"Land-Use Torts in Austrian Economics and Law and Economics"

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To conference participants:

For my contribution to the Leeson-Zywicki volume, I hope to adapt and focus on an angle different from an article I've previously written. I am attaching the most relevant portions of that article—"Jefferson Meets Coase."

The main intention of "Jefferson Meets Coase" was to introduce American property and tort professors to a set of natural-law and –rights principles that informed American common law in relation to trespass, nuisance, and land-related negligence. I chose those doctrines because they provide the examples on which Coase relied in "The Problem of Social Cost." In the course of introducing natural-law and -rights principles, I compared their prescriptions to the prescriptions given by mainline law and economic authorities in tort (which I called "accident law and economics"). I also made a few side observations pointing out that, even though natural-law and -rights principles come out of a theoretical tradition extremely different from economic theory, in practice those principles stress themes quite similar to the main themes of Hayekian economics: subjectivity of value, dynamic change, and the limitedness, dispersion, and uncertainty of empirical knowledge in practice.

For my contribution to the Leeson-Zywicki volume, I'd like to expand on those side observations about Hayekian economics from "Jefferson Meets Coase." I'd like to write a standard chapter-length essay explaining how the law and the policy implications from the land-use torts relate to criticisms Hayekians have made of law and economics.

To that end, I'm attaching an outline of the essay I have in mind. I hope the outline and the excerpts from "Jefferson Meets Coase" give an idea where I'd like to go and provide enough focus for suggestions and criticisms. You may infer from the fact that my outline is just a couple of pages long that this essay is very gestational. I welcome all comments or criticisms about how to restructure or revise the basic idea.

ERC

Outline of

"Land-Use Torts in Austrian Economics and Law and Economics"

Eric R. Claeys

I. Introduction

II. The Austrian Critique of Mainline Law and Economics

In the 1970s and 1980s, economics scholars with backgrounds in Austrian economics argued that the emerging field of law and economics was too perfectionist, too optimistic that judges and regulators would be able to discern and implement efficient results in practice. This section will illustrate with Rizzo, "The Mirage of Efficiency" (1980) and Cordato, *Welfare Economics and Externalities in an Open Ended Universe* (1992).

Austrian critics launched three main criticisms: Mainline law and economics underestimated (1) the subjectivity of value; (2) the extent to which dynamic change is the norm and not the exception in assignments of rights; and (3) the extent to which knowledge about assets is limited and dispersed unevenly. In common law fields, some Austrian critics (Cordato, restating other scholars' arguments) suggested an alternative: Courts should focus on enforcing rights, contracts assigning those rights, and simple and general rules of law, consistent with principles of justice accepted throughout the community. The most courts could do to contribute to efficiency, such critics suggested, was to establish security and stability for parties to order their own affairs with private contracts.

III. Land-Use Torts in Modern Tort Law and Economics

At a minimum, this Austrian critique has some traction in existing law. To illustrate, take cases about cattle-trespass disputes, nuisance disputes, and train-sparks disputes. Coase used these doctrines to illustrate his main lessons in *The Problem of Social Cost*. Mainline tort law and economic scholarship has used these doctrines to generate illustrations ever since.

In reality, however, mainline tort law and economic scholarship predicts the content of these doctrines inaccurately. In addition, the inaccuracies are systematic. The scholarship predicts that triers of fact should ask how best to optimize the concurrent land uses of the parties. In trespass and nuisance, the law defines the property rights associated with land simply and clearly, using boundary rules and strict-liability scienter. In land-based negligence cases, the law *removes* causation arguments and defenses ordinarily available to the defendant in negligence – to make the plaintiff's theory of recovery hinge more on boundary rules and strict principles of liability characteristic in trespass and nuisance.

IV. Land-Use Torts and the Austrian Critique

These cases confirm the Austrian critique in normative terms in a few partial but significant respects. To begin with, when different economic theories prescribe different results in law and there is not complete empirical information to judge which is better, law and economics scholars accept the common law's rules as weak but still probative evidence in favor

of the theory conforming more closely to its rules. That factor counts slightly in favor of the Austrian critique.

Separately, and more interestingly, the case law structures the property rights grounding trespass, nuisance, and land-related negligence as it does for policy reasons surprisingly similar to the concerns voiced in the Austrian critique. In these fields of tort, property rights in land were shaped to conform to and secure rights grounded in a moral theory of labor. That theory of labor prescribed that property rights be designed to give different individuals the greatest parallel free action possible each to use his own assets productively for his own individual benefit. To be sure, this rights-based labor theory starts from premises extremely different from those of Austrian economics. In practice, however, it prioritizes the design choices the law makes by assuming that: people have extremely heterogeneous preferences; that people have better information over things close to them and of personal interest to them than they do over things remote and not of such interest; and that uses of things can change suddenly and strongly in response to different social and legal regimes. Adjusting for the differences in vocabulary and methodology, these assumptions resemble quite closely Austrian arguments about (respectively) the subjectivity of value; the dispersion and limits of information; and the dynamic nature of change.

V. Implications

Obviously, the case law on trespass, nuisance, and land-based negligence suits provides positive and normative confirmation of the Austrian critique of mainline law and economics. Although that confirmation is partial, it is still significant because mainline law and economics is supposed to be able to explain the relevant case law better than any other scholarship.

