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Thomas W. Merrill

Henry E. Smith

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## THE MORALITY OF PROPERTY

THOMAS W. MERRILL\* AND HENRY E. SMITH\*\*

### INTRODUCTION

The relationship between property and morality has been obscured by three elements in our intellectual tradition. First is the assumption, which can be traced to Bentham, that property is a pure creature of law.<sup>1</sup> An institution assumed to be wholly dependent on law for its existence is unlikely to be infused with strong moral content. Second is the related tradition, also Benthamite, of examining questions about property law from a utilitarian perspective.<sup>2</sup> Utilitarianism is, of course, a moral theory. But in its modern applications, based on price theory and cost-benefit analysis, it adopts a framework largely indifferent to questions of individual rights and distributive justice, which many consider the hallmarks of a moral perspective. Third is the tradition, stronger perhaps in academic circles than in popular thought, that associates property with immorality. Starting with Proudhon's slogan that "property is theft,"<sup>3</sup> and building through Marx and Engels with their call for the abolition of private property,<sup>4</sup> this tradition has put property on the

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\* Charles Keller Beekman Professor of Law, Columbia Law School.

\*\* Fred A. Johnston Professor of Property and Environmental Law, Yale Law School. For comments and discussions, the authors would like to thank Eric Claeys, Robert Ellickson, James Gordley, Eric Posner, Arthur Ripstein, and participants in the Conference on Law and Morality at the William and Mary School of Law. All errors are ours.

1. As Bentham put it, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." JEREMY BENTHAM, *THEORY OF LEGISLATION* 111-13 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802).

2. *Id.* at 1-4.

3. PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840).

4. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO: A MODERN EDITION* 52 (Verso 1998) (1848) ("[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property.").

defensive in the minds of those drawn to thinking of public policy in moral terms.

This Essay seeks to challenge the conventional wisdom that dissociates property and morality. We hope to establish two propositions. First, no system of property rights can survive unless property ownership is infused with moral significance. By this, we mean that the differentiating feature of a system of property—the right of the owner to act as the exclusive gatekeeper of the owned thing—must be regarded as a moral right; intentional violations of this right, either by unlicensed invasions of owned things or unconsented takings of owned things, must be regarded as immoral acts. Second, the modern American legal system, at least with respect to this core aspect of property, does in fact adopt such a moral perspective.

Our claims are based on the following fundamental aspects of property: Property is a device for coordinating both personal and impersonal interactions over things. Consequently, property rights must be communicated to a wide and disparate group of potential violators; these rights are in rem.<sup>5</sup> Because property rights need to coordinate the behavior of large numbers of unconnected people, they must be easily comprehended and must resist possible misinterpretation. Law, including criminal prosecution and civil enforcement actions, is almost certainly inadequate to achieve this degree of coordination and compliance. Self-help, such as erecting fences and hiring guards, is also too feeble to assure the required degree of near-universal respect for property rights. Property can function as property only if the vast preponderance of persons recognize that property is a moral right, and this requirement has important consequences for the study of property.

For property to serve as an in rem coordination device, the morality upon which it rests must be simple and accessible to all members of the community. We do not attempt here to outline any theory of the origins of property. We do argue that the imperative of in rem coordination places significant constraints on the kind of morality upon which property must rest. Again, we do not offer any fully developed theory of the content of such a morality. But it

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5. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000).

seems highly unlikely that such a morality will be captured by many forms of utilitarianism. Pragmatism is too uncertain, and case-specific cost-benefit analysis too demanding and error-prone, to supply the kind of robust and widely accepted moral understanding needed to sustain a system of property.

Because the type of morality that will support a system of property rights must be suitable for all members of the community, to say that the essential quality of property is captured by the familiar metaphor of the bundle of sticks is also implausible. When it comes to the public definition of property rights, the metaphor implies that the content of property rights continually mutates from one context to the next as legislatures and courts add new sticks to the bundle and take others out. Such a process would make impossible the maintenance of a system of simple moral duties comprehensible to all. Likewise, if the core of property law must rest on a simple foundation of everyday morality, property is unlikely to be wholly the creature of law. If we are right about the necessary connection between property and morality, then Bentham is almost certainly wrong that property arises wholly from law.<sup>6</sup>

Human rights, including rights of bodily security and integrity, are another realm in which rights are widely held not to be wholly dependent for their existence on the state. We will argue that property rights and human rights have much more in common than is often supposed. In particular, both types of rights are "in rem," in the sense that they create corresponding obligations of non-interference on a very large and unspecified mass of dutyholders.<sup>7</sup> Moreover, given the communication problems associated with creating and maintaining such large-scale duties, the content of the respective rights must remain correspondingly simple. "No punching" is the direct analogue of "No taking."

If property is grounded in simple moral principles recognized by all members of society, then one can say property is immoral only by standing outside the existing social system. This stance, of course, is characteristic of the socialist revolutionaries who have excoriated

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6. BENTHAM, *supra* note 1, at 111.

7. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 29-30 (1997) (defining in rem duties and rights).

property: they typically have been outsiders seeking to overthrow the existing social order.

We do not offer the in rem nature of property rights as a theory of the morality of property. But recognizing the features of morality that make possible a system of in rem rights helps explain the relationship of morality and property. Nor do we claim that the traditional everyday morality that supports property extends to the refinements required when we move beyond simple exclusion rights and in rem dutyholders. Beyond the core of property, the simple robust morality supporting exclusion rights gives way to more pragmatic situational morality. In these more rarified contexts, decision makers can afford to let other moral considerations in, including the case-by-case pragmatism characteristic of modern utilitarianism, if so desired. At least the communicative cost constraints from core property do not stand in the way.

