort.²⁸² 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

²⁸⁰ Posner, *Economic Analysis of Law*, § 3.1, at 32, 34 (6th ed.).

²⁸¹ 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”).

²⁸² 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.

security that their chosen uses will not be disrupted in the likeliest invasive ways.²⁸³ 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 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.²⁸⁴ 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.²⁸⁵ 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

²⁸³ This security cannot be complete without the right remedial rules, a full discussion of which (again) exceeds the scope of this Article.

²⁸⁴ See above notes --. [notes about Locke & moderation & Federalist 37]

²⁸⁵ 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.").

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.²⁸⁶ 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-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

²⁸⁶ I am grateful to Lloyd Cohen for suggesting this phrase.

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 more on the ways in which the tort system instantiates corrective justice than on the ways in which it borrows on political morality to inform rights and duties. Corrective-justice insights 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 political morality to explain why rights and trespasses are both 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.”²⁸⁷

²⁸⁷ Eric A. Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, 112 Yale LJ 829, 834 (2003).

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.”²⁸⁸ 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.”²⁸⁹ 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.”²⁹⁰ 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 be hard to verify for a separate reason: “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

²⁸⁸ Coleman, *Practice of Principle* at 26-27 (cited in note JCPP).

²⁸⁹ Landes & Posner, *Economic Structure of Tort Law* at 114 (cited in note LP).

²⁹⁰ Landes & Posner, *Economic Structure of Tort Law* at 50.

that they would bargain to but for transaction costs.²⁹¹ Merrill employs a similar approach for nuisance, but a much more exclusionary one in trespass to avoid transaction costs associated with entitlement delineation.²⁹² 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.²⁹³ 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 explanations of doctrine and the accounts of utility and efficiency that claim to explain the doctrine. But Eric Posner’s concerns apply to empirical analysis as well as to 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.²⁹⁴ 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

²⁹¹ 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).

²⁹² See Merrill, *Trespass and Nuisance*, 14 J Leg Stud at 25-26.

²⁹³ See Smith, *supra* note HSN, [90 Va. L. Rev.] at 981-87, 992-95.

²⁹⁴ 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”).

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 most property-like qualities of property torts as much as any economic explanation available.²⁹⁵ To do so, Smith stresses Austrian themes: the problems in measuring economic data in a changing environment;²⁹⁶ the subjectivity of owner value;²⁹⁷ and information asymmetries among owners, neighbors, and courts.²⁹⁸ But to this extent Smith is trying to beat a theory with more theory. To settle this debate, economists must test different accounts of efficiency empirically. But as Smith recognizes, for the kinds of issues at stake in the design of property torts, "we do not have the empirical data to give an exact or even remotely certain answer."²⁹⁹ To cut through this empirical fog, Smith appeals to "the widespread, though often unacknowledged, use of exclusion in ours and other legal systems."³⁰⁰ 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 ethical and political theory can complement one another in explaining the law. But one might also reasonably wonder whether what contribution economics adds--if the most successful economic explanation gets whatever road-testing it has by its track record at replicating 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

²⁹⁵ Similar comments and criticisms apply to Richard Epstein, in the scholarship he has pursued since his utilitarian and economic turn. See, e.g., RICHARD A. EPSTEIN, TORTS §§ 1.10, 8.1, 13.1, 14.1-10, at 22-28, 190, 335-36, 355-78 (Aspen 1999).

²⁹⁶ 79 NYU L Rev at 1763-67.

²⁹⁷ See Smith, *Property and Property Rules*, 79 NYU L Rev at 1770-72, 1776-78; Smith, *Nuisance*, 90 Va L Rev at 985-87.

²⁹⁸ 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.

²⁹⁹ Smith, *Nuisance*, 90 Va L Rev at 1040.

³⁰⁰ 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).

economic analysts ever had a positive intention.³⁰¹ 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.³⁰² 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.

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 informative.³⁰³ 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.³⁰⁴ 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.”³⁰⁵ 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. 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.”³⁰⁶ Accident law and economics is more optimistic that it can reform the law without getting bogged

³⁰¹ See Ian Ayres, *Valuing Contract Scholarship*, 112 Yale L J 881, 881-82 (2003).

³⁰² 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”).

³⁰³ To be fair to Henry Smith, his work recognizes this limitation. See note – and accompanying text. [quote about absence of empirical information]

³⁰⁴ See notes – and accompanying text. [Locke on limits of human knowledge, and Fed 10].

³⁰⁵ Coase, *Social Cost* at 154 (cited note CSC).

³⁰⁶ 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).

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.