In addition, however, the case law also provides a few reasons to qualify Austrians' suggestions about how the common law works. Again, some Austrians have assumed that (moral) theories of justice and (economic) theories of efficiency focus on different concerns. In reality, when general normative theories are applied to prescribe government action in practical life, they raise basic questions about whether government is effective only at securing the basic conditions of order or can aim higher and satisfy the desires of individual parties. This debate recurs in many different normative theories or disciplines. Thus, moral theorists understand the difference between rights-based and perfectionist theories of justice, and economics scholars understand the trade-off between securing order and maximizing welfare.

These parallels help qualify Austrians' suggestions about the relation between justice and efficiency. Austrian critics have understood rightly that the common law of land-use torts does not aim explicitly to achieve economic or efficient goals. They have also been right to suggest that the common law can promote efficiency simply by enforcing the rule of law. Critics, however, have not appreciated one fact sufficiently: When American judges have designed property rights and protective tort doctrines, they have made intuitive and practical judgments to make property rights conform to the imperatives Austrian economists thought most important. Common law judges did not try to institute Austrian principles into U.S. common law, but they did try to institute, in a different normative vocabulary, practical prescriptions conforming to Austrians' prescriptions.

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Articles

***1379** JEFFERSON MEETS COASE: LAND-USE TORTS, LAW AND ECONOMICS, AND NATURAL PROPERTY RIGHTS

Eric R. Claeys [FNa1]

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

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

***1380** Introduction

Economic analysis has taken over tort law and scholarship. Before economic analysis came on to the scene, lawyers assumed that tort law secured personal rights grounded in moral interests. Philosophical tort scholarship still tries to defend this commonsense view. Yet over the last generation, tort's moral pretensions have taken the academic equivalent of a drubbing. Even leading tort philosophers concede, "frankly, . . . that the legal community has found various economic approaches more persuasive or compelling than those based on corrective justice," the main philosophical approach to tort. [FN1]

This perception seems convincing because economic analysis claims it can explain the law more determinately than philosophical ***1381** analysis. When tort cases appeal to moral terms, economists say, their arguments seem "mush-- lacking in clear or persuasive guidelines for determining what conduct counts as 'wrongful.'" [FN2] Only economic analysis, it seems, can

claim an “impressive level of fit with case outcomes” and a “comparatively high degree of determinacy.” [FN3] As a result, “philosophers have marveled in contemptuous amazement as the apparently dead body of economic [legal] analysis took its seat at the head of the legal academic table and reigned unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy.” [FN4]

From a longer time horizon, however, this debate is surprising. People often assume that American tort law used to have content focused enough to be described as “individualistic”--that is, organized “to specify and protect individuals' rights to bodily integrity, freedom of movement, reputation, and property ownership.” [FN5] These observers assume that the morality that used to inform the law was determinate enough to generate predictably “individualistic” results. [FN6] In addition, if economic criticisms are true, the various bodies of law that have now merged into the field of “tort” were incoherent for several centuries until economists came along and tidied them up. [FN7] It may sound naïve to say, but that claim seems a little presumptuous. So do contemporary comparisons of tort economics and philosophy fairly reflect the merits of tort doctrine, economics, and philosophy? Or do they instead reflect passing academic prejudices?

No single article can voice such a doubt comprehensively across the entirety of tort, and this Article will not try. But this Article can suggest that the doubt is well grounded in reference to a fair point of contact: land-use torts. “Land-use torts” refer to the grounds for liability for trespass to land, nuisance, and negligence claims involving an accidental but trespassory invasion of land. They include cases about cattle trampling on crops, [FN8] doctors building offices near noxious baking***1382** machines, [FN9] and trains emitting incendiary sparks onto crops or haystack fields. [FN10]

In other words, land-use torts cover all the chestnuts that Ronald Coase used to illustrate the lessons of his landmark article The Problem of Social Cost [FN11] (hereinafter “Social Cost”). Social Cost is the most-cited law review article ever. [FN12] It has contributed to many economists' general impression that philosophical argument seems “rigid” in its attachment to a harm-benefit distinction, a “pristine idea of right colliding with wrong.” [FN13] Tort economists now routinely use fact patterns involving cows, smokestack pollution, or train sparks to teach or to build on the main lessons of Social Cost. [FN14] If there is any set of cases where “Coasian” tort analysis should demonstrate its explanatory superiority, the land-use torts treated in Social Cost belong in that set.

It is thus big news to learn that economic tort scholarship does not explain foundational features of the rules regulating liability in trespass, nuisance, and land-use negligence. The relevant liability rules of those torts are better explained and justified as an application of “American natural-rights morality.” American natural-rights morality refers here to an amalgamated political morality that informed American law and politics considerably from the founding of the United States until 1920 and, to a lesser extent, since. According to this morality, the law's overriding object is to secure to citizens the natural rights to which they are entitled by general principles of natural law. This morality is “Jeffersonian” in the sense that it is a tolerably well-articulated version of the theory of unalienable and natural rights set forth in the Declaration of Independence. [FN15] This morality ***1383** explains basic features of trespass, nuisance, and land-use-related negligence better than “Coasian” economic tort analysis. In the process,

Jeffersonian morality anticipates and highlights problematic features of Coasian economic analysis. [FN16]