Part I of this Essay will consider the relation of property and morality in general. We will argue that, as in the case of human and civil rights, the in rem nature of property rights requires support from very simple and robust moral intuitions. To coordinate expectations among unconnected people through the mediating device of a thing, property must draw on a type of morality that calls for more than pragmatic balancing. In Part II we consider a number of areas of property law that illustrate the role moral intuitions and condemnation play in modern American property law. Part III will consider how situational morality plays a role in refinements to the core exclusionary regime of property law. We also argue that these refinements are just that—refinements—and do not undermine the need for the morally grounded exclusion rights at the core of property.

## I. MORALITY AND IN REM RIGHTS

In this Part, we argue that the critical feature of property rights—that they are in rem rights imposing duties of abstention on all other members of the relevant community—requires that property rights be regarded as moral rights. The nature of property as a coordination device among unconnected and anonymous actors, mediated through stereotyped things, requires that property rights

command widespread respect. This respect can only be provided by some version of morality that treats violations of possession, theft, trespasses, and other gross interferences with property as wrongs subject to widespread disapprobation. This moral code—whatever its origins and whatever its justification—is backstopped by criminal and civil legal enforcement and by self-help. But it is implausible to imagine that legal enforcement or self-help, either alone or in combination, is sufficient to sustain a system of property rights without such a system of morality.

#### *A. The Moral Nature of In Rem Rights*

Property rights, like human rights such as rights of personal security, face a general structural challenge if they are to get up and running. Both property rights and human rights are “in rem” or “good against the world.” The in rem nature of such rights means all actors in the relevant community must recognize that they are subject to a duty to abstain from interfering with such rights insofar as they are held by any other member of the community. This generalized duty, in turn, creates an enormous information cost and collective action problem. The rights must be defined in such a way that their attributes can be easily understood by a huge number of persons of diverse experience and intellectual skills.<sup>8</sup> The identity of the persons who hold such rights must be capable of communication by signals that can be immediately grasped and processed by an equally large multitude.

Take, by way of illustration, property rights in automobiles. In modern society, certainly in urban areas, thousands of automobiles circulate about and are parked here and there. Each auto is owned by someone—a single person, perhaps a couple, perhaps a corporation. The owners generally succeed in keeping track of and identifying their own cars. But most of the time virtually no one knows the identity of the owners of all the thousands of other cars they see on the streets and in parking lots. In order to maintain a semblance of

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8. See, e.g., Merrill & Smith, *supra* note 5, at 24-40 (analyzing the need for standardization in the law of property); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1115 (2003) (discussing the importance of simplification of language in the law of possession).

stability in this system, not only must each owner recognize and exercise dominion over his own car, but virtually all members of society—owners and nonowners alike—must recognize and respect the unique claims of owners to their own particular auto. In other words, virtually everyone must recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other.

How is it that such a system of universal in rem duties of abstention gets up and running and is sustained thereafter? The legal system is one possible answer. Invading or taking other people's property can be made a crime, and police resources can be devoted to investigating and prosecuting property crimes. Invading or taking other people's property can be made a tort, and courts can hear cases by aggrieved property owners and issue injunctions and damage awards against violators. Despite these possibilities, it is doubtful that law alone can generate and sustain a system of in rem duties of abstention. For one thing, when legal protection of property is out of sync with common morality, we often see widespread disregard of legally recognized property rights. This was true of mining claims on federal lands in California in the nineteenth century,<sup>9</sup> and is true of downloading copyrighted material from the Web today.<sup>10</sup> For another thing, we often see that formal legal protection of property is quite modest, both in terms of the severity of sanctions and the frequency of enforcement actions. Yet if the right in question corresponds with common morality, it can be highly secure even with minimal legal enforcement. This is true, for example, with respect to trespass to land or baby strollers left at the entrances to stores.

We are not suggesting that law does not matter. Spontaneous looting sometimes breaks out when the police are perceived to be out of commission, perhaps because of a power outage. And legal actions, whether criminal or civil, can perform educative or "preference-shaping" functions.<sup>11</sup> Thus, law unquestionably per

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9. See GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 36-37 (1989).

10. See generally Richard Swope, Comment, *Peer-to-Peer File Sharing and Copyright Infringement: Danger Ahead for Individuals Sharing Files on the Internet*, 44 SANTA CLARA L. REV. 861 (2004).

11. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 38 (noting that the preference-shaping function

forms a backstopping role in sustaining a system of in rem duties. Our only point is that it cannot do the job alone.

Another possible source of support for in rem duties is self-help.<sup>12</sup> Self-help is also unlikely, however, to support a system of property rights by itself. To return to the automobile example, self-help measures such as locks, alarms, anti-theft devices like “the Club,” and using guarded parking lots, undoubtedly are important in securing property rights in cars. But these devices work best when the percentage of car thieves in the community is small, and most people will call the police when they see someone smashing a window of a parked car. Indeed, we find that even in small-group settings with no formal property rights, third-party enforcement is crucial in maintaining stable allocations of resources.<sup>13</sup> Moreover, the very process of using self-help is governed by moral norms. An owner needs to know when and how much to retaliate against an invader, which requires widely shared norms. Otherwise, things can get quickly out of control and descend into a Hobbesian war of all against all.

