

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

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*This Article questions how well standard economic analysis justifies the land-use torts that Ronald Coase popularized in *The Problem of Social Cost*. The Article compares standard economic analyses of these torts against an interpretation that follows from the natural-rights morality that informed the content of these torts in their formative years. The “Jeffersonian” natural-rights morality predicts the contours of tort doctrine more determinately and accurately than “Coasian” economic analysis.*

*The comparison teaches at least three important lessons. First, a significant swath of doctrine, Jeffersonian natural-rights morality explains and justifies important tort doctrine quite determinately. Second, this natural-rights morality complements corrective justice theory by the substantive rights that tort’s corrective-justice features seek to rectify when wronged. Finally, standard economic tort analysis cannot prescribe determinate results without making simplifying assumptions more characteristic of moral philosophy than of social science.*

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## INTRODUCTION

Economic analysis has taken over tort law and scholarship. Before economic analysis came on to the scene, lawyers assumed that tort law secured personal rights grounded in moral interests. Philosophical tort scholarship still tries to defend this commonsense 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.<sup>1</sup>

This perception seems convincing because economic analysis claims it can explain the law more determinately than philosophical

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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).

analysis. When tort cases appeal to moral terms, economists say, their arguments seem “mush—lacking in clear or persuasive guidelines for determining what conduct counts as ‘wrongful.’”<sup>2</sup> Only economic analysis, it seems, can claim an “impressive level of fit with case outcomes” and a “comparatively high degree of determinacy.”<sup>3</sup> 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 academic table and reigned unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy.”<sup>4</sup>

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.”<sup>5</sup> These observers assume that the morality that used to inform the law was determinate enough to generate predictably “individualistic” results.<sup>6</sup> 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.<sup>7</sup> It may sound naïve to say, but that claim seems a little presumptuous. So do contemporary comparisons of tort economics and philosophy fairly reflect the merits of tort doctrine, economics, and philosophy? Or do they instead reflect passing academic prejudices?

No single article can voice such a doubt comprehensively across the entirety of tort, and this Article will not try. But this Article *can* suggest that the doubt is well grounded in reference to a fair point of contact: land-use torts. “Land-use torts” refer to the grounds for liability for trespass to land, nuisance, and negligence claims involving an accidental but trespassory invasion of land. They include cases about cattle trampling on crops,<sup>8</sup> doctors building offices near noxious bak-

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2 WARD FARNSWORTH & MARK F. GRADY, *TORTS*, at xlvii (2d ed. 2009).

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

4 *Id.* at 356–57.

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

6 *See id.* at 564.

7 *See generally* John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221 (2008) (discussing frequent observations about tort law, including its inability to be defined).

8 *See infra* notes 46–48, 292–98.

ing machines,<sup>9</sup> and trains emitting incendiary sparks onto crops or haystack fields.<sup>10</sup>

In other words, land-use torts cover all the chestnuts that Ronald Coase used to illustrate the lessons of his landmark article *The Problem of Social Cost*<sup>11</sup> (hereinafter "*Social Cost*"). *Social Cost* is the most-cited law review article ever.<sup>12</sup> It has 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."<sup>13</sup> Tort economists now routinely use fact patterns involving cows, smokestack pollution, or train sparks to teach or to build on the main lessons of *Social Cost*.<sup>14</sup> If there is any set of cases where "Coasian" tort analysis should demonstrate its explanatory superiority, the land-use torts treated in *Social Cost* belong in that set.

It is thus big news to learn that economic tort scholarship does not explain foundational features of the rules regulating liability in trespass, nuisance, and land-use negligence. The relevant liability rules of those torts are better explained and justified as an application of "American natural-rights morality." American natural-rights morality refers here to an amalgamated political morality that informed American law and politics considerably from the founding of the United States until 1920 and, to a lesser extent, since. According to this morality, the law's overriding object is to secure to citizens the natural rights to which they are entitled by general principles of natural law. This morality is "Jeffersonian" in the sense that it is a tolerably well-articulated version of the theory of unalienable and natural rights set forth in the Declaration of Independence.<sup>15</sup> This morality

9 See *Sturges v. Bridgman*, (1879) 11 Ch.D. 852, 852–53 (U.K.),

10 See *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 341 (1914).

11 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 29–34 (1960).

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

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

14 See, e.g., ROBERT ELLICKSON, *ORDER WITHOUT LAW* 40 (1991) (calling cattle trespass "the subject of Coase's Parable of the Farmer and the Rancher"); 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 D. Cooter, *Coase Theorem*, in 1 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 457, 458 (John Eatwell et al. eds., 1987) (using train-sparks cases, "which Coase made famous," as the sole example for illustrating the Coase Theorem).

15 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

explains basic features of trespass, nuisance, and land-use-related negligence better than “Coasian” economic tort analysis. In the process, Jeffersonian morality anticipates and highlights problematic features of Coasian economic analysis.<sup>16</sup>

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 reputation, this impression exists because too many onlookers conflate tort philosophy with corrective justice. Corrective justice is the species of practical moral philosophy determining in what circumstances wrongs to a victim’s rights should be annulled or rectified.<sup>17</sup> 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, corrective justice (or, at least, the best-known aspects of corrective justice) do 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 instead from a controlling local political morality. American natural-rights morality therefore focuses and complements tort’s corrective purposes.<sup>18</sup>

Second, existing philosophical tort scholarship has not done enough to learn how American natural-rights morality informs the moral content of particular torts.<sup>19</sup> Since natural-rights principles were influential in period when “tort” was coming together, it is quite reasonable to suspect that these principles explain and justify foundational tort doctrines. It is also reasonable to suspect that contemporary judges may continue to be influenced by inchoate expressions of the policy commitments associated with those principles. This Article confirms both suspicions in relation to basic land-use torts. In the process, American natural-rights morality also helps dispel a more general unfounded impression, that theories of moral philosophy are incapable of making tough-minded policy tradeoffs. American natural-rights morality makes the tradeoffs land-use tort law needs to get up and running.

Finally, this Article suggests that conventional economic tort analysis is not capable of making those same tradeoffs—at least, not with-

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mind.” Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 342, 343 (Paul Leicester Ford ed., 1899). In this Article, “Jefferson” and “Jeffersonian” refer to that common sense.

16 See *infra* Parts III–IV.

17 See Coleman, *supra* note 1, at 53–56.

18 See *infra* Part II.B.

19 See *infra* Part III.

out taking significant shortcuts.<sup>20</sup> The case comparison offered here highlights a problematic aspect of standard economic tort analysis that is often overlooked: To explain tort doctrine as determinately as conventional wisdom supposes, economic tort analysis must make informed hunches more characteristic of moral philosophy than of social science. In 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 econometrics).”<sup>21</sup> But if the land-use torts provide an accurate point of contact, these generalizations are overdrawn. Conventional economic tort analysis can provide precise accounts of *parts* of land-use doctrines, but not of doctrines in their entirety. Or, if it *does* try to render accounts of entire doctrines, such analysis makes assertionary behavioral claims resembling what economists derisively call “intuitions” in judicial opinions. If the land-use torts are representative, economic tort analysis can be scientific, and it can be relevant to doctrine, but it cannot have it both ways.

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

### A. *The Economic Indictment*

To set the stage, let us recount the general impressions that lead scholars to assume that economics is more determinate than commonsense morality or philosophy in tort. Because *Social Cost* is frequently cited as an authority proving or illustrating these impressions, I shall illustrate them especially with relevant passages from *Social Cost*. I have already identified one: Theories of justice seem “mush” and “lacking in clear or persuasive guidelines” for tort.<sup>22</sup>

Next, many lawyers assume with economists that tort common law is facile. When the common law distinguishes between harms and benefits or rights and injuries, the assumption goes, it does so less subtly than economic analysis. *Social Cost* is often cited as an authority here. After reviewing a long line of nuisance cases, Coase commented that the judges relied often on distinctions “about as relevant as the colour of the judge’s eyes.”<sup>23</sup> While restating the argument of *Social*

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20 See *infra* Part IV.

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

22 FARNSWORTH & GRADY, *supra* note 2, at xlvii.

23 Coase, *supra* note 11, at 15.

*Cost* in a republication, Coase asserted that “there is no difference, analytically, between rights such as those to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke.”<sup>24</sup> In other words, rather than employ traditional distinctions between benefits and harms, it is instead more constructive to portray a dispute as a resource conflict between competing and incompatible assets that inflict pairwise reciprocal externalities on one another.<sup>25</sup> This framework calls into question how the common law treats not only rights and wrongs but also causation. If the parties are really inflicting pairwise reciprocal externalities on each other, both parties jointly cause any economic losses.<sup>26</sup>

Third, these impressions are contributed to by the Coase Theorem. *Social Cost* is understood to teach, as Coase puts it, that “under perfect competition private and social costs will be equal.”<sup>27</sup> In Mitchell Polinsky’s paraphrase, “If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.”<sup>28</sup> 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.”<sup>29</sup> To economists, it seems more precise to ask, “what shall be done by whom?”

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24 R.H. COASE, *The Firm, the Market, and the Law*, in *THE FIRM, THE MARKET, AND THE LAW* 1, 12 (1988).

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

26 See, e.g., Coase, *supra* note 11, at 13 (“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.”).

27 COASE, *supra* note 24, at 14 (quoting GEORGE J. STIGLER, *THE THEORY OF PRICE* 113 (3d ed. 1966)).

28 A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 14 (3d ed. 2003).

29 Coase, *supra* note 11, at 15.

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, I shall refer to the conventional tort economic approach as "accident law and economics." Accident law and economics prescribes that tort accident disputes be resolved consistent with "productive efficiency." Accident law and economics tallies the gains each of the affected parties generates by its land uses. It then tallies all the relevant costs, including but not limited to: property damage or business impairment caused by a neighbor's nuisance; payments to other parties under contracts not to inflict nuisances; damage payments, in compensation for nuisances already committed; and transaction costs. Accident law and economics then focuses on the differences between the joint gains and joint losses. Productive efficiency refers to an ideal state in which any change in the parties' levels of production or precautions causes this difference to shrink.<sup>30</sup>

It should go without saying that this portrait of economic tort analysis could be qualified in many respects. To begin with, accident law and economics as defined herein does not automatically follow from *Social Cost*. The article's main intention is to refute an assumption, conventional in 1960 among many economists, that the efficient response to pollution is always to make the polluter pay taxes or damages to internalize the externalities it inflicts on other parties.<sup>31</sup> *Social Cost* is therefore interested primarily in "[t]he influence of the law on the working of the economic system"<sup>32</sup> and not vice versa. Yet *Social Cost* makes respectable the methodology of accident law and economics. Coase hypothesizes that the "legal system" may establish the "optimal arrangement of rights, and the greater value of production which it would bring," specifically by circumventing "the costs of reaching the same result by altering and combining rights through the market."<sup>33</sup> He praises American lawyers who "are aware . . . of the reciprocal nature of the problem" and "take . . . economic implications into

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30 The phrase "productive efficiency" comes from COOTER & ULEN, *supra* note 21, at 12; see also POLINSKY, *supra* note 28, at 15 ("[T]he preferred legal rule is the rule that minimizes the effects of transaction costs."); SHAVELL, *supra* note 25, at 80–83 (assuming that "the social goal is to maximize the sum of parties' utilities"); Coase, *supra* note 11, at 16 ("One arrangement of rights may bring about a greater value of production than any other.").

31 See Coase, *supra* note 11, at 1, 28 & n.35 (citing A.C. PIGOU, *THE ECONOMICS OF WELFARE* 183 (4th ed. 1932)).

32 COASE, *supra* note 24, at 10.

33 Coase, *supra* note 11, at 16.



account, along with other factors, in arriving at their decisions.”<sup>34</sup> He also lets slip some of the condescension many law and economists feel toward the common law, by describing judicial reasoning as “a little odd.”<sup>35</sup> So, with possible apologies to Coase, we shall focus here on the “Coasian Coase,” the general lessons that accident law and economists have taken away from *Social Cost*.<sup>36</sup>

In addition, accident law and economics is a rough general category covering many different specialized economic analyses of torts. Productive efficiency is an analytical device. It provides a launching point for many different economic analyses. Yet even though these analyses differ in many particulars, productive efficiency unifies their inquiries in important foundational matters.<sup>37</sup>

Finally, “accident law and economics” should not be understood to be a proxy for economic tort analysis generally. It should not be confused with cheaper-cost-avoider economic tort analysis,<sup>38</sup> new institutional economics,<sup>39</sup> behavioral law and economics,<sup>40</sup> or other refinements on or specialized applications of basic economic methodology. It *definitely* should not be confused with scholarship by Richard Epstein,<sup>41</sup> Henry Smith,<sup>42</sup> or other law and economists who explain

34 See *id.* at 19–20 & n.16 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 398–99 (2d ed. 1955) for the proposition that American nuisance law considers among other factors pollution’s “utility and the harm which results”).

35 See *id.* at 37.

36 See R.H. COASE, *Notes on the Problems of Social Cost*, in THE FIRM, THE MARKET, AND THE LAW, *supra* note 24, at 157, 174 (“The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave.”); accord Robert C. Ellickson, *The Case for Coase and Against “Coaseanism.”* 99 YALE L.J. 611 (1989).

37 See, e.g., COOTER & ULEN, *supra* note 21, at 82–98; POSNER, *supra* note 14, at 53 (“[E]fficiency is promoted by assigning the legal right to the party who would buy it . . . if it were assigned initially to the other party.”); SHAVELL, *supra* note 25, at 83–109 (comparing how polluter liability, bargaining, and legally mandated results each might maximize the parties’ joint net utility); see also ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN ENDED UNIVERSE 95 (1992) (“[M]ore complicated analyses in the law and economics literature are still all, in one form or another, applications of Coase’s efficiency criteria.”).

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

39 See, e.g., HANDBOOK OF NEW INSTITUTIONAL ECONOMICS (Claude Ménard & Mary M. Shirley eds., 2005).

40 See, e.g., Kraus, *supra* note 3, at 359. See generally *The New Chicago School: Myth or Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1 (1998).

41 See, e.g., RICHARD A. EPSTEIN, TORTS §§ 1.10, 8.2, 14.1–10, at 22–28, 189–91, 355–78 (1999); Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong with Euclid*, 5 N.Y.U. ENVTL. L.J. 277 (1996); Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace*, 1 J. L. ECON. & POL’Y 147, 152–59 (2005).

property torts in reference to bright-line boundaries and strict rules of scienter; I shall say a few words about their work in passing, but their work is not our primary focus here. Accident law and economics deserves pride of place. In tort casebooks and introductory textbooks, accident law and economics is presented as hornbook law and economics.<sup>43</sup> It gets credit for bringing determinacy to tort. And it takes credit for exposing the indeterminacy that supposedly exists in tort doctrine and philosophy.

### B. Explanatory Doubts

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

First, a trespass occurs when a defendant makes an act that directly results in a physical invasion of the plaintiff's close.<sup>44</sup> In other words, at common law, a "harm" occurs whenever the defendant penetrates the boundaries of the plaintiff's land—even if the penetration does not damage the land.<sup>45</sup> Economically, there are two puzzles with this rule. *Social Cost* articulates the first: When a rancher's cattle trespasses on a farmer's crops, it should not matter whether the rancher compensates the farmer for the crop damage.<sup>46</sup> This question is easy for accident law and economics to explain. *Social Cost* discusses the rancher-farmer conflict on the assumption that transaction costs are zero.<sup>47</sup> Once transaction costs are put back in the picture, it is less costly for the ranchers to come to the farmer's land to bargain than it is for the farmer to find them through their cows.<sup>48</sup>

Trespass, however, poses a second puzzle: Why does the prima facie case lack elements of causation or harm? There are few accident law and economic explanations for this rule, and those that do exist are not satisfying. For example, in a recent article, Lee Anne Fennell assumes that the whole "point of exclusion from boundaries is to facil-

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42 See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

43 See *supra* note 37.

44 See PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67, 70–71 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER AND KEETON].