If this comparison is an accurate indicator, the philosophy-versus-economics debate in tort has been off track for a generation, in at least three important respects. First, if philosophical tort scholarship suffers a bad reputation, this impression exists because too many onlookers conflate tort philosophy with corrective justice. Corrective justice is the species of practical moral philosophy determining in what circumstances wrongs to a victim's rights should be annulled or rectified. [FN17] Corrective justice has much to teach about the institutional structure of tort--for example, why it pits an aggrieved "plaintiff" against an allegedly aggressive "defendant" in a suit to recover for "wrongs." But, corrective justice (or, at least, the best-known aspects of corrective justice) do not supply the content of those wrongs--particularly the scope of the plaintiff's rights, or the defendant's duties in relation to those rights. That content comes instead from a controlling local political morality. American natural-rights morality therefore focuses and complements tort's corrective purposes. [FN18]

Second, existing philosophical tort scholarship has not done enough to learn how American natural-rights morality informs the moral content of particular torts. [FN19] Since natural-rights principles were influential in period when "tort" was coming together, it is quite reasonable to suspect that these principles explain and justify foundational tort doctrines. It is also reasonable to suspect that contemporary judges may continue to be influenced by inchoate expressions of the policy commitments associated with those principles. This Article confirms both suspicions in relation to basic land-use torts. In the process, American natural-rights morality also helps dispel a more general unfounded impression, that theories of moral philosophy are incapable of making tough-minded policy tradeoffs. American natural-rights morality makes the tradeoffs land-use tort law needs to get up and running.

Finally, this Article suggests that conventional economic tort analysis is not capable of making those same tradeoffs--at least, not without***1384** taking significant shortcuts. [FN20] The case comparison offered here highlights a problematic aspect of standard economic tort analysis that is often overlooked: To explain tort doctrine as determinately as conventional wisdom supposes, economic tort analysis must make informed hunches more characteristic of moral philosophy than of social science. In the words of one leading introductory law and economics casebook, where lawyers and judges decide legal issues "by consulting intuition and any available facts," economists use "scientific" approaches including "mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics)." [FN21] But if the land-use torts provide an accurate point of contact, these generalizations are overdrawn. Conventional economic tort analysis can provide precise accounts of parts of land-use doctrines, but not of doctrines in their entirety. Or, if it does try to render accounts of entire doctrines, such analysis makes assertionary behavioral claims resembling what economists derisively call "intuitions" in judicial opinions. If the land-use torts are representative, economic tort analysis can be scientific, and it can be relevant to doctrine, but it cannot have it both ways.

I. The Rivalry Between Economics and Justice in Tort

A. The Economic Indictment

To set the stage, let us recount the general impressions that lead scholars to assume that economics is more determinate than commonsense morality or philosophy in tort. Because Social Cost is frequently cited as an authority proving or illustrating these impressions, I shall illustrate them especially with relevant passages from Social Cost. I have already identified one: Theories of justice seem “mush” and “lacking in clear or persuasive guidelines” for tort. [FN22]

Next, many lawyers assume with economists that tort common law is facile. When the common law distinguishes between harms and benefits or rights and injuries, the assumption goes, it does so less subtly than economic analysis. Social Cost is often cited as an authority here. After reviewing a long line of nuisance cases, Coase commented that the judges relied often on distinctions “about as relevant as the colour of the judge's eyes.” [FN23] While restating the argument of Social ***1385** Cost in a republication, Coase asserted that “there is no difference, analytically, between rights such as those to determine how a piece of land should be used and those, for example, which enable someone in a given location to emit smoke.” [FN24] In other words, rather than employ traditional distinctions between benefits and harms, it is instead more constructive to portray a dispute as a resource conflict between competing and incompatible assets that inflict pairwise reciprocal externalities on one another. [FN25] This framework calls into question how the common law treats not only rights and wrongs but also causation. If the parties are really inflicting pairwise reciprocal externalities on each other, both parties jointly cause any economic losses. [FN26]

Third, these impressions are contributed to by the Coase Theorem. Social Cost is understood to teach, as Coase puts it, that “under perfect competition private and social costs will be equal.” [FN27] In Mitchell Polinsky's paraphrase, “If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule.” [FN28] On the Theorem's assumptions, it does not really matter how the common law assigns liability in a simple trespass or nuisance case. As long as transaction costs are not prohibitively high, the parties will bargain around liability to the efficient result. The Coase Theorem shifts the focus of analysis. As Coase puts it, “the immediate question faced by the courts is not what shall be done by whom but who has the legal right to do what.” [FN29] To economists, it seems more precise to ask, “what shall be done by whom?”

***1386** Finally, conventional tort economic scholarship prescribes what seems to be a more precise and quantitative method for resolving tort disputes than those advocated by doctrine or tort philosophy. For simplicity's sake, I shall refer to the conventional tort economic approach as “accident law and economics.” Accident law and economics prescribes that tort accident disputes be resolved consistent with “productive efficiency.” Accident law and economics tallies the gains each of the affected parties generates by its land uses. It then tallies all the relevant costs, including but not limited to: property damage or business impairment caused by a neighbor's nuisance; payments to other parties under contracts not to inflict nuisances; damage payments, in compensation for nuisances already committed; and transaction costs. Accident law and economics then focuses on the differences between the joint gains and joint losses. Productive efficiency refers to an ideal state in which any change in the parties' levels of production or precautions causes this difference to shrink. [FN30]