Solving such a complicated and massive coordination problem places some constraints on the type of morality that grounds property. Rights to exclude others from a thing must be grounded in robust moral notions that are easy to communicate and shared by the relevant members of the population. There is a range of possible sources for such robust moral rules, and we do not make an argument for which one of these is best. The rules could come from a widely shared deontological theory, or from theories that agree on the relevant property questions. Or they could be conventions that depend on some combination of public utility and human psychology. Hume, for example, argued that property comes about when contiguous possessors of valued things come to recognize the advantages of mutually forbearing from interfering with each

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of criminal law helps explain which conduct is punished and the significance of intent in imposing liability).

12. See Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 69 (2005) (naming self-help as a remedy that is “at the center of a system of property rights”).

13. A vivid example is the Lobster gangs studied by James Acheson. See JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988). This feature of third-party support is important in the case studies described by Elinor Ostrom. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).



other's thing, and this habit of mutual forbearance spreads and becomes conventional morality.<sup>14</sup> Some work by modern cognitive scientists suggests that gross violations of property rights trigger reactions in parts of the brain devoted to automatic emotions rather than general reasoning, as opposed to more general impersonal ethical problems.<sup>15</sup> Still others have noticed the connection between animal territoriality and the exclusionary aspect of property.<sup>16</sup> Any of these sources could help explain how property rules take on the generality, simplicity, and robustness necessary to coordinate basic expectations of large numbers of interacting members of a community.

Indeed, for present purposes any moral theory that endorses general, simple, and robust rules for core property situations, especially those in which claims are being broadcast to the world at large, would be consistent with our view of the relation of morality to property law. Even some forms of utilitarianism or consequentialism of a fairly general sort could justify simple, robust rules of property to which those making decisions of how to act could respond quasi-automatically. The contours of core property rules could be a genuine example of the "overlapping consensus" one hears invoked so often in an era not exactly characterized by consensus.<sup>17</sup> That being said, we will argue that the forms of utilitarianism that undergird modern law and economics which

14. DAVID HUME, A TREATISE OF HUMAN NATURE 314-15 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739).

15. See, e.g., Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2106-07 (2001) (finding "increased emotional engagement" in personal moral dilemmas than in impersonal moral dilemmas); Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517, 517 (2002) (describing the roles of reason and emotion in moral decisions, in which "automatic emotional processes tend to dominate").

16. See, e.g., Jeffrey Evans Stake, *The Property 'Instinct'*, 359 PHIL. TRANS. R. SOC. LOND. VIO. SCI. 1763, 1764 (2004), available at <http://www.journals.royalsoc.ac.uk/media/6cc6l52vtp3wvl47qu5m/contributions/rj/b/4/rj64b902wupym0yw.pdf> (comparing the first-in-time, first-in-right property rule with the natural ownership rules of species of butterflies); Peter C. Mayer, *Property Rights and Resource Management Among Nonhuman Species* 1 (Am. L. & Econ. Ass'n Paper No. 47, 2005), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1485&context=alea> (discussing "the correspondence between animal territoriality and human property rights").

17. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993) (discussing the coexistence of unity and pluralism in a stable society).

assume a degree of plasticity of property and have underplayed the information and coordination problems present in core property situations are inconsistent with the nature of the rights in question.<sup>18</sup>

Whatever their source, property rules and the moral rules that support them must be simple and general, at least as to the core of property. If the rules for determining access to and use of resources required the gathering of detailed information—for example, information about the attributes of rival claimants that might otherwise have moral relevance—this would not produce the stability of expectation needed for widespread coordination.<sup>19</sup> Standards incorporating detailed information would also present a temptation for each person to interpret the standard in his own favor.<sup>20</sup> A standard with too many complexities would give rise to opportunistic claims of miscalculation. In contrast, if the core of property is the simple right of an owner to exclude the world from the resource,<sup>21</sup> the behavior of each actor will be easy to predict: people will comply most of the time, and telling what compliance is—and, more importantly, is not—will be easy.

We will return to some evidence for the role of morality in property in Part II, but consider first two topics central to any

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18. The structure of our argument here is reminiscent of W.D. Ross's antiutilitarianism in its reliance on the way people actually think, and we, like Ross, remain skeptical that the nature and full presumptive force of rules like "Thou shalt not steal" really are captured fully by their consequences. See W.D. ROSS, *THE RIGHT AND THE GOOD* 41-47 (1930). But again, this does not mean that core property rules cannot be analyzed fruitfully and justified using consequentialism or even utilitarianism.

19. Hume's "convention, concerning abstinence from possession of others" rested on the assurance that men, after realizing and communicating their common interest in property rules, would continue to, and expect others to, regulate their conduct according to those rules. HUME, *supra* note 14, at 315-16, 322-23.

20. See Louis Kaplow & Steven Shavell, *Human Nature and the Best Consequentialist Moral System* 11-12 (Harv. Law Sch. Ctr. for Law, Econ. & Bus., Discussion Paper No. 349, 2002), available at <http://ssrn.com/abstract=304384> ("If an individual would like to be able to lie, because it promotes his narrow self-interest, he would like to convince himself that it would be moral to do so ... [and] if moral rules are complex, admitting myriad context-specific exceptions, the capacity to rationalize and misperceive pertinent information makes it likely that individuals would frequently err in favor of their own self-interest.").

21. For various approaches taking the right to exclude as basic, see PENNER, *supra* note 7, at 29-30, 71; Thomas W. Merrill, Essay, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 737-39 (1998); and Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

system of property that must loom large in any discussion of the morality of property.