45 See *Longenecker v. Zimmerman*, 267 P.2d 543, 545 (Kan. 1954); *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916); *Dougherty v. Stepp*, 18 N.C. (1 Dev. & Bat.) 371, 371 (1835); PROSSER AND KEETON, *supra* note 44, § 13, at 75.

46 Coase, *supra* note 11, at 1–8.

47 See *id.* at 2 ("[T]he operation of a pricing system is without cost.").

48 See ELLICKSON, *supra* note 14, at 186–87; Kenneth R. Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 J. LEG. STUD. 149, 153–60 (1987).

itate the effective matching of inputs with outcomes.”<sup>49</sup> The inputs are productive activities; the outcomes include both those activities’ benefits and the accidents that they occasionally but inevitably generate. Fennell concludes from this functional premise that trespass lacks causation or harm elements because “[b]oundary crossings . . . effectively puncture the containers that society has created for collecting risks and their associated outcomes.”<sup>50</sup> Assume for the moment that Fennell’s explanation is correct. Why does trespass law enforce boundary rules even when a risk of harm does not lead to a harmful accident?<sup>2</sup>

Consider *Jacque v. Steenberg Homes, Inc.*<sup>51</sup> Steenberg Homes asked the Jacques for permission to tow a home across a vacant field they owned, while the public road was blocked by a snow drift, so the company could complete a delivery on time. The Jacques refused to grant permission under any circumstances because they believed that a license might expose them to adverse possession.<sup>52</sup> (Under black-letter adverse possession law, they were almost certainly wrong.) Steenberg Homes towed the home across their field anyway, knowing that the Jacques objected, and caused no damage to the field.<sup>53</sup> In Fennell’s parlance, Steenberg Homes certainly punctured society’s risk-collecting boundary rules. But Steenberg Homes could not be blamed for the snowstorm, it was economically gainful for the company to perform its delivery contract, the Jacques had no serious reason for refusing passage, and their property was not damaged. A few different regimes might be productively efficient: no liability; liability compensated only by nominal damages; liability compensated by a reasonable one-time crossing fee; or liability compensated by some court-ordered profit-sharing arrangement.<sup>54</sup> It would be productively *inefficient* to award the Jacques not only nominal damages but also \$100,000 in punitive damages. But that is what the jury did,<sup>55</sup> and the Wisconsin Supreme Court affirmed—specifically to deter trespassers from undermining the general principle that “actual harm occurs in

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

50 *Id.* at 1437.

51 563 N.W.2d 154 (Wis. 1997). Prominent property casebooks give *Jacque* significant treatment. See, e.g., JESSE DUKEMINIER ET AL., *PROPERTY* 87–88 (6th ed. 2006); JOSEPH WILLIAM SINGER, *PROPERTY LAW* 116 (4th ed. 2006).

52 See *Jacque*, 563 N.W.2d at 157.

53 *Id.* Steenberg Homes’ assistant manager instructed employees: “I don’t give a — what [Mr. Jacque] said, just get the home in there any way you can.” *Id.* (alteration in original) (internal quotation marks omitted).

54 On this last possibility, see Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1845–49 (2009).

55 *Jacque*, 563 N.W.2d at 165–66.

every trespass.”<sup>56</sup> According to Fennell, *ex ante*, this holding deters future boundary invasions.<sup>57</sup> But her interpretation only begs the question why the law needs to punish harmless boundary invasions now to deter harmful ones later.

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 *Sturges v. Bridgman*,<sup>58</sup> a case between an early-moving baker and a late-developing doctor. According to Coase, it did not matter whether or not the law held the baker to be harming the doctor, because the parties would bargain around legal liability as long as transaction costs were not too high.<sup>59</sup> The accident law and economic scholarship follows Coase in different ways. Some articles suggest that the earlier builder should be protected categorically,<sup>60</sup> others that the law should examine on a case by case basis which party acted less strategically.<sup>61</sup> These approaches have seeped into some cases.<sup>62</sup> By and large, however, the cases make the business liable even though it came to the neighborhood first.<sup>63</sup>

The physical-invasion test also bars causes of action for aesthetic complaints and blockages of light.<sup>64</sup> Economically, it is hard to

56 *Id.* at 160 (emphasis added).

57 See Fennell, *supra* note 49, at 1431 & n.91 (citing *Jacque* to illustrate features of remedy law, without explaining its implications for underlying trespass liability).

58 (1879) 11 Ch.D. 852 (U.K.).

59 See Coase, *supra* note 11, at 15–19.

60 See, e.g., William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1, 106–13 (1973).

61 See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 50–51 (1987) (providing an example of a rejection of the “coming to the nuisance” doctrine and one upholding it); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 639 (2001); Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance,”* 9 J. LEGAL STUD. 557, 558–61 (1980).

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

63 See, e.g., *Kellogg v. Vill. of Viola*, 227 N.W.2d 55 (Wis. 1975).

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

explain why negative externalities should be sorted depending on whether they follow from a physical invasion. In *Social Cost*, Coase assumed that his analysis applied the same way whether the defendant was emitting smoke onto, or blocking sunlight from, the plaintiff's land.<sup>65</sup> Because accident law and economics scholarship typically defines "nuisance costs" to cover "harmful externalities" of all kinds, eyesores emit negative externalities on neighbors on similar terms as factory smoke.<sup>66</sup>

Nevertheless, commonsense 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."<sup>67</sup> Nuisance doctrine tracks commonsense perceptions. For example, in the course of rejecting a nuisance suit to protect a solar-powered house's access to sunlight, the California Court of Appeals contrasted "emissions of smoke affecting plaintiff's property" with the plaintiffs' "predicament," which the court described as "never [having] come under the protection of private nuisance law, no matter what the harm to plaintiff."<sup>68</sup>

Consider also the roles that scienter and interest-balancing play in trespass and nuisance. Some accident law and economic authorities recommend that nuisance law employ principles of negligence.<sup>69</sup>

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65 See Coase, *supra* note 11, at 7–8 & n.6 (citing Fontainebleu Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. 1959)).

66 See, e.g., Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, 58 CASE W. RES. L. REV. 673, 678–80, 684–85 (2008) (defining the interference in nuisance in reference to physical invasions, without considering that economic-externality analysis applies equally to noninvasive negative externalities); see also COOTER & ULEN, *supra* note 21, at 40–41 (defining and exploring the concept of externalities); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1310 (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).

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

68 *Sher v. Leiderman*, 226 Cal. Rptr. 698, 703 (Ct. App. 1986); see also *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) ("It may be the ugliest bird house in Indiana, or it may merely be a toilet seat on a post. The distinction is irrelevant, however; [the defendant's] tasteless decoration is merely an aesthetic annoyance . . .").

69 See, e.g., Hylton, *supra* note 66, at 681 ("[S]trict liability is desirable only when the external costs of the actor's activity substantially exceed the external benefits associated with the actor's activity." (emphasis omitted)).

In negligence, the element of breach of duty creates a doctrinal placeholder in which to conduct “*B v pL*” precaution/loss analysis. Nuisance could import the same analysis through the element that an interference with a land use be unreasonable.<sup>70</sup> Other authorities prescribe strict liability for unilateral accidents and negligence for multi-lateral accidents. In simple cases, strict liability avoids the costs of inquiring into reasonable care; in multi-party cases, negligence reduces the perverse incentives one party’s strict liability gives others not to take sensible precautions on their own.<sup>71</sup>

In practice, however, trespass and nuisance employ strict liability categorically, without distinguishing between one- and multiparty accidents. Trespass is often defined as an intentional tort. In practice, however, courts water down the concept of “intent” to include intent to commit the act causing the trespass regardless of whether the actor knows it is a trespass.<sup>72</sup> A similar move happens in nuisance. When intent is an element of nuisance, it is usually construed to cover intent to commit a land use while substantially certain that the use will annoy a neighbor.<sup>73</sup> There certainly is negligence-based nuisance,<sup>74</sup> but the law also preserves a strict-liability theory of nuisance as a backstop.<sup>75</sup> Courts also resist, surprisingly often, the invitation to make nuisance’s “reasonableness” element a placeholder for economic cost-benefit analysis. They prefer to focus on “the reasonableness of the interference and not on the use that is causing the interference.”<sup>76</sup>

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70 See, e.g., POSNER, *supra* note 14, § 3.8 at 63 (“The standard of reasonableness [in private nuisance] involves comparing the cost to the polluter of abating the pollution with the lower of the cost to the victim of either tolerating the pollution or eliminating it himself.”); Rabin, *supra* note 66, at 1316–31.

71 See, e.g., Hans-Bernd Schäfer & Andreas Schönenberger, *Strict Liability Versus Negligence*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 597, 607 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); see also POLINSKY, *supra* note 28, at 107–12 (applying this framework to pollution cases).

72 See, e.g., *Burns Philip Food, Inc. v. Cavalea Cont’l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998); *Brown v. Dellinger*, 355 S.W.2d 742, 747 (Tex. Civ. App. 1962); *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (D.C. 1960); RESTATEMENT (SECOND) OF TORTS § 158(a) (1977) (defining intent in trespass to cover intent to enter land in the possession of the plaintiff); JOHN C. GOLDBERG ET AL., *TORT LAW* 776–77 (2008).

73 See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953).

74 See RESTATEMENT (SECOND) OF TORTS § 822(b).

75 See *id.* § 822 cmt. b.

76 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 66, at 686–87 (discussing *Boomer v. Atl.*

Of course, economic cost-benefit analysis could still seep into land-use torts through the back door, by encouraging affirmative defenses asking whether a land-owning plaintiff has invited harm on herself. 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.<sup>77</sup> In doctrine, however, the common law does not use affirmative defenses in this manner. Even making the necessary qualifications for exceptional cases and minority rules, it is “canonical” that “if you hold a property entitlement, then you should not be required to anticipate the possible wrongs or torts of another.”<sup>78</sup> In sparks cases, the general rule has been to bar contributory negligence on the ground “[t]hat one’s uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly.”<sup>79</sup> Courts also limit assumption of risk as a defense against trespassory torts. In the 1974 case *Marshall v. Ranne*,<sup>80</sup> Marshall was bitten while he was walking from his farm house to his car by an ornery boar that had threatened him on several previous occasions.<sup>81</sup> Ranne argued (note that the case was litigated in Texas) that Marshall assumed the risk of being bitten because he did not shoot Ranne’s boar when he had a chance.<sup>82</sup> This argument was rejected: “[T]here was no proof that plaintiff had a free and voluntary choice, because he did not have a free choice of alternatives. He had, instead, only a choice of evils, both of which were wrongfully imposed upon him by the defendant.”<sup>83</sup> The opinion intuitively uses boundary principles to stop a trespasser from making an inappropriate “your money or your life” argument. But other cases allow plaintiffs’-misconduct defenses when

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Cement Co., 257 N.E.2d 870 (N.Y. 1970)). Nuisance does balance interests more than trespass at the remedy stage—but not at the liability stage.

77 See, e.g., Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 5–11 (1985); Grady, *supra* note 13, at 33–41.

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

79 *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 349 (1914).

80 511 S.W.2d 255 (Tex. 1974).

81 *Id.* at 260–61.

82 *Id.* at 257.

83 *Id.* at 260.

defendant-owners impose “take it or leave” demands on plaintiff-licensees injured on their land.<sup>84</sup>

Now, in all of these doctrines, accident law and economists may say that the common law is “rigid,” missing “ambiguity,”<sup>85</sup> or any of many other synonyms for “not as sophisticated as the approach one would take if one had learned more economics.” Yet lawyers might reasonably wonder whether these are scholars who cannot stop themselves from “perpetually enquiring into publick Affairs” even though there is not “the least Analogy between” mathematics and politics.<sup>86</sup> And judges may wonder whether the prescriptions of accident law and economics recounted in this Part confirm the “growing disjunction” Chief Judge Harry Edwards noted between the interests of the legal academy and the needs of the bar.<sup>87</sup>

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

### A. *American Natural-Rights Morality*

In this Article, I explain the doctrines recounted in the last Part using different account of law: American natural-rights morality. For the purposes of this Article, “American natural-rights morality” refers to a common political morality that amalgamates Anglo-American law and several different philosophical and religious theories of liberty. The amalgamation is restated explicitly and generally in the Declaration of Independence and many Founding Era state constitutions. I hypothesize here that it served as a common political morality until at least the end of the first third of the twentieth century.

### B. *Political Morality and Corrective Justice*

At this point, one may reasonably wonder whether this claim has already been made in philosophical tort scholarship. For example, Stephen Perry has suggested that pre-1950 American tort law came “close . . . to instantiating pure corrective justice.”<sup>88</sup> This claim is accurate if understood with important implicit qualifications. Without those qualifications, the claim illustrates an important confusion.

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

85 Grady, *supra* note 13, at 30–33.

86 JONATHAN SWIFT, *GULLIVER’S TRAVELS* pt. III, ch. 2, at 167–69 (Oxford Univ. Press 1999) (1726).

87 See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 70 (1992).

88 Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 382 (1992).



Corrective justice refers to a class of moral principles that justify why and how wrongs by actors against victims should be annulled.<sup>89</sup> Perry, Jules Coleman, Ernest Weinrib, and others have used corrective justice to shift the terms of debate in tort. One part of the critique relates to foundations: Law and economists are not really studying law, because “whenever we are talking about the law we are not talking about [economic] incentives but rather about the collective use of force against some in the name of all”—a philosophical question about “legitimate authority.”<sup>90</sup> Another part of the critique focuses on whether law and economics can explain broader issues of legal form and architecture—why tort speaks of “plaintiffs” and “defendants,” and “rights” and “wrongs,” and not “incompatible-resource users” and “externalities.” In addition, at least where economic theory has not seeped into doctrine, tort law looks retrospectively to restore a status quo that existed between two parties before an alleged wrongful act. Economic analysis prefers to analyze the consequences of a rule prospectively and on everyone whose behavior might be altered by the rule.<sup>91</sup>

These insights are important, and they have enriched our understanding of tort. At the same time, these insights can be taken too far. When Perry says that “pure corrective justice” can explain pre-1950 American law, absent important context, his words suggest that general principles of corrective justice can explain and prescribe specific rules of tort doctrine with little or no supplementation. As Gregory Keating has explained, however, that suggestion threatens to “put[ ] the cart before the horse.”<sup>92</sup>

A full account of tort law presumes a fully developed primary theory of political morality. This theory must give an account of whether, and in what circumstances, individuals are entitled to personal interests in security, reputation, liberty, property, or so on.<sup>93</sup> In easy

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

90 Jules L. Coleman, *Some Reflections on Richard Brooks's "Efficient Performance" Hypothesis*, 116 YALE L.J. POCKET PART 416, 421 (2007); see *id.* at 421–22.

91 See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 374–75 (1992) [hereinafter COLEMAN, *RISKS AND WRONGS*]; JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 13–63 (2001); ERNEST P. WEINRIB, *THE IDEA OF PRIVATE LAW* 22–83 (1995).

92 Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOC. PHIL. 1, 11 (2006); see also Goldberg, *supra* note 7, at 1256 (“[T]he remedial tail is wagging the substantive dog.”).

