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SPARKS CASES IN CONTEMPORARY LAW AND ECONOMIC SCHOLARSHIP

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ABSTRACT

“Sparks cases” arose in the late 19th century, when sparks from newly laid railroads caused fire damage to adjacent landowners. Sparks cases have become a staple example in law and economic scholarship over the last generation. This entry uses those cases to contrast the differences between leading approaches to law and economics and Austrian economics. Sparks cases illustrate concretely important differences between welfare-maximizing and order-securing legal theories of regulation. Many leading law and economic works assume that legal actors can maximize the welfare created from incompatible resource disputes; in sparks cases, such theories assume that legal actors may and should choose the regime of tort liability most likely to maximize the joint product from a railroad right of way and adjacent land. Austrian economics focus on basic ordering, for it presumes that information shortfalls, subjective value, and changing resource uses all make it prohibitively difficult for legal actors to identify the highest and best uses of resources in conflict. In such constraints, the tort principles that regulate sparks disputes should be designed around simple and clear property boundaries, so that railroad operators are strictly liable for fires caused on land owners’ lots by sparks from their trains.

This basic Austrian critique may be applied in other, more recent, and more complex fields of regulation. If scholars hope to expose a wider audience of legal scholars to this critique, however, they must integrate Austrian themes better into the normative frameworks and scholarly categories applied by legal scholars.

TEXT

Introduction

In any academic discipline, a scholar may classify different normative theories by whether they assume what Thomas Sowell calls “constrained” or “unconstrained” priors. (Sowell, 2002, pp. 9-34). “Constrained” theories assume that human knowledge is limited more often than it is abundant, and that people are resistant to attempts to transform their preferences or behavior by political or social control. Constrained theories thus focus on identifying the goals that decision makers can know, with practical certainty, to be feasible and likely to contribute to the well-being of the members of the community in question. Such theories tend to support strong individual rights and private ordering. In contrast, “unconstrained” theories tend to assume that decision makers can know most of what they need to know to plan centrally, and/or that human behavior is relatively pliable and responsive to socialization. Unconstrained theories facilitate more ambitious government planning, and they justify case-specific administration of particular resource disputes. In case it needs saying, among normative economic theories, Austrian theories of economics fall on the constrained side of the spectrum.

Constrained and unconstrained approaches vie with one another in American law and economic scholarship. For example, in 2001, Thomas Merrill and Henry Smith wondered why “economists” and “economically oriented lawyers [had] los[t] sight” of very basic aspects of property rights. Their answer: “[M]odern legal economists [had become] interested not in the

problem of order but in the maximization of welfare.” Merrill and Smith deplore this tendency; they think it “overlooks ... that the refined problems of concern in advanced economies exist at the apex of a pyramid, the base of which consists of the security of property rights.” (Merrill & Smith, 2001, p. 398). Following Merrill and Smith’s usages, in this entry, the “welfare-maximizing” approach assumes and applies unconstrained priors to economic analysis of law, while the “order-securing” approach assumes and applies constrained priors.

This entry uses “sparks cases” to illustrate the contrast between welfare-maximizing and order-securing legal theories of regulation -- and to suggest possibilities for further scholarship deepening and extending the case for theories in the latter group. “Sparks cases” refer to common law tort cases between rail engine (“train”) operators and the owners of land lots adjacent to railroad rights of way. It may seem parochial or narrow for a scholarly work to focus on sparks cases. The issues raised in such cases are technical, and the cases are hardly ever litigated anymore. (In the United States, most sparks cases were litigated between 1860 and 1920.) Nevertheless, sparks cases provide an excellent point of contact for our interests here. Contemporary American legal scholars often cite Ronald Coase’s *The Problem of Social Cost* (1960) (“*Social Cost*”) as paving the way for welfare-maximizing approaches to economic analysis of law. Coase used the sparks fact pattern as one of several key examples illustrating *Social Cost*’s main insights. Law and economic scholars often use the sparks fact pattern to illustrate new theoretical insights about the economic analysis of tort doctrine; many of those insights illustrate the preference for welfare-maximization criticized by Merrill and Smith. By the same token, leadings sparks cases apply, in a rights-based vocabulary, many assumptions about legal rights and regulation operationally similar to key tenets of Austrian economics. Austrian economics cannot influence American legal scholarship without engaging legal

doctrine, moral concepts, and economic analysis on the terms on which *legal* scholars are accustomed to engaging them. The following study of sparks explains and concretely illustrates the terms of engagement legal scholars expect.

I. Sparks Cases in Legal Doctrine

Trains driven by coal-powered steam engines emit sparks, cinders, ash, and burning embers. These flammable emissions (“sparks” for short) can ignite grass on the train operator’s right of way, and such fires can spread to nearby properties. Sparks can also float tens or even hundreds of feet from a railroad track, and then ignite nearby crops, grass, haystacks, or other materials on private property. When claims for property damage are made by the owners of land adjacent to railroad rights of way, the owners initiate sparks cases.

Doctrinally, sparks cases have raised two main questions. First, when sparks ignite materials on private property, should the train operator be held strictly liable for any property damage -- or should the land-owning plaintiff be required to prove that the operator negligently took substandard precautions against sparks fires? Different authorities have taken different approaches to this question. In England, in the 1860 case *Vaughan v. Taff Vale Railway Co.*, Baron Bramwell, sitting as the trial judge in the Exchequer Court, instructed the jury to find the operator negligent if its engine was dangerous to adjacent property even if the train was operated with the utmost skill and care. “The defendants come to the [plaintiff’s land],” Bramwell reasoned, with the plaintiff “being passive, and do it a mischief.” The judges in the Exchequer Chamber, however, overruled Bramwell. Baron Cockburn and his colleagues believed that, when Parliament enacted a law authorizing the construction and operation of the rail line, the authorization had the effect in law “that if damage results from the use of the [authorized] thing independently of negligence, the party using it is not responsible.”¹ In the 1880 case *Powell v.*

Fall, however, the Queen's Bench tried another sparks case, found the train operator strictly liable for fire damage, and rejected the statutory argument that Cockburn and his colleagues had found decisive in *Vaughan*. This judgment was affirmed unanimously, and Baron Bramwell (now on the appellate court) specifically pointed out that 20 years of time had hardened his conviction that the Exchequer Chamber had decided *Vaughan* wrongly.² In the early nineteenth century, many American state courts required a sparks plaintiff to prove negligence. Gradually, however, state legislatures preempted such common law holdings. Some legislatures enacted statutes requiring that, if a land-owner proved he suffered property damage caused by a sparks fire, the court should presume the railroad operator liable unless it could disprove its negligence. Other statutes instituted strict liability. By the end of the nineteenth century, these relatively strict (and land-owner-favoring) legal rules prevailed over (railroad-favoring) negligence. (Ely, 2001, pp. 123-24.)

Second, assuming that the railroad operator is *prima facie* liable, may the operator excuse that *prima facie* liability by proving contributory negligence -- i.e., by blaming the land-owning plaintiff for negligently failing to move crops, haystacks, &c out of harm's way? Case law split on this issue as well. Hornbook law held that the land-owning plaintiff owed no duty to prevent contributory negligence. Since the "use of the land [by the plaintiff] was of itself a proper use" -- that is, "it did not interfere with nor embarrass the rightful operation of the railroad" -- the owner should not be "subject in its use to the careless as well as the careful operation of the [rail] road."³ In a substantial number of cases, however, judges or courts resisted applying this principle categorically. In the case just quoted (the 1914 U.S. Supreme Court decision *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway Co.*), Justice Oliver Wendell Holmes concurred separately to warn that this field of law turned on "differences of degree," it was at

least possible that “a man [could] stack[] his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train,” and a jury should thus be free to find the man contributorily negligent and disentitled from recovery.⁴ Holmes described this hypothetical land-owning plaintiff as being negligent, but another court (the Kansas Supreme Court, in the 1877 case *Kansas Pacific Railway Co. v. Brady*) portrayed the same point as a matter of causation: “If the defendant was negligent at all as against the plaintiffs, it was really as much because said hay was stacked in a dangerous place, and because dry grass was allowed to intervene all the way from the stack to the railway track, as because said fire was permitted to escape.”⁵

II. Sparks Cases in *The Problem of Social Cost*

Whether readers find sparks cases interesting or quaint, in contemporary legal and economic scholarship they have become a stock example. They were made most popular by *Social Cost*. In that article, Coase critiqued a conventional assumption shared among economists at the time: When an entity creates a negative externality for neighbors in the course of conducting a productive activity, the entity should be excluded from, made liable for, or taxed for creating the externality. Coase made four main arguments in response.