### 1. Possession

What counts as possession is important for getting particular property rights started and for grounding the entire system of property.<sup>22</sup> Property can be regarded as a robust right to possess over time; ultimately the right to exclude is the right to determine who can possess the thing in question.<sup>23</sup> Hume argued that people make associations in their minds between themselves and the things they possess.<sup>24</sup> Rules making nearness and physical control the criteria for possession have a psychological basis, and the convention of respecting possession stems from people's mutual expectations that they will respect the right to control these things.<sup>25</sup> Building on Hume's convention-based account, Robert Sugden has shown that possession can be modeled by a simple game in which players, when challenged, fight if they are in possession and defer if they are not in possession.<sup>26</sup> This "possession" or "bourgeois" convention is an evolutionarily stable strategy. The opposite strategy—always defer when challenged—would also be stable, but might not be as useful or as salient. Personhood and autonomy theories also point to the importance of certain core cases of possession. Like Hume's and Sugden's possession convention, personhood theories stress proximity and control and hence possession; for example, Hegel's self-actualization can occur through possession of the thing.<sup>27</sup> And the sphere of autonomy starts with

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22. See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221-24 (1979); Dean Lueck, *First Possession as the Basis of Property*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 200, 200 (Terry L. Anderson & Fred S. McChesney eds., 2003); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73-75, 77-79 (1985); Smith, *supra* note 8, at 1115-25.

23. See, e.g., Rose, *supra* note 22, at 77 (citing Blackstone for the proposition that possession requires acts evincing "a declaration of one's intent to appropriate").

24. HUME, *supra* note 14, at 323-24 & n.71.

25. *Id.* at 311-24.

26. ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE* 153-59 (1986). Once the rules of the game are established, everyone's best interest is to follow them. See *id.* at 155-56.

27. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 51 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) ("My inner idea [*Vorstellung*] and will that

the space closest to the person. Related rights of the person, like the right to be free from offensive contact under battery, extend to objects that are closely related to a person's body.<sup>28</sup>

Related to possession is the first-in-time rule. Again, first-in-time is a simple rule and one which most people pick up as a matter of everyday morality in childhood. Like other simple moral rules, first possession can come into conflict with other moral rules. For example, first-in-time in some scenarios can lead to excessive competition, which is regarded as wasteful.<sup>29</sup> Such conflict does not make first-in-time any less of a grounding for the basics of property; rather, the conflict in these cases requires refinements for high-stakes situations, especially those in which a clear winner cannot be expected to emerge early.

Importantly for our purposes, the rules of possession are quite general. It takes fairly high stakes or a high degree of personal

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something should be *mine* is not enough to constitute property; ... on the contrary, this requires that I should *take possession* of it. The *existence* which my willing thereby attains includes its ability to be recognized by others." In Radin's Hegelian personhood theory of property, the criterion for personhood property is whether the person is so bound up with an object that it helps constitute the person, and canonical examples (wedding rings, residences) involve possession. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61, 965-68 (1982).

28. The *Second Restatement of Torts* extends coverage to objects connected to the person in a dignitary sense, which seems to imply possession, but not vice versa:

Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person. On the other hand, there may be things which are attached to one's body with a connection so slight that they are not so regarded. The line of distinction is very difficult to draw. It is a thing which is felt rather than one to be defined, since it depends upon an emotional reaction.

RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (1965).

29. See, e.g., Terry L. Anderson & Peter J. Hill, *Privatizing the Commons: An Improvement?*, 50 S. ECON. J. 438, 441, 447 (1983) (arguing that competition for resources can be inefficient because it encourages excessive expenditure in the attempt to win); Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 395-409 (1995) (modeling conditions under which first possession rules can instigate wasteful racing behavior).

interaction for law to recognize a different rule for establishing ownership.<sup>30</sup> For example, whaling customs track the certain control norms of possession except when whales are too dangerous or too likely to sink to make them practicable.<sup>31</sup> The whaling industry and whaling communities can develop the more specific information at low cost.<sup>32</sup> But the norm of first possession is left in place in a surprisingly wide variety of contexts. This widespread and general norm allows nonexpert and anonymous parties to interact in predictable and peaceful ways.

## 2. Nonreciprocal Causation

Coase made famous the idea that in any conflict over resources, causation is reciprocal.<sup>33</sup> If a rancher's cattle are trampling the farmer's corn,<sup>34</sup> or the confectioner's pestle is making too much noise for the neighboring doctor,<sup>35</sup> or a factory is sending foul odors onto the land of a resident,<sup>36</sup> Coase pointed out that each activity is

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30. Smith, *supra* note 8, at 1115-25.

31. See Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 88-94 (1989); Smith, *supra* note 8, at 1119-22; see also *Swift v. Gifford*, 23 F. Cas. 558, 559-60 (D. Mass. 1872) (No. 13,696) ("The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used; and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception.").

32. Smith, *supra* note 8, at 1121-22.

33. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2, 8-15, 35 (1960).

34. *Id.* at 2-8.

35. *Id.* at 8. See also *Sturges v. Bridgman*, (1879) 11 Ch.D. 852, 852-53, the case upon which Coase based his example.