93 Here and elsewhere, I use “interest” as it is used when referring to an “interest-based theory of rights.” Specifically, I use the term to refer to a moral justification for an owner’s having practical discretion in relation to a sphere of his life and using it to make choices for his own flourishing in that sphere. So understood, an “interest” confers on the bearer: a stake in having the discretion as an ingredient of his well-

cases—say, an encroachment, with specific intent to dispossess the owner of her land, which topples over the owner’s house—the primary theory of morality is uncontroversial and easy to overlook. In these cases, tort law seems to be mainly, or even wholly, corrective. Yet corrective justice seems more problematic in a hard case—say, a nuisance dispute about an ugly sculpture or blockage of sunlight. Nuisance might accord with corrective justice if it imposed on an owner a duty to rectify “harm” to his neighbor caused by offending her artistic sensibilities or cutting off her light. But it also might accord with corrective justice to say that a cause of action would “harm” the owner by limiting his free and legitimate use of land.<sup>94</sup> Which result better accords with corrective justice depends on a political choice not specified by corrective justice (or at least the core remedial aspects of corrective justice):<sup>95</sup> which delineation of property rights is most just in relation to some combination of abstract justice and principles of justice held in the controlling local political morality? As Keating correctly concludes, “The identification of those actions which require correction takes precedence over their correction.”<sup>96</sup>

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being; a psychological motivation and a moral responsibility to use the discretion for his own well-being; a moral right to be free from and power to repel interferences with his discretion; and a responsibility and duty not to exercise the discretion in situations when the underlying justification ceases to apply. By the same token, the interest’s justification imposes correlative duties and liabilities on others and its limits confer rights on them. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 33–35 (1984). I assume context will adequately warn readers when I use “interest” in other senses. See, e.g., *supra* text accompanying note 69 (referring to utilitarian “interest balancing”).

94 See Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1168 & n.56 (2006).

95 Legal philosophers debate where to situate the field of practical moral reasoning that declares and specifies the normative interests whose invasions tort rectifies. One view holds that this field belongs to corrective justice. See, e.g., WEINRIB, *supra* note 91, at 70–73. On another view, this field belongs to distributive justice. See John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice* (Univ. of Oxford, Legal Research Paper No. 1/2010, 2010), available at <http://ssrn.com/abstract=1538342>. I suspect but cannot prove here that the field sounds in a category of justice separate from and lexically prior to the fields of distributive and corrective justice. The precise categorization of this field of practical morality is too tangential to this Article to be settled here. Readers only need to agree that the core remedial functions corrective justice assigns to tort cannot explain or justify the differences between different property interests; they may assign the norm-declaring functions of tort into whichever field of justice they deem most appropriate.

96 Keating, *supra* note 92, at 11; cf. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 733–38 (2003) (suggesting that private rights of action are prior in tort to corrective duties of repair).

Different corrective-justice theorists have recognized this admonition to different extents. As the next Part shows, some scholarship has asserted, without qualification, that general corrective justice principles can make predictions about specific doctrinal choices in tort. That scholarship promises more of corrective justice than it can deliver. In relation to that scholarship, this Article, therefore, clarifies the proper bounds of torts' norm-declaring and -protecting functions and its norm-rectifying functions.

Other scholars have distinguished more carefully between these functions. For example, Coleman has acknowledged that "the content of rights derives from normative argument, not conceptual analysis," including corrective justice.<sup>97</sup> Thus, when corrective justice makes prescriptions in property disputes, it "builds on, or is layered on, rights that already govern the relationship between the parties."<sup>98</sup> In relation to that scholarship, this Article is mostly complementary; it fills in a normative account of property rights on which torts' corrective aims are layered in the land-use torts.

### C. *The Argument*

Now that we have clarified the relation between corrective justice (or its remedial core) and American natural-rights political morality, let us explain the argument that follows. Part III shows why American natural-rights morality explains and predicts the contours of basic land-use law better than accident law and economics or corrective-justice theory (or its remedial core) in isolation. In the process, Part III shows why American natural-rights morality's account of land-use tort liability rules is at least normatively plausible. Let me restate these claims more precisely. This Article does not claim that American natural-rights morality is the only political morality that could explain or has influenced the doctrine; other theories of political morality may converge with it in suggesting that owners deserve to enjoy a significant domain of autonomy over their land. Separately, contemporary judges do not follow American natural-rights morality in land-use cases completely. When I claim that American natural-rights morality is influencing current law, I mean specifically that current law is still borrowing implicitly on moral interests informed by behavioral and prescriptive generalizations articulated explicitly in different sources of American natural-rights morality. Most of the remaining discrepancies can be explained by a modified version of Chief Judge Edwards'

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97 COLEMAN, RISKS AND WRONGS, *supra* note 91, at 338.

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

“disjunction” thesis.<sup>99</sup> When judges use specialized terms of art, like “property” or “rights,” they follow usages and utilitarian vocabulary from accident law and economics and other contributors to contemporary legal theory; when they focus on particular doctrinal questions, however, they appeal to behavioral generalizations informed significantly by or at least in accord with American natural-rights morality.

Part IV then shows why accident law and economics does not adequately take account of the normative arguments imparted to the relevant law by American natural-rights morality. Here, the Article makes a hypothetical normative claim: American natural-rights morality provides a convincing normative justification for the basic features of land-use liability law only *if* one presumes that American natural-rights morality is normatively convincing generally. Many comprehensive criticisms could be and have been leveled at American natural-rights morality or its individual ingredients.<sup>100</sup> It would take several scholarly lifetimes to consider such criticisms. Nevertheless, similar foundational objections could be leveled at many competent economic studies of law. Those studies finesse their criticisms by assuming: “To the extent that you care about efficiency as a value, you should pay attention to the following conclusions.”<sup>101</sup> This Article’s normative claims about American natural-rights morality are similarly contingent.

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

#### A. *The Natural Right to Labor*

When American trespass and nuisance law define the possessory interests they protect, both aim 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. Although these jurists’ approach is sometimes described as “individualistic,”<sup>102</sup> that adjective

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99 See *supra* note 87.

100 For critiques of Lockean property theory, see, for example, G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 175–94 (1995) (arguing that self-ownership cannot deliver the freedom it claims political society should secure); STEPHEN R. MUNZER, A THEORY OF PROPERTY 254–91 (1990) (criticizing labor theory enough to reduce it to being only one of several components of a pluralist justification for property); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137–252 (1988) (concluding that labor-desert theory can provide a specific but not a general right to property).

101 Richard Craswell, *In that Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 YALE L.J. 903, 906 (2003); see also *id.* at 906 (describing this type of argument as “necessarily contingent”).

102 Goldberg, *supra* note 5, at 520.

does not explain the law's commitments except in easy cases. Before he switched from rights theory to law and economics, Richard Epstein defended an individualistic approach to nuisance on the basis of corrective justice.<sup>103</sup> But as Part II.B suggested, this argument claims more from corrective-justice theory than it can deliver without supplementation.

The key is to understand the scope of the moral rights to “enjoy” and “use” in American natural-rights morality. The active use and enjoyment of property is one of several manifestations of the natural right of “labor” or “industry.” Thus, when John Locke traces the moral foundations of property in his *Second Treatise*, he insisted that God gave the world “to the use of the industrious and rational, (and labour was to be his title to it),” and that “[t]he measure of property, nature has well set, by the extent of mens labour, and the conveniences of life.”<sup>104</sup> As U.S. Supreme Court Justice William Paterson explains in the 1795 case *Vanhorne's Lessee v. Dorrance*<sup>105</sup>:

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.<sup>106</sup>

For judges like Paterson, “labor” or “industry” has focus because it has at least three characteristics. For one thing, labor is dynamic. Locke refutes the suggestion that it might seem “strange . . . that the Property of labour should be able to over-balance the Community of Land.”<sup>107</sup> He insists that it would

be but a very modest Computation to say, that of the Products of the Earth useful to the Life of Man 9/10 are the effects of labour: nay, if we will rightly estimate things as they come to our use . . . in most of them 99/100 are wholly to be put on the account of labour.<sup>108</sup>

Separately, the interest in “labor” abstracts from the specific use choices individual owners make. By focusing on man's common tendencies to acquire, create, and work productively, natural-rights

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

104 JOHN LOCKE, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT § 36, at 190–91 (Neill H. Alford, Jr. et al. eds., Legal Classics Library 1994) (1698) [hereinafter LOCKE'S SECOND TREATISE].

105 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

106 *Id.* at 310.

107 LOCKE'S SECOND TREATISE, *supra* note 104, § 40, at 195.

108 *Id.* Shortly after, Locke ups the fraction again, to 999/1000. See *id.* § 43, at 197.

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

degrees [and] many . . . varieties of human genius, human dispositions, and human characters. One man has a turn for mechanics; another, for architecture; one paints; a second makes poems: this excels in the arts of a military; the other, in those of civil life. To account for these varieties of taste and character, is not easy; is, perhaps, impossible.<sup>109</sup>

Last, the natural right to labor reflects a certain moderation, a disposition to accept limits on what man 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 his bettering his condition. One can deduce these limitations from prominent religious teaching, as necessary consequences of original sin and man's inferiority to God.<sup>110</sup> Similar limitations can be deduced from secular first principles. Indeed, much of the pre-1800 canon of moral philosophy separated the study of moral affairs from the natural sciences for this very reason.<sup>111</sup> Locke stresses that separation. In his analysis, man operates in a "state of mediocrity," in which he can learn only with "judgment and opinion, not knowledge and certainty."<sup>112</sup> These limits on knowledge are especially pronounced in relation to moral ideas, which "are commonly more complex than those of the figures ordinarily considered in mathematics."<sup>113</sup>

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109 1 JAMES WILSON, *Of Man as a Member of Society*, in THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 283, 307 (Bird Wilson ed., Bronson & Chauncey 1804); see LOCKE'S SECOND TREATISE, *supra* note 104, § 48, at 200–01; THE FEDERALIST No. 10, at 45, 46 (James Madison) (Clinton Rossiter ed., 1999).

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

111 See, e.g., ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 3, at 96–97 (Christopher Rowe trans., 2002).

112 JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING 645 (Peter H. Niddich ed., 1975) (1700) (emphases and upper-case lettering removed).

113 *Id.* at 550; see also THE FEDERALIST No. 37 at 192, 196 (James Madison) (Clinton Rossiter ed., 1999) (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").

These concerns limit and guide property regulation. In *Federalist 10*, Madison assumes that a “connection subsists between [man’s] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.”<sup>114</sup> While this passage is often cited as anticipating public-choice economics,<sup>115</sup> in context it stresses how hard it is to regulate property given the limits of human knowledge. In many cases, partisan selfishness certainly overwhelms rational inquiry. But perhaps more fundamentally, selfishness overwhelms rational inquiry because such inquiry has little pure knowledge on which to work. In practice, human “reason” makes many basic decisions relying not on hard scientific knowledge but on soft “opinions,” which are distorted by human “passions” and especially the ones encouraging “self-love.” Given how little hard knowledge citizens have in politics, it is usually better that the law refrain from regulating assets directly and steer control to owners. Other things being equal, the people with the greatest “self-love” in relation to assets generally have the most informed opinions about them.

These prescriptions cooperate to make property seem simple—even “formal,” in the limited sense that simple forms are more useful. To encourage all citizens’ equal natural rights to labor, the law must design property to make citizens secure so that they may recoup the products of their labor without outside interference. Property, therefore, consists not so much of specific entitlements as a general domain of practical discretion in relation to an external asset. That discretion protects the owner’s free choice how actively to use and enjoy the asset in relation to his own individual needs. Chancellor James Kent refers to this domain by suggesting that “[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others.”<sup>116</sup>

The portraits of “labor” and “property” I have sketched here do not conform to “labor-desert” theory as it is often understood and taught.<sup>117</sup> According to conventional labor-desert theory, whenever an actor labors on an external asset, he is morally entitled to extract

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114 THE FEDERALIST NO. 10, *supra* note 109, at 46.

115 See, e.g., Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1330–31 (1994) (citing THE FEDERALIST NO. 10 (James Madison)).

116 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (Neill H. Alford, Jr. et al. eds., O. Halsted 1987) (1827).

117 I thank Nestor Davidson for encouraging me to consider this objection.

the benefits that flow from that labor.<sup>118</sup> This version of labor-desert theory looks backward: An actor deserves to reap what he has sown wherever he has sown.

By contrast, American natural-rights morality looks forward. It holds that sowing is a valuable moral interest, and encourages legislators to write laws that enlarge different owners' parallel freedoms to sow in different ways. This version of labor theory therefore sometimes protects a non-laboring owner's right to keep the fruits of a laboring nonowner: "If I build my house with your axe and out of your wood, I cannot gain a clear title to the house."<sup>119</sup> In cases like this, natural-rights labor theory makes an indirect consequentialist prediction: if legal rights are reasonably likely to encourage the greatest free and concurrent labor by different citizens to different ends, the law will protect labor more effectively by enforcing the legal rights of non-laboring owners than it would by rewarding the labor of nonowners on property they do not own. It is easy to appreciate this point when one is speaking of one person's labor on another's axe and wood. It is harder to appreciate when one owner labors on a neighbor's air column while operating a factory. Yet the basic principles remain the same.

This rendition of labor theory may seem non-Lockean to some readers. After all, Locke argues in section 27 of the *Second Treatise*: "Whatsoever then [any man] removes out of the state that nature hath provided, and left it in, he hath mixed his labour with it, and joyned to it something that is his own, and thereby makes it his property."<sup>120</sup> Yet this passage needs to be read in context of the rest of the *Two Treatises*. Throughout the *Treatises*, Locke describes the external world as something which man has "reason to make use of . . . to the best advantage of life and convenience," or "the support and comfort of [his] being."<sup>121</sup> In context, then, Locke uses labor not to refer to "a kind of substance, to be literally mixed or blended with an object, but

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118 See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 14 (6th ed. 2006) (introducing labor-desert theory and suggesting several respects in which it is deficient).

119 A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 275 (1992).

120 LOCKE'S SECOND TREATISE, *supra* note 104, § 27, at 185, *quoted in* DUKEMINIER ET AL., *supra* note 118, at 14.

121 LOCKE'S SECOND TREATISE, *supra* note 104, § 27, at 185; *see also* JOHN LOCKE, *The First Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT, *supra* note 104, § 86 [hereinafter LOCKE'S FIRST TREATISE] (arguing that God "directed [man] by his senses and reason . . . to the use of those things, which were serviceable for his subsistence, and given him as means of his preservation" and gave man a "right . . . to make use of those things that were necessary or useful to his being" (emphasis omitted)); LOCKE'S SECOND TREATISE, *supra* note 104 § 46, at 198 ("The measure of property, nature has well set, by the extent of mens labour, and the conveniency of life



as a kind of purposive activity aimed at satisfying needs or supplying the conveniences of life.”<sup>122</sup> In addition, section 27 focuses on the state of nature. The conventional reading assumes that the interests owners enjoy in the state of nature carry forward to govern property disputes in civil society without significant qualification. Read in their entirety, *The Two Treatises* do not support such an assumption. In the state of nature, each person owes others a duty to refrain from harming their property.<sup>123</sup> In both state of nature and civil society, men are equals.<sup>124</sup> In civil society, citizens may therefore reasonably expect that the commonwealth will make its primary end to secure to them—each of them, on equal terms—their concurrent moral interests in labor.<sup>125</sup> Thus, even if an owner’s factory is a productive use of his land, the productivity does not necessarily give him a right to use the neighbor’s air column as a pollution repository.

The property rights that follow from labor theory so understood are often called “rights to exclude” in case law and in conceptual philosophy.<sup>126</sup> There are two reasons to be careful with this conception. First, as others<sup>127</sup> and I<sup>128</sup> have shown elsewhere, the conceptual property interest is better described as a right to determine exclusively the

. . . .”); *id.* at 198 (“Man . . . had still in himself . . . that which made up the great part of what he applied to the Support or Comfort of his being . . .”).