First, every negative externality created by an economic activity may be paired to a reciprocal externality that occurs if the government stops or penalizes the activity. As the Kansas Supreme Court had treated haystacks and sparks as reciprocal negative externalities, so Coase generalized: “We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A.” (Coase, 1960, p. 2.)

Second, if there were no transaction costs or resource constraints, and if actors pursued their rational economic interests, it would not matter how legal decision makers assigned starting

legal rights. Neighbors with resource disputes would bargain to conduct activities at levels that would maximize their joint product. Here, “joint product” means the difference created by subtracting, from the sum of the values of their productive activities, the sum of the externalities associated with both activities. If one party stood to generate a large surplus from its activity, it could pay the other from its surplus to reach that maximum joint product. (Coase, 1960, pp. 2-15.)

Third, however, because transaction costs do exist and vary in many ways, in practice, it might make a significant difference how legal decision makers initially assign legal entitlements relating to the activity. (Coase, 1960, pp. 15-42.) So, fourth and finally, before deciding that a tax, a liability system, a shut-down, or any other remedy will optimally induce a polluting entity to internalize negative externalities, an economist must consider, on one hand, all the ways in which parties might bargain around such legal rules and, on the other hand, all the ways in which transaction costs might distort such attempts to bargain.

To illustrate these arguments, Coase analyzed the facts of a sparks dispute at length. A.C. Pigou’s economics textbook (1932) illustrated the conventional assumptions Coase was challenging. Pigou had used sparks as an illustration of the conventional approach. When train sparks inflicted damage on adjacent woods, Pigou had argued, an economist could not sum up the total net social product without subtracting for the losses wood owners suffered by sparks fires. (Pigou, 1932, p. 134). Coase concluded that Pigou’s economic analysis had been faulty.

Coase developed several counter-examples illustrating problems in Pigou’s analysis. Coase supposed that a railway, *not* liable for sparks fires, had the choice to run two trains per day with the following profit function:⁶

Table 1.

	Value of services performed	Cost to railroad of operation	Net value
Train 1	\$150	(-\$50)	\$100
Train 2	\$100	(-\$50)	\$50
Trains 1 and 2	\$250	(-\$100)	\$150

He then supposed that each train would inflict \$60 of crop or other property damage per run.

That property damage diminishes the value of each railroad run:

Table 2.

	Value of services performed	Cost to railroad of operation	Cost to farmers	Net value
Train 1	\$150	(-\$50)	(-\$60)	\$40
Train 2	\$100	(-\$50)	(-\$60)	(-\$10)
Trains 1 and 2	\$250	(-\$100)	(-\$120)	\$30

Assuming these figures to be accurate, Coase acknowledged, it would be better if train 2 did not run. Yet Coase doubted that these figures would be accurate or complete in real life. The figures assume that owners with land near train tracks would not generate any income from their crops unless they received damage payments from the railroad; in real life, farmers could sell (unburnt) crops on the market. Pigovian payments could distort farmers' incentives to sell crops in competitive markets. If the railway were liable, farmers would be indifferent whether they received revenue for their crops from sale or from liability payments from the railroad. If the railway were *not* liable, the farmer would take out of cultivation land that would not be cost-justified to farm when the costs of expected crop damage were factored in. Liability would generate more crops -- and more liability payments by the railroad.

Coase assumed more hypothetical data to illustrate his points. On one hand, he assumed that, if the railroad was held liable for crop damage, the liability rule would encourage farmers to double their crop production. Under that assumption, if the railroad were required to pay some sort of Pigovian payment, no railroad runs would generate positive joint product:

Table 3.

	Value of services performed	Cost to railroad of operation	Cost to farmers	Net value
Train 1	\$150	(-\$50)	(-\$120)	(-\$20)
Train 2	\$100	(-\$50)	(-\$120)	(-\$70)
Trains 1 and 2	\$250	(-\$100)	(-\$240)	(-\$90)

On the other hand, Coase insisted, a full analysis would also need to consider the possibility that the coming of the railroad might *deter* farmers from planting and raising crops on some parts of their land. Farmers would lose value from farming these parts, but make it up by switching to the next best uses of the land abandoned. Coase illustrated as follows:

Table 4.

	Value of services performed	Cost to railroad of operation	Cost to farmers from crop damage	Cost to farmers from not farming	Value of farmers' next best uses	Net value
Trains 1 and 2	\$250	(-\$100)	(-\$120)	(-\$160)	\$150	\$20

With these assumed figures, if the railroad were not held liable for crop damage, the railroad would increase joint product by operating. Since Pigovian payments would generate negative joint product (by stimulating an increase in crop damage, see Table 3), Coase concluded “that it is better that the railway should not be liable for the damage it causes, thus enabling it to operate

profitably. Of course, by altering the figures, it could be shown that there are other cases in which it would be desirable that the railway should be liable for the damage it causes.” For Coase’s purposes, it did not matter what the relevant data indicated in real life; the important point was “that, from an economic point of view, a situation in which there is ‘uncompensated damage done to surrounding woods by sparks ...’ is not necessarily undesirable.” (Coase, 1960, pp. 33-34; see id. pp. 28-34).

When he made arguments like the ones just recounted, Coase was not necessarily prescribing that legal entitlements be assigned in the manner most likely to maximize net joint product. Coase wrote *Social Cost* to economists, to challenge conventional assumptions (which he attributed to Pigou) about the relationship between economic activity and government fines or regulation. In the above passages, Coase was careful to specify that his prescriptions were all made “from an economic point of view.” And, he reminded economist readers, “that the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what.” (Coase, 1960, p. 15).

Nevertheless, in law and economic scholarship, *Social Cost* has been read to justify and anticipate legal scholars’ prescribing legal entitlements based on economic analysis. (I will refer to this reading of Coase as “the Coasean Coase.” Merrill & Smith, 2011; Claeys, 2010a, p. 1387). In arguments like the ones just recounted, *Social Cost* portrayed economic analysis as determinate, careful, and open to considering the future consequences of legal rules. In other parts of *Social Cost*, Coase portrayed standard judicial legal reasoning as indeterminate and thoughtless. For example, after reporting and analyzing several nuisance cases, Coase described “[t]he reasoning employed by the courts in determining legal rights” as seeming “strange to an

economist,” and he described one judicial argument as “about as relevant as the colour of the judge’s eyes.” (Coase, 1960, p. 15; see Merrill & Smith, 2011; Merrill & Smith, 2001).

III. Sparks Cases in Law and Economic Scholarship

A substantial segment of law and economic scholarship equates *Social Cost*’s argument with the approach associated with the Coasean Coase. This scholarship applies *Social Cost*’s insights in the opposite direction from Coase’s argument – i.e., it uses economic analysis to prescribe substantive legal entitlements.

In legal scholarship, sparks cases are used in two main ways. In more general scholarship, authors use sparks cases simply to illustrate *Social Cost*’s main lessons. Richard Posner (2011) uses a sparks fact pattern in this manner, to illustrate the basics of regulating what he calls “incompatible uses.” (P. 63.) Posner does not generate any hard and fast prescription about incompatible-use regulation; instead, he works through several different approximations, each highlighting important factors a thorough economic analysis would consider. When one considers Posner’s presentation in its entirety, however, it strongly suggests that judges can administer incompatible uses, while taking account of extremely detailed, party- and context-specific information, to maximize the joint utilities of the regulated parties.