It should go without saying that this portrait of economic tort analysis could be qualified in many respects. To begin with, accident law and economics as defined herein does not automatically follow from Social Cost. The article's main intention is to refute an assumption, conventional in 1960 among many economists, that the efficient response to pollution is always to make the polluter pay taxes or damages to internalize the externalities it inflicts on other parties. [FN31] Social Cost is therefore interested primarily in "[t]he influence of the law on the working of the economic system" [FN32] and not vice versa. Yet Social Cost makes respectable the methodology of accident law and economics. Coase hypothesizes that the "legal system" may establish the "optimal arrangement of rights, and the greater value of production which it would bring," specifically by circumventing "the costs of reaching the same result by altering and combining rights through the market." [FN33] He praises American lawyers who "are aware . . . of the reciprocal nature of the problem" and "take . . . economic implications into ***1387** account, along with other factors, in arriving at their decisions." [FN34] He also lets slip some of the condescension many law and economists feel toward the common law, by describing judicial reasoning as "a little odd." [FN35] So, with possible apologies to Coase, we shall focus here on the "Coasian Coase," the general lessons that accident law and economists have taken away from Social Cost. [FN36]

In addition, accident law and economics is a rough general category covering many different specialized economic analyses of torts. Productive efficiency is an analytical device. It provides a launching point for many different economic analyses. Yet even though these analyses differ in many particulars, productive efficiency unifies their inquiries in important foundational matters. [FN37]

Finally, "accident law and economics" should not be understood to be a proxy for economic tort analysis generally. It should not be confused with cheaper-cost-avoider economic tort analysis, [FN38] new institutional economics, [FN39] behavioral law and economics, [FN40] or other refinements on or specialized applications of basic economic methodology. It definitely should not be confused with scholarship by Richard Epstein, [FN41] Henry Smith, [FN42] or other law and economists who explain ***1388** property torts in reference to bright-line boundaries and strict rules of scienter; I shall say a few words about their work in passing, but their work is not our primary focus here. Accident law and economics deserves pride of place. In tort casebooks and introductory textbooks, accident law and economics is presented as hornbook law and economics. [FN43] It gets credit for bringing determinacy to tort. And it takes credit for exposing the indeterminacy that supposedly exists in tort doctrine and philosophy.

B. Explanatory Doubts

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

First, a trespass occurs when a defendant makes an act that directly results in a physical invasion of the plaintiff's close. [FN44] In other words, at common law, a "harm" occurs whenever the defendant penetrates the boundaries of the plaintiff's land--even if the penetration does not damage the land. [FN45] Economically, there are two puzzles with this rule. Social Cost

articulates the first: When a rancher's cattle trespasses on a farmer's crops, it should not matter whether the rancher compensates the farmer for the crop damage. [FN46] This question is easy for accident law and economics to explain. Social Cost discusses the rancher-farmer conflict on the assumption that transaction costs are zero. [FN47] Once transaction costs are put back in the picture, it is less costly for the ranchers to come to the farmer's land to bargain than it is for the farmer to find them through their cows. [FN48]

Trespass, however, poses a second puzzle: Why does the prima facie case lack elements of causation or harm? There are few accident law and economic explanations for this rule, and those that do exist are not satisfying. For example, in a recent article, Lee Anne Fennell assumes that the whole "point of exclusion from boundaries is to facilitate***1389** the effective matching of inputs with outcomes." [FN49] The inputs are productive activities; the outcomes include both those activities' benefits and the accidents that they occasionally but inevitably generate. Fennell concludes from this functional premise that trespass lacks causation or harm elements because "[b]oundary crossings . . . effectively puncture the containers that society has created for collecting risks and their associated outcomes." [FN50] Assume for the moment that Fennell's explanation is correct. Why does trespass law enforce boundary rules even when a risk of harm does not lead to a harmful accident?

Consider Jacque v. Steenberg Homes, Inc. [FN51] Steenberg Homes asked the Jacques for permission to tow a home across a vacant field they owned, while the public road was blocked by a snow drift, so the company could complete a delivery on time. The Jacques refused to grant permission under any circumstances because they believed that a license might expose them to adverse possession. [FN52] (Under black-letter adverse possession law, they were almost certainly wrong.) Steenberg Homes towed the home across their field anyway, knowing that the Jacques objected, and caused no damage to the field. [FN53] In Fennell's parlance, Steenberg Homes certainly punctured society's risk-collecting boundary rules. But Steenberg Homes could not be blamed for the snowstorm, it was economically gainful for the company to perform its delivery contract, the Jacques had no serious reason for refusing passage, and their property was not damaged. A few different regimes might be productively efficient: no liability; liability compensated only by nominal damages; liability compensated by a reasonable one-time crossing fee; or liability compensated by some court-ordered profit-sharing arrangement. [FN54] It would be productively inefficient to award the Jacques not only nominal damages but also $100,000 in punitive damages. But that is what the jury did, [FN55] and the Wisconsin Supreme Court affirmed--specifically to deter trespassers from undermining the general principle that "actual harm occurs in ***1390** every trespass." [FN56] According to Fennell, ex ante, this holding deters future boundary invasions. [FN57] But her interpretation only begs the question why the law needs to punish harmless boundary invasions now to deter harmful ones later.