122 SIMMONS, *supra* note 119, at 273; *see also* PETER C. MYERS, OUR ONLY STAR AND COMPASS 129 (1999) (defining labor, “broadly conceived,” as “the essential means whereby we take responsibility for our lives”); Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 160 (2002) (“[T]he phrase ‘mixing labor’ is a . . . metaphor for *productive activities*.”); A. John Simmons, Makers’ Rights 1 (Feb. 16, 2009) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1344432> (evaluating interpretations of Locke’s theory “that labor is the original source of exclusive property rights”).

123 *See* LOCKE’S SECOND TREATISE, *supra* note 104, § 6, at 168–69.

124 *See id.* § 4, at 167.

125 *See id.* §§ 124, 134, at 261–62, 267. *But see infra* note 245.

126 JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1996) (defining property rights in terms of a “right to exclude others from things which is grounded by the interest we have in the use of things” (emphasis omitted)); *see also* J.W. HARRIS, PROPERTY AND JUSTICE 13, 141–42 (1996) (defining property as including interests protected by trespassory protections).

127 *See, e.g.*, Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008) (arguing that the exclusion-based approach fails to capture an owner’s agenda setting goal); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377 (2003) (describing the “right to exclude” theory as “essential but insufficient”).

128 *See* Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (book review).

use of an external asset.<sup>129</sup> Consider a definition in an 1892 legal 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.”<sup>130</sup> A “right to exclude” suggests that the owner enjoys a right to blockade non-owners from encroaching on the boundaries of her property. According to the 1892 definition, however, “exclusion” operates to bar nonowners from interfering with the domain of free choice over use—“dominion,”<sup>131</sup> or an “indefinite right of user and disposition.” In some cases, *A*’s right to exclude *B* from *W* is not necessary to protect *A*’s right to use *W* exclusive of *B* and others’ interference. In other cases, when the law says, “*A* has a right to exclude *B* from *W*,” it is using the “right to exclude” as coarse shorthand: “*B*’s use violates *A*’s rights because it interferes with the domain of exclusive use determination the law assigns *A*.”

Second, we must take care not to blow conceptual claims out of proportion. In Part II.B, I explained why tort conceptualists must resist the temptation to explain all of tort through corrective justice. Property conceptualists must resist a similar temptation. Although the “right of exclusive use determination” is more precise than the “right to exclude,” neither conception explains completely which rights come with property. Both conceptions explain and justify property as a domain of autonomy. Yet the autonomy has focus and limits, which are supplied by normative judgments, embraced by a political community, spelling out generally which general uses most accord with property’s functions and purposes. In a very wide cross-section of state land-use tort cases, American natural-rights morality continues to inform such judgments.

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129 Penner uses a variation on the phrase in the text (“the interest in exclusively determining the use of things”) to describe the normative interest underlying property. See PENNER, *supra* note 126, at 49. Law and social norms, he argues, then cash this right out into a right to exclude non-owners from things. See *id.* at 71. For reasons too complicated to develop here, I suspect Penner is creating a distinction between normative interest and social/legal rights that does not exist in practice. See Claeys, *supra* note 128, at 631 n.67.

130 19 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 284 (John Houston Merrill ed., 1892).

131 Accord LOCKE’S SECOND TREATISE, *supra* note 104, § 26, at 185 (“[N]o body has originally a private dominion, exclusive of the rest of mankind . . .”).

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

1. Boundary Rules and the Rights to Use and Enjoy

The understanding of labor sketched in the previous section generates different rules of ownership, control, and use for different species of property. In general, legal property rights often range from (limited) rights of use to (unlimited) rights of possession and disposition.<sup>132</sup> Use rights endow an owner with a right to continue to enjoy the benefits of an asset she is using—only as long as she is using it, and without giving her a right to destroy the substance of the asset.<sup>133</sup> Water rights provide the prototypical example of use rights, and understandably so. Water is used for a narrower set of private uses than land is, and water is also used quite often for important public needs like navigation. In temperate jurisdictions, at least, water is also plentiful and can be acquired without strong property rights. In such jurisdictions, most sources of water are left in commons, and those that may be subject to privatization are subject to “use it or lose it” conditions and reasonable-use restrictions.<sup>134</sup>

At the other end of the spectrum lie full rights of possession and disposition. These rights give owners the right to possess and dispose of things they own, even if they are not actually and presently using those things.<sup>135</sup> Fast land is covered under such rights. In a society with any significant commerce, land can be deployed to a wide range of uses, and many are quite resource- or cooperation-intensive. To enlarge landowners' interests in using land purposefully for their own plans, the law enforces exclusionary rights so “the [land] necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require.”<sup>136</sup>

The law therefore organizes property rights in land in the first instance around boundary rights not tied directly to owners' uses. As Chief Justice Holt put it in a seminal 1703 opinion:

So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action

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132 See 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

133 See, e.g., WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIA LAW DICTIONARY 624 (Frank D. Moore ed., 3d ed. 1940) (defining *jus utendi* as “[t]he right to use property without destroying its substance”).

134 See 2 BLACKSTONE, *supra* note 132, at \*14; JOHN W. JOHNSON, UNITED STATES WATER LAW 35–43 (2009).

135 See SHUMAKER & LONGSDORF, *supra* note 133, at 618 (defining *jus abutendi* as “the right to abuse property, or having full dominion over property”).

136 SIMMONS, *supra* note 119, at 275.

against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.<sup>137</sup>

In both the cuff and the riding, an unconsented touching is the law's proxy for a moral principle that it is wrong for one party to interfere with another party's domain of free choice.<sup>138</sup> In each case, that standard of freedom is subject to qualification and revision. But the standard still matters. It provides a simple and clear way to translate into real space the abstract moral principle, "equal liberty of action to use property productively and purposefully for one's own individual plans."

Let us recapitulate using Wesley Hohfeld's taxonomy of legal rights.<sup>139</sup> Once it has been determined that land should be reduced to full rights of possession and disposition, an owner has a claim right to be free from unconsented physical invasions and a reciprocal duty not to inflict unconsented physical invasions on others.<sup>140</sup> Both the claim right and the duty are in rem (in Hohfeld's terminology, "multital" relations), which is to say that they attach to an indefinite class covering everyone who does not own the land.<sup>141</sup> To protect their claim rights, owners also enjoy Hohfeldian powers to eject trespassers and repel nuisances by self-help. The claim right, duty, and power all reserve to individual owners a wide range of different land uses to which they may apply their land. Each of those uses counts as a liberty, a Hohfeldian privilege.<sup>142</sup> The owner also holds a more general liberty to choose among these various specific liberties. By contrast, each neighbor has an exposure, a Hohfeldian "no right," inasmuch as he is powerless to veto objectionable but noninvasive liberty-uses chosen by the owner.<sup>143</sup> The claim right, the power, and (most of all) the general liberty (and nonowners' in rem duty, liability, and exposures)

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

138 Here and throughout, I 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.

139 See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35–38 (Walter Wheeler Cook ed., 2000) (1919).

140 See *id.* at 38.

141 See *id.* at 73–74.

142 See *id.* at 38–39.

143 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, e.g., Antonio Nicita et al., *Towards an Incomplete Theory of Property Rights* 16 (May 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1067466>.

recognize that the owner has a wide realm of practical discretion in which to determine how his land is used.

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

[I]t 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 . . . .<sup>144</sup>

## 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. The core of trespass lies in the possessory interest—each owner's moral interest in controlling his land exclusively, consistent with neighbors enjoying like exclusive interests, all in the further interests of determining the ends for which their lands are used, enjoyed, and disposed of. The moral right shapes the possessory interest and the harm in tort. In Blackstone's restatement, "every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression."<sup>145</sup> This rule is just because "much inconvenience may happen to the owner, before he has an opportunity to forbid the entry."<sup>146</sup> Here, "inconvenience" is shorthand for "interference with the owner's indefinite range of possible uses, enjoyments, or dispositions." So, in subsequent American law, "[e]very unauthorized intrusion upon the private premises of another is a trespass, and to unlawfully invade lands in his possession is 'to break and enter his close' and destroy his private and exclusive possession."<sup>147</sup>

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144 3 BLACKSTONE, *supra* note 132, at \*209.

145 *Id.*

146 *Id.*

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

This understanding explains why courts continue to claim, as the Wisconsin Supreme Court has in *Jacque v. Steenberg Homes*, that “actual harm occurs in every trespass.”<sup>148</sup> Accident law and economics focuses on the parties’ likely particular uses of their lots. If one party’s specific use diminishes the value of the other’s use, the former use automatically cashes out as a harm to the latter. By contrast, the common law protects in each individual owner “use” in the form of a realm of free action to choose among many possible uses. These zones of free action transfer to each owner (not, as productive efficiency does, the trier of fact) discretion over how to prioritize the values of her and her neighbors’ land uses to the extent they all hit her where *she* lives. Trespass law also illustrates the confusion that follows from speaking of a “right to exclude.” The *Jacque* opinion affirms punitive damages as an appropriate response to “the loss of the individual’s right to exclude others from his or her property.”<sup>149</sup> Yet to support this proposition, the court cites an older case declaring an owner’s “right to the *exclusive enjoyment* of his own property.”<sup>150</sup> Consider how *Jacque* interprets an analogy from an 1814 English punitive-damages precedent, *Merest v. Harvey*<sup>151</sup>:

Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser permitted to say ‘here is a halfpenny for you which is the full extent of the mischief I have done.’ Would that be a compensation? I cannot say that it would be.<sup>152</sup>

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.”<sup>153</sup> Yet the eavesdropper thought he could compensate the owner for the right to exclude by paying him a half-penny. The halfpenny seems insufficient because the owner’s normative right conforms the “right to exclude” to his exclusive interest in using his paddock free from threats to his privacy.<sup>154</sup>

*Jacque*’s holding seems especially extreme because Steenberg Homes was using the Jacques’ land productively, in unusual circum-

148 *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997).

149 *Id.* at 159.

150 *Id.* at 160 (quoting *Diana Shooting Club v. Lamoreux*, 89 N.W. 880, 886 (Wis. 1902)).

151 128 Eng. Rep. 761 (1814).

152 *Jacque*, 563 N.W.2d at 159 (quoting *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (1814) (opinion of Gibbs, C.J.)).

153 *Id.*

154 See *Claeys*, *supra* note 128, at 640–41; *Katz*, *supra* note 127, at 302–03.

stances created not by Steenberg Homes' aggression but by a snow-storm. Even so, the holding secures owners' concurrent moral interests in labor for indirect consequentialist reasons. By making Steenberg Homes' conduct actionable and subject to punitive damages, the *Jacque* opinion claims to protect privacy<sup>155</sup> and discourage violent self-help.<sup>156</sup> If people (or, at least, a significant minority of people) "naturally" retaliate against intentional aggression, a contrary holding would increase the risk of self-help and extra-legal retaliation.<sup>157</sup> To rigorous social scientists, these arguments are mere assertions. To moral philosophers, however, these citations just confirm how judges manage Chief Judge Edwards' "disjunction" problem. In practice, it is extremely difficult to say in rigorous social-science fashion whether ruling for the *Jacques* will protect privacy or reduce the number of private venge feuds in close cases. Instead, the *Jacque* court makes a reasonably educated practical judgment and rationalizes that judgment in instrumentalist window dressing.<sup>158</sup>

### 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,"<sup>159</sup> and our observations here will therefore not be exhaustive. Yet even with these constraints, most garden-variety nuisance disputes are informed by a principle of free use and enjoyment paralleling the conception of free control and enjoyment in trespass.

To begin with, most commentators recognize that a nuisance suit ordinarily requires some physical invasion.<sup>160</sup> This requirement

155 *Jacque*, 563 N.W.2d at 159.

156 *See id.* at 160–61.

157 *Cf.* LOCKE'S SECOND TREATISE, *supra* note 104, §§ 7–8, 87–88, at 169–70, 239–40 (justifying civil society on the ground that a commonwealth executes the laws of nature more effectively than individuals can in the state of nature).

158 The *Jacque* court could have cited respectable "social norm" scholarship as partial corroboration for such a view. *See, e.g.*, ELLICKSON, *supra* note 14, at 40–81 (documenting how rural neighbors voluntarily resolve cattle-trespass disputes to protect the victims of trespasses, regardless of whether legal entitlements are assigned to the trespass victims or the ranchers).

159 PROSSER AND KEETON, *supra* note 44, § 86, at 616.

160 *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 51, at 271.

makes nuisance law draw on analogies to bodily cuffs, much as trespass does. Coming to the nuisance is especially revealing here. The common law's position against coming to the nuisance strikes many 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, nuisance law protects the developer's freedom to determine the future use of her land. It follows from that principle and the basic boundary rule that the factory owner starts taking the developer's development potential as soon as the pollution starts. Consider this passage from *Campbell v. Seaman*,<sup>161</sup> a standard restatement of coming to the nuisance doctrine:

One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. . . . [H]e cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such a way only as the neighboring nuisance will allow.<sup>162</sup>

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

In the process, the common law also challenges the way in which lay reactions and standard accident law and economics portray coming to the nuisance. Those views presume that, once the factory is built, after-the-fact nuisance liability inefficiently forces him to abandon sunk building costs and move. But the common law focuses attention on a parallel problem. Setting aside economic jargon, if there is no nuisance liability, at the time when the factory owner is deciding whether and how big to build, why doesn't the absence of nuisance liability encourage the factory owner to build a bigger factory than is consistent with similar choices by future neighbors later? If one presumes, as American natural-rights morality does, that different property uses are dynamic, heterogeneous, and all generally productive, better to protect equal concurrent use potential. The physical-invasion test protects different concurrent uses while trying to avoid rating them on their merits. By the same token, it protects uses that come to the neighborhood at different times without giving any

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161 63 N.Y. 568 (1876).

162 *Id.* at 584.



owner priority “[j]ust because it happened that [he] arrived in the area first.”<sup>163</sup>

Coming to the nuisance also confirms how American natural-rights morality complements corrective justice. Note how the moral grammar runs in *Campbell*: The factory owner “measurably control[s] the uses to which his neighbor’s land may in the future be subjected,” and “compel[s] his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.”<sup>164</sup> Corrective-justice theorists might cite active verbs like “control” and “compel” as proof 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.”<sup>165</sup>) But skeptics may 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. American natural-rights morality responds to this objection: “Compel” and “disturb” make sense, and “sandbag” is inappropriate, because land-ownership comes with a substantive power to determine, and right to be free in determining, the future use of land.

#### 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. It would be quite easy for courts to encourage sight nuisances under current doctrine. The *Second Restatement 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.”<sup>166</sup>

Yet courts refuse to use language like the *Restatement’s* to extend nuisance law to most non-invasive annoyances—and when they refuse, they appeal to inchoate arguments resembling those of American natural-rights morality. In one light-blockage case, a court balanced utili-

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163 *Kellogg v. Vill. of Viola*, 227 N.W.2d 55, 58 (Wis. 1975).

164 *Ensign v. Walls*, 34 N.W.2d 549, 554 (Mich. 1948).

165 Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 165 (1973) (quoting Coase, *supra* note 11, at 2). Note that 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 the substance of such rights. See Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 657–58, 664–66 (1987).

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

ties under the *Restatement of Torts*, but then held that the trump utility was “[a] landowner’s right to use his property lawfully to meet his legitimate needs,” which the court called “a fundamental precept of a free society.”<sup>167</sup> Some courts achieve the same result by making specific utilitarian policy arguments tracking how American natural-rights morality describes property. One case argues, “Given our [populous society’s] myriad and disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for [aesthetic] complaints would cause inexorable confusion.”<sup>168</sup> This argument tracks Wilson’s, Locke’s, and Madison’s insistence that property accommodates “diversity” of faculties and needs.<sup>169</sup> Other cases appreciate that simple forms facilitate change:

Because every new construction project is bound to block someone’s view of something, every landowner would be open to a claim of nuisance. If the first property owner on the block were given an enforceable right to unobstructed view over adjoining property, that person would fix the setback line for future neighbors . . . .<sup>170</sup>

These arguments do not follow directly from corrective justice—which, as suggested in Part II.B, allows different communities to disagree about whether an ugly sculpture or house counts as a nuisance. Nor do these arguments 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, if owners want a general right of free use determination for their land, they must accept a correlative duty to abstain from complaining about how others choose to use their own. Otherwise each landowner would be subject to a dozen or more vetoes in land-use choices.

