NOTES

THE STEWARDSHIP MODEL OF NECESSITY

*Joseph Graziano**

The current understanding of the necessity defense to trespass to property in American law stems from a simple—or perhaps simplistic—balancing of rights. Based in the individualistic understanding of property as a right against the world that creates an obligation for others, necessity pits the interloper's right to life, liberty, or property against the property owner's right. Although feasible in the extremes, dueling rights leads to an unwieldy judicial task, discouraging advocates from alleging the privilege and discouraging judges from recognizing the privilege. Overall, the right to exclude has become more and more the libertarian vision of a right to be left alone, isolated from our society. A decisional theory founded in an Aristotelian sense of property forms a stronger foundation to develop a more comprehensive understanding of the defense. Aristotle, as glossed by philosophers of the Middle Ages, understood private property ownership to be distinct from use. While there was a presumption of exclusion from the property necessary for the good of the home, the owner only had preferential usage of all extraneous goods; these privately owned goods were for public use. Reconceptualizing the right to exclude as rebuttable by a claim of use for the common good founds private necessity anew on a more sustainable and easily applicable communitarian judicial theory. After developing the contrasting decisional theories as applied to necessity, this Note will also speculate on possible implications of extending this decisional theory to takings and contemporary debates on traditional knowledge.

* * *

> *"Something there is that doesn't love a wall . . . [yet my neighbor] will not go behind his father's saying . . . He says again, 'Good fences make good neighbors.'"*[1]

* Notre Dame Law School, J.D. expected 2023; Pontifical Faculty of the Immaculate Conception, S.T.B. 2019; Providence College, B.A. 2014. I would like to thank my fellow editors on the Notre Dame Law Review for their hard work in polishing citations while also tracking down and checking sources in four languages. This Note was born out of workshop discussions led by Jeffrey Pojanowski and David P. Waddilove. In addition to those professors and my classmates in the workshop, I would also like to thank Samuel Bray, Nicole S. Garnett, Dan Kelly, Alec Afarian, Katie Alexander, K'reisa Cox, Nathaniel Schetter, and Sachit Shrivastav for their particularly helpful comments in thinking through this Note.

1 ROBERT FROST, *Mending Wall*, *in* NORTH OF BOSTON 11, 11–13 (1914).

INTRODUCTION

Property as a responsibility is a concept that has been out of fashion about as long as the United States has been a nation. The American Dream has long included the white picket fence which makes demands on others to stay off my land and leave me alone. It has long been almost axiomatic that property as a right "create[s] duties that attach to 'everyone else.'"[2] But our conception of property law, a body of law with its roots in feudal society long before the Enlightenment turn to the individual as the locus of society, has not always been so exclusionary.[3]

An ancient and medieval understanding of property focuses on the community. In the premodern era, a community had to band together for survival against the elements in ways that were more visceral than today.[4] In such a society, the private actions of each individual were measured in light of how they affected the community.[5] While this communal approach was read through a theological valance for much of the Middle Ages, the message was the same from Aristotle until the Enlightenment: those with a right to property bear an equally

---

2 Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001).

3 *The European Dream*, ENV'T MAG. (Mar. 1, 2005), https://emagazine.com/the-european-dream/ [https://perma.cc/V6DL-RNL4] ("America's founders came over from Europe 200 years ago in the waning days of the Protestant Reformation and the early days of the European Enlightenment. They took these two streams of European thought, froze them in time, and kept them alive in their purest form until today. . . . Both the Protestant Reformation and the Enlightenment emphasized the central role of the individual in history."). *See generally* JEREMY RIFKIN, THE EUROPEAN DREAM: HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004) (expanding on the idea that American individualism freezes in amber a blip between European communitarianism of the Middle Ages and modern European communitarianism).

4 One may question why the medieval era matters for American legal interpretation. Although such a defense could be a whole paper unto itself, I will cite just two reasons here. First, the Supreme Court seems willing to do so. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2139–40 (2022) (discussing the history of weapon regulation back to the thirteenth century); *see also* Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 620–55 (2022) (exploring empirically the current Court's usage of English common law). Second, the Constitution drew upon many common-law terms without additional explanation, such as the writ of habeas corpus. *See* U.S. CONST. art. I, § 9, cl. 2. There was evidence in the early courts that these terms also incorporated the common law itself. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). That common law traces its development back to the Middle Ages. *See, e.g.*, William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 401 (1968) (generally arguing that the colonies accepted the English common law and specifically pointing to a property rule in Massachusetts that stretched back to the Middle Ages). Finally, it goes without saying that property is a common law matter. Therefore, it is reasonable to consider medieval era property law. *See infra* note 90–91 and accompanying text.

5 *See infra* Section II.B.

grave responsibility to use that property well for the sake of the community.[6] The medieval would consider the landowner to be the first beneficiary of the fruit of his land, but the land owner also bore the responsibility to give from his excess.[7] If he failed to do so, the poor who suffered retained a right to take that which he neglected to give them.[8]

Some property doctrines that we retain today make more sense under this older philosophical understanding. The privilege of necessity stands chief among these.[9] What allows a private individual to infringe on the rights of a sovereign owner and get off scot-free? For instance, why can a boat full of vagrants use a wealthy man's dock in the midst of a storm in such a way that he may not exclude them at all?[10] If they can, why does another boat owner have to pay for damages to the dock for taking a legally identical action?[11]

Under a law and economics "rights against the world" understanding of property—either the traditional "right to exclude" flavor or the contemporary "bundle of rights" flavor—necessity is a defense in which the judge recognizes dueling rights and makes a judgment call that one right is worth more than the other.[12] The current understanding of private necessity as a justification for a trespass to land boils down to an odd form of rights calculus, or perhaps an odd game of

---

6 *See infra* Part II.

7 *See infra* Part II.

8 *See id.*

9 I also considered the doctrines against waste of a life estate and riparian rights as examples, but the analysis seems clearest in doctrines concerning the privilege of necessity and the related taking clause.

10 *See* Ploof v. Putnam, 71 A. 188, 188–89 (Vt. 1908) (finding that the boat owners had a privilege to moor at a private dock for the length of a storm without disturbance, despite the appearance of trespass).

11 *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910) (finding that, although the boat owner could remain at the dock during a storm, despite the appearance of trespass ab initio, he still had to pay for the damage his boat caused to the dock due to his choice to remain).

12 *See* Peter Vallentyne, Response to *Eric Mack on "John Locke on Property" (January 2013)*, ONLINE LIBR. LIBERTY (Jan. 14, 2013), https://oll.libertyfund.org/page/liberty-matters-eric-mack-john-locke-property/ [https://perma.cc/8GNH-8NRW] (discussing Lockean property rights as a claim-right of an individual against the world); Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 62–66 (2013) (explaining the history of the bundle of rights metaphor as born of Hohfeldian rights). Note that even early American commentators did not view the right to exclude as definitive of property but rather as a necessary accident incidental to property. In order to use a property well, individuals have to exclude others, but the ability to exclude is just a sign of ownership. *See* JAMES KENT, *Lecture 34: Of the History, Progress, and Absolute Rights of Property*, *in* 2 COMMENTARIES ON AMERICAN LAW 136, 136–37 (Lonang Inst. 2006) (1827) (explaining a natural law reason for property which thereafter creates a right to exclude).

rock, paper, scissors where rights are on the line.[13] Essentially, courts look to the three dominant loci of rights—life, liberty, and property—and balance whether the violation of the property right is properly justified by another person's individual right to life, liberty, or property.[14] The refrain that life beats property is universal. Property of the interloper and property of the owner are of equal value, which reduces the equation to a simple liability rule: pay for any damage to property used to save your property.[15] As for liberty, the jury is still out.[16]

Although importing a law and economics perspective on rights is attractive, the difficulty with this rights analysis is that the items in balance are utterly incommensurate. Judges, being living people themselves, generally agree that life is worth more than land, but forcing judges to balance interests like life and property rights is always to ask "whether a particular line is longer than a particular rock is heavy."[17] There needs to be some similarity in order to make a real distinction between things, an underlying substrate that both share, and life and

13 *See, e.g.*, Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1533–35 (2005) (analyzing critically the broad necessity defense today as contrasted with the ancient principle that necessity "privileges the violation of virtually any law . . . if performed to advance a greater social good").

14 *See infra* Part II.

15 Since both the right of the property owner and the right of the interloper are property rights, and every property right is considered equally, the matter reduces to a monetary exchange. Both properties are evaluated and the interloper has to pay for the damaged caused. *See Vincent*, 124 N.W. at 222; *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (arguing that judges may either enforce an entitlement through strict property rules or gentler pay-to-play liability rules).

16 Part of the complexity of this judgment is the difficulty in figuring out what liberty even means. Personal liberty jurisprudence stems from the claim that liberty means what the *Casey* Court boiled down to as "defin[ing] one's own concept of existence"—the Mystery Passage—but the current precedential value of *Casey* and its precedential ancestors is questionable at best. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."), *and* Lawrence v. Texas, 539 U.S. 558, 573–74, 578 (2003) (citing the Mystery Passage to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986) and deny states the authority to write laws that curtail personal liberty based on exclusively moral reasoning), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257, 2284 (2022) (citing the Mystery Passage but concluding that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives").

17 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

property are far more disparate than even apples and oranges.[18] What should a judge do when fundamental liberties come up against property rights? The answer is more fraught with policy opinions than judicial ones.