Posner starts with two inversely-related curves, one for the railroad’s marginal profits per extra train and another for farmers’ marginal costs per extra train. In stage 1, Posner suggests that the socially-optimal “uses” of trains and crops occur at the point where the curve for the railroad’s (decreasing) marginal profit per train crosses the curve for the farmers’ (increasing) marginal cost per train. Here, Posner is not yet making prescriptions for judges; he is identifying an economic ideal state. As *Social Cost* teaches, this state is the optimum to which the parties would bargain if transaction costs are not prohibitively large. Note, however, that *if* a court did

try to require parties to reach this ideal state, the trier of fact would need to learn and grasp the railroad's profit curve and the farmers' cost curve. The trier of fact would also need to administer both parties' operations in as much detail as a public utility regulator regulates the prices and services of a railroad or a cable company.

As stage 2, Posner starts to make legal prescriptions. He qualifies the presentation in stage 1, for situations in which transactions costs prevent the parties from bargaining. In such cases, "efficiency is promoted by assigning the legal right to the party who would buy it" if the judge or regulator (mistakenly) assigned the relevant legal right to the wrong party at stage 1. Here, Posner assumes a judge or regulator can identify the most likely impediments to market bargaining. At stage 3, Posner then calls into question the assumptions crucial to stages 1 and 2. At stage 3, he exposes "the costs of administering the property-rights system, which might be lower under a simpler criterion for assigning rights," and he acknowledges that "it is difficult to apply in practice" the (stage 1) ideal of requiring the parties to use their properties at the levels where the railroad's marginal profit curve intersects with the farmers' marginal cost curve.

At stage 3, Posner acknowledges that, in practice, it might be difficult for courts to conduct the analyses he has suggested in stages 1 and 2. Among other things, public decision makers must choose among an "endless" list of possible combinations of farmer and train activities. "[I]t is unrealistic to expect courts to discover the optimum one – and uneconomical to make them search too hard for it!" Nevertheless, without any explanation, Posner immediately disregards these practical problems: "[I]n most cases, and without excessive cost, [courts] may be able to approximate the optimum definition of property rights, and these approximations may guide resource use more efficiently than would an economically random assignment of rights." (Posner, 2011, pp. 66-67.)

Separately, sparks cases are also used in law and economics scholarship focusing on accident precautions. Consider for example Cooter (1985). In this article, Cooter highlights a theoretical paradox. On one hand, whenever a party can take precautions to diminish losses created by an incompatible-use conflict with another party, it is efficient to make that party liable for all harm caused. On the other hand, if both parties to a bilateral dispute can take precautions against losses, there is no way to make them both take efficient precautions. The more the law makes one party responsible, the more it encourages the other to leave precautions to the first party. Cooter modeled the paradox formally and suggested that the most likely way to achieve the efficient levels of precautions and losses was to condition each party's recovery or responsibility on its taking reasonable (i.e., legally non-negligent) precautions. Although Cooter illustrated with several examples, his lead example consisted of sparks cases. A railroad can take precautions against a sparks fire by installing a sparks arrester, by ordering trains to run more slowly, or by running fewer trains – but farmers can plant their crops elsewhere, plant crops unlikely to burn, or leave their fields fallow.

In the same spirit, Grady (1988) surveyed American sparks cases to corroborate observations about strategic behavior by parties in cases in which both could take precautions against accidental losses. According to Grady, a party may take precautions against incompatible-use losses in any of three periods. The first is a “preparation period,” when the party is trying to protect his own person or resources in advance, without knowing what precautions other individuals will take against accidental loss. The second is a “reaction period,” when the accident is occurring and the party is trying to avoid further loss to himself or his property. The last is a “mitigation period,” in which the accident has ended but the party may reduce its adverse consequence to himself or others. In Grady's interpretation, American sparks

cases applied different doctrines of negligence as appropriate to incentivize railroads and land owners each to take the efficient precautions available in each period. Courts held railroads liable for failing to install adequate protections against sparks fires (like arresters) and also for failing to take reasonable care to keep tracks and rights of way free of combustible materials. Courts required landowners, as a condition of recovering for sparks damage, to take preparation-period precautions – e.g., not to build structures too near rights of way, and not to leave wood shavings or other combustibles near rights of way. Courts did not require landowners, however, to take reaction-period precautions – e.g., to tamp down fires as soon as they started.

In law and economic scholarship on the private law, authors are not always entirely clear about the precise contributions they intend their works to make. Some economically-oriented works of legal scholarship make “full-blown normative arguments.” More, however, “(implicitly) advanc[e] a limited and contingent normative argument ... ‘To the extent that you care about efficiency as a value, you should care about the following conclusions.’” (Craswell, 2003, p. 906.) Cooter (1985) is better read as making a limited and contingent normative argument: If efficiency has normative value, then the policy-maker must consider how general efficiency-based prescriptions about precautions may be difficult to apply when both parties may take precautions. In contrast, Grady (1988) clearly makes full-blown normative arguments. In normative terms, Grady assumes that tort doctrine promotes efficiency if it forces parties to take precautions feasible in one of his three periods. As he read the facts of the cases he presented, courts did require parties to take precautions when (judging the facts as reported) such precautions seemed feasible. So in positive terms, Grady concludes that the relevant tort law was in fact efficient. (In its treatment of sparks cases, it is difficult to pin down Posner (2011) along this spectrum.)

IV. Austrian Reactions to Welfare-Maximizing Law and Economic Scholarship

Law and economic analysis has brought great insights to law, and law and economic works have provoked helpful debate about the foundations of property rights, liability in tort, and public law alternatives to both. In particular, works like those just recounted help identify important consequences of alternative legal rules. Such works create heuristics; whatever their other limitations, at least those heuristics force legal decision makers to consider trade-offs.

In analyzing those consequences and trade-offs, however, the works just recounted make important assumptions and normative arguments characteristic of welfare-maximizing economic analysis. Scholars sympathetic to Austrian economics have noticed those assumptions and arguments – and criticized them. Such Austrian sympathizers, however, have made their criticisms generally and abstractly – *not* by engaging particular legal doctrines or economic analyses, at the level of particularity to which legal scholars are accustomed.

For example, Rizzo (1980, p. 641) advanced two main arguments: “if the normative case for common law efficiency has any validity at all, it can only be for concepts of efficiency for which the information requirements are exceedingly high,” and “partial efficiency is insufficient as a basis for constructing any persuasive normative argument.” Rizzo proved these theses with several different arguments. First, analyzing leading hypotheses about the relation between law, efficiency, and wealth, Rizzo concluded that none of them could make clear positive prescriptions or normative arguments without collapsing into tautology or non-verifiability. Second, Rizzo sketched several general reasons why wealth-maximizing theories could not produce or validate a coherent theory of legal rights: wealth effects, relative price effects, and problems measuring wealth across societies with substantially different rights. Similarly, Rizzo suggested several reasons why it might be difficult or impossible to explain what it means to

make a “marginal” change in legal rules, or to predict whether legal rules supply “ex ante” compensation.

Cordato (1992) attempted to work out the implications of Austrian economics for law and economics at some length. Cordato argued that it was impossible for economic analysis to identify legal arrangements that are efficient in relation to social welfare – i.e., they allocate resources to their highest and best use more effectively than alternative arrangements. To make this argument, Cordato relied on primary Austrian themes: time and change; the limits of the knowledge of actors and regulators; and the subjectivity of value. As an alternative to efficiency defined in relation to social welfare, Cordato proposed that Austrian economics focus on promoting what he called “catallactic efficiency,” an arrangement in which individuals, in a social community but with different individual goals, may accomplish their own goals more effectively than they could in alternative arrangements. A political community could achieve catallactic efficiency, Cordato continued, *not* by having legal decision makers allocate resources as they thought most likely to maximize social welfare, but rather by enforcing basic rules of property and contract. Such rules embody and implement an “ideal institutional setting” (or “IIS”), a set of conventions which members of the political community intuitively judge by how well it frees them all use property or make promises to satisfy their own preferences. (Cordato, 1992, pp. 4-10, 57-68, 99-105).