The nuisance cases covered in this section and the previous one also highlight that “labor” sets priorities in a more subtle and forward-looking fashion than it does in conventional labor-desert theory. Even if a developer labors earnestly to build a factory in an undeveloped neighborhood, his labor does not entitle him to obtain a de facto prescriptive easement before anyone else in the neighborhood has chosen his own land uses. Similarly, if a homeowner builds a solar-energy heating system in his home while his neighbor sits by idly, the owner’s labor does not entitle him to a negative prescriptive easement to light. If the labor were to give the owner a servitude on the neighbor’s prop-

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

168 *Green v. Castle Concrete Co.*, 509 P.2d 588, 591 (Colo. 1973).

169 *See supra* note 109 and accompanying text.

170 *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380, 382 (Iowa 1988).

erty, it would set a precedent giving landowners opportunities to veto many kinds of future use or development next to their properties. Conventional labor-desert theory still remains relevant—primarily at the remedy stage. If a plaintiff has a valid claim for prima facie nuisance liability, the more she has cultivated her land, the more she will be entitled to claim in damages for pollution disrupting her uses. Yet the interest reflected in conventional labor-desert theory takes a back seat to the interest in labor as conceived in American natural-rights morality. The former informs only the remedies within a broader framework of prima facie liability rules designed to secure and enlarge the latter.

### C. Causation

Because property consists of a domain of free and exclusive use, it follows logically that causation should be unidirectional in trespass, nuisance, and land-based negligence. The core of the tort—the harm—is the interference an owner suffers to her discretion to determine the use or enjoyment of her land. Parties whose acts contribute to that interference are deemed to cause the harm. While this relation is assumed in easy cases, it becomes explicit in theoretically revealing cases. *Campbell v. Seaman* confirms as much by portraying the early-moving brick maker as the agent who “measurably control[s]” the future development of the plaintiff’s land, and who “compel[s]” the plaintiff “to leave his land vacant.”<sup>171</sup>

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.”<sup>172</sup> But the arguments they criticize make far more sense when understood in context of American natural-rights morality. It makes sense to keep causation joint if one aims, as accident law and economists do, to maximize the joint value of the two parties’ conflicting uses. But causation takes a different focus if one aims to protect parallel domains of freedom. In that context, cause focuses on the conduct of the party who diminishes another party’s free action.

Sparks cases illustrate the difference. In a sparks case, it is plausible 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

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171 *Campbell v. Seaman*, 63 N.Y. 568, 584 (1876).

172 Vogel, *supra* note 48, at 152.

omissions of *both* the plaintiffs and the defendant.”<sup>173</sup> But *LeRoy Fibre*, a leading statement of the general approach, assumes as a matter of fact that “[t]he negligence of the railroad was the *immediate* cause of the destruction of the property.”<sup>174</sup> Both the farmer and the train contribute to the accident as a matter of simple fact and as part of productive-efficiency analysis. But the farmer enjoys discretion to use his land free from trespassory 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.<sup>175</sup>

#### D. *Scienter*

American natural-rights morality also explains why the basic land-use torts strongly prefer strict liability over negligence. Any trespassory invasion of the land—faulty, intentional, or strict—threatens an owner’s entitlement to a domain of choice for secure use and enjoyment. When a landowner plans to build a house, she deserves security that the law will rectify any accident that follows from such an invasion. In principle, the mere trespass creates a risk of accident against which the owner should not need not plan.<sup>176</sup> So, in trespass, if two boys trespass onto a vacant house and accidentally burn it down, “the purpose of civil law looks to compensation for the injured party regardless of the intent on the part of the trespasser[s].”<sup>177</sup> Similarly, in nuisance, certain kinds of pollution can be noxious without proof of fault. In these cases,

it is no defense to show that [the polluting] business was conducted in a reasonable and proper manner . . . . It is the *interruption of such enjoyment and the destruction of such comfort* that furnishes the ground of action, and it is no satisfaction to the injured party to be informed that it might have been done with more aggravation.<sup>178</sup>

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173 *Kan. Pac. Ry. v. Brady*, 17 Kan. 380, 386 (1877) (emphasis added).

174 *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 348 (1914) (emphasis added).

175 For a more recent case, see *Zimmer v. Stephenson*, 403 P.2d 343, 346 (Wash. 1965).

176 This explanation differs from George Fletcher’s in that the present analysis requires reciprocity in risks *to rights*. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540–41 (1972),

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

178 *Pennoyer v. Allen*, 14 N.W. 609, 613 (Wis. 1883) (emphasis added).

Many lawyers assume that English law favors strict liability as the dominant paradigm for accident cases<sup>179</sup> but American law does not.<sup>180</sup> Some of the foundational American cases opt for negligence over strict liability with natural-law and -rights arguments.<sup>181</sup> These cases anticipate contemporary scholarship, by corrective-justice theorists, concluding that strict liability is incompatible with the phenomenon of moral agency. Ernest Weinrib, for example, argues that corrective justice has a built-in preference for negligence.<sup>182</sup> Strict liability, he argues, puts the plaintiff in an unequal and superior position to the defendant and builds on “the incoherent conception of agency.”<sup>183</sup>

Even so, normatively, strict-liability principles do and should govern in foundational land-use torts. Conceptually, in these torts, strict liability accords with corrective justice. Properly construed, corrective justice’s remedial core specifies that tort does and should focus on correcting wrongs by defendants. As Coleman explains, “[a] loss falls within the ambit of corrective justice only if it is wrongful,”<sup>184</sup> and Weinrib himself elsewhere says that corrective justice requires that tort be not negligence-based but “*fault*-based.”<sup>185</sup> Moral fault does not always cash out into doctrinal negligence. As Coleman explains, “[i]f causing a loss is a morally relevant fact about someone, then strict liability may be preferable to fault liability.”<sup>186</sup> Corrective justice’s

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179 See, e.g., *Fletcher v. Rylands*, 159 Eng. Rep. 737, 741–42 (Ex. 1865), *aff’d*, 1 L.R. Exch. 265 (1866).

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

181 *Losee v. Buchanan*, 51 N.Y. 476, 484 (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.”).

182 See WEINRIB, *supra* note 91, at 178–83 (approving of the rule of negligence applied in *Vaughan v. Menlove*, 132 Eng. Rep. 490 (Comm. Pl. 1837)).

183 *Id.* at 179.

184 COLEMAN, *RISKS AND WRONGS*, *supra* note 91, at 361.

185 WEINRIB, *supra* note 91, at 190 (emphasis added).

186 COLEMAN, *RISKS AND WRONGS*, *supra* note 91, at 233. 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 Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT LAW, 1, 26–29 (2007). Ripstein, however, does not distinguish enough between fault

remedial core cannot say whether causing a loss is a morally relevant fact; it passes the buck on to the controlling political morality.

Notwithstanding cases suggesting otherwise, American natural-rights morality does not prescribe any one-size-fits-all rule regarding scienter, either. It merely holds that, in different situations, legal doctrine should use whichever rules of scienter best secure or enlarge the concurrent freedoms of all regulated actors to pursue their concurrent liberty and property interests. In simple land-use conflicts, strict liability accomplishes this end more fairly than negligence. Imagine that a plaintiff is enjoying his land quietly and passively, and that the defendant, while enjoying her land, generates trespassory disturbances diminishing the plaintiff's enjoyment. Those disturbances create risks of accidents for the plaintiff. Without legal protection, the plaintiff must either undertake self-help, change her preferred land uses, or expect and budget for accidents. Whatever happens, the risks of accident limit her freedom to determine the future use of her land. If there are no qualifications, the disparity in risk is a morally relevant fact about the defendant's land use.

That risk disparity makes strict liability generally appropriate in land-use torts. Obviously, this logic explains why trespass and nuisance are generally strict torts. Even though neither has a fault requirement, both apply only to conduct that is inherently morally faulty even when the defendant acts carefully and without intent to harm.

The same risk disparity helps explain many subtle variations in negligence-based land-use torts. It explains why flood cases buck American law's general preference for negligence in favor of *Rylands v. Fletcher*<sup>187</sup>-style strict liability.<sup>188</sup> The water holder is morally culpable merely for creating a risk of flood, because the risk of flood by itself creates a condition that neighbors must anticipate.

This approach also explains, as neither accident law and economics nor corrective-justice theory can, how scienter used to vary in sparks cases. At common law, sparks cases generally required negli-

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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.

187 1 L.R. Exch. 265 (1866).

188 See *Fletcher v. Rylands*, 159 Eng. Rep. 737, 741–42 (Ex. 1865), *aff'd*, 1 L.R. Exch. 265 (1866); Jed H. 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); Jed Handelsman Shugerman, *The Twist of Long Terms: Disasters, Elected Judges, and American Tort Law* 10–14 (Harv. Law Sch. Faculty Scholarship Series, Paper 25, 2008), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1027&context=harvard\\_faculty](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1027&context=harvard_faculty).

gence in the prima facie case.<sup>189</sup> Even so, many state courts instituted *res ipsa loquitur* or other doctrines to shift to the railroad the burden to prove it was not negligent.<sup>190</sup> When courts refrained from making this move, legislatures often instructed their courts to use strict liability instead.<sup>191</sup> In 1897, the U.S. Supreme Court dismissed a constitutional property-rights challenge to one such law consistent with passive-plaintiff/active-defendant logic:

When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments.<sup>192</sup>

### *E. Affirmative Defenses*

The moral interest in free use and enjoyment also explains why the law presumes and enforces a distinction between “take it or leave it” defenses and “your money or your life” defenses. In Hohfeldian terms, the plaintiff is ordinarily entitled to an *in rem* claim right to be free from trespassory invasions and a liberty to make use choices within the parameters of that claim right. If, however, the defendant may plead contributory negligence, the plaintiff’s claim right is then qualified by an exposure, *in personam*, whenever reasonable prudence requires the plaintiff to minimize the risk of accident in relation to the defendant’s land use. A plaintiff may change her land use to avoid a risk of accident, or she may continue using her land and accept a risk of accident, but in either case her free use determination is diminished. These implications help explain why courts refuse to accept that a plaintiff makes a “voluntary choice” when he is forced to choose between “facing [a] danger or surrendering his rights with respect to his own real property.”<sup>193</sup>

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189 See *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 340 (1914); *Phila. & Reading R.R. Co. v. Hendrickson*, 80 Pa. 182, 187 (1876).

190 See, e.g., *St. Louis, Vandalia & Terre Haute R.R. Co. v. Funk*, 85 Ill. 460, 461 (1877); *Ruffner v. Cincinnati, Hamilton & Dayton R.R.*, 34 Ohio St. 96, 97 (1877); *Burlington & Mo. R.R. v. Westover*, 4 Neb. 268, 272 (1876).

191 See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 123–25 & nn.37–39 (2001) (citing nineteenth-century Michigan and Massachusetts legislative acts establishing strict liability).

192 *St. Louis & S.F. Ry. v. Mathews*, 165 U.S. 1, 26 (1897); see ELY, *supra* note 191, at 124.

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

Sparks cases highlight the policy concerns particularly clearly. In *LeRoy Fibre*, Justice McKenna calls it “an anomaly” to say “[t]hat one’s uses of his property may be subject to the servitude of the wrongful use by another of his property.”<sup>194</sup> The landowner’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.<sup>195</sup> But this approach is impractical in a world with many owners with many heterogeneous uses: Is each plaintiff’s use one “which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why?”<sup>196</sup>

#### F. Rights-Securing Qualifications

##### 1. Qualifications and the Interest in Labor

The principles sketched thus far explain why trespass, nuisance, and land-based negligence generally track bright-line boundary rules without qualification. However, within limits, American natural-rights morality allows such rules to be qualified. In simple cases, coarse boundary rules enlarge owners’ concurrent labor rights. In these cases, “labor” reflects a broad but shallow moral interest in many different owners’ being left alone, to determine how to apply their self-ish and productive energies to reasonably useful and productive but sharply-different needs. But in some situations, the law can help owners pursue different but concurrent property uses by ordering some features of ownership—say, titling and conveyancing rules.<sup>197</sup>

At the same time, the natural law sets a moral baseline against which particular common-law modifications are measured. Lawmakers must be reasonably and practically certain that the focused package really enlarges the affected parties’ interests. The U.S. Supreme Court used to articulate this standard, in substantive due process cases, by asking whether legislative property regulations

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194 *LeRoy Fibre Co.*, 232 U.S. at 349.

195 *Id.* at 354 (Holmes, J., concurring).

196 *Id.* at 350 (majority opinion).

197 See 1 BLACKSTONE, *supra* note 132, at \*134 (explaining how natural principles of property justify specific “modifications” in local positive law for “translating it from man to man”).



“secured an average reciprocity of advantage.”<sup>198</sup> 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 intended uses than uniform boundary rules do.

## 2. Nuisance

These principles go a long way in explaining why nuisance principles allow for more variation than trespass rules. Nuisance differs from trespass in that the latter deals with substantial physical invasions, while the former usually deals with low-level, non-particulate physical invasions.<sup>199</sup> Nuisance is often defined as a direct interference with a landowner’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 owners’ subjective perceptions of control, use, and enjoyment, nuisance protects a more objectively defined, one-size-fits-all domain of free action and use determination.

To begin with, nuisance enlarges owners’ use and enjoyment interests when it shifts from the model of a trespass- or rights-based tort to that of a harm-based tort. Ordinarily, unconsented smells, noise, and smoke do not threaten an owner’s use or enjoyment of land as starkly as does an unconsented personal entry like the field crossing in *Jacque*. The harm element limits the reach of nuisance, so it focuses on smells and other disturbances that are sharp enough to feel to the owner like trespasses.<sup>200</sup> Conversely, by shrinking neighbors’ formal rights to exclude, the law frees owners to generate similar smells, noise, and smoke of their own in the course of using and enjoying their land. Each owner is freer to use and enjoy his own land with an exposure to low-level smoke and a liberty to emit it than he would have been with a broader claim right to veto smoke from neighbors’ property.

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

199 See, e.g., Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 222 (Mich. Ct. App. 1999) (finding that trespass requires physical invasion); Smith v. New Eng. Aircraft Co., 170 N.E. 385, 388 (Mass. 1930) (same).

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

The “unreasonability” element of nuisance serves a similar function. Many authorities recommend that nuisance law scrutinize closely the conduct of the defendant—especially the *Second Restatement of Torts*, which recommends that nuisance law balance all the factors relating to the social value of the defendant’s land use against all the factors relating to the social harm associated with the plaintiff’s loss of enjoyment.<sup>201</sup> In practice, however, at least at the liability stage,<sup>202</sup> courts resist such inquiries surprisingly often. That is why, in the 2002 decision *Pestey v. Cushman*,<sup>203</sup> the Connecticut Supreme Court insisted that the “crux of a common-law private nuisance cause of action . . . is on the reasonableness of the interference and not on the use that is causing the interference.”<sup>204</sup> When the law focuses on the use, it second-guesses the merits of the parties’ competing land uses. When it focuses on the defendant’s interference, it focuses instead on the question how the interference compares to other pollution in the neighborhood.<sup>205</sup> This latter inquiry is less likely to generate controversy than any of the other realistic doctrinal possibilities. The *Second Restatement* encourages the trier of fact to consider the fairly political question which land use better fits local community values. Productive efficiency encourages the trier of fact to amass party-specific information about the money and subjective values of the relevant uses and costs in play. By contrast, *Pestey* encourages the trier to focus on a simpler and more apolitical question, whether physical pollution is higher than the customary level in the neighborhood.