In contrast to this rights-balancing view of necessity, the communitarian understanding of property in the water when the privilege developed would see necessity as a matter of discerning how the interloper's usage of the property corresponds to the common good. This decision remains a judgment call, as all judicial action must be, but it removes the uncertainty of a test attempting to balance incommensurates.[19] Founded on an Aristotelian understanding of property popular in the Middle Ages and even up to the time of Locke, this decisional theory provides an understanding of necessity that could allow it a more robust presence in American jurisprudence.[20] To set up this counterproposal, this Note will unpack an Aristotelian theory that distinguishes between property and use.[21] In contrast to the later conception of property being a right against the world, Aristotle's property starts with a rebuttable presumption of control. This presumption may balk at unjustified violations, but still denies an absolute right to exclude from use. Aristotle claims that private property is defensible because the proper management of the goods of the earth requires a subdivision of stewardship, but this stewardship does not take property out of the realm of the public good. Rather, it ensures that individuals manage their plots of land to contribute to the common good.[22] Exclusion is permissible and sound insofar as it allows for good stewardship, but exclusion is indefensible insofar as it stands in the way of the good of the community. As the common good is harmed by the

18 At least apples and oranges are both fruit. Life and property may both be rights, though that has been debated, but rights are vague and vacuous things that are hard to pin down in the first place. Trying to compare two of them is a nightmare. *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (supporting the incommensurability of natural rights and questioning the existence of rights in Aristotle).

19 For instance, a vagrant enters a strawberry field and eats a dozen strawberries. Under the modern understanding of necessity, this would only be permitted if there was proof that a life would be lost. Under an older communitarian theory, if the interloper could simply show that they did not harm the common good and that they contribute to the same common good, the trespass could be warranted. Similarly, if a hiker breaks into a house in the midst of a bad storm, under a modern theory, she would have to show that it was a matter of life or death, which could be defeated if other less destructive options were at her disposal. Under a communitarian theory, any pressing need coupled with a simple showing that the common good was not harmed by permitting the temporary entry would suffice to justify the trespass.

20 *See infra* Part III.

21 Aristotle also distinguishes between property for the needs of the household and property for the mere amassing of private wealth. *See infra* Section II.C.

22 For discussion of the common good, see *infra* Section II.A.

untimely death or the starvation of its members, the presumption of exclusion would be defeated by a claim of danger to the health of the individual.[23] Similarly, if there is some public good which would be harmed by private exclusion from land, the private interest would cede to the public good.[24] This Aristotelian sense of communitarian property further developed in the Middle Ages, when the logic of Aristotle was wed to a strong sense of Christian charity. Hints of this ancient and medieval continental sense of the common good continued to be prevalent up to the founding of the United States, even appearing in Locke's writings and in Blackstone's account of justifiable trespass.[25]

This Note will proceed in four parts. First, I will present the contemporary understanding of necessity as a defense to trespass to property, and briefly touch on its weaknesses, at least as a judicial decisional theory.[26] Second, I will walk through the Aristotelian understanding of property as it developed through the Middle Ages and the related foundation of the common good. Third, I will propose a stewardship model of property as applied to necessity. Fourth, I will conclude by extrapolating on how a stewardship model might also apply to constitutional takings and could provide a justiciable foundation for conflicts in traditional knowledge.

I. THE COMMON UNDERSTANDING OF NECESSITY IN TRESPASS TO LAND

Private necessity as a defense to trespass to land has a long tradition in the common law. While older commentaries understood necessity as a privilege which gave a selective right to persons in a particular relationship with either the land or the landowner, by the early twentieth century, commentators on the common law had concluded that it was a limited defense to allow an interloper to save her life without fear of reprisal. Today, the defense has been reduced to a

23 *See infra* Part IV.

24 For a compelling illustration of the public usage of private property to prevent the spreading of a church fire, see SIGRID UNDSET, KRISTIN LAVRANSDATTER 262–67 (Tiina Nunnally trans., Penguin Books 2005) (1920).

25 3 WILLIAM BLACKSTONE, COMMENTARIES *212–13. This sense of the common good as a limit on private property usage remains preserved in the writings of Charles De Koninck. *See generally* CHARLES DE KONINCK, DE LA PRIMAUTÉ DU BIEN COMMUN CONTRE LES PERSONNALISTES [THE PRIMACY OF THE COMMON GOOD AGAINST THE PERSONALISTS] (1943) (arguing that the common good should be favored over the private good, and that the two are not in conflict); *infra* Section II.A.

26 *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1934–35 (2017) (suggesting that judges can adapt a different decisional theory to undergird new cases without offending stare decisis).

desiccated husk of what once was a robust and broad recognition that exclusion is not the end-all and be-all of property.

This Part will proceed in four Sections. First, I will outline the way that trespass has been discussed in representative commentaries. The purpose of this glance at the history of the privilege is not to trace its initial development but rather to show how the exclusion-rights conception of property has narrowed necessity to a couple of key instances. Second, I will highlight the contemporary limits of the defense, namely balancing threats to a person's life and some threats to property against a sovereign owner's right to exclude. Third, I will explain the defense from the rights-based perspective commonly presented in American cases, expounding briefly on the decisional theory currently undergirding necessity. Finally, I will draw out the logical problems with the defense under this decisional theory.

A. Early Cases and Commentaries

By the early twentieth century, commentators of the common law tended to understand that necessity was a privilege that grants permission by the law to enter the land of another, grown out of a moral duty that individuals have to their neighbors in an organized state.[27] Sometime between then and now, the language has shifted from a privilege to a defense. Taken as a defense, necessity justifies an action that otherwise would be a trespass.[28]

Commentators by the eighteenth century only touch briefly on necessity while explaining trespass to property. Blackstone mentions necessity, but in far broader terms than it is understood in the modern United States.[29] He subdivides the justifiable trespasses into four categories. First, entry that is not a trespass on account of entry with the power of law.[30] Second, entry that is not trespass because the land in question is a common carrier.[31] Third, entry for "the apparent

27 *See* MELVILLE MADISON BIGELOW, THE LAW OF TORTS 13–16 (3d ed. 1908) (describing privileges in torts); *accord* Hidden Vill., LLC v. City of Lakewood, 734 F.3d 519, 524 (6th Cir. 2013) (discussing privilege as "a variety of common-law defenses . . . to a trespass action").

28 Modern sources are somewhat torn over the effect of this defense. Some suggest that the need in question excuses the trespass, such that the trespass is noted but forgiven. Others, more commonly, argue that the need makes an action that would be a trespass into no trespass at all. On this second theory, the law would recognize some reason for the trespass which is of great value or importance to the society, such that, had the owner been there, it would have been repugnant for him not to grant entry to his land for this purpose. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 369–70 (3d ed. 2017).

29 3 BLACKSTONE, *supra* note 25, at *212–13.

30 *Id.*

31 *Id.*

necessity of the thing," which lists three relationships that allow for entry for a narrow purpose.[32] Fourth, interestingly, "that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass" and "[i]n like manner the common law warrants the hunting of ravenous beasts of prey . . . because the destroying such creatures is profitable to the publick."[33]

Each of these images of justifiable trespasses is related to, but not quite the same as, necessity. The first, entry with power of law, implies that the interloper has some other law that applies to him, permitting him to enter the land. This maps to a modern understanding of rights of a landlord to enter with notice or even a warrant which provides lawful entry. The second, common carrier law, remains virtually unchanged today.[34] The third, entry for some apparent necessity, maps closest to the modern defense, but the relationships are broader than modern necessity. While modern necessity really is limited to matters of life or death, Blackstone does not have the same kind of limiting in his explanation of the privilege.[35] The fourth, gleaning and ravenous beasts, have no parallel in American law, but both extend the principle of entering for defense of life. None of these exactly map to the modern understanding of necessity, but the last goes far beyond modern necessity and smacks of a medieval understanding of property as for the common good.[36]

By the late nineteenth century, torts scholars would talk about times when entry into another's land without explicit license would not be considered a trespass. Melville Bigelow put necessity in a list of nine such instances.[37] The first four of these cases point to kinds of license, either explicit or constructive.[38] The last five, however, point to cases

32 *Id.*

33 *Id.*

34 The most recent Supreme Court discussion of common carriers points out the "long history . . . of restricting the exclusion right of common carriers" before suggesting the law might apply to some digital platforms. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

35 *See* 3 BLACKSTONE, *supra* note 25, at *212–13.

36 *See infra* Part III. If the gleaning and ravenous beasts exceptions crossed the Atlantic, they did not survive even to 1778, as Hammond comments that "these common-law rights have disappeared entirely from American law . . . by that entire change in the convictions and circumstances of the people out of which all rules of the common law grow." 3 WILLIAM BLACKSTONE, COMMENTARIES 295 (William G. Hammond ed., S.F., Bancroft-Whitney Co. 1890) (1768). It is possible that the defense of necessity in Blackstone would fall under the special pleas in bar, but he does not list that as one of his exemplar pleas. *Id.* at 306–08.