Cordato did apply these general arguments to a case example – Coase’s treatment of sparks disputes. “The principle question that a judge must ask in resolving this dispute is not whether the farmer or the railroad contributes more to the social value of output, but who owns the land that is acting as a receptacle for the sparks.” (Cordato, 1992, p. 100). In Coase’s portrait, this issue is “unimportant.” In Cordato’s view, by contrast, the most important and useful

function a legal decision maker may perform is uphold the IIS – by enforcing the conventions members of the society have adopted to give specific content to property and contract rights. For example, sparks cases arise against a backdrop in which land owners are entitled to exclude most trespassory invasions from their lots. Decision makers should hold railroads strictly liable for sparks damage because injurious sparks constitute invasions of the sort that deprive land owners of their property. Judges promote catalytic efficiency not directly, by reasoning about what efficiency requires, but rather by enforcing legal rights grounded in common political and ethical commitments to the IIS. (Cordato, 1992, pp. 100-03). (Drawing on non-economic legal tort scholarship, Cordato called this approach “corrective justice.” See Epstein, 1979; Epstein, 1973). In other words, judges can only, and should only, focus on securing the conditions of private ordering.

Finally, some Austrians have gone even farther than Cordato -- by suggesting that the analysis of law should be treated as basically separate from economics. Here, Rothbard (1982) is instructive. Rothbard confronted Coase and particular Coase’s use of sparks hypotheticals -- among other reasons because his approach, while “pretending to be value-free ... in reality import[s] the ethical norm of ‘efficiency,’ and assert[s] that property rights should be assigned on the basis of such efficiency.” Rothbard proposed instead to ground legal analysis in self-ownership, the principle that “[n]o action should be considered illicit or illegal unless it invades, or aggresses against, the person or just property of another.” (Here, “justice” entitles every person to be a “self-owner, having absolute jurisdiction over his own body.”) (Rothbard, 1982, pp. 59-60).

Rizzo criticized assumptions central to the welfare-maximizing tendencies in contemporary law and economics. Yet he did not illustrate any of his criticisms with particular

case examples (like train sparks) or theoretical examples (like analysis of efficient precautions). However appropriate Rizzo's criticisms are, they are formal, and not likely to engage economically-oriented legal scholars in the manner to which they are accustomed. Cordato and Rothbard referenced sparks cases and other similar cases. Yet they focused primarily on sketching how such cases could and should be decided by principles of justice -- in Rothbard's case, a libertarian theory of self-ownership or, in Cordato's case, a theory of corrective justice implementing and enforcing the IIS. Neither Cordato nor Rothbard considered welfare-maximizing economic analyses of sparks cases at length.

* * * * *

In short, Austrian scholars have responded to welfare-maximizing law and economic scholarship in at least two significant ways. One has been to criticize the epistemological and economic priors of that scholarship's economics. The other has been to change the subject, to explain and justify law and legal rights in theories of justice independent of economics. Each of these responses will be considered (respectively) in each of the next two parts.

V. An Austrian Critique of Previous Analyses of Sparks Disputes

There is considerable force to Austrian critiques of the economic priors of welfare-maximizing law and economic scholarship. To be sure, to date, the critiques have not resonated in American legal scholarship. Among other reasons, criticisms like Rizzo's and Cordato's have not been made using more legal examples, and they have not considered welfare-maximizing scholarly works on those works' own terms. This Part illustrates how Rizzo's and Cordato's criticisms could be articulated, to make the criticisms more immediately relevant to the criteria by which law and economic scholarship is judged.

A. Property, Rights, Harm, and Causation in Legal Doctrine

The first place to focus is on the conceptual structure of the common law. Although law and economic scholarship tends to stress “economics” over the “law,” the scholarship suffers significantly if it does not respect legal doctrine and institutions as they exist in real life. Posner, Cooter, Grady, and the Coasean Coase all portray basic common-law concepts in a manner alien to social practice and the common law.

Most important, there is a huge gulf between the meanings of a property “right” at common law and in *Social Cost*-inspired law and economic scholarship. (Claeys 2011; Claeys 2010a, pp. 1432-37; Merrill & Smith, 2001). In the latter, “property” means neither “ownership” nor “using [an asset] as a factor of production” but rather “a right to carry out a circumscribed list of actions.” (Coase, 1960, p. 44). Implicitly, a “right” is an entitlement, conferred by the government, to carry out a particular use at levels and subject to conditions spelled out by the state. A *property* right consists of such an entitlement when it relates to an external asset.

By contrast, at common law and in common morality, “rights” refer to domains of freedom or decisional authority. Such domains are structured to give many different individuals authority to decide -- simultaneously, each right-holder for himself -- how to use a given resource for his own individual benefit. That is the meaning the U.S. Supreme Court assumed in *LeRoy Fibre*, when it observed that the land-owning plaintiff’s land use “was of itself a proper use, -- it did not interfere with nor embarrass the rightful operation of the railroad.” It is also the meaning that Baron Bramwell assumed in *Vaughan*, when he assumed that Vaughan deserved a right to enjoy the “natural and proper” “use” of his land free from trespassory invasions creating fires or other risks of accident. In both cases, the plaintiffs enjoyed a general domain of freedom to decide how to use their land. That freedom was subject to outer boundaries, so that neither the

plaintiff nor any other land-owner could assert decisional freedom inconsistent with or greater than the general freedom enjoyed by every other resident. Conduct that claimed greater freedom than allowable would (in *LeRoy Fibre's* terms) “interfere with [or] embarrass” neighbors.

When they neglect or reject this understanding of rights, Posner, Cooter, and the Posnerian Coase then invert the conceptual structure of “harm.” If *A* and *B's* “rights” refer to incompatible and reciprocal permissions to engage in two particular conflicting uses, then it makes sense to assume, as *Social Cost* does, that “[t]o avoid the harm to *B* would inflict harm on *A*.” Harm is not reciprocal, however, if a property right refers to a domain of freedom or legitimate decisional authority. Then, conceptual “harm” occurs only when one party’s use exceeds the proper bounds of his decisional authority, and diminishes the corresponding authority of another party.

This relation is easiest to see not in property disputes but in personal disputes involving physical violence. Assume that *B* injures *A* while successfully repelling *A's* attempt to hold him up. In Coase’s framework, the injuries *B* inflicts on *A* are reciprocal negative externalities on *A's* desire for money from *B*. In common sense, *B* has a right to bodily security and liberty, *A's* hold-up threatens *B's* security and liberty, and *B* inflicts no moral or legal harm on *A* because he acts legitimately to repel a threat to his own rights. With appropriate adjustments, the same relations apply to property disputes. Even if *B* planted crops where *A's* cinders could burn them, if *A* was the only party who invaded someone else’s rights, *A* is the sole “cause” of recognized social “harm.” (Claeys 2010a, pp. 1393-94, 1405-14). The common law structures and protects landowners’ legitimate decisional authority by protecting them from unconsented particulate entries across their boundaries. The physical-invasion test endows owners with freedom to choose how to use their land, more or less as a physical-touching test protects people’s rights to

deploy their bodies toward goals of their own choosing. On that basis, one land owner “harms” another *not* by diminishing the economic value of activities on the other’s land, but rather by diminishing that owner’s zone of free choice. That understanding explains why, in *LeRoy Fibre Co.*, the Court spoke of the “harm” as follows: “That one’s uses of his property may be subject to the servitude of the wrongful use by another seems an anomaly.” The land-owner had a right to set the “uses” of his property; the railroad engaged in conduct “wrongful” because it diminished that right. That understanding also explains the contrast Bramwell drew between Vaughan’s “passive” use of his land and the railway company’s “mischievous” use of its right of way. Even conceding that a railway constitutes a valuable activity, it inflicts more physical disruptions on neighbors than the other way around, and it diminishes neighbors’ spheres of free and equal choice how to manage their lots than they do to it.