36. Coase, *supra* note 33, at 1. Coase discussed, among other cases, *Bass v. Gregory*, (1890) 25 Q.B.D. 481, 481-82, involving the owners of a public house with a brewing vat and an owner of some cottages with a well that served as a ventilating shaft for the vat. The factory-resident scenario featured prominently in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-90, 1110-12, 1115-24 (1972), and has continued to be a stock example in the literature on property rules and liability rules. See, e.g., Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 NW. U. L. REV. 267, 292 (2002) (discussing "the familiar example of a dispute between a polluter and a resident who is affected by the pollution"); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 748-52 (1996) (arguing for employment of pollution taxes rather than a liability system); James E. Krier & Stewart J. Schwab, Essay, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 441-43 (1995) (using pollution example in arguing for

necessary for a conflict to exist. If either were eliminated, there would be no harmful interaction and, therefore, in Coase's view, it makes no sense to speak of either activity as being the cause of the problem.<sup>37</sup> Such a view fits in well with the bundle of sticks conception of property: a judge faced with conflicting uses can decide which is the more valuable and favor it with the entitlement to the use. Promoting the more valuable use could take the form of making the one engaged in the less worthy use liable or, in the case of more sensitive uses, simply denying relief from the "harm" from the more valuable use.

This stick-by-stick view of resolving resource conflicts does not accord with core property law.<sup>38</sup> Instead, the starting point in property is to ask whose default package of entitlements—starting with the basic right to exclude—would cover the conflict in question. If what *A* is doing causes something tangible to cross the boundary line onto *B*'s land, the presumption is that there is a violation. In the case of visible objects, the law of trespass makes this the end of the story. Nuisance law is often seen as adopting a system of ad hoc balancing to decide which of two interfering uses will prevail, but the balancing type of analysis is less widespread than one might think.<sup>39</sup> And even in cases that ostensibly balance, causation is not really regarded as reciprocal.<sup>40</sup>

It is worthwhile to note that reciprocal causation does not accord with everyday intuitions about morality. If *A* punches *B* in the nose, we do not see *B*'s nose as having contributed causally to the fist-nose interaction. More generally, some of the most serious moral

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new type of liability rule). See generally Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. 1 (2001) (discussing a nuisance dispute between polluter and resident); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001) (involving a factory and resort).

37. Coase, *supra* note 33, at 2.

38. See Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 391-94 (2001) (discussing the skepticism with which legal scholars have received the idea of "causal agnosticism"). For a discussion of how nuisance law does not reflect Coasean causal agnosticism, see Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

39. Smith, *supra* note 38, at 974.

40. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 68-69 (1987).

objections to Coasean analysis have come from those who find the implications for killing and rape to be unacceptable.<sup>41</sup>

Property rights are in a sense "lumpy" and their lumpiness breaks the symmetry between the holder of the right and neighbors or strangers.<sup>42</sup> Partly because our moral intuitions track thingness, we do not evaluate conflicts on a stick-by-stick basis. Instead, the right to exclude indirectly protects a wide range of uses.<sup>43</sup> The right to exclude directs us to very simple signals of boundary crossing, in a nonreciprocal fashion. Property rights are *ex ante* and lumpy, and when the interaction comes along, the causal question is no longer up for grabs as it is in Coase's hypothetical world.<sup>44</sup>

Property rights reflect nonreciprocal causation and draw on morality in doing so. Nowhere is this more dramatically the case than in the discussions over Guido Calabresi and A. Douglas Melamed's framework of property rules and liability rules.<sup>45</sup> A property rule gives the current holder of the entitlement a veto over transfers; the property rule is designed to be robust enough to force potential takers into respecting the entitlement or acquiring it consensually.<sup>46</sup> A liability rule allows the nonholder to take the entitlement from its current holder by paying officially determined damages; the current holder has no absolute veto.<sup>47</sup> Reflecting Coase's views on reciprocal causation, Calabresi and Melamed noted that one could locate the entitlement in either party and protect it by either a property rule or a liability rule.<sup>48</sup> In the canonical

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41. See, e.g., *id.* at 68-69, 118-19 (criticizing transaction cost analysis of questions of entitlement not to be raped and noting the role of reciprocal view of causation); A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 60 (1996) ("[O]nce the reciprocal nature of the problem is conceded, there is just no end to the possibilities .... The reciprocal nature of human interaction can raise emotive issues, as when women object to the idea that the way to stop sexual assaults on the streets at night is for them to stay at home. Even if they are the cheapest cost avoiders, ought this to be conclusive?").

42. See Smith, *supra* note 12, at 70-76.

43. A number of authors have stressed this aspect as a result of philosophical analysis of the concept of property. See, e.g., J.W. HARRIS, *PROPERTY AND JUSTICE* 30-32 (1996) (analyzing property as an "open ended" set of "use-privileges" protected by "trespassory rules"); PENNER, *supra* note 7, at 68-74 (noting the connection between use and exclusion).

44. See *supra* note 38 and accompanying text.

45. See generally Calabresi & Melamed, *supra* note 36.

46. *Id.* at 1092.

47. *Id.*

48. *Id.* at 1092-93.

example of the polluter and the resident, the resident could have the entitlement—the right to be free from pollution—with property rule protection (Rule 1).<sup>49</sup> If the polluter would like to continue polluting, it must pay the price demanded by the resident. Or, the resident could have the entitlement protected only by a liability rule (Rule 2).<sup>50</sup> The polluter could, if it so chose, pollute and pay compensatory damages for the harm inflicted on the resident. Calabresi and Melamed note that the shoe could be on the other foot; the polluter could have the entitlement.<sup>51</sup> Here, Coasean reciprocal causation gets us into trouble. Yes, the polluter could have the entitlement protected by a property rule (Rule 3). But what does that mean? Having “the entitlement” could mean that the polluter could have a separately negotiated easement for pollution, and, in this sense—mostly relevant only to the parties to the agreement—there would be a right to pollute.<sup>52</sup>

But what if no such adjustment has occurred to the default package of rights held by the polluter and the resident? Seemingly, when commentators speak of a “right to pollute,” what they really mean is that a court will deny either an injunction or damages to the resident.<sup>53</sup> But the question is whether this is equivalent to a

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49. *Id.* at 1115-16.