37 BIGELOW, *supra* note 27, at 316–20.

38 *Viz.* (1) entry into a common carrier, (2) entry by a creditor, (3) entry by a landlord, and (4) entry by a buyer of goods. *Compare id.* at 317–18, *with* 3 BLACKSTONE, *supra* note

when some need arises that renders the interloper's right more urgent than the owner's right to exclude. The first two of these are instances when the goods of an interloper are somehow on another person's property, either because they were left there or because they were placed there by accident.[39] The last three are the need to save a beast in danger, a need to remove a nuisance, and true necessity, e.g. to save a life or pass by a portion of the highway that is wholly flooded.[40] While the first four look at the identity of the person entering or some quality about the land entered, the last five look at the need of the interloper and recognize that need as of greater import than the right of the owner to exclude.[41]

By the 1920s, torts textbooks would speak vaguely about necessity, stating only that "there is some old authority for saying that in certain cases a man can justify the commission of a tort on the ground of necessity."[42] Incidentally, this discussion follows immediately after one such text book discusses how law is "[t]he due regulation and

---

25, at *212 (specifying entry by law and entry into a common carrier as privileges eliminating a trespass). Note that each of these is based on the relationship between the person entering and the owner of the property, such that the relationship creates a situation in which the general law of trespass does not apply: traveler-host; creditor-debtor; landlord-lessee; buyer-shopkeeper.

39 BIGELOW, *supra* note 27, at 318–19.

40 *Id.* at 319–20. I would note here that these five suggest a condition inhering in the interloper which creates a situation in which the general law of trespass does not apply. This could point to how necessity could be considered a privilege. If a privilege, as the root of the word implies, is a law that is private to an individual, then there would have to be some different condition to justify such a deviation from the general law. In modern law, that is a relationship between two discrete persons—doctor-patient, attorney-client, priest-penitent. In medieval law, there might be a relationship between the individual and the general public created by situations like this one. To dive into the genesis of privilege in law, however, goes far beyond the scope of this Note.

41 It is worth noting that Bigelow traces this necessity defense to trespass back to the reign of Henry VI. *Id.* at 320 (first citing YB 37 Hen. 6, fol. 37a, Trin., pl. 26 (1459) (Eng.); and then citing Absor v. French (1678) 89 Eng. Rep. 772; 2 Show. K.B. 28). Incidentally, both commentators follow justifiable trespasses with the concept of trespass ab initio, under which someone who is licitly on the land of another becomes a trespasser by stepping beyond the scope of their license. *See* BIGELOW, *supra* note 27, at 320; 3 BLACKSTONE, *supra* note 25, at *213. If anything, this shows a logical similarity between the two doctrines, insofar as necessity gives a quasi-license or an implied license for a particular purpose. If the interloper acting out of necessity moves outside of the scope of the privilege, he trespasses ab initio.

42 J.F. CLERK & W.H.B. LINDSELL, THE LAW OF TORTS 6 (W. Wyatt-Paine ed., 7th ed. 1921). The text cites to three cases: *Maleverer v. Spinke* (1537) 73 Eng. Rep. 79, 1 Dyer 35 b; YB 9 Edw. 4, fol. 34b, Mich., pl. 10 (1469) (Eng.); and *Cope v. Sharpe* [1910] 1 KB 168 (Eng. & Wales).

subordination of conflicting rights."[43] While the previous commentaries did not expound upon the theory behind necessity, this early twentieth-century textbook presents a viable reason for the privilege: competing rights. The law shifted from recognizing conditions or relationships in which entry into the land of another is not a trespass to justifying necessity through competing rights. This shift in theory mirrored a contemporaneous cabining of necessity to mere matters life or death.

B. The Limitations on Necessity

As law continued to develop through the twentieth century, necessity seemed increasingly limited to a defense permitted only when action was taken to save a life. While earlier twentieth-century cases like *Ploof v. Putnam*[44] or *Vincent v. Lake Erie Transport Co.*[45] discuss the contemporary justifications related to necessity as expounded upon in Bigelow, modern courts tend minimize the doctrine or focus on its protecting a right to live.[46]

These classic law school cases hardly need further discussion. In *Ploof*, a wealthy man's servant pushed a family of boat-bound vagrants off his master's private dock and out into the raging elements, risking their lives in the process.[47] In *Vincent*, much like in *Ploof*, there was a ship docked in the midst of a storm. There, in light of the admitted danger, the ship was permitted to remain, and left safely in the mooring. The dock, however, sustained some damage.[48] Contrary to the more ancient perspectives reflected in the dissent,[49] the court in *Vincent* required the boat owner to pay damages to the dock owners to repair the dock, specifying that it was the ship's direct fault, as it continued to repair the lines that broke as the winds dashed the boat against the moorings.

---

43 CLERK & LINDSELL, *supra* note 42, at 6 (quoting C.G. ADDISON, A TREATISE ON THE LAW OF TORTS OR WRONGS AND THEIR REMEDIES 66 (William E. Gordon & Walter Hussey Griffith eds., 8th ed. 1906)).

44 Ploof v. Putnam, 71 A. 188 (Vt. 1908).

45 Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

46 *See, e.g.*, People v. Frederick, 895 N.W.2d 541, 547 (Mich. 2017) (refusing to extend the necessity from *Ploof* and *Vincent* to a police need to talk to the members of a household at night); Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 480 (D.C. Cir. 2006) (suggesting that *Ploof* only concerns the preservation of human life).

47 *See Ploof*, 71 A. at 188–89; *see also* Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and* Ploof v. Putnam, 45 ST. LOUIS U. L.J. 791, 798–806 (2001) (discussing the social perception of the Ploof family as pirates).

48 *Vincent*, 124 N.W. at 221.

49 *Id.* at 222 (Lewis, J., dissenting).

Thus, in *Vincent*, the privilege granted by necessity is further limited to a partial privilege to trespass, so to speak, a license to trespass that must simply be paid for on the back end. The boat owners could trespass, but still had to pay later for the damage caused. While this is commonplace for the modern legal analysis, in the early twentieth century, the suggestion that someone who makes use of a privilege would have to pay for it was novel enough to elicit commentary.[50] Typically, the perceived purpose of such a privilege was to allow for a "small violation[] of rights . . . in order to prevent vastly greater evils."[51] Key to exercising this privilege, according to the textbooks of the day, was that "people must be left free to do such acts when the occasion calls for them *without being checked by fear of legal liability*."[52] That being said, no one contested that "a person who does such acts for his own sole benefit ought to make a compensation for any substantial damage done by him in so acting."[53] While both principles stand in theory, balancing them opposite each other undermines the rationale behind necessity, namely that people facing extreme circumstances might act as best they can without fear of liability if they incidentally harm others. Being required to compensate damages done is a legal liability that one might fear.

While some scholars laud the ruling as properly recognizing a private right that has been infringed, if not violated, others complain that this mixing of theories has stretched the justification to absurdity by trying to transform it into only the right to pay for goods after the fact.[54]

---

50 *See, e.g.*, Note, *Necessity As an Excuse for a Trespass upon Land*, 22 HARV. L. REV. 296 (1909).

51 HENRY T. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW § 425, at 423 (Philadelphia, T. & J. W. Johnson & Co. 1884).

52 *Id.* (emphasis added).

53 *Id.*

54 *Compare, e.g.*, JUDITH JARVIS THOMSON, *Self-Defense and Rights*, *in* RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY 33, 40 (William Parent ed., 1986) (distinguishing between infringing on a right by acting justly but against the right of another and violating a right by acting unjustly against the right of another), *and* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 316 (1926) (arguing that those who benefit from a burdensome act should bear the cost of the act, regardless of need), *and* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166–89 (1973) (suggesting a causation theory, under which the cause of a benefit should be repaid), *with* Stephen D. Sugarman, *The "Necessity" Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, ISSUES LEGAL SCHOLARSHIP, 2005, at 1, 1, 3, 6 (arguing that people should be under a moral obligation to help others in need, and therefore introducing liability to the privilege undermines its purpose), *and* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 980 (1999) (insisting that the doctrine of necessity rightly excludes liability for goods used and that the taking of innocent life can never be out of necessity).

Regardless of the view, there is some serious tension between the standard view of rights and the privilege of necessity.

C. Rights-Based Explanation

In this modern iteration of necessity, the privilege stands clearly on a foundation of the balancing of rights. Even in the early 1900s, matters of private necessity were framed in light of times when "the court must balance the interest of the land-owner against the needs of the trespasser."[55] Such a rights-balancing perspective has only become more prevalent in the last century.[56]

Accordingly, law students are now taught through these cases that there are three possible characterizations of what is called an exception to the right to exclude.[57] First, necessity shifts the right to exclude to the person in need.[58] This explanation clearly reflects a balancing of rights, such that a right to life would effectively rob an owner of a "lesser" right to property. Second, the landowner retains the right to exclude, but under the conditions of the necessity, they can only vindicate the right through a liability rule, rather than a property rule, that is, the owner can assess the value of that trespass and demand that the court enforce payment for that trespass.[59] Rather than simply balancing one right against another, this explanation first assesses the value of each right and then sets them against each other. Third, necessity negates liability in torts but restitution for unjust enrichment is still possible, that is, it renders the trespasser not guilty of trespass, but still allows the owner to recover any value taken by the interloper unjustly.[60] This suggestion does not balance rights, as it is not the value of the right that the owner sues for but rather the value gained through

55 *See* Note, *supra* note 50, at 297. They continued that neither pursuit of dangerous game nor the demands of charity suffices to excuse a trespass, a clear development from the earlier cases. *Id.*

56 Rights balancing has been discussed ad nauseum for the last half-century, and such discussions are usually replete with examples of trolleys, cabins in the woods, or insulin shots. *See* Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204, 206 (1976); Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978); JULES L. COLEMAN, RISKS AND WRONGS 282 (1992). The test cases for what counts for necessity are as endless. It seems to me, though, that the purpose of a privilege is not to present a clear casuistic rule but rather to give a clear principle of law that allows a judge leeway—in an equitable or quasi-equitable exercise of discretion—to recognize a reason not to find a defendant liable for what otherwise would be a trespass. See *infra* Section I.D for further discussion of problems with rights-balancing.