Of course, substantiality is just one of many factors relevant to unreasonability, which often requires all-the-circumstances balancing. Yet it is surprising how often substantiality trumps other factors in the balance. In one 1982 case, a New Jersey appeals court announced that nuisance law balances a wide range of factors, but then relied primarily on a finding that the noise pollution at issue was “louder than others” in the neighborhood.<sup>206</sup>

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201 See RESTATEMENT (SECOND) OF TORTS §§ 827, 828 (1977).

202 The relative hardships are appropriately relevant after courts establish liability and proceed to consider whether to enjoin a nuisance. See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 206 & nn.93–97 (1990); *supra* note 76.

203 788 A.2d 496 (Conn. 2002).

204 *Id.* at 508 (emphasis added).

205 See, e.g., *id.* (describing unreasonableness in terms of whether “the interference is beyond that which the plaintiff should bear, under all of the circumstances of the particular case, without being compensated”).

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

The same institutional logic also explains some of the more important variations on the basic nuisance cause of action. Take the locality rule. The locality rule makes the character of a neighborhood an important factor among the many factors informing the “unreasonability” of pollution. Noise and fumes that would be reasonable in an industrial district are unreasonable in a residential district.<sup>207</sup> 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 a 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 utility-balancing; they instead crudely allow different uses within each neighborhood as long as the pollution levels are appropriate. Justice Cooley explains why this regime accords with natural property rights: Even though “every man has a right to the exclusive and undisturbed enjoyment of his premises, . . . [o]ne man’s comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his neighbors.”<sup>208</sup> The locality rule accepts that “the tastes, desires, judgments and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others.”<sup>209</sup>

These examples also confirm that property’s right to exclude is parasitic on owners’ normative interests in exclusive use determination. In the words of one prominent English opinion, nuisance hardwires into the law a “give and take, live and let live” regime, to enlarge for all owners “the common and ordinary *use* and occupation of land.”<sup>210</sup> By itself, the right to exclude does not predict when and in what circumstance one owner may exclude another’s pollution.

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207 See, e.g., *id.* at 1382; *Jewett v. Deerhorn Enters., Inc.*, 575 P.2d 164, 166–68 (Or. 1978); RESTATEMENT (SECOND) OF TORTS §§ 827(d), 828(b) (1977).

208 *Gilbert v. Showerman*, 23 Mich. 448, 452–53 (1871).

209 *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 AND KEETON, *supra* note 44, § 88, at 628.

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

Exclusion is tailored to accord with and enlarge regulated owners' likely interests in productive use.

The same moral principles can also justify departing from boundary rules in the other direction—to make noninvasions nuisances in some cases. Lateral-support doctrine defies boundary-driven conceptions of exclusion in trespass and nuisance.<sup>211</sup> Lateral-support doctrine makes a landowner 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.<sup>212</sup> This rule protects landowners by increasing each landowner's security that she may enjoy “the use of his land for ordinary and legal purposes.”<sup>213</sup> Similarly, although the law normally refrains from making eyesores nuisances, it makes an exception when a neighbor builds the eyesore maliciously and without productive benefit to himself.<sup>214</sup> In such cases,

the real evil consists in the occasional subjection of a landowner to the impairment of the value of his land by the erection of a structure which substantially serves, and is intended to serve, no purpose but to injure him in the *enjoyment* of his land; and so a new exception is made to the absolute power of disposition involved in the ownership of land, as well as to the absolute submission involved in that ownership to the chances of damage incident to the use by each owner of his own land.<sup>215</sup>

In other words, in lateral-support and spite cases, neighbors are not excluded from the landowner's close. Instead, the landowner enjoys a domain of free use and enjoyment exclusive of outside interference. Now, exclusion theorists might argue that spite-fence and lateral-support rules are not in rem property rules but in personam tort complements to property. Yet cases hold that spite fences “injure and destroy the peace and comfort, and . . . damage the *property*, of one's neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful.”<sup>216</sup> Similarly, the right to lateral support for

211 See Claey's, *supra* note 128, at 644.

212 See, e.g., Noone v. Price, 298 S.E.2d 218, 221–22 (W. Va. 1982); see also 2 C.J.S. *Adjoining Landowners* § 9 (West 2009) (discussing obligations of adjoining landowners to provide lateral support).

213 Winn v. Abeles, 10 P. 443, 447 (Kan. 1886).

214 See Hullinger v. Prah, 233 N.W.2d 584, 585 (S.D. 1975); 1 AM. JUR. 2D *Adjoining Landowners* § 111 (2005).

215 Whitlock v. Uhle, 53 A. 891, 892 (Conn. 1903) (emphasis added).

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

land in its natural state is deemed a “‘*property right*’” that “accompanies the *ownership* and *enjoyment* of the land itself.”<sup>217</sup> By contrast, for land threatened in its artificial state, the right to be free from careless excavation is a tort duty—not in rem but in personam, and not a strict but only fault-based duty.<sup>218</sup>

### 3. Trespass

Although trespass law preserves sharper boundaries than nuisance, on occasion even it allows qualifications to boundary rules. For example, when a domestic animal enters a neighbor’s close without permission, the neighbor suffers a trespass only if the animal causes actual property damage<sup>219</sup> or if the animal’s owner specifically intends that the animal trespass.<sup>220</sup> These rules deviate from *Jacque’s* general presumption that “actual harm occurs in every trespass.”<sup>221</sup> As *Social Cost* suggests in its treatment of the rancher and the farmer, it is hard for accident law and economics to explain why the law presumes trespasses in some cases but not in others. All the same, the animal trespass rules do for trespass what the harm and unreasonability elements do for nuisance. In a community in which owners own both land and cattle, the exceptions enlarge owners’ free action to use their cattle in cases in which the cattle do not seriously threaten their free action in relation to their land.

By contrast, when cattle ownership ceases to overlap with land-ownership, the same principles may justify relaxing boundary rules. Some American jurisdictions reversed such rules early in the nineteenth century, by giving animal owners an affirmative defense against trespass if the plaintiff did not protect his land with a fence in good working order. Many western states still have such “fence out” regimes because there are many public lands and ranching is preva-

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217 *Sanders v. State Highway Comm’n*, 508 P.2d 981, 987 (Kan. 1973) (quoting 2 THOMPSON ON REAL PROPERTY § 415, at 640 (1961)); *id.* at 990; *see also* *Walker v. Strosnider*, 67 S.E. 1087, 1091 (W.Va. 1910) (identifying property rights in restraints on adjacent landowner conduct).

218 *See Walker*, 67 S.E. at 1090–91.

219 *See, e.g., Griffin v. Martin*, 7 Barb. 297 (N.Y. Gen. Term 1849); *Stackpole v. Healy*, 16 Mass. 33 (1819); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 21 (Proposed Final Draft No. 1, 2005); PROSSER AND KEETON, *supra* note 44, § 76, at 539 & nn.8–13.

220 *See, e.g., Lazarus v. Phelps*, 152 U.S. 81, 85 (1894); *Monroe v. Cannon*, 61 P. 863, 864–65 (Mont. 1900).

221 *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997).

lent.<sup>222</sup> These rules operate similarly to nuisance's locality rules.<sup>223</sup> But if and when a substantial number of local landowners cease to own and use productively roaming animals, the rationale for the locality rule vanishes. A fencing-out regime then "manifestly increases the burdens of the freeholders within the inclosure, who make objection that their lands are to be turned into a public pasture" unless they "fence any portion of their [own] lands which they may wish to cultivate."<sup>224</sup> Contrary to *Social Cost's* treatment of cattle trespasses, owners' control and enjoyment provide sufficient reason to choose between fence-in and fence-out regimes. And, 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.<sup>225</sup> The formal right to exclude does not acquire focus without piggybacking on a substantive account specifying whether ranging or farming with give local owners more use out of their land.

For similar reasons, trespass law does not protect owners against high-altitude overflights. For example, in the 1930 opinion *Smith v. New England Aircraft Co.*,<sup>226</sup> the Massachusetts Supreme Court noted

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222 See, e.g., *Garcia v. Sumrall*, 121 P.2d 640, 644 (Ariz. 1942); *Larson-Murphy v. Steiner*, 15 P.3d 1205, 1213 (Mont. 2000); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 21 cmt. c.

223 See, e.g., *Griffin*, 7 Barb. at 304 ("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, 291 (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, 171 (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).

224 *Smith v. Bivens*, 56 F. 352, 356 (C.C.D.S.C. 1893) (quoting *Fort v. Goodwin*, 15 S.E. 723, 726 (S.C. 1892)) (declaring a new state fencing-out statute unconstitutional as a regulatory taking). In *Smith*, the fence-out law was especially objectionable because it seems to have been passed largely at the prompting of a small number of cattle ranchers who wanted continued cheap access to one owner's pasturage. See *id.* at 353. Nevertheless, the court's reasoning does not rely on the special-interest politics. The court begins by protecting the pasture owner's "complete possession and use of his own land," *id.*, and then examines whether the law secures him a reciprocity of advantage, see *id.* at 356-57.

225 See *id.* at 356.

226 170 N.E. 385 (Mass. 1930); see also RESTATEMENT (FIRST) OF TORTS § 194 (1934) (stating that an entry over a person's land by another in an aircraft is privileged if it is for a legitimate purpose and done in a reasonable manner). *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.

that air travel is valuable “as a means of transportation of persons and commodities.”<sup>227</sup> Those benefits enlarge owners’ interests more than their interests are restrained by losing the control of the air column over their lands and above the five-hundred-foot regulatory minimum, because “the possibility of [the landowner’s] actual occupation and separate enjoyment” of that air column “has through all periods of private ownership of land been extremely limited.”<sup>228</sup> By contrast, overflights below five-hundred feet threaten owners’ “possible effective possession” and “create in the ordinary mind a sense of infringement of property rights which cannot be minimized or effaced.”<sup>229</sup>

In *Social Cost*, Coase uses overflight cases like *Smith* to emphasize that all legal rights and responsibilities are products of policy choices intended to enlarge the public welfare.<sup>230</sup> In context, this suggestion criticizes common law trespass case law, on the ground that it makes rights claims that do not take sufficient account of the public consequences of legal rules. Coase assumes that public policy can efficiently promote specific, first-order act-utilitarian policy goals—like the efficient development and consumption of air travel.

If one were to cash out *Smith*’s moral principles in instrumentalist terms, the public welfare is better understood in terms of a more general, second-order, indirect consequentialist goal—the protection of individual citizens’ free exercise of the discretionary choice they get from their rights. So in overflight cases, the law may be reformed to encourage air travel, but only if it is reasonably and practically certain that the reforms will confer on landowners more free action from new air travel and commerce than they would otherwise have from using the slices of their air columns at cruising altitudes.<sup>231</sup> This proviso is easy to satisfy in overflight cases, because no or hardly any owners can claim any real interest in exploiting air columns above overflight paths. Yet the proviso matters, because it hardwires 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 com-

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227 *Smith*, 170 N.E. at 388.

228 *Id.* at 389.

229 *Id.* at 393.

230 Coase, *supra* note 11, at 26–28. While Coase cites and treats other overflight cases, *Smith* justifies the case law’s preferences in closest alignment with American natural-rights morality.

231 See, e.g., *Bamford v. Turnley*, 122 Eng. Rep. 27, 33 (1862) (opinion of Bramwell, J.) (“[W]henver a thing is for the public benefit, 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 . . .”).

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

#### 4. The Philosophical Bases for Reordering Civil Property Rights

These standards for qualifying rights are subject to many possible criticisms. For example, Robert Bone has portrayed pre-1900 nuisance law as oscillating between two extremes: Some cases claim that property rights are “absolute” and brook no qualifications, while others qualify rights heavily because all rights are “relative” to contextual social factors.<sup>232</sup> One must be careful here to avoid anachronisms. In some contexts, nineteenth-century legal discourse did use “absolute” and “relative” consistent with modern usage, in which the former is a synonym and the latter an antonym for “not subject to any legal diminution or adjustment.”<sup>233</sup> 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.<sup>234</sup> According to these definitions, property is a hybrid right. The natural right to labor is absolute, but labor cannot be secured in relation to property without regulations establishing an owner’s positive-law rights “relative” to neighbors in society. In simple pollution cases, the law preoccupies itself with threats to the plaintiff’s “absolute” interests in use and enjoyment. But in locality-rule cases and other cases where qualifications are appropriate, the

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232 See Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1106 (1985) (contrasting “absolute” and “social and relational” rights).

233 Compare *Eaton v. Boston, Concord & Montreal R.R.*, 51 N.H. 504, 512 (1872) (“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 N.H. 545, 551 (1874) (“Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges . . .”).

234 See, e.g., 1 BLACKSTONE, *supra* note 132, at \*119–24; 2 KENT, *supra* note 116, at 1 (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”); *id.* at 10–12, 33 (providing examples).



doctrines are made “relative” to enlarge neighbors’ concurrent, free, and equal uses of their property.

Separately, one could object that the law may not justify forced transfers of legal rights without undermining the philosophical bases of natural property rights.<sup>235</sup> For example, when Richard Epstein defended nuisance relying on rights theory, he insisted: “Individual rights do not rest upon foundations so insecure that any fresh wave of empirical research may displace them.”<sup>236</sup> Yet he then proceeded to relax the strict boundary rules he drew from corrective justice by using “utilitarian” limitations based on the principle of implicit in-kind compensation.<sup>237</sup> Many apply to Epstein’s approach what I have called elsewhere a “deontology trap”<sup>238</sup>: Epstein’s account of rights makes no sense unless what he calls corrective-justice rights are based in deontological theories of morality; but deontological rights may never be sacrificed and remain morally justifiable; and Epstein therefore stumbles into philosophical incoherence by limiting such rights to accomplish utilitarian side goals.<sup>239</sup>

This criticism is extremely difficult to pin down. “Deontology” is used in too many different senses in too many different contexts for there to be one commonly-accepted meaning.<sup>240</sup> To keep the discussion manageable, let us focus on three especially prominent definitions. One states a nonappropriation norm: “Do not appropriate another’s existence without her consent to make yourself better off than you would be had she not existed, and her worse off than she would be had you not existed.”<sup>241</sup> If that is what “deontology” means, the factors that make natural rights relative (in the sense just explained) also make it not deontological.

235 I am grateful to Larry May and Dennis Tuchler for encouraging me to consider the objection in this section, and to Michael Shapiro and Dennis Klimchuk for help in fashioning my response.

236 Epstein, *supra* note 103, at 75.

237 *See id.* at 57–58, 90–91.

238 Eric R. Claeys, *Virtue Ethics and Rights Politics in American Property Law*, 94 CORNELL L. REV. 889, 897–901 (2009). The coverage in that article, however, did not consider enough how “deontology” is used in John Rawls’s political philosophy, as is considered here *infra* text accompanying notes 242–244.

239 *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 52–81 (2002).

240 Barbara Herman identifies at least six different prominent definitions of “deontology” in different scholarly quarters. *See* BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 209–10 & nn. 1, 5 (1993). Her list is not exhaustive; it does not cover all the definitions I discuss here in the text.

241 Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1845 (1997) (emphasis omitted).