The same contrast recurs in scholarly treatments of legal causation. The Kansas Supreme Court made a conceptual mistake when it equated the harm caused by sparks with the harm caused by putting haystacks in the likely path of sparks. Conceptually, a party “causes” harm only if it causes a *harm* -- *i.e.* a significant setback to a party’s moral interests. And such harms can’t be ascertained without knowing which interests inhere in the party’s moral rights. That is why the U.S. Supreme Court assumed that the railroad was the “immediate cause” of moral and legal harm to the land-owner but not vice versa.⁷ The Kansas Supreme Court’s portrait makes more sense in a context like *Social Cost* – where the legal rights are taken as givens and the focus is on transacting with the rights given. It makes much less sense when the rights are the object of focus – as they are for Cooter, Grady, Posner, and the Coasean Coase.

As just recounted, in lay discourse and in law, the terms “right,” “harm,” and “cause” all assume and contain implicit moral content. Some scholars may think that the reciprocal negative

externality framework avoids that moral content—and find the framework preferable because it avoids moral issues. Yet the externality framework is confused practically and philosophically—and the confusions seem likely to have the effect of obscuring the issues that seem most salient from a commonsensical moral perspective. A railway company inflicts a loss on an adjacent farm when sparks from its trains ignite crops or personal articles on the farm. The farm, by itself, doesn't inflict any corresponding loss on the railway. The farm owner may petition a legal official to enjoin trains or impose liability on the railway company, and these legal orders may inflict losses on the company. But the harms or externalities that the government causes when it orders the railway company to stop violating property rights are conceptually and normatively different from the losses the parties' conflicting land uses impose on one another. (Coleman 1980, pp. 235-36.) The government shouldn't be allowed to limit the freedom of the railway or take money from it unless it can show that it has legitimate authority to do so — as it would if the farmer has legitimate property rights and the government is protecting them. Similarly, the railway company shouldn't be allowed to inflict losses on the farmer unless it can show that it inflicts those losses in the legitimate exercise of a right. A defendant could make such a showing if the plaintiff and the defendant were competitors and the plaintiff suffered losses because the defendant sold a better product. Or if (as in another of Coase's examples) the defendant inflicted losses on the plaintiff in the course of repelling back to the plaintiff pollution originally emitted from the plaintiff's property.⁸ From a conceptual perspective, however, when the losses going each way are classified as reciprocal negative externalities, that classification obscures what in law and morality are the most salient questions: whether the railway company has a general right to emit sparks, whether the farmer has a general

right to farm free from risk-threatening trespasses, and whether the government has justification to intervene to protect one or the other party's rights.

To be sure, even if one has a sound grasp of the concepts "right," "harm," and "causation," these concepts do not by any stretch determine the scope of the "rights" and "wrongs" relevant to property law. River water, personal articles, land, trade secrets, patents, and copyrights all confer different domains of decisional authority. Yet there are obvious normative reasons why the possessory interest for land should be extremely broad: privacy, personal autonomy, security of investment, and clarity of rights for the purposes of transaction. Presumptively, any unconsented entry onto land -- by a person, by a projectile, or by a spark or another low-level physical invasion -- diminishes land owners' presumptive freedom to decide how their lots should be used. Many presumptive invasions end up being excused at common law because the invasions do not threaten and perhaps even encourage common uses of land. Nuisance law excuses barbecue smoke and the noises from lawn mowing, in the expectation that neighbors bothered by these low-level nuisances will benefit reciprocally when *their* neighbors are bothered by their music-playing or lawn-mowing. However, sparks cannot be excused with such a justification. They create a risk of fire and property damage to land owners, but land owners do not generate reciprocal risks of accidents on railroad rights of way that could be excused like low-level nuisances.

That normative justification for land rights then explains the character of sparks law. In principle, any invasion by a spark onto land wrongfully diminishes land owners' rightful control to decide how to use their land. Sparks law excuses harmless sparks invasions for administrative reasons. When sparks inflict actual property damage, however, this excuse ceases to apply. At that point, the railroad should be deemed strictly liable. Furthermore, since the wrong from the

spark is its disruption to the land owner's freedom to decide how to use his land, it is indeed an "anomaly" to say that the land owner owes a duty to anticipate and take counter-measures against the possibility of property damage from sparks fires.

B. Time, Ignorance, Subjectivity, and Sparks

In short, the concept of a "reciprocal negative externality" delinks the analysis of a sparks dispute from contexts presumed in law and common sense discourse. Legal and common sense link the dispute to the relevant legal right, namely the right of the land owner to determine how his land will be used. That right is structured as it is to fulfill a few different overdetermining goals. Many of those goals assume that, other things being equal, in a broad range of situations, the land owner is better situated than the train operator, other non-owners, or courts and juries how his land may best be used.

Austrian economics can flesh out the links in this argument. Austrian economics have a lot to say about the last link (about which party is best situated to manage a resource and know its best uses) and also about the limits of attempts by outside lawyers or economists to forecast a resource's highest and best use. In different ways, the works recounted in the last Part all study in isolation a few practical policy issues raised by sparks cases -- and then jump to the conclusions that their studies of *parts* of the relevant issues are relevant to knowing how the *whole* should be regulated in practice. For Austrian economists, the trick is to identify all the policy issues relevant to the whole any legal doctrine tries to regulate -- and then to show how limited the partial contributions are.

Grady's study illustrates. Grady derides the concepts discussed in the last section much as Coase did -- as "rigid," and in the grip of a "pristine idea of right colliding with wrong." (Grady, 1988, pp. 30, 33). This criticism assumes that an economist or a court can maximize the joint

social product of a railroad and the activities of one or a few land owners, and criticizes a legal approach that declines to increase welfare where it can. The common law, by contrast, prefers to focus on securing the minimal conditions of order. For example, in *LeRoy Fibre*, when the U.S. Supreme Court rejected contributory negligence, it insisted: “Depart from the simple requirement of the law, that everyone must use his property so as not to injure others, and you pass to refinements and confusing considerations.”⁹ The Court justified the common law not in terms of efficiency or welfare but justice and rights -- in particular, “property” grounded in each owner’s having a right of free “use” choice structured to give other members of the community equal rights of similar use choice. (Claeys, 2010a, pp. 1398-1407.) When the Court spoke of the dangers of “refinements” and “confusing considerations,” however, it voiced practical concerns that may be explained in economic terminology.

To be sure, Austrian economics is not absolutely indispensable to explain these concerns in economic terms. After all, Coase was not an Austrian, and yet he warned against taking his insights about the economics of resource disputes too seriously as a guide to resource administration. Such administration “would require a detailed knowledge of individual preferences and I am unable to imagine how the data needed for such a taxation system could be assembled,” and “the proposal to solve ... smoke-pollution and similar problems by the use of taxes bristles with difficulties: the problem of calculation, the difference between average and marginal damage, the interrelations between the damage suffered on different properties, etc.” (Coase, 1960, pp. 41-42). Nevertheless, Austrian economics deserves pride of place in any discussion of the limits of economic analysis. Temporal change, limits in human knowledge, and the subjectivity of value capture the problems that plague welfare-maximizing law and economic analysis.