57 MERRILL & SMITH, *supra* note 28, at 366, 369–70.

58 *Id.* at 369.

59 *Id.* at 370; *see* Calabresi & Melamed, *supra* note 15, at 1112 (presenting the distinction between an inalienable property rule and a monetizable liability rule).

60 MERRILL & SMITH, *supra* note 28, at 370.

use of the property. This suggestion also goes beyond an analysis of why the necessity exists in the first place but brings in an equitable remedy to make amends for a gap in law. In the first two instances, the modern understanding of the doctrine unnecessarily limits the privilege of necessity to matters of life versus property, as only then can the claim predictably survive the rights calculus. The third option, however, preserves the older understanding of the freedom of a privilege while also recognizing an equitable need to pay the landowner for unjust enrichment.[61]

D. Inconsistencies and Confusion

Two discrete problems make this modern understanding of using necessity to justify a trespass theoretically unstable. First, this balance between the harm that might come to the landowner—not least of which being the harm of losing his right to exclude—and the needs of the trespasser, under this broad and strict theory of rights, is not just incommensurate, but also unhelpful.[62] Because the rights are incommensurate, this kind of rock-paper-scissors—or rather, life-liberty-property—becomes too complex of a game to play. As a result, rather than struggle through the difficult analysis of what right justifies a wrong, the law collapses a robust set of necessity principles down to the simple matter of letting life triumph and requiring compensation in the case of protecting mere property by using another's property.

Second, as discussed above, the *Vincent* rule introduces a new question of paying for the use of property.[63] While it is clear that *Vincent* demands that the person who uses land out of a need to preserve her own property must pay for the damage to the neighbor's property, it is less clear whether and to what extent this monetization of rights might apply to necessity to protect one's life or liberty interests. On one hand, there does not seem to be a principled reason why the same rule should not also apply to necessity for the protection of life.[64] If people have to pay to sleep in a hotel, why would someone not have to

61 *See generally* EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 693–95 (3d ed. 2020) (discussing the appropriateness of equitable compensation).

62 *See* Thomas A. Russman, *Balancing Rights: The Modern Problem*, 26 CATH. LAW. 296, 296–97, 299–300 (1981) (applying the rights theories of John Finnis and Leo Strauss to the impossible task of weighing opposed rights in the legal context, touching especially on the right to property).

63 *See supra* notes 49–52 and accompanying text.

64 One possible solution could be considering the price to be equitable compensation to prevent unjust enrichment. While this patches the law when balancing between two properties, I contend that it does not resolve the problem when it comes to balancing property against liberty.

pay for sleeping in someone's cabin in the woods, even if out of necessity? Our sensibilities and the traditional desire to avoid discouraging such usages may balk at the suggestion that we would place a price on protecting one's life, but since property and life are both incommensurate, there is no principled reason why this should not also be the case for destruction of property. On the other hand, there is in principle a tension between acting out of genuine necessity and the risk of accepting unknown liability on account of that action. While any price might be acceptable when the other option is death, the possible risk of incurring some massive cost has a chilling effect on those who would otherwise act beyond the scope of the ordinary law in order to protect their inalienable rights. Rights balancing does nothing to alleviate these aporia, but I propose that a medieval understanding of property could provide a tool to clarify the doctrine of necessity and grant it new life.

II. THE ANCIENT PERSPECTIVE ON PROPERTY

Many of the presumptions implicit to necessity are only problematic when property is thought of as an absolute natural right to exclude, either as definitive of property or as the most important stick in a bundle of rights.[65] Often, those two possibilities are presented as the only two options. Such a polar understanding of debates in property theory is a false dichotomy. Focus on exclusion as definitive of ownership does not reflect the reality of what it means to own.[66]

Aristotle's view of property that found support through the Middle Ages defined property ownership without reference to exclusion, distinguishing between use and ownership. This Part will proceed in four steps. First, it will briefly clarify what is meant by the common good, as the Aristotelian tradition hinges on this term. Aristotelian communitarians would limit private property rights based on a sense of the common good, but this term is easily misunderstood and often overused. Second, it will turn to the original Aristotelian root of the distinction between ownership and use and the defining features of private property. Third, it will treat the maturation of the Aristotelian tradition in the High Middle Ages. Finally, it will glance at Locke to find some of these Aristotelian threads still present there.

---

65 *Compare* Baron, *supra* note 12 (affirming the importance of viewing property as a bundle of rights), *with* KENT, *supra* note 12 (recognizing exclusion as stemming from property as a right but not defining the right).

66 *Cf.* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 570 (1823) (reflecting another incident when a dichotomous view of property disenfranchised millions of their use of land simply because they had no concept of a Blackstonian right to exclude).

A. Defining the Common Good

As the term has received much attention and confusion recently, it is worth saying a quick word about what medieval scholars meant when referring to the common good. To be fair to scholars writing about the common good, the concept is terribly simple, but explaining it is not.[67]

In the medieval understanding, the good is that to which all things tend, essentially anything which is desirable in itself.[68] Things that are not desirable themselves are only good insofar as they lead to things desirable in themselves.[69] There are some goods which are personal: my food, my bed, my shelter. The use of these goods is exclusive, such that if one person eats a plate of food, no one else can eat that food and the total food available is diminished. Other goods, however, are of a kind that one can receive the good of the thing without detracting from the enjoyment someone else might take in this good. My enjoyment of the beauty of the Colorado Rockies does not in any meaningful way detract from other people enjoying that same beauty. Anyone can read Tolkien or Dante or Eliot and receive knowledge and illumination from the wisdom and beauty of the writing without in any way preventing another from receiving it. Similarly, the good of the family—peacefulness, security, encouragement in good deeds, the joy of community life, the challenges to virtue—is a common good that each member of the family receives in proportion to how much they participate in family life.[70]

This communicability of the common good is key to understanding the distinction between the medieval Aristotelians and a modern socialist. The common good is different than goods held in common.[71] A stockpile of goods, although available to all, is depleted by those who use them. Joseph in the Hebrew scriptures was working for the

67 For an excellent explanation of the common good, see C.C. Pecknold, *False Notions of the Common Good*, FIRST THINGS (Apr. 23, 2020), https://www.firstthings.com/web-exclusives/2020/04/false-notions-of-the-common-good/ [https://perma.cc/3M4Z-BM6V]. For a less clear explanation of the common good, see PONTIFICAL COUNCIL FOR JUST. & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 83 (2004).

68 DE KONINCK, *supra* note 25, at 7–8 (« Le bien est ce que toutes choses désirent entant qu'elles désirent leur perfection. »).

69 *See, e.g.*, BOETHIUS, PHILOSOPHIAE CONSOLATIONIS [THE CONSOLATION OF PHILOSOPHY], bk. III, prose ix, at 61–62 (Guilelmus Weinberger ed., Hölder-Pichler-Tempsky 1934) (c. 523) (discussing the sacrifice of suffering undesirable things for a perceived good).

70 For an excellent discussion of the distinction between common and personal goods, see *How Common is Your Good? | Fr. Aquinas Guilbeau, O.P.*, THOMISTIC INST. (Feb. 26, 2021), https://soundcloud.com/thomisticinstitute/how-common-is-your-good-fr-aquinas-guilbeau-op/ [https://perma.cc/T2MP-T5ZX].

71 DE KONINCK, *supra* note 25, at 8.

common good by preventing the starvation of Egypt, but he did so by taking the goods the people produced during the years of plenty and storing the surplus as state-regulated but commonly held goods from which the people could draw resources in the years of famine.[72] The fact that Joseph's choice to hold all goods in common was noteworthy suggests that the normal way to provide for the common good of a well-fed nation was by encouraging private parties to feed themselves and use their disparate stores of surplus to feed their workers. It was the exceptional circumstance of the famine which led to Joseph's desperate measure of pooling resources for the sake of the common good. Similarly, the United States Strategic Petroleum Reserves may be held for the common good of dulling the pain of embargo, but the petroleum itself is not the common good, but rather a commonly held good.[73] The ancient philosopher, unlike his Marxist counterparts, was not saying that all goods should be held in common; he was saying that all privately owned goods should be ordered to the common good.[74]

Another earmark of the common good is that working to the common good does not limit or detract from the individual in any way.[75] The common good of a group is precisely common because it "is the good of every member."[76] To illustrate, familial harmony is something that is held by no one member of the family, but which is to the benefit of every member of the family. If a husband acts toward the good of the family, perhaps by remembering to celebrate an anniversary instead of staying out for a few more rounds of drinks with potential clients, this small act of prioritizing serves the common good of the family

72 *See Genesis* 41:33–49.

73 *See* Thomas Franck, *U.S. to Release 1 Million Barrels of Oil Per Day from Reserves to Help Cut Gas Prices*, CNBC (Mar. 31, 2022, 3:23 PM), https://www.cnbc.com/2022/03/31/us-to-release-1-million-barrels-of-oil-per-day-from-reserves-to-help-cut-gas-prices.html [https://perma.cc/86JZ-SHZA].