50. *Id.* at 1116.

51. *See id.* at 1090.

52. We do not argue that the bundle of rights is not a useful analytical tool or that owners may not, as between themselves and identified others, break up the bundle. But, as soon as this fragmentation of the bundle presents information costs to third parties, as easements in rem theoretically do, the fragmentation must follow the fault lines prescribed by property law, specifically through the *numerus clausus* principle. *See generally* Merrill & Smith, *supra* note 38. Courts will make an effort to pigeonhole a detached “stick” into the category of license, easement, or lease. *See, e.g.,* *Baseball Publ’g Co. v. Bruton*, 18 N.E.2d 362, 364 (Mass. 1938) (finding that plaintiff’s right to hang a sign on defendant’s wall is an easement).

53. *See* Calabresi & Melamed, *supra* note 36, at 1118-19 (discussing “the right to pollute”); *see also* Ayres & Goldbart, *supra* note 36, at 46 (discussing “the right to pollute” in the property rule versus liability rule framework); Kaplow & Shavell, *supra* note 36, at 719 n.14 (noting the alternative of protecting a polluter’s right to pollute with a property rule); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1343 (1977) (arguing that it is an oversimplification to speak of a “right to pollute” because the polluter “actually has only a qualified right to pollute in quantities reasonable for the time and place, given the present state of the art of pollution abatement”). For a very careful formulation of how the failure of a plaintiff’s suit against a polluter results, “[i]n effect,” that the defendant “enjoins” the plaintiff and enjoys “what amounts to a property right,” *see* KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 176-77 (2d ed. 2002).



"right to pollute." Before considering this possibility, note that the notion of a right to pollute offends the moral sense of many commentators.<sup>54</sup> The legislative history behind the Clean Water Act of 1972, to take but one example, assumes as a baseline that "[n]o one has the right to pollute."<sup>55</sup> Interestingly, it offends the right-to-exclude foundation of the default package of property rights as well. When a court denies a resident either an injunction or damages in a nuisance case—which should be exceptional based on the traditional view of property—the polluter is exercising a privilege, not a right, to pollute.<sup>56</sup> The resident cannot come onto the polluter's land and smash the factory because that would violate the polluter's right to exclude. But nothing stops the resident from exercising her own privileges and, for example, building a wall or erecting a large fan to stop the fumes from coming over the boundary line. A court would not enjoin the wall or the fan.<sup>57</sup> Properly considered, the Blackstonian default package of rights<sup>58</sup>—a right to exclude coupled with a wide range of largely unspecified privileges to use—breaks

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54. See, e.g., Todd B. Adams, *Is There a Legal Future for Sustainable Development in Global Warming? Justice, Economics, and Protecting the Environment*, 16 GEO. INT'L ENVTL. L. REV. 77, 122 (2003) (noting that critics regard cap-and-trade programs as immoral because such programs acknowledge "a property right to pollute"); Peter Berck & Gloria E. Helfand, *The Case of Markets Versus Standards for Pollution Policy*, 45 NAT. RESOURCES J. 345, 365-66 (2005) ("[E]nvironmental goods are not and should not be simple market goods."); Michael J. Sandel, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23 ("[T]urning pollution into a commodity to be bought and sold removes the moral stigma that is properly associated with it.").

55. S. REP. NO. 92-414, at 43 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3709; 1 STAFF OF S. COMM. ON PUB. WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1415, 1461 (Comm. Print 1973).

56. See Smith, *supra* note 38, at 1037-45.

57. The treatise upon which Coase relied states unequivocally that the right to a lateral passage of air, as well as to a flow of water, superadds a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern, possesses to prevent his neighbour transmitting to him air or water in impure condition; this latter right is one of the ordinary incidents of property, requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance.

GALE ON EASEMENTS 241 (Michael Bowles ed., 13th ed. 1959).

58. The basic exclusionary regime is similar to what Robert Ellickson calls the "Blackstonian" Bundle of Land Entitlements." Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362-63 (1993). This lumpy "bundle" is unique and has the status of a default, partly for information cost reasons. See Smith, *supra* note 21, at 454.

the symmetry between the polluter's and resident's entitlement possibilities.

It should come as no surprise, then, that Calabresi and Melamed's Rule 4, under which the polluter has the "entitlement to pollute" that the resident can take upon payment of the polluter's cost of abatement or shutting down,<sup>59</sup> makes little sense and has only rarely been encountered in actual practice. In the case of the resident's entitlement, substitution of damages for injunctions (Rule 2 for Rule 1) is a way of softening the default bundle in the face of holdouts, granting for the sake of argument that this is a good idea. In the case of the possibility of the polluter entitlement, however, nothing in the Blackstonian bundle gives the polluter a robust right (as opposed to a mere privilege) to pollute. There is, therefore, no need to "soften" it with Rule 4.<sup>60</sup> That symmetry has been broken by setting up lumpy Blackstonian rights to exclude in the first place. This gives additional content to objections to Rule 4, suggesting that it ignores the preexisting baselines of property.<sup>61</sup>

Again, the notion of a right to pollute illustrates our view of the relation between property and morality. A right to pollute sounds morally offensive, in part because our default entitlements track moral rules under which causation is not reciprocal.<sup>62</sup> Problems like pollution are, in the normal course, not treated as free-floating use conflicts, but as a matter of moral rights. Part of the difficulty in negotiating easements is overcoming the stickiness of this moral right, much to the annoyance of the social engineer.<sup>63</sup> Likewise, on

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59. See Calabresi & Melamed, *supra* note 36, at 1116.