Change, knowledge limits, and the subjectivity of value all constrain how much public decision makers can know about the operations of the railroad and land owner: about their profit functions, the costs from accidents or corresponding liability payments, or the costs of implementing precautions. The analyses in Parts II and III assume that these figures are knowable -- knowable enough to depict in tables like Tables 1 through 4 or in a graph (like Posner's) of marginal profit and cost curves. Yet it is at least possible, and from everyday life it seems quite likely, that these various costs and profits fluctuate drastically depending on many factors. It also seems possible and even likely that the land owner and the railroad will value the different profits and costs extremely differently. If so, then it is inappropriate to depict the various costs in terms of things like repair costs, and it is inappropriate to depict profits in simple monetary terms. Indeed, it is inappropriate to depict the profits and costs with *single figures*. The railroad probably values all the profits and costs extremely differently from the land owner. In addition, time and change may complicate analysis further. The land owner and railroad's valuations may change depending on how markets for crops, transportation service, fuel, and other factors change. In addition, if both act in an economically rational manner, each should behave game-theoretically. Each should increase or decrease precautions when the other does the opposite. Accident losses should vary across time for similar reasons; the more trains the railroad runs, the fewer crops the farmer may plant. (Claeys, 2010a, pp. 1437-40).

By contrast, when legal rights are keyed toward physical invasions, these informational problems are diminished significantly.¹⁰ Decision makers only need to inquire whether owners have suffered physical invasions, whether they have suffered harm as a result of the invasions, and whether the invasion and harm may be excused by reciprocal invasions running in the other direction. These tests *avoid* forcing decision makers to identify party subjective value. The tests

leave all property owners free to enjoy and protect their subjective values in the land uses closest and most tangibly *on* their properties -- on condition that they all also waive rights to claim value in land uses remote from or physically removed from their properties.

These subjectivity, informational, and game-theoretic difficulties seem severe enough when the public decision maker is trying to administer a pure bilateral dispute. They seem exponentially more severe when the decision maker is trying to administer a dispute with many parties -- say, many railroads using the same track, and all the owners with land along the track. Different legal entitlements differ in the information costs they impose on third parties. (Merrill & Smith, 2011, pp. S91-S92; Merrill & Smith, 2000). Furthermore, in sparks cases, courts and regulators settle disputes *ex post*, after losses have occurred. The information costs are even greater *ex ante* -- if a railroad commission is trying to settle disputes prophylactically, or if a train operator is trying to identify thousands of farmers along a right of way, determine whether it will be liable, and if so head off litigation by purchasing pollution easements. By contrast, boundary rules simplify the determinations judges or regulators must make to determine legal liability, and they also simplify the forecasts any railroad must make about whether it will be liable to any particular owner.

Yet temporal change and the subjectivity of value can have even more far-reaching influence -- on the content of legal property rights. Although boundary rules and invasion tests help steer to owners control over the use of their assets, they are also structured to be apolitical. Triers of fact must determine only: where boundaries lie; whether a defendant's conduct invades those boundaries; and (in some doctrines, like nuisance) whether the invasions may be excused on the ground that they are characteristic of a class of reciprocal invasions incidental to beneficial land uses common in the area. Farmers, railroads, or other constituencies may consider

lobbying the legislature to preempt the common law and to institute a new rule more partial to their particular factional interests -- but clear and simple rules may seem fair and stable enough that the disputants leave well enough alone.

But assume that, in sparks cases and in many other trespass, accident, or pollution disputes, public decision makers maximize the social products of the parties with the strongest interests in the disputes. Such a standard requires parties to submit more information to the decision maker. The facts to be found require decision makers to make more judgments, and judgments that are more subjective and contestable, than the factual findings involved in boundary rules and invasion tests. When legal standards are open-ended and indeterminate, disputants will submit more partisan information, about their costs, profits, precautions, and so forth. The less clear the rules, the more likely it is that polluters will refuse to bargain early or settle quickly, knowing that they are *prima facie* liable; instead, they will be more likely to litigate, in the hope that they can persuade a trier of fact that their activities generate great social wealth, that the owners suffering pollution are better cost avoiders or precaution-takers, and so forth. And if parties are dissatisfied with indeterminate and politicized decision making by common law courts, they are more likely to lobby legislators. Indeed, if the relevant legal standards are indeterminate, the law may encourage disputants to believe that they are *entitled* to legal rights, ones which guarantee to them what they subjectively believe to be the true values of their assets and those assets' uses. The more disputants litigate and lobby for preferential legislative regulation, the less property rights are respected, the less parties bargain in markets, and the more they divert resources, which might have been invested in crop production, hay supply, or so forth, instead on further litigation and lobbying. (Claeys, 2010a, pp. 1441-42).

C. The Limits of Welfare-Maximizing Law and Economic Methodologies

None of the foregoing predictions or analyses are obviously right. Yet none of them are obviously wrong. At a minimum, there is a huge gulf between the accounts of sparks disputes (recounted in Part III) by welfare-maximizing law and economic scholars and the account given in the last section. That gulf illustrates, in a very concrete way, the way in which unconstrained and constrained priors drive different economic analyses of law to sharply different approaches and conclusions.

In addition, there are also reasons for preferring the Austrian analysis sketched in the last section over the accounts recounted in Part III. If Austrian priors about change, the limits of human knowledge, and the subjectivity of value seem generally more faithful to how people process social knowledge than their opposites, then the predictions and analyses supplied in the last section are more persuasive than mainline, welfare-maximizing law and economic analyses like those by Posner, Cooter, and Grady.

In addition, law and economic scholars often judge economic analyses of law by the extent to which they conform to existing doctrine. Analyses like those in Part III and the last section make “claims [that] are implicitly empirical but not capable of precise justification.” In the absence of such justification, law and economic scholars accept as a tiebreaker whether a given explanation is consistent with “the very strong set of practices in legal systems,” in the expectation that a “judgment has been made” in favor of that explanation, “perhaps unconsciously, by large numbers of persons who have been forced to confront” law’s economic tradeoffs. (Epstein, 1997, p. 2095). The account supplied in the last section explains not only how the relevant common law doctrines treat sparks cases but also how they regulate land-use disputes generally. (Claeys, 2010a, 1398-1430). By contrast, while Posner and Cooter use sparks disputes to illustrate their approaches to economic analysis, neither discusses whether their

analyses conform to existing law. Grady (1988) claims that his analysis fits the case law; although courts may have insisted on strict property boundaries and physical-invasion tests in cases like *LeRoy Fibre*, he argues, in practice courts behaved more like the *Kansas Pacific Railway v. Brady* court when strict boundary rules really mattered. Here, the positive question (how did courts really decide sparks cases) becomes intertwined inextricably with the deep methodological, epistemological, and normative questions that distinguish welfare-maximizing and order-securing theories of economics. If one accepts welfare-maximizing priors, courts could and should focus on precautions -- and thus legal scholars may and should treat cases like *Kansas Pacific Railway* as the general-rule cases. If one prefers order-securing priors, *Kansas Pacific Railway* and similar cases should be regarded as aberrational decisions; they gamble that they can enlarge the net joint product of a few specific parties without destabilizing property rights generally.

The same gulf also helps expose and highlight limits in traditional welfare-maximizing law and economic methodologies. Grady's analysis is the most ambitious, but it is the most contestable for the reasons just recounted: Because it focuses on a few retail-level consequences issues (about precautions in sparks disputes), it does not consider whether wholesale-level concerns (about the clarity and security of property rights) dwarf retail-level consequences. The analysis of Posner is similar to Grady's. Posner assumes in the first instance that courts can forecast which legal assignment of rights will maximize joint social product, and save the parties the transaction costs of bargaining to that assignment. He qualifies this assumption out of respect for "the costs of administering the property-rights system, which might be lower under a simpler criterion for assigning rights" -- but then, without elaboration, assumes "in most cases, and without excessive cost, [courts] may be able to approximate the optimum definition of property

rights.” (Posner, 2011, pp. 66-67). Like Grady, Posner does not explain why retail-level analysis of joint product will not be overwhelmed by wholesale problems that come with maintaining a system of property rights and markets.