74 In fact, Aristotle argues that the common good of a given community constitutes that community. *See* ARISTOTLE, POLITICS 1252b29, 1328a26–b1, at 9, 570–71, (H. Rackham trans., Harvard Univ. Press reprt. 1944) (c. 350 B.C.E.). For discussion of the incommensurability of the common good against the individual good in the ancient mind, see Thomas W. Smith, *Aristotle on the Conditions for and Limits of the Common Good*, 93 AM. POL. SCI. REV. 625, 628 (1999); *see also* Eleni Leontsini, The Appropriation of Aristotle in the Liberal-Communitarian Debate 59–60 (Feb. 2002) (Ph.D. Dissertation, University of Glasgow) (ProQuest).

75 In making this suggestion, I am rather squarely placing myself in the distinctive common-good camp. For a discussion of the distinction among the instrumental, aggregative, and distinctive schools of the common good, see J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 20 (2022). I generally think that this position is the most sustainable and true to a broader understanding of a society in which the person is ordered to all other persons, not to his or her independent self-interest.

76 Yves R. Simon, *On the Common Good*, 6 REV. POL. 530 (1944) (book review), *reprinted in* 2 THE WRITINGS OF CHARLES DE KONINCK, 164, 167 (Ralph McInerny ed. & trans., 2009).

which redounds to every member of the family, himself included. In contrast, whenever someone fails to sacrifice personal goods to the broader good of the family, the whole suffers, including whoever failed to put familial happiness before personal gain. Most people can remember a time when one parent might complain that another was being inconsiderate. Both the inconsiderateness and the public declamation of the inconsiderateness would be against the common good of the family and detracted from the happiness of the home. In a like way, whenever an individual decides to focus on his own good in society, perhaps by vandalizing a wall with graffiti, this failure to put the common good first detracts from the overall happiness of each individual, as the beauty of the whole has been harmed.[77]

The common good, thus, cannot be the good of the government taken as an individual (i.e., The State), but rather it is the good of a group such that an increase in the good of the group increases the good of each individual.[78] If the State benefits to the detriment of the citizen, the act is not one of the common good. One cannot work toward the common good with a goal to possess it. To do so, one would be trying to dominate the whole, not participate in it.[79] The dominator may have a great number of individual temporal goods, but he cannot possess the whole of the common good. He can only diminish the common good of all by converting it into his own individual good. It is against this backdrop of a rightly understood common good that we can turn to Aristotle's understanding of property.

---

77 For further discussion of the universality of the common good, see DE KONINCK, *supra* note 25, at 15. Incidentally, this is why beautiful public works of art and architecture are for the common good. A basilica is an excellent example of this benefit to the common good. No one owns the basilica, at least not in the exclusive sense of modern property law, but everyone can experience and receive the beauty of the basilica. The author has had many conversations with homeless persons who love churches because they are places that they know they have the same right to as anyone else. While the lives of the homeless can be very rough between the frequent need to beg and the prevalence of violence, not to mention the lack of a place to call home, many of the homeless with whom I have spoken over the years find great solace in the beauty of basilicas and the reminder of a shared humanity and a higher purpose that they can find there.

78 That being said, the purpose of all governments in the classical understanding is the common good and the flourishing of the individual in the common good. *See, e.g.*, Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 418 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022)) (pointing out, among other maxims of the classical tradition, the principle that the purpose of law, its final cause, is "to promote the common good of the polity for which it is a law").

79 *See* DE KONINCK, *supra* note 25, at 17.

B. Politics and Ethics

While Aristotle's account of property rights can be found across his works, the strongest and fullest account lies in the *Politics*.[80] There, Aristotle lays out first that the purpose of property is to serve as a tool for the purpose of life, such that property in general is a collection of tools for the sake of household management.[81] Not only is property necessary for household management but it is, in a real sense, a part of the household.[82] Aristotle frequently defends a need for private property, both for life in general and specifically in order that human beings might have a good life.[83] Among other arguments, he suggests that since the goal of life is the fullness of happiness, it behooves persons to have many pleasing things, and the absence of a pleasing thing prevents us from a degree of happiness.[84]

Of greater import, though, Aristotle further argues that self-actualization and use of rational judgment is what makes the person happy. One cannot exercise this rational judgment without having things to govern. As such, property is necessary for the fulfillment of the human person because only then does the person have things to govern with his reason.[85] Despite concluding that private property is necessary to a good society, Aristotle further suggests that while ownership and care of the property necessary for the household should be private, use

80 A base assumption in Aristotle is the existence of slaves in a society, and that some aspect of personal property includes other human beings. While this deplorable perspective also exists in the *Politics*, I have concluded after exacting scrutiny that the underlying philosophical perspective does not logically rely on a cultural presupposition of slaves as one kind of property, so the philosophy survives the taint of a less progressive culture.

81 *See* ARISTOTLE, *supra* note 74, 1253b24–25, at 15 ("Since, therefore, property is an aspect of a household and the acquisition of property is an aspect of household management (for a lack of property renders impossible both life and a good life) . . . so too is property a tool used for the purpose of life, and property overall is a collection of tools." (translated by author)).

82 *See* Fred D. Miller, Jr., *Aristotle on Property Rights*, *in* 4 ESSAYS IN ANCIENT GREEK PHILOSOPHY: ARISTOTLE'S ETHICS 227, 227 (John P. Anton & Anthony Preus eds., 1991) (arguing against Finnis and many others that there is a concept that could be analogized to a right in Aristotle, specifically in the realm of property, as Aristotle's definition meets all of the earmarks of a modern property right). As I am not taking up the question of whether a property interest can be called a right, nor whether that right inheres in a subject, I decline to comment on whether Finnis or his opposition hold the correct view on the question of whether Aristotle recognizes rights.

83 *See* ARISTOTLE, *supra* note 74, at 1295b30–1296a12, at 330–32.

84 *See id.* at 1253b25, at 14.

85 *See* ARISTOTLE, ART OF RHETORIC 1371b22–23, at 120 (Gisela Striker ed., Gisela Striker & J.H. Freese, trans., Harvard Univ. Press rev. ed. 2020) (c. 350 B.C.E.); *see also* Miller, *supra* note 82. Aristotle makes a similar argument with regard to the exercise of the virtue of generosity. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 1178a28–29, at 621 (H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 350 B.C.E.).

should be common. By this, he means that each private owner makes some things useful to his friends while other things he makes useful to all in common.[86]

Although it is unclear whether this generous sharing of privately owned goods is truly voluntary or a matter of government coercion, Aristotle's arguments from generosity, that people should be able to enjoy free sharing of their goods in the manner of friends, would suggest that this private ownership-common use paradigm ultimately leaves the decision of how best to dispose of goods to the individual landowner.[87] In fact, insofar as Aristotle never denounces private property, for him to be consistent requires that he leave that authority to alienate in the hands of the landowner: what defines ownership for Aristotle is not the capacity to exclude but the capacity to alienate.[88] This definition of ownership corresponds well to the American understanding of sale. One can only sell or give away what one has. If an owner cannot alienate his property, Aristotle would argue that the property is not truly his.[89]

In the end, Aristotle's view of property suggests that private owners should willingly, but readily, grant usage of their private property, excluding others from the property only as good management of the household would require. As such, Aristotle has a developed and robust theory of private ownership but retains that use should not be fully exclusionary or even predominantly so.

C. The Aristotelian Middle Ages

With the rediscovery of Aristotle and the contemporary development of the university in the eleventh century, a Christian communitarian Europe added a gloss to Aristotle that subtly transformed this understanding of property and the common good.[90] Medieval

86 ARISTOTLE, *supra* note 74, at 1263a33–35, at 87 ("For indeed those who owned property privately should make that which is theirs useful to their friends, and declare these things to be common." (translated by author)).

87 *See* Robert Mayhew, *Aristotle on Property*, 46 REV. METAPHYSICS 803, 820 (1993). *But see* Martha Nussbaum, *Aristotelian Social Democracy*, *in* LIBERALISM AND THE GOOD 203, 232 (R. Bruce Douglass, Gerald M. Mara & Henry S. Richardson eds., 1990) (arguing that Aristotle suggests that the state should coerce the individual owner to offer their land for the common use).

88 A.R.W. HARRISON, THE LAW OF ATHENS: THE FAMILY AND PROPERTY 202 (1968).

89 *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 155–56 (3d ed. 2007) (discussing Aristotle's focus on the community). *But see* Christof Rapp, *Was Aristotle a Communitarian?*, 17 GRADUATE FAC. PHIL. J. 333, 336 (1994) (arguing that he was not, against MacIntyre); Leontsini, *supra* note 74, at 273 (arguing that both the communitarians and the liberals are wrong to put Aristotle in their camp).

90 *See* Hans Peter Broedel, *The Rise of Universities and the Discovery of Aristotle*, *in* HISTORY OF APPLIED SCIENCE & TECHNOLOGY 191, 193–94 (Danielle Skjelver, David Arnold,

philosophers framed the community's divided care for communal lands as a divine command to steward the earth, but the communal use of individually owned property remained undeniably Aristotelian.[91] As such, medieval philosophers understood that human beings must be good stewards of creation, to care for the earth and increase the goodness and beauty of the earth and be better ready to "come to the aid of those who are in need."[92] The purpose of property in general lies in the human person's capacity to order the things of the world and use them for the benefit of the human person.[93] It is important to note that this explanation extends only to relationship between the human person and the natural world in which he finds himself. Nature for the medieval philosopher is for the betterment of human society.