Next, consider how nuisance liability tracks the physical-invasion test. In some pollution cases, the common law assigns nuisance liability where accident law and economics predicts and prescribes no liability. The classic illustration is the "coming to the nuisance" fact pattern, in which a plaintiff develops previously unused land years after the defendant first started running a dirty but productive business nearby. English and American common law by and large hold that the business is liable regardless of how long it has operated in the neighborhood. Coase dissected this position using Sturges v. Bridgman, [FN58] a case between an early-moving baker and a

late-developing doctor. According to Coase, it did not matter whether or not the law held the baker to be harming the doctor, because the parties would bargain around legal liability as long as transaction costs were not too high. [FN59] The accident law and economic scholarship follows Coase in different ways. Some articles suggest that the earlier builder should be protected categorically, [FN60] others that the law should examine on a case by case basis which party acted less strategically. [FN61] These approaches have seeped into some cases. [FN62] By and large, however, the cases make the business liable even though it came to the neighborhood first. [FN63]

The physical-invasion test also bars causes of action for aesthetic complaints and blockages of light. [FN64] Economically, it is hard to ***1391** explain why negative externalities should be sorted depending on whether they follow from a physical invasion. In Social Cost, Coase assumed that his analysis applied the same way whether the defendant was emitting smoke onto, or blocking sunlight from, the plaintiff's land. [FN65] Because accident law and economics scholarship typically defines "nuisance costs" to cover "harmful externalities" of all kinds, eyesores emit negative externalities on neighbors on similar terms as factory smoke. [FN66]

Nevertheless, commonsense attitudes remain strongly suspicious of economic conceptions of externalities. As Robert Ellickson explains, a "layman would regard a smokestack . . . as 'theft' of neighborhood enjoyment," but would "perceive quite differently . . . the demolition of an architectural landmark or the construction of a housing development on a beautiful vacant meadow." [FN67] Nuisance doctrine tracks commonsense perceptions. For example, in the course of rejecting a nuisance suit to protect a solar-powered house's access to sunlight, the California Court of Appeals contrasted "emissions of smoke affecting plaintiff's property" with the plaintiffs' "predicament," which the court described as "never [having] come under the protection of private nuisance law, no matter what the harm to plaintiff." [FN68]

Consider also the roles that scienter and interest-balancing play in trespass and nuisance. Some accident law and economic authorities recommend that nuisance law employ principles of negligence. [FN69] ***1392** In negligence, the element of breach of duty creates a doctrinal placeholder in which to conduct "B v pL" precaution/loss analysis. Nuisance could import the same analysis through the element that an interference with a land use be unreasonable. [FN70] Other authorities prescribe strict liability for unilateral accidents and negligence for multi-lateral accidents. In simple cases, strict liability avoids the costs of inquiring into reasonable care; in multi-party cases, negligence reduces the perverse incentives one party's strict liability gives others not to take sensible precautions on their own. [FN71]

In practice, however, trespass and nuisance employ strict liability categorically, without distinguishing between one- and multiparty accidents. Trespass is often defined as an intentional tort. In practice, however, courts water down the concept of "intent" to include intent to commit the act causing the trespass regardless of whether the actor knows it is a trespass. [FN72] A similar move happens in nuisance. When intent is an element of nuisance, it is usually construed to cover intent to commit a land use while substantially certain that the use will annoy a neighbor. [FN73] There certainly is negligence-based nuisance, [FN74] but the law also preserves a strict-liability theory of nuisance as a backstop. [FN75] Courts also resist, surprisingly often, the invitation to make nuisance's "reasonableness" element a placeholder for

economic cost-benefit analysis. They prefer to focus on "the reasonableness of the interference and not on the use that is causing the interference." [FN76]

***1393** Of course, economic cost-benefit analysis could still seep into land-use torts through the back door, by encouraging affirmative defenses asking whether a land-owning plaintiff has invited harm on herself. For example, according to economic scholarship on train-sparks cases, liability payments do and should vary depending on whether land-owning plaintiffs take cost-justified precautions to keep their land uses protected against the risk of sparks fires. [FN77] In doctrine, however, the common law does not use affirmative defenses in this manner. Even making the necessary qualifications for exceptional cases and minority rules, it is "canonical" that "if you hold a property entitlement, then you should not be required to anticipate the possible wrongs or torts of another." [FN78] In sparks cases, the general rule has been to bar contributory negligence on the ground "[t]hat one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly." [FN79] Courts also limit assumption of risk as a defense against trespassory torts. In the 1974 case Marshall v. Ranne, [FN80] Marshall was bitten while he was walking from his farm house to his car by an ornery boar that had threatened him on several previous occasions. [FN81] Ranne argued (note that the case was litigated in Texas) that Marshall assumed the risk of being bitten because he did not shoot Ranne's boar when he had a chance. [FN82] This argument was rejected: "[T]here was no proof that plaintiff had a free and voluntary choice, because he did not have a free choice of alternatives. He had, instead, only a choice of evils, both of which were wrongfully imposed upon him by the defendant." [FN83] The opinion intuitively uses boundary principles to stop a trespasser from making an inappropriate "your money or your life" argument. But other cases allow plaintiffs'-misconduct defenses when ***1394** defendant-owners impose "take it or leave" demands on plaintiff-licensees injured on their land. [FN84]

Now, in all of these doctrines, accident law and economists may say that the common law is "rigid," missing "ambiguity," [FN85] or any of many other synonyms for "not as sophisticated as the approach one would take if one had learned more economics." Yet lawyers might reasonably wonder whether these are scholars who cannot stop themselves from "perpetually enquiring into publick Affairs" even though there is not "the least Analogy between" mathematics and politics. [FN86] And judges may wonder whether the prescriptions of accident law and economics recounted in this Part confirm the "growing disjunction" Chief Judge Harry Edwards noted between the interests of the legal academy and the needs of the bar. [FN87]

… The next two parts of the Article proceed to explain the doctrines that accident law and economics cannot explain in light of a natural-rights morality reflected in the writings of John Locke, William Blackstone, Chancellor James Kent, and many nineteenth-century state court decisions.