In political philosophy, however, “deontology” can also refer to any moral theory whose prescriptions about the right or the just are lexically prior to its prescriptions about the good. Paraphrased roughly, actors must determine what justice requires, and then do justice or abstain from injustice, before they determine and do what produces good consequences.<sup>242</sup> John Rawls popularized this usage; he and his followers assume that “good consequences” refer to social welfare “as defined independently of any moral concepts or principles.”<sup>243</sup> This sense is the one by which a policymaker asks whether it is good to abandon the *ad coelum* rule for overflights by focusing on whether air travel will generate commerce and not considering seriously how much air travel will interfere with under-flight owners’ free use of their land.

By Rawls’s usage, most if not all of the theories contributing to American natural-rights morality are deontological—but they reject the terms of Rawls’s definition in ways that anticipate and finesse the deontology trap. The moral principles that endow each owner with liberty of action also impose on him correlative duties to respect the like rights of others and the common good. Yet the common good consists in turn of all citizens’ concurrent exercise of their moral interests.<sup>244</sup> In a practical sense, then, the right and the just are lexically prior to the (conventional, act-utilitarian, morality-independent) good. Since the common good consists primarily of respect for liberty and property, the political community needs to make sure it is holding owners harmless before it gives airlines servitudes in their air columns. In a principled sense, however, most contributors to American natural-rights morality reject the dichotomy Rawls assumes between the right and the good. For most practical purposes, those contributors recast the common good to be *coterminous* with the right.<sup>245</sup>

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242 See JOHN RAWLS, *A THEORY OF JUSTICE* 30 (1974).

243 Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 *PHIL. & PUB. AFF.* 313, 323 (1994); see also RAWLS, *supra* note 242, at 30–32 (equating “the good” with the good as understood in conventional act utilitarianism).

244 See, e.g., I WILSON, *supra* note 109, at 302 (describing “[t]he 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). This characteristic is sometimes called “compossibility.” See Fred D. Miller, Jr., *Virtue and Rights in Aristotle’s Best Regime*, in *VALUES AND VIRTUES* 67, 88 (Timothy Chappell ed., 2006).

245 There are limits to the statement in the text. For example, for practical purposes, Locke conceives of the common good as the aggregation of the individual interests of all citizens, but strictly speaking the interests of individuals are part of the common good only “as far as will consist with the publick good.” LOCKE’S *SECOND TREATISE*, *supra* note 104, § 134, at 267–68. For example, the sovereign acts in accord

Thus, Coase and other act-utilitarians have it wrong to the extent they assume that public policy only requires the government to ask whether air travel benefits the public without subtracting for its harms to the rights of under-flight owners.

By contrast, in ethical philosophy, “deontology” is used often to classify normative theories by their fundamental phenomena or ends. In this usage, deontological theories assume that the rightness of a given action is judged fundamentally by whether or not it conforms to a moral duty. Deontological theories in this sense are set apart from consequentialist theories (in which the ultimate foundations for moral justifications are good external consequences) and virtue ethics theories (in which the foundations focus on how actions influence the character of the actor). If a deontological theory so understood makes prescriptions about external consequences or internal character formation, it does so because (and only to the extent that) consequences and character help actors do what they are already required to do by the obligatoriness of moral duty.<sup>246</sup>

When “deontology” is used in *this* sense, it is impossible to draw generalizations about American natural-rights morality as a whole. Different contributing theories rest on different normative foundations. Property rights may be justified on deontological grounds, for example, because we respond to divine commands or a moral sense, both of which tell us that we may use the bounty of the natural world for our enjoyment provided that we respect the like rights of others.<sup>247</sup> Property rights may be justified on consequentialist grounds, for example, because they secure to citizens naturally-useful external goods and diminish social strife over resources. Property rights may also be justified on virtue-based grounds. They discourage greed and tyrannical tendencies, encourage industry, civility, moderation, and self-mastery, and they facilitate the cultivation of many social and intellectual virtues.<sup>248</sup>

Yet even if different contributing theories start from different normative foundations, all of the theories may adjust legal rights consequentially without slipping into gross inconsistency or incompre-

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with the common good if it tears down the house of an innocent owner to stop an oncoming fire. See *id.* § 159, at 291–92. So if Rawls’s deontology/teleology distinction states a dichotomy, Locke is a teleologist; if it states a continuum, Locke inclines far closer to the deontological end than the teleological end.

246 See, e.g., ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 1 (1999); Lawrence C. Becker, *The Neglect of Virtue*, 85 ETHICS 110, 110–11 & n.1 (1975).

247 See, e.g., 1 WILSON, *supra* note 109, at 114–25.

248 See, e.g., 2 KENT, *supra* note 116, at 256; see also Claeys, *supra* note 238, at 910–16, 928–33 (reviewing the merits of virtue-based theories).

hensibility. As Rawls explains, it is uncharitable to insist that a theory of morality cannot “take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>249</sup> By conceiving of the common good as an aggregation of individual citizens’ concurrent moral interests in liberty of action, American natural-rights morality prevents separation between moral rights on one hand and moral responsibilities and the common good on the other. It explains why law may consequentially qualify private rights in different situations. Neither the variations nor the regard for consequences makes the natural right to labor any less moral an interest.

#### IV. ACCIDENT LAW AND ECONOMICS RECONSIDERED

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

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

Obviously, this Article cannot cover this possibility exhaustively. There are three central issues. One might ask whether law and economics explains legal doctrine in terms that are foundational in the law from its own perspective.<sup>250</sup> If that issue is paramount, there is no point in engaging law and economics at all.

Alternatively, one might ask whether one of the two approaches frames inquiries into normative value better—say, whether individual freedom or social welfare provides a more satisfying touchstone for normative analysis. Surprisingly, however, differences over these questions are not particularly important to what divides American natural-rights morality from accident law and economics. For practical purposes here, the central issue is how the two approaches handle the challenges that arise when triers of fact and lawmakers lack complete information. Different normative theories of social control disagree about how much expert-driven regulation can regulate economic life. This difference cuts across different theories of economics and also different theories of philosophy. American natural-rights theory

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249 RAWLS, *supra* note 242, at 30; *see also* Freeman, *supra* note 243, at 348 (“No significant position has ever held consequences do not matter in ascertaining what is right to do.”).

250 *See supra* note 90 and accompanying text.

keeps legal regulation to a minimum, but other theories of justice may prescribe that judges assign entitlements on a case-by-case basis to promote justice or to do justice.<sup>251</sup> A similar debate plays out in law and economics.

There is an irony here. American natural-rights morality fell into desuetude in large part as lawyers gradually assumed that its prescriptions were too simple to apply to the complex industrial economy the United States developed in the early twentieth century.<sup>252</sup> That general perception helped to justify approaches to legal and social planning more centralized than seems realistic within American natural-rights morality. Yet even as that morality was being displaced, social scientists who had no reason to know about it started to raise serious doubts about centralized planning—relying to a large degree on generalizations about human behavior strikingly similar to American natural-rights morality's. For example, Friedrich Hayek concluded economics should focus on the fundamental "problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know."<sup>253</sup> In fact, Hayek worried especially that the "character of the fundamental problem has . . . been rather obscured than illuminated by many of the recent refinements of economic theory, particularly by many of the uses made of mathematics."<sup>254</sup> It is fair to wonder whether accident law and economics makes refinements of the type that worried Hayek.

### B. *The Historical Pedigree of Accident Law and Economics*

There are at least three ways to appreciate the problem. One is genealogical. Accident law and economics describes its own origins in the period when academics were sweeping away American natural-rights morality. In academia, the decisive break between American natural-rights morality and the instrumentalist and utilitarian approaches that inform American law now took place between

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251 Compare, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753–73 (2009) (promoting fine-grained virtue-based approaches to property law), and Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 860–86 (2009) (same), with Claey's, *supra* note 238, at 916–22 (challenging such approaches and preferring private ordering instead), and Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 963–80 (2009) (same).

252 See, e.g., Goldberg, *supra* note 5, at 519.

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

254 *Id.*

roughly 1880 and 1920. In this period, prominent political and social scientists discredited American natural-rights morality and propounded in its place new theories of democracy and administration.<sup>255</sup> Most scholars who subscribed to this consensus agreed on a more interventionist theory of government. They assumed that government was supposed to implement the general will of the electorate, and they then examined how law, administration, and other tools of social control might implement that will most efficiently and rationally.<sup>256</sup>

These trends influenced the academic study of tort at leading law schools. During this period, social-science-trained legal academics started to reconsider tort law in what Ernest Weinrib has described as “instrumentalist” terms, by using policy-driven interest-balancing tests to give specificity to tort’s general moral claims.<sup>257</sup> William Landes and Richard Posner approvingly cite tort scholarship from this period as “protoeconomic,” and as important “[a]ntecedents of the positive economic theory of [t]ort law.”<sup>258</sup>

### C. *Conceptual Property Theory*

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

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255 See, e.g., C. EDWARD MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 307 (1924) (describing an emerging consensus in which “the individualistic ideas of the ‘natural right’ school of political theory, indorsed in the Revolution, are discredited and repudiated”); accord FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* (1914); Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 201 (1887), reprinted in WOODROW WILSON: *THE ESSENTIAL POLITICAL WRITINGS* 231 (Ronald J. Pestritto ed., 2005) [hereinafter WOODROW WILSON].

256 See, e.g., GOODNOW, *supra* note 255, at 17–19, 88–91; WOODROW WILSON, *supra* note 255, at 240–45.

257 Ernest J. Weinrib, *Understanding Tort Law*, 23 *VAL. U. L. REV.* 485, 486–88 (1989).

258 LANDES & POSNER, *supra* note 61, at 4 & nn.9–11 (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 94–96 (1881)); James Bart Ames, *Law and Morals*, 22 *HARV. L. REV.* 97 (1908); Henry T. Terry, *Negligence*, 29 *HARV. L. REV.* 40 (1915)).

While Legal Realism is difficult to pin down,<sup>259</sup> many important projects associated with the Realists can be understood as efforts to apply the general lessons of 1900-era political and social science to American law. Realist property theory can certainly be understood as such a project. For example, Realist economist Richard Ely says of the labor theory of property expounded in *Vanhorne's Lessee*<sup>260</sup>: “It rests upon an unscientific eighteenth century social philosophy of natural rights existing prior to the formation of society and of a compact whereby men left a state of nature . . . . All this has long ago been totally discredited by science.”<sup>261</sup>

The Realists therefore needed to revise property conceptual theory for substantive political reasons. The political assumptions informing their conception of social science led them to believe that resource uses could and needed to be managed by experts applying “scientific” conceptions of social efficiency.<sup>262</sup> If the concept “property” is a nominalist term—that is, if “property” refers to “that which the law happens to call property in a particular case”—the term makes it easier for experts to manage particular uses of property in particular resource disputes without being constrained by the structure of property.<sup>263</sup>

Different Realists propounded different theories. Some Realists reconceived of property as a nominalist “bundle of rights.” To be sure, the “bundle of rights” metaphor predated the Realists and is not necessarily tied to their political agenda. John Lewis used it in an eminent-domain treatise, for example, to explain why any restraint on the

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259 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).

260 See *supra* note 106 and accompanying text.

261 1 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 107 (1914); see also MORRIS R. COHEN, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 21 (1927) (“[B]ecause 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.”).

262 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”).

263 See, e.g., Walton H. Hamilton & Irene Till, *Property*, in 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937) (defining property as “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth”).

free control, use, or disposition of property counted as a taking.<sup>264</sup> Leading Realists, however, used the bundle metaphor as an apologetic conceptual tool for political tendencies opposite Lewis's. These Realists appropriated Wesley Hohfeld's conceptual taxonomy (recounted in Part III.B), to recast in rem claim rights of exclusive use determination into clusters of in personam privileges, to use or alienate assets for specific purposes, in relation to particular claimants on the asset.<sup>265</sup> Thus, in a policy analysis of rate making, Realist economist Robert Hale recasts the general "right of ownership in a manufacturing plant [into], to use Hohfeld's terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products."<sup>266</sup> If the state significantly limits the owner's last power, Hale implies, it still does not take property if it leaves the owner with the first three privileges and rights.

This Realist bundle of rights conception is now the standard conceptual lens through which prominent judges and academics view property in property torts. In the sparks case *LeRoy Fibre*, Justice Holmes argued that the law should not categorically block contributory negligence from going to the jury but rather weigh the defense by balancing minor "differences of degree" depending on where the plaintiff's flax stacks were in relation to the defendant's train.<sup>267</sup> Two decades later, the authors of the *First Restatement of Torts* restated nuisance law to suggest it turns on a balancing of the social policy values promoted by the parties' land uses.<sup>268</sup> Coase assumed a similar view in *Social Cost*, as suggested by this passage: "We may speak of a person owning land and using it as a factor of production, but what the landowner in fact possesses is the right to carry out a circumscribed list of actions."<sup>269</sup> This viewpoint is now typical in accident law and econom-

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

265 See HOHFELD, *supra* note 139, at 65, 74–82.

266 Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

267 *LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry.*, 232 U.S. 340, 353–54 (1914) (Holmes, J., concurring).

268 See RESTATEMENT (FIRST) OF TORTS §§ 826–28 (1934); see also Lewin, *supra* note 202, at 210–12 (explaining the reasons for and implications of the Restatement determining reasonableness by focusing on "utilitarian criteria aimed at promoting the public good").

269 Coase, *supra* note 11, at 44.



ics. For example, Robert Cooter and Thomas Ulen define property “[f]rom a legal viewpoint, . . . [as] a *bundle of rights*.”<sup>270</sup>

This shift transforms American tort common law in the guise of explaining it.<sup>271</sup> In Hohfeldian terms, American natural-rights morality hardwires into the relevant common law an assumption that “use” refers to in rem claim rights,<sup>272</sup> which protect in owners a liberty to choose among many possible liberties how to use their land. Although the legal tests canvassed in the last paragraph vary in different ways, all of them frame resource disputes as entitlement-allocation decisions that could go either way. The landowner who otherwise enjoys a claim right has the same liberties to use his land for single purposes, but now subject to exposure that outside pollution or trespasses may disrupt those use-liberties. The various shifts described above thus pit one liberty, corresponding to the owner’s current use, against another, corresponding to the neighbor’s current use. The liberties that correspond to land uses not currently practiced are transferred to the trier of fact or the regulator. So are 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 Realist bundle of rights theory into contemporary law and economics.<sup>273</sup> Although their diagnosis is instructive in many respects, it leaves one significant mistaken impression: that there is only one alternative to the Realists’ bundle of rights, namely a conception of property organized around an in rem right to exclude.<sup>274</sup> As Part III explained, at common law, the “right to exclude” is better understood as an owner’s conceptual interest in determining exclusively how her property may be used combined with a substantive interest in using it productively as specified by natural-rights labor theory. Some Realists, however, recon-

270 COOTER & ULEN, *supra* note 21, at 74.

271 See also Penner, *supra* note 200, at 17 (concluding, after canvassing standard accident law and economics treatments of nuisance, that, “as an analysis of the orders judges actually make, this is really very strained”).

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

273 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); 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).

274 See Merrill & Smith, *supra* note 273, 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).

ceived of property as a negative and formal in rem right of exclusion. According to this approach, property requires some minimal level of in rem exclusion. As long as the owner is endowed with some general right to blockade most strangers from some aspect of his control or use of his asset, he has property—even if the state limits his control, use, or disposition in relation to other individuals with claims on the asset.<sup>275</sup>

Merrill and Smith's account compresses the differences between these alternatives and favors the Realist one.<sup>276</sup> As relevant to the land-use torts covered in this Article, a formal right to exclude gives an owner property in a prima facie right to recover if a stranger trespasses. But it does not guarantee him property-rule protection against the trespass, and it does not guarantee him exclusive use of his property through doctrines of nuisance and negligence.<sup>277</sup> Similarly, if the right to exclude is understood too formalistically, it explains easy trespass cases but not animal or overflight cases, and not why remedies vary between accidental and intentional trespasses.<sup>278</sup> A formal right to exclude explains why nuisance protects against heavy pollution, but not perfectly, and it cannot explain spite-fence or ground-support cases.<sup>279</sup>

Nevertheless, Merrill and Smith are quite right to suggest that Realist bundle of rights property theory causes accident law and economics to misunderstand the “property” features of property torts.<sup>280</sup> Because it presumes that economic policy makers can resolve resource disputes by maximizing productive efficiency, accident law and economics assumes that property control and use rights refer to not to

275 See Cohen, *supra* note 261, at 12 (“The law does not guarantee me the physical or social ability of actually using what it calls mine . . . . But the law of property helps me directly only to exclude others from using the things which it assigns to me.”); see also Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370 (1954) (concluding that “ownership is a particular kind of legal relation in which the owner has a right to exclude the non-owner from something or other”).