In contrast, Cooter (1985) makes the most cautious, limited, and contingent claim: If efficiency is a value worth considering while setting legal doctrine, then the problems that arise when both parties can take precautions count as one of several factors that decision makers should consider in the course of setting doctrine. If information is limited, change is the rule and not the exception, and party values are subjective and heterogeneous, however, then in practice it is impossible for a decision to know how much weight to give Cooter’s analysis of double-precaution problems. Cooter’s work deserves credit for its elegance and insight about one retail-level effect. If Austrian priors are correct, however, this effect contributes extremely little to the factors on which legal decision makers can realistically focus in practice. Decision makers may and should disregard Cooter’s precaution effect, on the ground that the best they can do is to institute legal rights that encourage apolitical decisionmaking and steer to owners control over property use, planning, and bargaining.

VI. Theories of Justice, Law, and Austrian Economics

Recall that Cordato and Rothbard suggested that legal rights should be treated as being largely autonomous from economic analysis. The issues these scholars raise have not been developed adequately in contemporary American legal scholarship, and in any case this collection is an encyclopedia not of Austrian philosophy but Austrian *economics*. That said, a few general observations may be in order.

First: Some recent legal-philosophy scholarship confirms Cordato and Rothbard’s basic point – that there is and should be some separation between economics and law -- but for reasons

different from those scholars themselves articulated. Some legal philosophers have taken law and economic methods on their own terms, and identified shortcomings or unexamined premises in those methods. (See, e.g., Coleman 1980.) George Fletcher (1996, pp. 155-70) used *Vaughan* and the sparks fact pattern in this spirit, to suggest that Posner and other law and economic scholars use the Kaldor-Hicks criterion in efficiency analysis far more often than may be warranted. In Fletcher's interpretation, the Pareto superiority criterion applies with the most moral justification to transactions when the parties have well-defined and –justified rights to the resources they intend to transact, they are capable of consenting to the transaction, and they have sharply different personal interests and preferences. The paradigm case where Pareto superiority applies is a simple contractual exchange. The Kaldor-Hicks criterion applies with the most justification when a party who may lose from a transaction has a bad or problematic claim to the entitlement threatened. Kaldor developed what became the Kaldor-Hicks criterion to study protectionist tariffs on corn, and Hicks generalized to all systems protecting imperfect competition. (Hicks 1939; Kaldor 1939.) The sparks fact pattern fits the Pareto paradigm better; the right to determine the uses of one's land is a far more solid and convincing right than a continued expectancy that one's country will continue to impose tariffs on grain imported from another country. Posner and other law and economic scholars use Kaldor-Hicks criteria anyway. When they do so, the economic analysis that follows "restate[s] the utilitarian principle that in a dispute about property rights, the courts should make the decision that would promote the interests of society as a whole." (Fletcher 1996, 162.) Austrian economics supplies normative arguments and empirical generalizations why such utilitarian analysis is unlikely to succeed. In particular, as applied to a sparks dispute, Kaldor-Hicks analysis will founder when the economist is forced to make interpersonal comparisons about the subjective values of the farmer and the

train operator. But such economics acquire much more traction once a legal scholar has, like Fletcher, showed how this problem arises from the choice to apply Kaldor-Hicks and not Pareto.

Second: Non-economic legal scholars have raised sharp questions about whether law and economic scholarship can supply a satisfactory account why efficiency is normatively attractive in the kinds of ways that make it capable of justifying law. Law is distinct from many other institutions because it coerces people, and that coercion is problematic normatively unless defenders of the legal system can supply a justification showing how the coercion protects just freedoms and a just conception of the general welfare. (See Raz 1979, 29-30.) Legal philosophers wonder whether efficiency links to any normative value capable of supplying such a justification. Law and economic scholars have suggested three main possibilities – preference utilitarianism, wealth, and consent imputed from Pareto superiority – but all three suffer from major problems. (See Coleman 2003, 1514-23; Shapiro & McLennen 1998.) Austrian economics expresses, in economic language, why efficiency analysis may founder in making estimates about subjective value problems, change, and information limits. These critiques parallel moral arguments about why people deserve freedom to decide what resources and activities they value, and freedom to decide how to pursue those sources of value. But Austrian critiques may gain further traction if the similarities and differences with moral critiques of efficiency are explored.

Last: Assume, as Cordato and Rothbard do, that the common law is not informed directly to a significant degree by economics and that it is layered on a common political morality focusing on rights, duties, and justice. Cordato and Rothbard both refer to such a layered approach as a “corrective justice” approach. Given these assumptions, where does the common political morality come from? Legal and political philosophers could answer this question in a

range of ways; Cordato and Rothbard's answers illustrate the two ends of that range. Cordato's answer is relatively general and universal: Different political communities are likely to converge on a common IIS. In relation to the use of external assets, for example, people have similar needs for them and (after making appropriate adjustments for differences in economic development across different societies) people's likely intended uses of such assets should be relatively similar across different societies. It could well be that, notwithstanding their economic, political, cultural, or religious differences, many cultures institute very similar protections for tangible property, relying on boundary rules, strict-liability tests, and so on. This answer could be right, but it has not yet been proven to be right. To determine whether it is right would require comparative-law scholarship, canvassing how different legal systems protect property rights for important test cases – like the accidental fire damage in sparks disputes. Such a determination would also require careful anthropological and economics scholarship, studying how land and other common objects of property ownership are used and protected in different societies.

By contrast, Rothbard illustrates the other end of the range of acceptable answers: to interpret and justify the common political morality in a very particular theory of justice. Rothbard favors a libertarian theory of justice, grounded in such principles as self-ownership and autonomy. (Rothbard, 1982; see Nozick, 1974). This libertarian theory generates strong individual rights of liberty and control over property; corrective justice then requires citizens to rectify interferences they make with the liberty and property of others. This strategy requires considerable focus on political and legal philosophy, answering questions like the following: Are libertarian theories of self-ownership and autonomy internally coherent? Do the policies they prescribe seem just? Do they adequately accommodate the rights-claims of individual citizens and the common interests those citizens share? How do they propose to settle sparks

cases and other hard cases, and can they respond adequately to the theoretical objections legal and economics scholars associate with those hard cases?

Another possible source of a theory of justice consists of flourishing-based theories of natural law (Claeys, 2010b; Gordley 2007), and political and legal theory by John Locke, William Blackstone, and other natural rights political theorists and jurists (Claeys, 2010a, pp. 1398-1430). Many of these sources do not elaborate about what they mean when they say that a legal right is grounded in natural law or rights. Yet some do. In these sources, what is “natural” is usually defined to be what contributes to human flourishing. In the more explicit and better-reasoned sources, however, the “natural” is defined in relation to universal human psychological tendencies and motives to action, realistic limits on what people can know about the future and about the happiness of others, and realistic expectations about politics given human selfishness.

For example, property rights may be justified by Locke’s account of the natural right to labor. In that account, “labor” refers to purposeful and intelligent activity generating goods contributing to the survival or improvement of the actor. (Locke, 1689, II.26-.27, pp. 304-06; see Buckle, 1991, p. 151). Locke structured “labor” in such a manner (among other reasons) in response to epistemological limitations. Human knowledge of practical action, Locke believed, was limited to a “state of mediocrity,” such that man could only ever have “judgment and opinion, not knowledge and certainty” – in contrast with the knowledge he could acquire over the “figures ordinarily considered in mathematics.” (Locke, 1700, bk. IV, ch. 3, sec. 19, bk. IV, ch. 2, sec. 10, pp. 550, 645). Within these limitations, Locke believed, it was politically prudent to ground property rights in a low but solid moral good. In practice, government actors cannot forecast reliably the best particular uses of things for particular people; they can forecast reliably that most people will want to apply similar acquisitive and productive passions to do different

things with assets. Locke structured the natural right to labor to capture the common acquisitive and productive tendencies, without getting them mired in the different particular uses different owners might make of their assets. (Claeys, 2010a, pp. 1400-01). A justification like this defends, on a combination of moral argument and broad empirical generalizations, concerns quite like Austrian concerns about time, ignorance, and subjective value.