Medieval philosophers understood that originally all things were common property, and that any property which is held by an individual

---

Hans Peter Broedel, Sharon Bailey Glasco, Bonnie Kim & Sheryl Dahm Broedel eds., 2021). This period is particularly important to understanding American law because it is the root both of law schools with the founding of the University of Bologna, *see id.* at 191–92, and the common law in England with the formation of the King's Court after the Norman Conquest and the University of Oxford. *See Origins of Common Law*, USLEGAL, https://commonlaw.uslegal.com/origins-of-common-law/ [https://perma.cc/X42W-CYX7]; GEORGE BURTON ADAMS, COUNCIL AND COURTS IN ANGLO-NORMAN ENGLAND 1–2 (1926); *History*, UNIV. OXFORD, https://www.ox.ac.uk/about/organisation/history/ [https://perma.cc/DV6Y-KKJF] (placing the founding of teaching at Oxford in 1096).

91 Medieval philosophers would start with scripture, such as "the Lord's is the earth and its fullness," *Psalm* 24:1 (Revised Grail Psalms), or "to the children of men, he has given the earth," *Psalm* 115:16 (Revised Grail Psalms), or "God blessed [the man and the woman], and God said to them, 'Be fruitful and multiply, and fill the earth and subdue it,'" *Genesis* 1:28 (New Revised Standard Version, Catholic Edition). The philosopher would then use this as a springboard into philosophical considerations. In a medieval philosophical conception of the world, God is rationality itself, and so any act of God corresponds to reason, and so can be reasoned about. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE I Q. 1 art. 1 (Leo XIII ed., Polyglotta 1888) (c. 1270). Throughout this note, I will use Aquinas as an exemplar of the medieval philosopher mainly because he has the most works extant and because the endorsement of Aquinas by Pope Leo XIII has led to a greater body of scholarship on Aquinas than on any of his contemporaries. *See* POPE LEO XIII, AETERNI PATRIS: ON THE RESTORATION OF CHRISTIAN PHILOSOPHY § 17 (1879) ("Among the Scholastic Doctors, the chief and master of all towers Thomas Aquinas . . . ."). Perspectives similar to Aquinas's can be found in other thinkers including John of Salisbury and Marsiglio of Padua, *see* Cary J. Nederman, *Freedom, Community and Function: Communitarian Lessons of Medieval Political Theory*, 86 AM. POL. SCI. REV. 977, 978–91 (1992) (discussing the communal functionalism of John of Salisbury and Marsiglio of Padua), therefore I do not think it is reductive to attribute this perspective to Medieval thinkers more broadly.

92 AQUINAS, *supra* note 91, at II-II Q. 66 art. 7 (translated by author).

93 *Id.* at II-II Q. 66 art. 1 ("External things can be considered . . . as regards their use, and in this way, the human person has natural dominion over external things, because, by his reason and will, he is able to use them for his own profit . . . . It is for this reason that [Aristotle] proves in the *Politics* that the possession of external things is natural to the human person." (translated by author)).

was, at some point, taken from the communal goods and entrusted to an individual to steward.[94] Even when stewarded, though, "temporal goods, which have been divinely conferred to a person, are his according to ownership, but according to their use, should not be his only, but also for those others, who are able to be sustained out of that which is superfluous of the goods of that person."[95] A person may own the goods of the earth, but cannot exclude people from use of these goods when another is in need.[96]

Rather than leading to a full communist—or even socialist—perspective, this led medieval society to a conclusion that it is necessary for there to be individual property for three reasons. First, a person is "more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community."[97] Second, private property orders human affairs so that there is less confusion.[98] Third, the capacity to be satisfied with one's own things leads to a more peaceful society overall.[99] Because personal property is only for the sake of good management, personal property only affords individuals

94 *Id.* at II-II Q. 66 art. 2 (attributing personal property to positive law as a legitimate and necessary division of the goods of the earth).

95 *Id.* at II-II Q. 32 art. 5 (translated by author). Note that Aquinas specifies here that the superfluous belongs to the needy other. There was a sense in the Middle Ages that the property of the individual necessary to their well-being is, in a matter of speaking, an extension of the person following Aristotle's sense of the household being an extension of the person mentioned above. *See supra* Section II.B. It is for this reason that Dante punishes thieves by condemning them to spend eternity shifting from humans to serpents and back again, reflecting how they, in life, refused to respect the bounds of the identities of others, so in perfect poetic justice, their own flesh would no longer obey its proper bounds. *See* DANTE ALIGHIERI, THE DIVINE COMEDY: INFERNO cantos XXIV–XXV, at 216–35 (Allen Mandelbaum trans., Bantam Classic ed. 1982) (c. 1314).

96 This duty inherent to ownership was reflected in the works of Gratian and in the law, preaching, and writing of the period. *See* Elaine Clark, *Institutional and Legal Responses to Begging in Medieval England*, 26 SOC. SCI. HIST. 447, 451 (2002) ("The duty of property holders to help the poor mattered greatly to clerics familiar with Gratian's *Decretum* (1140) . . . .").

97 AQUINAS, *supra* note 91, at II-II Q. 66 art. 2 (translated by author); *accord* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("Freedom in a commons brings ruin to all."). For a modern discussion of the solution for the problem of the commons being local custom, see ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (arguing that local custom often proves the best governor of the commons).

98 AQUINAS, *supra* note 91, at II-II Q. 66 art. 2 ("[H]uman affairs are conducted in more orderly fashion if each person is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately." (translated by author)).

99 *Id.* ("[A] more peaceful state is ensured to humanity if each person is contented with those things which are his own." (translated by author)).

the power to procure and dispense the goods of the earth, not to exclude others from the use thereof, except perhaps as incidental—necessary and proper—to that power to procure and dispense.[100]

This kind of ownership, however, does not lead to an individual right to exclude others from the use of the goods which are his own. Rather, with respect to use, a person must "possess external things, not as his own, but as common, so that . . . he is ready to communicate them to others in their need."[101] It is worth noting that to the medieval mind, this was not merely a morally laudable action, but rather a matter of command, such that anything that a person has in surplus "is due, by natural law, to the purpose of succoring the poor."[102] By placing this command as a precept of natural law, the implication is that this matter of conceiving of property—limited to the owner for the sake of good management but still for the use of all—is one that strikes to the heart of what it means to be human. Management or stewardship of a property, to be efficacious, must include some capacity to limit access to the land, but exclusion from property, as part of the acts permitted to an owner, stems from a recognition that the "unmolested use of the land" allows for the better stewardship of the land.[103] The land, given to all people and only divided by human convention for the good management thereof, remains ordered to the common good.

D. The Lockean Remnants of Communitarian Property

Many of these preconceptions about property persisted into the Enlightenment and were still alive at the time of the American Revolution. The American system of property law preserved the early Enlightenment emphasis on the radical independence of the individual and "froze [the Enlightenment] in time[] and kept [it] alive in [its] purest form until today."[104] But Lockean principles are not so removed from the Aristotelian Middle Ages to be irreconcilable. John Locke might

100 *Id.* (Man has "power to procure and to dispense [external things]. And to the extent that a person can procure and dispense things, a person has license to possess that which is his own." (translated by author)).

101 *Id.* (translated by author).

102 *Id.* at II-II Q. 66 art. 7 (translated by author). Aquinas goes on to say that the effect of this rule is that when someone takes the goods that are owned by another in superabundance, not only is the act permissible, but it does not even amount to theft because by right, use of those goods belongs to the one who needs, not the one who owns. *Id.*

103 *Id.* at II-II Q. 57 art. 3 ("If a particular plot of land is considered absolutely, it has nothing which renders it unto one person more than unto another person, but if it is considered according to the opportunity to cultivate it and use the land peaceably, there is a certain practicality that it should belong to one person and not another, as [Aristotle] shows in the *Politics*." (translated by author)).

104 RIFKIN, *supra* note 3.

not agree with the extent of the ownership-use distinction, but there are aspects of Aristotelian theory in his work.

For example, Locke started with the same presumption that "the earth and its fruits" are originally given "in common to men for their use."[105] The only thing that a person owns by nature is "his own person; this nobody has any right to but himself," which is why it is always violence to a person to harm their body without permission.[106] By dint of using the body in labor, Locke proposes that a person lays claim to aspects of that common state of property and permits a person to exclude others. This emphasis on labor and exclusion is stronger than the conclusions of the Aristotelian, but his reason for such exclusion still hinges on the same realization that "tis labour indeed that puts the difference of value on everything . . . the improvement of labour makes the far greater part of the value."[107] Essentially, because a person values more the land that he himself works, it is best for the continued optimal stewardship of the common goods of the earth that individuals have ownership of the land that they work. The result of this acquired right to exclude from land is the stark claim that "no one ought to harm another in his life, health, liberty, or possessions."[108] Here, Locke moves far beyond the earlier thoughts on property by placing "the right to possessions on the same level as the right to life, health, and liberty."[109]

Locke goes further than the ancient mind would by putting more of an emphasis on exclusion from even the use of the common land, but his starting point of common land and the reason for both private property and exclusion as part of that private property preserves vestiges of the Aristotelian understanding of a communitarian pragmatic foundation for private property. When it comes to the common-law doctrine of necessity, however, the Lockian move toward exclusion proves inimical to any robust theory of why one person's need should trump another person's property.