276 See Merrill & Smith, *supra* note 273, 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).

277 For more comprehensive diagnoses of the limitations of right to exclude theory, see Claeys, *supra* note 128, at 631–49; Mossoff, *supra* note 127, at 375–76, 408 & n.150.

278 See *supra* Part III.B.2, F.3.

279 See *supra* Part III.F.2.

280 See, e.g., Merrill & Smith, *supra* note 273, at 391–94 (criticizing law and economics’ “causal agnosticism”).

spheres of freedom but rather to individualized use claims by competing resource users.

#### D. Normative Assumptions About Social Control

These conceptual issues set up the fundamental normative question: whether accident law and economics prescribes normatively more desirable results in land-use torts than does the common political morality internal to the cases. The following discussion will not be exhaustive.<sup>281</sup> But generally speaking, productive efficiency may be attractive in theory and unattainable in practice. According to American natural-rights morality and students of Hayek,<sup>282</sup> productive efficiency often requires information too costly or volatile to use in practice, and it often abstracts away from other factors important in property regulation.<sup>283</sup>

Let us start with precaution and accident costs. It is quite often hard in advance to predict what accident loss  $L$  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 over 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 pre-

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

282 See, e.g., CORDATO, *supra* note 37, at 4 (stating that first, “market activity should be analyzed as a dynamic, disequilibrium process,” second, “the concepts of value and utility are strictly subjective and therefore unobservable and unmeasurable (radical subjectivism),” and third, “knowledge of market phenomena . . . is always imperfect”). In theory, Cordato's second proposition makes personal value more subjective than most sources in the American natural-rights tradition would probably allow. In practice, the two approaches are quite close. American natural-rights morality presumes that individual uses and needs vary too much to allow for party-specific regulation, and reverses that presumption only when land uses strongly suggest otherwise as explained *supra* Part III.F.

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

vent. A regulator can posit that there are only two possible dam designs and then plug in assumed  $p$  and  $L$  figures for these dams,<sup>284</sup> but these assumptions are just simplifying assumptions. Then, since the parties are selfish and each can respond to the other's behavior, the regulator must then forecast how each party may react strategically to precautions by the other.<sup>285</sup> Perhaps the neighbor at the bottom of the shaft should consider moving her house or building a breakwater; but perhaps she builds a bigger house after the mine owner builds a better dam. Most accident law and economists agree that the resolution of these problems varies on many factors specific to the parties,<sup>286</sup> but the scholarship does not come to any single resolution.<sup>287</sup> It may not be possible to identify any level of precautions on both sides that simultaneously minimizes excessive precaution spending in the short term and moral hazards in the long term.<sup>288</sup> 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.<sup>289</sup> These sorts of examples usually presume that the fact finder can know each party's production function accurately and instantaneously.<sup>290</sup> Yet

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284 See Rose-Ackerman, *supra* note 78, at 31–33 & tbl.1; see also LANDES & POSNER, *supra* note 61, at 38 & tbl.2.2 (assuming railroad profits and farmer damages in a sparks case depending on whether the farmer leaves a firebreak).

285 See POLINSKY, *supra* note 28, at 18; Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J.L. & ECON. 589, 592–98 (1983).

286 See *supra* note 71.

287 Compare LANDES & POSNER, *supra* note 61, at 90 (suggesting, on the facts of a sparks case, that the farmer should not be forced to take precautions except when the railroad's sparks are "very conspicuous"), with Grady, *supra* note 13, at 19–25 & tbl.1 (suggesting that sparks cases be sorted by the extent to which different parties fall into each of six different precaution traps).

288 See James M. Anderson, *The Missing Theory of Variable Selection in the Economic Analysis of Tort Law*, 2007 UTAH L. REV. 255, 260–61.

289 See Coase, *supra* note 11, at 31–33; see also POLINSKY, *supra* note 28, at 17 & tbl.1 (presenting hypothetical data about party profits and damages in a pollution-nuisance case).

290 See Hayek, *supra* note 253, at 521–22 (suggesting that economic methodology undervalues "the knowledge of the particular circumstances of time and place").

E.C. Pasour suggests that “[t]he real world never contains an entity corresponding to the marginal-cost curve, since the amount of product that a firm will try to produce at any given price depends on many factors including length of run, technology, and expected input prices.”<sup>291</sup> So whenever economic analysis presents such cost-revenue functions, the lawyer should discount them substantially to account for the slippage between an economic hypothetical and the uncertainty of a real-life lawsuit.

Separately, “productive efficiency” is usually construed to assume perfect competition.<sup>292</sup> When the rancher’s cattle trample the farmer’s crops, Coase assumes the first causes \$1 marginal extra annual crop damage, the second \$2, the third \$3, and the fourth \$4.<sup>293</sup> For the purposes of developing his economic critique of Pigou, Coase’s numbers and market assumptions are not controversial. But when Coase’s analysis is turned around to study legal entitlements, it is very controversial 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.<sup>294</sup> Accident law and economic scholarship does recognize the problem of subjective valuation. Some scholarship worries that damage rules short-change subjective values,<sup>295</sup> while others worry that subjective valuation encourages parties to hold out<sup>296</sup> and expect that liability rules circumvent this danger.<sup>297</sup> But if heterogeneous property uses are the norm and not the exception, the law should worry far more about the former possibility than the latter.

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

292 See, e.g., Coase, *supra* note 11, at 18, 30.

293 See *id.* at 41.

294 See, e.g., CORDATO, *supra* note 37, at 6–7, 58, 97; 2 F.A. HAYEK, *LAW, LEGISLATION & LIBERTY* 113 (1976); D. Bruce Johnsen, *Wealth Is Value*, 15 *J. LEGAL STUD.* 263, 269 (1986).

295 See, e.g., Epstein, *supra* note 281, at 2093.

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

297 See, e.g., POLINSKY, *supra* note 28, at 21–23.

Let us turn from productive efficiency to 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.<sup>298</sup> The party-valuation problems just described can create substantial execution costs, and empirical uncertainty about the parties' production functions and costs can generate information costs. But there are other serious sources of transaction costs—particularly associated with third parties.

To this point, I 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.<sup>299</sup> At the same time, multiplicity creates other complications if one zooms away from the immediately affected parties to strangers who need to live under the precedents set by particular cases. Among other things, as Merrill and Smith have shown, society suffers significant third-party information costs if basic property liability doctrines are fine-grained. Strangers to property must then process all the data specific to individual assets to know their rights and liabilities.<sup>300</sup> 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.<sup>301</sup> Economic analysis *could* suggest that the efficient response is to let the factory establish a footprint in the

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298 Ellickson, *supra* note 36, at 614–16.

299 See Calabresi & Melamed, *supra* note 281, at 1115–19; Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

300 See Merrill & Smith, *supra* note 273, at 394–97.

301 See COOTER & ULEN, *supra* note 21, at 86.

neighborhood and clarify everyone's rights in the process.<sup>302</sup> It could suggest that, *ex ante*, there is no one-size-fits-all efficient solution.<sup>303</sup> But it could also suggest that, because the early parties cannot bargain with the highest value users likely to appear twenty years later, "ex ante anonymity" may encourage them excessively to discount the interests of late-comers and overinvest in polluting activities.<sup>304</sup> Although coming to the nuisance cases highlight these informational challenges vividly, the challenges exist in principle in any changing neighborhood.

The difficulties covered thus far make it hard to identify the productively-efficient outcome focusing only on the parties directly interested in the outcome of a resource dispute. But to measure social welfare really comprehensively, a policymaker must also subtract from net social welfare administrative costs, the "public and private costs of getting information, negotiating, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures."<sup>305</sup>

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.<sup>306</sup> 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 ground<sup>307</sup> 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

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302 See Baxter & Altree, *supra* note 60, at 17–28; Wittman, *supra* note 61, at 560–61.

303 See, e.g., Bebchuk, *supra* note 61, at 632.

304 See Rohan Pitchford & Christopher M. Snyder, *Coming to the Nuisance: An Economic Analysis from an Incomplete Contracts Perspective*, 19 J.L. ECON. & ORG. 491, 494–97 (2003).

305 Ellickson, *supra* note 67, at 689.

306 See Cooter, *supra* note 296, at 14–27.

307 See, e.g., EPSTEIN, *supra* note 41, § 13.1, at 336.

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. 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.<sup>308</sup> In principle, however, 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 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 accident law and economics invites information overload. 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 the exclusive right to a resource may reduce rather than increase efficiency.”<sup>309</sup> But suppose that land is used in conditions of uncertainty, with diverse and selfishly-driven uses, in which temporary resolutions of use conflicts can change suddenly. If these generalizations are tolerably accurate, it is unrealistic to expect that a trier of fact can simultaneously secure investment and maximize welfare in property.

The tough-minded response is instead to limit the project of welfare improvement substantially. The basic land-use torts should then

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308 See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 88–89 (1986).

309 POSNER, *supra* note 14, § 3.1, at 32, 34.



push policy control down to the individuals who have the best localized knowledge and incentives to use it productively.<sup>310</sup> Boundary-like protections serve this goal in tort.<sup>311</sup> Such rules (and strict liability, and the choice to limit plaintiffs'-misconduct defenses) guarantee in a clear and determinate way that owners will have some security that their chosen uses will not be disrupted in the likeliest invasive ways.<sup>312</sup> Seen in reverse, those rules also limit owners' attempts to hijack or blockade land uses by their neighbors when those uses hit the neighbors more where *they* live. These rules may also 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, bargaining among many owners, and factual inquiries by triers of fact.

Of course, one may fairly question the behavioral generalizations that lie under this alternative. These generalizations are empirical, but in an extremely soft sense: the sense in which one makes "empirical" claims by observing, often anecdotally, a wide range of phenomena about human behavior and then drawing a few comprehensive generalizations. The philosophical tradition in which Locke and *The Federalist* operated presumed that such generalizations were the most one could know about human "nature."<sup>313</sup> That is why these and other contributors to American natural-rights morality resisted the temptation to explain law and politics with reference to mathematics. Austrian economics makes generalizations on a similar basis. But the underlying generalizations are falsifiable. In practice, they are extremely hard to test; in principle, however, they may be inaccurate.

But this possibility applies equally to any mode of law and economic analysis. When accident law and economics focuses on the most concrete and party-specific factors, it assumes implicitly but empirically that law and economics can maximize the joint product of

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310 See Hayek, *supra* note 253, 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.").

311 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.

312 This security cannot be complete without the right remedial rules, a full discussion of which (again, see *supra* note 281) exceeds the scope of this Article.

313 See *supra* notes 112–14 and accompanying text.

the parties and social welfare generally without seriously threatening investment, creating information-cost problems, encouraging rent-seeking, or demoralizing markets. Accident law and economic analysis may consider these more systematic issues as part of an all-the-circumstances analysis. In an all-the-circumstances analysis, however, the party-specific factors are likely to seem concrete and immediate, while the social factors are more likely to seem diffuse and remote. Tacitly, such an analysis assumes that the party-specific factors should weigh about as much as the more systematic factors. Such an approach is misguided if the most concrete and party-specific factors are the least relevant and the least concrete but most social factors are most relevant.

The important point here is that these various assumptions are empirical, and they are foundational “meta-economic” assumptions about human behavior.<sup>314</sup> In crucial respects, these meta-assumptions do more work than concrete numbers or productive-efficiency equations do in accident law and economic analysis. These assumptions do not provide definitive answers, but they do focus economic analysis on questions capable of definitive answers. Important here, these meta-assumptions resemble the broad generalizations that ethical and political philosophy and Austrian economics make about human nature more than they do the more concrete numbers and production functions on which accident law and economics purports to focus. Until accident law and economics defends those meta-assumptions, no one can say convincingly that it operates on foundations sound enough to justify its reputation for determinacy.

My criticisms of accident law and economics should not be understood as wholesale criticisms of economics or law and economics. I find much commendable and instructive, for example, in law and economics scholarship on land use torts by Richard Epstein and Henry Smith.<sup>315</sup> I have some reservations whether their interpretations of the relevant doctrines can be confirmed empirically without piggybacking on the natural-rights morality internal to American property law,<sup>316</sup> but their economic justifications for the doctrines are surely plausible on their own. Here, it suffices to recall two points. First, as Smith himself has already noted, “utilitarian and libertarian or corrective justice accounts of nuisance law [are] closer to each

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

315 See *supra* Parts IV.C–D.

316 See Eric R. Claeys, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 NW. U. L. REV. COLLOQUY 262 (2010), <http://www.law.northwestern.edu/lawreview/Colloquy/2010/4/index.html>.

other than previously thought.”<sup>317</sup> Second, Epstein and Smith, like Austrian economists, set the ambitions of law and economics considerably lower than do scholars of accident law and economics. Their moderation in the face of information problems makes their interpretations and justifications of doctrine more tentative and intuitive—but it also confirms this Article’s basic point: when law and economic analysis proceeds mindful of its limitations, it does not have the advantages of definiteness or precision it is conventionally assumed to have over moral philosophy.

#### CONCLUSION

Coase assumed in *Social Cost* that “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”<sup>318</sup> Welfare economics tends to focus more on questions that lend themselves to mathematical analysis, while aesthetics and morals tend to focus on questions shot through with opinion. That difference gives welfare economics more concreteness and determinacy in its sphere than aesthetics and morals have in theirs. Over the last generation, however, a prominent group of law and economists have tried to export the determinacy of welfare economics into law, and particularly parts of law raising issues properly in the province of morality. The most important question about that project is whether law and economics can have it both ways—whether it can keep all the determinacy of welfare economics without bogging the economics down in the indeterminacy of the parts of human life caught up in moral opinion.

This Article has shown that the economic tort scholarship in question cannot explain basic features of prima facie liability and affirmative defenses in trespass to land, nuisance, and land-based negligence. Of course, the common law land-use torts represent just one slice of doctrines. All the same, economic tort scholarship has assumed it can explain these doctrines. And to the extent that these doctrines *are* representative, prominent economic torts scholars have pushed law and economics beyond its bounds.

Readers may reasonably wonder why these contrasts have not been discussed in significant detail in previous legal scholarship. There are surely a number of answers; this Article has suggested three. First, American natural-rights morality has been in desuetude in the American legal academy for a long time. This Article has taken one small step toward filling that void, by showing how American natural-rights morality justifies doctrine in land-use torts.

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317 Smith, *supra* note 42, at 1049.

318 Coase, *supra* note 11, at 43.

Second, at a high level of generality, philosophical tort scholarship has tended to focus 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. This Article has pushed back against that tendency. It has shown how tort's corrective commitments take shape when informed by American natural-rights morality's justification for owners' moral possessory interests in control and use of their land.

Most important, mainline segments of economic tort scholarship view resource disputes through a conceptual framework that makes expert-driven policy analysis seem feasible and attractive. These segments have created an impression that law and economics explains tort more determinately than other approaches to the law. But if the land-use torts provide a fair test case, these rumors of superior determinacy are greatly exaggerated.