IV. Accident Law and Economics Reconsidered

A. The Tension Between Private Ordering and Expert Supervision

So American natural-rights morality is not obviously philosophically incoherent. It certainly does not generate mush. It explains many general features and specific rules in land-use torts

that accident law and economics gets wrong. Yet accident law and economics has not been considered on its normative merits. Perhaps accident law and economics makes normative criticisms not adequately considered in American natural-rights morality.

Obviously, this Article cannot cover this possibility exhaustively. There are three central issues. One might ask whether law and economics explains legal doctrine in terms that are foundational in the law from its own perspective. [FN250] If that issue is paramount, there is no point in engaging law and economics at all.

Alternatively, one might ask whether one of the two approaches frames inquiries into normative value better--say, whether individual freedom or social welfare provides a more satisfying touchstone for normative analysis. Surprisingly, however, differences over these questions are not particularly important to what divides American natural-rights morality from accident law and economics. For practical purposes here, the central issue is how the two approaches handle the challenges that arise when triers of fact and lawmakers lack complete information. Different normative theories of social control disagree about how much expert-driven regulation can regulate economic life. This difference cuts across different theories of economics and also different theories of philosophy. American natural-rights theory ***1431** keeps legal regulation to a minimum, but other theories of justice may prescribe that judges assign entitlements on a case-by-case basis to promote justice or to do justice. [FN251] A similar debate plays out in law and economics.

There is an irony here. American natural-rights morality fell into desuetude in large part as lawyers gradually assumed that its prescriptions were too simple to apply to the complex industrial economy the United States developed in the early twentieth century. [FN252] That general perception helped to justify approaches to legal and social planning more centralized than seems realistic within American natural-rights morality. Yet even as that morality was being displaced, social scientists who had no reason to know about it started to raise serious doubts about centralized planning--relying to a large degree on generalizations about human behavior strikingly similar to American natural-rights morality's. For example, Friedrich Hayek concluded economics should focus on the fundamental "problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know." [FN253] In fact, Hayek worried especially that the "character of the fundamental problem has . . . been rather obscured than illuminated by many of the recent refinements of economic theory, particularly by many of the uses made of mathematics." [FN254] It is fair to wonder whether accident law and economics makes refinements of the type that worried Hayek.

Section IV.B documents how Posner and Landes approve of tort scholarship by early twentieth-century tort scholars who embraced an extremely interventionist understanding of common-law regulation. Section IV.C documents how contemporary legal tort scholarship embraces "bundle of rights" conceptual property theory made popular by Legal Realists who sought to recast common law conceptual categories to facilitate interventionist regulation.

D. Normative Assumptions About Social Control

These conceptual issues set up the fundamental normative question: whether accident law and economics prescribes normatively more desirable results in land-use torts than does the common political morality internal to the cases. The following discussion will not be exhaustive. [FN281] But generally speaking, productive efficiency may be attractive in theory and unattainable in practice. According to American natural-rights morality and students of Hayek, [FN282] productive efficiency often requires information too costly or volatile to use in practice, and it often abstracts away from other factors important in property regulation. [FN283]

Let us start with precaution and accident costs. It is quite often hard in advance to predict what accident loss L will follow if no one takes precautions, and harder to predict how much any precaution will reduce the risk of accident p at the margins. In a Rylands-style case about a mine shaft full of water, the mine owner has wide discretion over what kinds of material to use to build a dam, how high to build the dam, and so forth. In advance, it is hard to forecast precisely how much different constructions, shapes, and heights will flood-proof the mine, or how much extra overflow different dams will prevent.***1438** A regulator can posit that there are only two possible dam designs and then plug in assumed p and L figures for these dams, [FN284] but these assumptions are just simplifying assumptions. Then, since the parties are selfish and each can respond to the other's behavior, the regulator must then forecast how each party may react strategically to precautions by the other. [FN285] Perhaps the neighbor at the bottom of the shaft should consider moving her house or building a breakwater; but perhaps she builds a bigger house after the mine owner builds a better dam. Most accident law and economists agree that the resolution of these problems varies on many factors specific to the parties, [FN286] but the scholarship does not come to any single resolution. [FN287] It may not be possible to identify any level of precautions on both sides that simultaneously minimizes excessive precaution spending in the short term and moral hazards in the long term. [FN288] But it expects much from a jury or judge to expect them to consider all the relevant short-run factors, let alone balance the short-run ones with the long-run ones.

Turn to the parties' production functions. Many accident law and economic treatments illustrate general principles with charts or tables showing how much each extra increment of production by one party increases that party's profits and the other party's likely losses. In Social Cost, Coase refutes Pigou by drawing out the consequences that follow when one daily train generates $150 revenue at $50 cost, and a second $100 additional revenue at $50 additional cost. [FN289] These sorts of examples usually presume that the fact finder can know each party's production function accurately and instantaneously. [FN290] Yet ***1439** E.C. Pasour suggests that “[t]he real world never contains an entity corresponding to the marginal-cost curve, since the amount of product that a firm will try to produce at any given price depends on many factors including length of run, technology, and expected input prices.” [FN291] So whenever economic analysis presents such cost-revenue functions, the lawyer should discount them substantially to account for the slippage between an economic hypothetical and the uncertainty of a real-life lawsuit.