III. A STEWARDSHIP THEORY OF PROPERTY

This forgotten Aristotelian framework for property, as glossed by medieval philosophers, could breathe new life into the limited

105 Karen I. Vaughn, *John Locke's Theory of Property: Problems of Interpretation*, LITERATURE LIBERTY, Spring 1980, at 5, 7.

106 JOHN LOCKE, *The Second Treatise of Government, in* THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 1, 12 (Tom Crawford ed., Dover Publ'ns 2002) (1690).

107 *Id.* at 18.

108 *Id.* at 3.

109 Vaughn, *supra* note 105, at 6.

privilege of necessity as applied to trespass to property. As outlined above, the current doctrine fixates on balancing the life of the interloper against the property concern of the landowner. To move away from a battle of the rights to undergird property, I propose a decisional theory[110] that draws on the Aristotelian distinction between use and ownership. Such a reimagination of property requires moving a couple steps away from the American roots in a Lockean vision of property. The very suggestion is stark, as to suggest any other conception of property strikes at the core of why the United States broke from England in the first place.[111] As such, my proposal is very modest. I am not suggesting that this theory replace the Lockean theory in toto. Rather, I only propose that it can provide a more consistent and generally applicable decisional theory to aid judges and advocates using the defense of necessity. After pointing out this primary usage, I will gesture at a couple of other potential applications of this broader decisional theory.

This understanding of property, which I will call the stewardship model of property, would be one under which ownership is entirely private but use is at least potentially public. The sovereign owner under such a system would become the sovereign steward. The primary aim of the individual property steward would be to care for the goods of the earth entrusted to him for the good of all. The owner would still seek his own good, but that good would be properly recognized as his participation in the common good. Unlike the individualistic property conception of a right-claim good against the world, this communitarian conception of property would approach property as an interdependent right to use wisely the property you have for the good of all.[112] Under such a system, exclusion would not be the defining right of property but rather alienation. Exclusion would remain instrumental, but not primary. In order to support the common good through the

110 *See* Barrett, *supra* note 26, at 1934–35 (suggesting that judges can adhere to precedent while changing the underlying decisional theory, and that judges in fact do so frequently).

111 *See* Sam Spiegelman & Gregory C. Sisk, Cedar Point*: Lockean Property and the Search for a Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 171–73.

112 Although all property would be ordered to a united common good, that single common good has many valences. Essentially, some people may view that common good and the means to it differently, without utterly departing from that common good. *See, e.g.*, Nederman, *supra* note 91, at 977–78 ("Unquestionably, communitarianism is committed to the view that a single common good exists; it need not (logically speaking) also be committed to the view that this good will be understood or applied identically by all persons. Instead, it seems plausible to adopt the view that the realization of any common good is conditioned by circumstance, in the sense that different persons occupying divergent life situations will conceive of the common good in a manner relevant to their social needs and surroundings.").

best stewardship of one's property, one has a need to exclude interlopers who do not have a clear and valid cause to be there. Such exclusion could remain relatively extensive. The steward could exclude from those things that the sovereign steward needs for her continued health and well-being—such as the fields or places where she reaps the goods from her property—or even exclude for the simple reason that others do not have a need to be on her land. As sovereign steward, one would have a strong presumption of first right to use, but that right would be defeasible by a fittingly strong counterclaim of need for use.

In order to win a claim against the steward, counsel for the interloper would have to argue on grounds other than competing rights. Each party would have an equal claim to the right to use the land, offset only by the steward's presumption of first right. All that the counsels would have to prove is that the gross benefit to the common good would be greater if the trespass is permitted for this cause. Since the common good is gravely wounded by the removal of one of its members,[113] proving that the common good would be harmed more than benefited by denying the right of entry to save a life would be simple. There would be no question of compensation, à la *Vincent* because the goods used are for the use of all, not taken from one person to give to another. An exception could be made if that usage struck to the necessities which the steward required for the good of his family. One possible limitation could be a showing that both parties are equal participants in the same common good. As the common good is the good which is common to a particular group—concentric circles such as the common good of the family, of the town, of the county, of the state, of the nation, and of the world—there is room to exclude from the goods of the family those who are not part of the family. Those who are in a certain circle of the common good thereby may participate in the common good of that group, while those who do not participate in that community and contribute to its common good also might be excluded from receiving benefits from its common good.[114] To show membership in a group which holds the contested thing in common would look much like showing jurisdiction or venue, but would be a relatively low bar, depending on the use claimed by necessity.[115] If an

113 *See, e.g.*, IT'S A WONDERFUL LIFE (Liberty Films 1946).

114 For example, if a family keeps a German Shepherd primarily for the enjoyment of their children, that common good of enjoyment belongs to the family. As such, if an interloper were to come onto their land to enjoy the German Shepherd's soft fur, he could still be excluded because that good is not common to the community as a whole but rather to the family in particular, and he is not a member of that common group.

115 Naturally, voluntary assistance to those in need would remain preferable, but in the event of some genuine necessity, this low bar of involvement in the community might look something like the registration of the local poor that happened throughout the late Middle

interloper claims a use that is ordered to a narrower common good, such as the common good of the family of the landowner, and the individual is not a member of that family, this bar could provide a lower limit to the most absurd claims.

To boil down the claim for private necessity, there would be four questions asked upon the proposing of necessity as a defense against a trespass to land. First, do both parties participate in the same community, to which common good the property in question is ordered? Second, what would the harm be to the common good for refusing entry and marking this a trespass? Third, how does that balance with the benefit added to the common good by the transaction? Fourth, as a mitigating factor on borderline cases, is the required good part of the property essential for the continued health and well-being of the sovereign steward or merely part of the superabundance of the steward?

Such would be the analysis for private necessity, but what of public necessity? Public necessity is a less common defense at common law.[116] As public necessity functions as an aggregation of private necessity to the needs of the whole society,[117] the logical focus of this Note has been private necessity. Public necessity claims would similarly be restructured under this stewardship model. Rather than being a utilitarian calculus of aggregated rights, the stewardship model would consider the common good. As such, the government official exercising the choice to use a property for public necessity would have to show the harm to the common good which the sovereign steward's denial of entry would cost society. Then the public official would have to show actual necessity, akin to strict scrutiny.[118] The claim would be that in the totality of the circumstances involved, there was no similarly available means that could have the equal possibility of alleviating that

---

Ages in England. *See, e.g.*, Marjorie K. McIntosh, *Local Responses to the Poor in Late Medieval and Tudor England*, 3 CONTINUITY & CHANGE 209, 228–29 (1988) (showing how limited resources for individual communities in the late medieval period led to a registration of the poor so that they could glean or receive alms from the particular community where they lived without any community bearing too much burden).

116 *See* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 994 (1999).

117 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 98–100 (7th ed. 2013).

118 Strict scrutiny requires a compelling government interest that is narrowly tailored to the law in question. Actual necessity would be a slightly higher standard even than strict scrutiny, but it would be similarly important as "the government is impinging upon someone's core constitutional rights," here the right to property, and therefore "only the most pressing circumstances can justify the government action." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944) (first suggesting the strict scrutiny test)).

grave harm to the common good. The official would have to show that this person's stewardship for the sake of contributing to the common good, if respected, would in this case harm the common good. This failure would justify a public official with charge to care for the common good in her action to dissolve that stewardship for a particular purpose.[119]

Because this reading of the necessity defense would not be a balance of the rights of the sovereign owner, one of the great benefits of this shift in perspective would be that lesser claims to necessity would be admissible. Such claims could include ancient ones such as gleaning for the poor, chasing off dangerous interlopers or beasts (akin to castle doctrine but for your neighbor's land), and the homeless seeking shelter in unused houses. The poor person gleaning would imply entry onto the land of a sovereign steward, triggering the test. As a preliminary matter, the interloper would have to show that she belongs to the same community as the farmer, with respect to the common good of feeding the community. If she can pass this liminal requirement, the court would look at the harm to the common good in refusing this entry. The harm here could be encouraging a selfish society or endorsing that the poor die and do so quickly to "decrease the surplus population."[120] Or it could be something more utilitarian, such as requiring the poor to become wards of the state, requiring the creation of state programs to a much higher cost than simply letting the poor take what they need from the surplus of a harvest. The next question would look to the contribution of each to the common good. The farmer provides greatly to the common good, but the gleaning in this instant would not detract from that contribution. As for the pauper, there is no clear indication of what present or future contribution that the pauper may make to the common good without more information, so the presumption could be the inherent dignity of that human person: regardless of any utilitarian view of what good she will add to society, her existence is benefit enough to presume some contribution to the common good. As such, given the grave harm to the common good of denying such a claim, and especially as the gleaning would be from the farmer's surplus, the gleaning would be permitted. The same analysis could be done for each other example.

---

119 As in 3 BLACKSTONE, *supra* note 25, at *212–13, the scope of this license would be limited to the particular purpose, such that it would become an unjustifiable taking if the official's actions were to extend beyond the scope of what was needed to protect the common good. *See, e.g.*, Surocco v. Geary, 3 Cal. 69, 74 (1853) (holding that a public official was justified in destroying a private house for the public good of preventing a fire from destroying the city).

120 CHARLES DICKENS, A CHRISTMAS CAROL 17 (The Floating Press 2009) (1843).

IV. FURTHER IMPLICATIONS: PROPERTY DOCTRINE, SOCIETY, AND TAKINGS

The Aristotelian communitarian understanding of property stems from an era when human beings understood from harsh experience that we have to band together for survival. As a result, it recognizes a deep need that we have for one another and the grave effect that the failure of one person to assist the community has on another person. The fact of this interdependence still exists today, and yet our law and philosophy of property reflects an image of the radically independent individual. If American legal theory were to adopt an older understanding of ownership and recognize property to be primarily for society, stewarded by individuals for the sake of the whole, there would be broader implications for the way society approaches relationships, particularly in constitutional takings and when approaching traditional knowledge.