Conclusion

This entry has used sparks litigation as a case study. The case study illustrates how property rights and regulation are structured and justified in Austrian economics, welfare-maximizing law and economic scholarship, several different rights-based theories of justice – and in Anglo-American common law.

This case study does not generate policy prescriptions immediately relevant to any contemporary important political or regulatory dispute. Sparks disputes never were of crucial importance, and in any case the applicable principles of law were settled almost a century ago. Instead, the case study should illustrate, in a very concrete way, the most effective and profitable avenues for scholars to transplant themes from Austrian economics to contemporary American legal scholarship.

The most straightforward avenue is to critique contemporary welfare-maximizing scholarship using tenets of Austrian economics. Here, if the scholarship covering sparks is representative, existing Austrian economic scholarship has critiqued the relevant law and economic scholarship on Austrian terms but not on law and economic terms. In other words, Austrian scholars have criticized law and economic scholarship for not taking change, relative ignorance, or the subjectivity of value seriously enough. Yet Austrian scholars have not explained how these themes limit the ability of policy makers to gather the kinds of information

law and economic scholars are accustomed to discussing: about the costs of accidents, precaution costs, party profit functions, and social responses to legal rules. Nor have Austrian scholars focused enough on how basic private-law doctrines and structures reflect change, ignorance, or the subjectivity of value: especially the structure of a property “right” and the nature of legal “causation.”

Alternately, Austrian scholars may explore rights-based accounts of the private law, on the suspicion that law is largely autonomous from economics and other social sciences. If they pursue this avenue, Austrian scholars will need to engage issues raised in contemporary conceptual, legal, and political philosophy.

All of these questions may be explored and answered. Whether “Austrian” themes will influence American legal scholarship a generation from now depends in large part on whether scholars interested in those themes answer the relevant questions in terms that American legal scholars are accustomed to following.

BIBLIOGRAPHY

Buckle, Stephen. 1991. *Natural Law and the Theory of Property: Grotius to Hume*. Oxford: Clarendon Press.

Claeys, Eric R. 2010a. “Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights,” 85 *Notre Dame Law Review* 1379-1446.

Claeys, Eric R. 2010b. “The Private Law and the Crisis in American Catholic Scholarship in the American Legal Academy,” 7 *Journal of Catholic Social Thought* 253-87.

Claeys, Eric R. 2011. “Bundle-of-Sticks Notions in Legal and Economic Scholarship,” 8 *Econ Journal Watch* 205-14.

Claeys, Eric R. 2012. “Exclusion and Private Law Theory: A Comment on *Property as the Law of Things*,” 125 *Harvard Law Review Forum* 133-50.

- Coase, R.H. 1960. "The Problem of Social Cost," 3 *Journal of Law and Economics* (Oct.): 1-44.
- Coleman, Jules L. 1980. "Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law." 68 *California Law Review* 221.
- Coleman, Jules L. 2001. *The Practice of Principle*. Oxford: Oxford University Press.
- Coleman, Jules L. 2003. "The Grounds of Welfare." 112 *Yale Law Journal* 1511.
- Cooter, Robert. 1985. "Unity in Tort, Contract, and Property: The Model of Precaution," 73 *California Law Review* 1-51.
- Cordato, Roy E. 1992. *Welfare Economics and Externalities in an Open Ended Universe: A Modern Austrian Perspective*. Norwell, MA: Kluwer Academic Publishers.
- Craswell, Richard. 2003. "In That Case, What Is the Question? Economics and the Demands of Contract Theory," 112 *Yale Law Journal* 903-24.
- Ely, James W. 2001. *Railroads and American Law*. Lawrence, KS: University Press of Kansas.
- Epstein, Richard A. 1973. "A Theory of Strict Liability." 2 *Journal of Legal Studies* 151-204.
- Epstein, Richard A. 1979. "Nuisance Law: Corrective Justice and Its Utilitarian Constraints." 8 *Journal of Legal Studies* 49-102.
- Epstein, Richard A. 1997. "A Clear View of the Cathedral: The Dominance of Property Rules," 106 *Yale Law Journal* 2091-2120.
- Fletcher, George P. 1996. *Basic Concepts of Legal Thought*. Oxford: Oxford University Press.
- Gordley, James. 2007. *Foundations of Private Law: Property, Tort, Contract, and Unjust Enrichment*. Oxford: Oxford University Press.
- Grady, Mark F. 1988. "Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer," 17 *Journal of Legal Studies* 15-42.
- Hicks, Cecil R. 1939. "The Foundations of Welfare Economics," 49 *Economic Journal* 696.
- Kaldor, Nicholas. 1939. "Welfare Propositions of Economics and Interpersonal Comparisons of Utility." 49 *Economic Journal* 549.
- Locke, John. 1689. *Two Treatises of Government*, ed. Peter Laslett. Cambridge, UK: Cambridge University Press, 1960.

Locke, John. 1700. *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch. Oxford: Clarendon Press, 1975.

Merrill, Thomas W. & Smith, Henry E. 2000. "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle," 110 *Yale Law Journal* 1-70.

Merrill, Thomas W. & Smith, Henry E. 2001. "What Happened to Property in Law and Economics?" 111 *Yale Law Journal* 357-398.

Merrill, Thomas W. & Smith, Henry E. 2011. "Making Coasean Property More Coasean," 54 *Journal of Law and Economics* S77-S104.

Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.

Pigou, A.C. 1932. *The Economics of Welfare*, 4th ed. London: MacMillan & Co.

Posner, Richard A. 2011. *Economic Analysis of Law*, 8th ed. United States: Aspen Publishers.

Raz, Joseph. 1979. *The Authority of Law*. Oxford: Oxford University Press.

Rizzo, Mario. 1980. "The Mirage of Efficiency," 8 *Hofstra Law Review* 641-58.

Rothbard, Murray N. 1982. "Law, Property Rights, and Air Pollution," 2 *Cato Journal* 55-99.

Shapiro, Scott & Edward McLennen. 1998. "law-and-economics from a philosophical perspective," *The New Palgrave Dictionary of Economics and the Law*. London, MacMillan Reference Ltd. Vol. 2, 460.

Sowell, Thomas. 2002. *A Conflict of Visions: Ideological Origins of Political Struggles*, USA: Basic Books.

FOOTNOTES

¹ *Vaughan v. Taff Vale Railway Co.*, 157 Eng. Rep. 667, 671 (Exch. Ct. 1858), overruled, 157 Eng. Rep. 1351, 1354 (1860).

² *Powell v. Fall*, Q.B. 597, 601 (1880).

³ *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 349 (1914); see *Kellogg v. The Chicago & N.W. Ry. Co.*, 26 Wis. 223 (1870).

⁴ *LeRoy Fibre Co.*, 232 U.S. at 352-54 (Holmes, J., concurring).

⁵ *Kansas P. Ry. Co. v. Brady*, 17 Kan. 380, 386 (1877).

⁶ In all of the following tables, negative numbers are indicated with parentheses and also a negative sign.

⁷ *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 348, 349 (1914).

⁸ See *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79), cited in Coase 1960, 11-13.

⁹ *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 350 (1914).

¹⁰ The problems are “diminished,” not eliminated. Many items listed in text do get considered in common law -- later, if a defendant is liable and the court must determine the appropriate damages or other remedies. Even so, this process simplifies the common law’s decisional process. *Prima facie* theories of liability rely on simple boundary rules and invasion tests to specify the content of legal rights. Courts consider more party-specific information only when they have concluded that defendants have wronged plaintiffs’ rights. That conclusion simplifies what courts do with party-specific information; they inquire mainly what relief is necessary to restore plaintiffs to their rights.