Separately, “productive efficiency” is usually construed to assume perfect competition. [FN292] When the rancher's cattle trample the farmer's crops, Coase assumes the first causes $1 marginal extra annual crop damage, the second $2, the third $3, and the fourth $4. [FN293] For the purposes of developing his economic critique of Pigou, Coase's numbers and market

assumptions are not controversial. But when Coase's analysis is turned around to study legal entitlements, it is very controversial to assume that the extra crop damage per steer may be accurately described by one number and not two or three. To be comprehensive, a regulator would need to discern how the rancher values the crop damage, how the farmer values it, and maybe also what figure the market sets as a replacement price for crops. Coase's function assumes that the farmer and the rancher value the crop damage at the market price. In practice, it is possible if not likely that the farmer and rancher value the crops extremely differently from each other and the market-replacement price. [FN294] Accident law and economic scholarship does recognize the problem of subjective valuation. Some scholarship worries that damage rules short-change subjective values, [FN295] while others worry that subjective valuation encourages parties to hold out [FN296] and expect that liability rules circumvent this danger. [FN297] But if heterogeneous property uses are the norm and not the exception, the law should worry far more about the former possibility than the latter.

***1440** Let us turn from productive efficiency to transaction costs. Robert Ellickson has helpfully subdivided transaction costs into get-together costs (the search costs of finding a bargaining or disputing partner), execution costs (the costs of consummating a bargain), and information costs. [FN298] The party-valuation problems just described can create substantial execution costs, and empirical uncertainty about the parties' production functions and costs can generate information costs. But there are other serious sources of transaction costs--particularly associated with third parties.

To this point, I have assumed, as Coase's hypotheticals all do, that the economist is trying to maximize wealth in a bilateral dispute between two present and established land users. As more owners become parties to a resource dispute, they increase holding out and free-riding. These coordination costs can simplify economic analysis. In some circumstances, such costs counsel strongly in favor of assigning liability in the manner most likely to circumvent the coordination costs. [FN299] At the same time, multiplicity creates other complications if one zooms away from the immediately affected parties to strangers who need to live under the precedents set by particular cases. Among other things, as Merrill and Smith have shown, society suffers significant third-party information costs if basic property liability doctrines are fine-grained. Strangers to property must then process all the data specific to individual assets to know their rights and liabilities. [FN300] Sparks cases presumed railroads liable and limited plaintiffs'-misconduct defenses to avoid such complications along railroad lines. Similar concerns are equally important in most simple trespass and pollution-nuisance fact patterns.

The relevant liability rules must also consider how land-use decisions made in one year will affect planning in the neighborhood twenty years later. On a coming to the nuisance fact pattern, it is cost-prohibitive for a factory owner to find all the likely residents in the neighborhood twenty years later. Maybe he can find and bargain with their current predecessors in interest. But in a world of scarce information, the present owners' forecasts may be haphazard. The more often neighborhood conditions change the more frequently later parties will need to renegotiate. [FN301] Economic analysis could suggest that the efficient response is to let the factory establish a footprint in the ***1441** neighborhood and clarify everyone's rights in the process. [FN302] It could suggest that, ex ante, there is no one-size-fits-all efficient solution. [FN303] But it could also suggest that, because the early parties cannot bargain with the highest

value users likely to appear twenty years later, “ex ante anonymity” may encourage them excessively to discount the interests of late-comers and overinvest in polluting activities. [FN304] Although coming to the nuisance cases highlight these informational challenges vividly, the challenges exist in principle in any changing neighborhood.

The difficulties covered thus far make it hard to identify the productively-efficient outcome focusing only on the parties directly interested in the outcome of a resource dispute. But to measure social welfare really comprehensively, a policymaker must also subtract from net social welfare administrative costs, the “public and private costs of getting information, negotiating, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures.” [FN305]

One such administrative cost relates to the robustness of markets. By and large, productive-efficiency analysis anticipates what a market would do, discounts for transaction costs, and either nudges the parties toward a bargain or replicates the bargain they should have attained. [FN306] In doing so, productive-efficiency analysis assumes that legal doctrine does not shape the parties' preferences for market bargaining. Here is another assumption that can be reasonably questioned. Take train-sparks cases. The rule barring contributory negligence seems harsh, for it seems to encourage farmers to plant as close as they want to tracks. The authorities that favor contributory negligence on this ground [FN307] assume the law can maximize the joint value of the farmer's crops and the railroads operations without destabilizing general perceptions about property rights, markets, and litigation. Perhaps. But if contributory negligence typically goes to the jury, the law discourages railroads from settling up front. It encourages them instead to run their spark-emitting trains, make farmers litigate, and then settle at a discount. So perhaps contributory negligence decreases social welfare in the long run even if it increases ***1442** joint party welfare in the short run. Or, even if contributory negligence increases social welfare in both the short and long runs in sparks cases, perhaps it confuses the tort system generally about how boundaries work in land-use torts like nuisance. These various economic costs are considered more explicitly in economic scholarship on the public use doctrine in eminent domain and the choice between property and liability rules. [FN308] In principle, however, they are also relevant to the basic rules of liability in the common law land-use torts.