A. Implications for Takings

As a property concept logically related to necessity,[121] takings recognize that there are some public needs that can trump the private right to property, even if those needs do not rise to a strict necessity. Although the United States was founded at a time when the Lockean conception of the sovereign right to property was the heart of the contemporary debate and education,[122] the primacy of the government remains.

Like matters of necessity, takings are justified as a balancing of rights. Takings are distinct from public necessity insofar as the bar for a public necessity is far higher, especially since the category of recipients of a taking has been broadened far beyond the public use.[123] Despite the distance between the two doctrines in terms of application, the underlying theories are closely related.

Takings broaden necessity to common goods that are desirable but not strictly necessary. The Supreme Court's doctrine on takings shows a gradual broadening of what counts as a taking. After declaring in *Horne* that a physical taking of goods through regulations constitutes a physical taking,[124] the Supreme Court clarified in *Cedar Point Nursery v. Hassid* that a taking of any full thing, even if it is simply an easement

121 *Reasons for Eminent Domain: Justification of Necessity*, FINDLAW (Jan. 9, 2019), https://www.findlaw.com/realestate/land-use-laws/eminent-domain-justification-or-necessity-requirement.html [https://perma.cc/R42P-UM9R].

122 Spiegelman & Sisk, *supra* note 111, at 167.

123 *See* Kelo v. City of New London, 545 U.S. 469, 485–86 (2005).

124 Horne v. USDA, 576 U.S. 351, 352 (2015).

for a third of the year, constitutes a taking, and the government must provide just compensation.[125] It would seem that, under the *Penn Central* test as applied in *Tahoe-Sierra*, the denominator for a regulatory taking must be a whole thing, both in time and space.[126] That being said, in each of these cases, the thing taken was not, strictly speaking, necessary to the government, but the government nevertheless suggested a need to take the property for some broader purpose. Since this Supreme Court's doctrine builds upon the underlying common law, the jurisprudential theory undergirding necessity may influence the analysis of takings that do not rise to the level of a necessity.

If under the stewardship theory of property a case of public necessity is no longer a matter of recognizing the triumph of a public need over a private right but rather as acknowledging that stewardship of the land now stands in the way of its purpose in the common good, what would distinguish that necessity from a constitutional taking?[127] I propose two possible approaches: a taking could be (1) the government paying to relieve an individual of stewardship which now would harm the common good or (2) the government paying to transfer stewardship to a new steward who would better serve the common good. Under the first of these options, a taking would simply be the recognition of a public necessity, but one not immediately required. Because of the temporal delay in the taking, the government could therefore pay the individual for the value of eliminating that person's preferential usage of the land. The government's showing for this would be the high bar that this person's continued stewardship is actively harming the common good, either by a negative effect like blight or simply by stagnating a resource that could be ameliorative. This would, in a sense, monetize the Aristotelian conception of the right to own being the right to alienate. Under the framework that Calabresi and Melamed suggested, the court would assess the value of that stewardship right, the personal and common good benefited by it, and set a standard price.[128] It is likely that a fair market value would probably still suffice.

The other option would keep the takings doctrine much closer to what it is now. Under that option, a taking could be something different from necessity entirely: recognizing not a need but an instance in which the common good demands a shifting of the stewardship of the

125 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

126 *See* Penn Cent. Trans. Co. v. New York City, 438 U.S. 104 (1978); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326–27 (2002).

127 As said previously, this shift in decisional theory need not be extended to takings, but if it were to be so extended, these two options could potentially help distinguish a taking from public necessity.

128 *See* Calabresi & Melamed, *supra* note 15, at 1116–17, 1125–26.

goods of the earth for the sake of that common good. The government in this instance would need to show that the common good would be greatly benefited by the shift in stewardship, but the harm to the common good, including the common good of trust in the fairness of government, would be minimally harmed. The former theory, like necessity, would require a showing that the continued exclusion from land is to the detriment of some common good. The latter would only require a showing that there is some way that the land could better serve the common good. The bar would be high in either instance, but far higher in the first. Given current jurisprudence, the latter stands more in line with the holding in *Kelo*, while the former gets closer to the dissents.[129]

To illustrate, consider the facts of *Kelo*: the government has taken a large swath of individual family homes in order to utilize the land more economically by selling the land to Pfizer for its new plant.[130] A court working under the theory that a taking is a recognition that the common good is harmed by the continued state of affairs would require the government to prove that the current stewards of the property, by refusing to sell to Pfizer, are working to the detriment of the whole. In contrast, under a decisional theory motivated by maximized usage of the goods of the earth, the showing would simply have to be that the potential increase to the common good would be far greater than the potential injury to Kelo and to the common good of trust in government and the general welfare. The government would likely fail the test under the first theory but succeed under the second.[131] Either theory, though still a multifactor balancing test, recognizes the complexity of property as weighing the incommensurate benefits and harms of using unique resources and provides a clearer approach, closer to comparing apples to oranges than comparing property to freedom.

B. Potential Implications for Traditional Knowledge

Traditional knowledge provides a particular difficulty to the law and economics approach to property. Traditional knowledge in the intellectual property field refers to techniques, methods, and practices that indigenous groups have used without recording, disseminating, or sharing for centuries. For instance, William Fisher suggests in his article on *The Puzzle of Traditional Knowledge* that there is a grave abuse of indigenous tribes who lose the potential profits from the Western

129 *See* Kelo v. City of New London, 545 U.S. 469 (2005).

130 *Id.* at 474.

131 More work would have to be done to better understand the importance of trust of government, but likely the bar would be higher than that.

distillation, isolation, and monetization of traditional remedies.[132] The question is how to protect the property interest that these tribes have in their traditional knowledge. Do they even have a property interest in that knowledge? How broadly known does it have to be before they lose that interest?

More even than the comparable claims of right between the life of one individual and the property rights of another, the vague claims of first discovery of a tribe that has no conception of the monetized use of western medicine are utterly incomparable to an insubstantiable claim of the overwhelming utilitarian benefit of isolating and distributing a potentially lifesaving drug. There is no way to compare those two claims when taken under a rights-balancing approach: one is vague and the other is entirely hypothetical, by definition, except ex post. Under this stewardship theory of property, however, there is some chance to reconcile these incomparable claims.

When considering traditional knowledge, we could apply the same analysis as private necessity. Consider a case similar to those mentioned by Fisher: traditional knowledge of a plant that could be used to treat serious symptoms of some illness that is spreading rapidly to the global population and threatening lives. We first ask whether both the indigenous tribe and the industrious western explorer participate in the same common good. Here, we can answer in two ways. First, both parties, as members of the same human species, participate to some extent in the common good of the whole species. But second, if the question is whether the indigenous tribe participates in the prosperity and general benefits of the modern society, the answer there may be no. In order, then, to continue with the analysis, there would need to be some action on the part of the West to ensure that the tribes have an opportunity to participate in the same common good. This seems to be Fisher's principal concern: the disenfranchisement and exploitation of tribes.[133] If there were an accepted guarantee of participation in the common good of the West—a fuller recognition of the humanity of the people involved—the analysis could proceed to consider the remaining prongs of analysis.[134]

---

132 William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L.J. 1511, 1514–20 (2018). He goes on to discuss two other matters: one which amounts to a native trademark claim bolstered by religious liberty concerns and another quasi-copyright claim on production of native rugs. Since those are two different topics, I make no comment on those here.

133 *See id.* at 1515.

134 For reference, the prongs are: 1) Are both the interloper and the steward in the same community such that they hold the same common good? 2) What would the harm to the common good be if the trespass is enforced? 3) What would the benefit be to the common good be if the trespass is permitted? 4) For borderline cases, would the gift of the trespass hinder the good of the steward or is it from the steward's surplus? *See supra* Part III.

If we were to continue to that analysis, in this case, the potential harm to the common good would be the dilution of the traditions of these tribes by spreading the intricacies of their practices to the whole world, diminishing the beauty of the tapestry of diversity in the human condition. The contrasting benefit to the common good, however, would be a vast increase in the health of the whole. As a mitigating factor, the medicine taken would presumably be minimal and out of the tribe's surplus.

The overall permissiveness of taking this traditional knowledge, therefore, would rise or fall first on the question of participation in the same common good, but second on precise details of how much the way of life of the tribe would be harmed, and with it, the common good interest in the diverse beauty of humanity. Regardless of how the analysis would resolve, the benefit of the analysis comes from splitting out the factors and presenting them for clear consideration, a difficult move when a topic is so passionately felt.

CONCLUSION

Any claim that works against the rights of a sovereign owner is bound to get heated, especially in a nation founded when sovereigns exercised too much control over the people's property. If the analysis is a matter of dueling rights, the courts are faced either with the prospect of a desiccated husk of a once-robust privilege or a balancing test impossible to apply impartially. The Aristotelian solution, founded in a sense of the common good and a narrower understanding of ownership, presents one possible way to rethink the subject. Under this stewardship theory of property, private goods are maintained, but not at the expense of public needs. Thus, a stewardship model of property provides clarity to the necessity privilege, which otherwise can be a contentious and convoluted area of property law.