Finally, if parties shift from bargaining to litigating or lobbying, they seek rent, and the costs of rent dissipation need to be subtracted from net social welfare as well. Maybe land-owning parties will seek rent in legislative and administrative settings no matter how basic common law liability rules are assigned. But maybe individual economic behavior, while basically selfish, is at least partially teachable. Then different legal regimes may encourage litigation, lobbying, or interest-group politics to different degrees. A comprehensive account of social efficiency must therefore determine with practical certainty to what extent different legal regimes encourage gainful production or rent dissipation.

E. A Simpler Alternative?

Take all these factors together, and it is plausible to wonder whether accident law and economics invites information overload. The informational demands seem even more severe when one recalls that productive-efficiency analysis focuses, as section IV.C showed, on

individualized use liberties. In Economic Analysis of Law, Richard Posner presumes, on one hand, that property law can and should first "parcel[ ] out mutually exclusive rights to the use of particular resources," and then, on the other hand, that tort and other bodies of law can reconfigure those rights when "giving someone the exclusive right to a resource may reduce rather than increase efficiency." [FN309] But suppose that land is used in conditions of uncertainty, with diverse and selfishly-driven uses, in which temporary resolutions of use conflicts can change suddenly. If these generalizations are tolerably accurate, it is unrealistic to expect that a trier of fact can simultaneously secure investment and maximize welfare in property.

The tough-minded response is instead to limit the project of welfare improvement substantially. The basic land-use torts should then ***1443** push policy control down to the individuals who have the best localized knowledge and incentives to use it productively. [FN310] Boundary-like protections serve this goal in tort. [FN311] Such rules (and strict liability, and the choice to limit plaintiffs'-misconduct defenses) guarantee in a clear and determinate way that owners will have some security that their chosen uses will not be disrupted in the likeliest invasive ways. [FN312] Seen in reverse, those rules also limit owners' attempts to hijack or blockade land uses by their neighbors when those uses hit the neighbors more where they live. These rules may also focus and stabilize market and government processes. Because such control and use rights make it easier for each party to predict its rights and duties without inquiring or bargaining with neighbors, they simplify future planning by one owner, bargaining among many owners, and factual inquiries by triers of fact.

Of course, one may fairly question the behavioral generalizations that lie under this alternative. These generalizations are empirical, but in an extremely soft sense: the sense in which one makes "empirical" claims by observing, often anecdotally, a wide range of phenomena about human behavior and then drawing a few comprehensive generalizations. The philosophical tradition in which Locke and The Federalist operated presumed that such generalizations were the most one could know about human "nature." [FN313] That is why these and other contributors to American natural-rights morality resisted the temptation to explain law and politics with reference to mathematics. Austrian economics makes generalizations on a similar basis. But the underlying generalizations are falsifiable. In practice, they are extremely hard to test; in principle, however, they may be inaccurate.

But this possibility applies equally to any mode of law and economic analysis. When accident law and economics focuses on the most concrete and party-specific factors, it assumes implicitly but empirically that law and economics can maximize the joint product of ***1444** the parties and social welfare generally without seriously threatening investment, creating information-cost problems, encouraging rent-seeking, or demoralizing markets. Accident law and economic analysis may consider these more systematic issues as part of an all-the-circumstances analysis. In an all-the-circumstances analysis, however, the party-specific factors are likely to seem concrete and immediate, while the social factors are more likely to seem diffuse and remote. Tacitly, such an analysis assumes that the party-specific factors should weigh about as much as the more systematic factors. Such an approach is misguided if the most concrete and party-specific factors are the least relevant and the least concrete but most social factors are most relevant.

The important point here is that these various assumptions are empirical, and they are foundational "meta-economic" assumptions about human behavior. [FN314] In crucial respects, these meta-assumptions do more work than concrete numbers or productive-efficiency equations do in accident law and economic analysis. These assumptions do not provide definitive answers, but they do focus economic analysis on questions capable of definitive answers. Important here, these meta-assumptions resemble the broad generalizations that ethical and political philosophy and Austrian economics make about human nature more than they do the more concrete numbers and production functions on which accident law and economics purports to focus. Until accident law and economics defends those meta-assumptions, no one can say convincingly that it operates on foundations sound enough to justify its reputation for determinacy.

My criticisms of accident law and economics should not be understood as wholesale criticisms of economics or law and economics. I find much commendable and instructive, for example, in law and economics scholarship on land use torts by Richard Epstein and Henry Smith. [FN315] I have some reservations whether their interpretations of the relevant doctrines can be confirmed empirically without piggybacking on the natural-rights morality internal to American property law, [FN316] but their economic justifications for the doctrines are surely plausible on their own. Here, it suffices to recall two points. First, as Smith himself has already noted, "utilitarian and libertarian or corrective justice accounts of nuisance law [are] closer to each ***1445** other than previously thought." [FN317] Second, Epstein and Smith, like Austrian economists, set the ambitions of law and economics considerably lower than do scholars of accident law and economics. Their moderation in the face of information problems makes their interpretations and justifications of doctrine more tentative and intuitive--but it also confirms this Article's basic point: when law and economic analysis proceeds mindful of its limitations, it does not have the advantages of definiteness or precision it is conventionally assumed to have over moral philosophy….