60. See Smith, *supra* note 38, at 1020-21.

61. Cf. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2103-05 (1997) (referring to Rule 4 as posing an "enormous risk," "grotesque," "wholly subversive of any account of ordinary property rights," and "misguided"); Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919, 950 (noting approvingly that "Coase's insight ... destabilizes the received wisdom of the common law and its conventional moral and aesthetic architecture").

62. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 151-53 (1973); see also RICHARD A. EPSTEIN, *TAKINGS* 115-21 (1985); Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 724-25 (1983); Kenneth R. Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 J. LEGAL STUD. 149, 152-54 (1987).

63. See, e.g., Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1580-81 (2004) (accusing Michael Sandel of erroneous extension of "a moral heuristic"

a larger scale, tradable emissions permits have been designed so that they do not look like rights to pollute.<sup>64</sup> The robustness of the moral intuition against a right to pollute is a firm starting point, as is the right to exclude that implements these intuitions automatically.

### *B. Some Implications*

If property is critically dependent on simple moral intuitions about the importance of protecting possession against unwanted invasions, then this has critical implications for the way the institution is understood. First, it suggests that the type of morality needed to sustain a system of property rights must be something other than unconstrained pragmatism. Much effort has gone into explaining, justifying, and critiquing property from a consequentialist point of view. Much of this theorizing has implicitly assumed that property is fully malleable.<sup>65</sup> Based on this expert-oriented view,<sup>66</sup> one might think that the more property can be justified in utilitarian terms, the more utilitarianism would succeed at putting property on its own foundation without regard to extralegal moral considerations, such as the intuition that it is wrong to steal. The wrongness of theft can be seen as part and parcel of a thing-based right-to-exclude view of property, which is too naïve to stand in the light of sophisticated analysis.<sup>67</sup> But success in justifying an

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in arguing that emissions trading is immoral).

64. See Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 284 (noting that trading systems are often based on prior pollution control standards adopted without regard to efficiency norms); see also Henry A. Span, Note, *Of TEAs and Takings: Compensation Guarantees for Confiscated Tradeable Environmental Allowances*, 109 YALE L.J. 1983 (2000) (discussing the Fifth Amendment implications of tradable emissions allowances).

65. For a general discussion of this assumption, see Merrill & Smith, *supra* note 38. Scholars, particularly economists, conceive of property as "an ad hoc collection of rights in resources." *Id.* at 358.

66. Bruce Ackerman terms this the perspective of the "[s]cientific [p]olicymaker." BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10-20 (1977) (contrasting ordinary observer's and scientific policymaker's view of property).

67. See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1086 (1984) ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does

institution on utilitarian grounds does not foreclose a role for deontology in the institution. This can be seen in the case of those rights that have even stronger prelegal moral intuitions backing them—civil and human rights. Rights not to be killed or subject to violence clearly serve an important function in society and are obviously welfare-increasing. But this is not to say that this is all there is to such rights, that people generally think about them in these terms, or that they make decisions involving them using utilitarian calculus.

Although both property rights and civil or human rights can be justified on utilitarian grounds, that does not mean that they can be cashed out into mere utilitarian precepts or rules of thumb and nothing more. Moral philosophers and legal activists who champion human or civil rights, such as rules against torture or rape, would agree that such rights have utilitarian justifications. But most would not, out of this consideration, acquiesce in the notion that these rights are just utilitarian rules of thumb, subject to case-by-case adjustment in accordance with pragmatic considerations.<sup>68</sup> The same general point holds true for property rights: just because property serves utilitarian ends does not mean that the definition and enforcement of property rights reduces to case-by-case pragmatics.

Second, our account suggests that the Legal Realists' favorite metaphor of property as a bundle of rights is seriously misleading as a general account of property. The metaphor implies a degree of malleability that is not, and arguably cannot be, displayed in the core of property rights.<sup>69</sup>

The Realist view—which has been carried forward in much of modern law-and-economics and property scholarship—requires that the traditional everyday morality of property, grounded in the right to exclude, be denigrated and dismissed. Tom Grey, in his classic formulation of the bundle of rights picture, notes that

[t]he legal realists who developed the bundle-of-rights notion were on the whole supporters of the regulatory and welfare

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not have in it.”).

68. See *supra* note 18 and accompanying text.

69. See *supra* note 38 and accompanying text.

state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.<sup>70</sup>

One prime example is Felix Cohen. He saw the right to exclude as important to defining property.<sup>71</sup> But he also regarded property rights as emanating from the state, and considered traditional common law rules implementing the right to exclude as unworthy of any presumptive force, especially to the extent they rely on everyday notions of "things" and traditional morality.<sup>72</sup> Drawing on then-contemporary pragmatist and logical-positivist currents in philosophy, he dismissed these conventional views as metaphysical, meaningless, and superstitious.<sup>73</sup> His essay, "Transcendental Nonsense and the Functional Approach," the title of which echoes Bentham's critique of natural rights as "nonsense upon stilts,"<sup>74</sup> provides a clear indication of Cohen's felt need to denigrate traditional morality in order to clear the way for a more rational design of the legal system, property rights included. Indeed, the article is stuffed with dismissive references to metaphysical status and the supernatural,<sup>75</sup> "scholastic theologians,"<sup>76</sup> medieval popes,<sup>77</sup> angels on needles,<sup>78</sup> myths,<sup>79</sup> "true believers in the orthodox legal theology,"<sup>80</sup> "moral faiths or prejudices,"<sup>81</sup> and "otherworldly" morality.<sup>82</sup> Likewise, Edward Robinson pairs advocacy of "scientific"

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70. Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

71. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373-74 (1954).

72. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815-17 (1935).

73. See *id.*

74. See, e.g., JEREMY BENTHAM, *Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued During the French Revolution*, in 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843); see also A.I. MELDEN, RIGHTS AND PERSONS 179 (1977).

75. Cohen, *supra* note 72, at 810-11, 816, 821-22, 826, 828, 831.

76. *Id.* at 810.

77. *Id.* at 813.

78. *Id.* at 810.

79. *Id.* at 812.

80. *Id.* at 818; see *id.* at 821, 831.

81. *Id.* at 816; see *id.* at 841.

82. *Id.* at 840; see *id.* at 839-40. Cohen advocates a "functional approach" to religion itself. See *id.* at 830-31.

social engineering<sup>83</sup> with disdain for “old ways of thinking”<sup>84</sup> and (nonrealist) “experts [who] are continually mistaking the vividness of their moral indignation for the probable efficiency of their devices for social control.”<sup>85</sup>

Interestingly, like the antiproperty theorists who offer an alternative morality under which property is theft, the Realists too offer a different moral vision. First, in pragmatic or utilitarian terms, they believe that social engineering can come up with more satisfactory answers to resource conflicts.<sup>86</sup> The technocratic approach is probably clearest where property implicates environmental values; again, Realism aside, environmentalism tends to be cast in strongly moral but antiproperty terms.<sup>87</sup> Second, the Realists claim to be implementing some more general, but largely unspecified, moral command, akin to the Golden Rule.<sup>88</sup> The Realists envision judges and regulators devising detailed rules of proper use of resources.<sup>89</sup> They take as antecedents traditional but weaker versions of the Golden Rule, such as can be found in the maxim *sic utere tuo ut alienum non laedas*: “use your property so as not to damage another’s.”<sup>90</sup>

The Realists’ reliance on an extreme version of the bundle of rights, under which no baselines are privileged and bundles are plastic in the hands of courts and legislatures, has become a sort of conventional baseline itself for property theorists. For example, Coase presupposed a radically realist bundle of rights picture of property and this carried forward to modern law and economics.<sup>91</sup> The framework of property rules and liability rules, as we have seen, rests on a very thin and agnostic notion of entitlement. This

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83. Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L.J. 235, 236-38, 267 (1934).

84. *Id.* at 253.

85. *Id.* at 236.

86. See Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 825 (1931) (defining legal realism as a method to advance “social utility” or achieve “social change” without any true standard).

87. See *supra* note 54 and accompanying text.

88. See, e.g., Radin, *supra* note 86, at 825 (arguing that Realists must “decide between a better and a worse readjustment of the human relations disturbed by an event”).

89. Cf. *id.* (“[O]ne of the most urgent of legal problems is to find out just when any particular standard is to be applied.”).

90. BLACK’S LAW DICTIONARY 1757 (8th ed. 2004).

91. See generally Merrill & Smith, *supra* note 38.

has proved true of more recent work in this area, with its divided entitlements, put options, dual-chooser rules, and higher-level auctions.<sup>92</sup> Outside law and economics, the idea that property serves as any kind of presumption finds little favor. Instead, it is taken as self-evident that property is a bundle of rights, the content of which is whatever lawmakers decide it should be.<sup>93</sup>

What these approaches have in common is their context-dependence. They do not rule out any considerations and regard property rights as plastic in the hands of the enlightened social engineer. This is their main appeal to the Realists—and their successors. But their very context-dependence renders them ineligible as a foundation for a moral theory of property rights, given the *in rem* quality of those rights and the coordination problem this feature entails.<sup>94</sup>

## II. MORALITY AND AMERICAN PROPERTY LAW

Property law often generates outcomes that are strongly conditioned by moral values. This Part discusses doctrines or decisions that reveal the moral side of property law. The features we identify with morality-based decision making include (1) sharp condemnations of certain kinds of violations of property rights; (2) the implausibility of explaining these condemnatory responses in terms of case-specific utilitarian balancing or cost-benefit analysis; (3) explanations for the protection of property couched in deontological or rights-language, rather than consequentialist justifications; and (4) a scope of protection for property rights that goes beyond what would be needed to protect nonproperty-based interests, such as bodily security or privacy, suggesting that the protection of property is viewed as a moral good in itself. Each of the following doctrines exhibits some of the foregoing features, although usually not all at once. Collectively, they suggest that property, at least in its core significations, is infused with moral value.

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92. For one recent and highly developed example in which new, complicated designed mechanisms are offered as a proposal to structure entitlements, see IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 3-6 (2005).

93. See *supra* notes 65-67. For a recent example of two authors making the assumption that property is purely a creature of law—in this case, the tax system—and has no other force, presumptive or otherwise, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 8-9 (2002).

94. See *supra* note 7 and accompanying text.

*A. Trespass to Land*

The tort of trespass to land illustrates all four of the features that characterize the moral dimension of property law. The tort of intentional trespass to land has been described as "exceptionally simple and exceptionally rigorous."<sup>95</sup> An intentional trespass occurs when the defendant knowingly or deliberately crosses the boundary lines of another's land, either personally or with an object large enough to displace the owner of possession.<sup>96</sup> No inquiry is made into the comparative utility of the invasion as between the intruder and the possessor.<sup>97</sup> Especially interesting for our purposes, the tort occurs irrespective of whether the defendant causes any harm to the possessor.<sup>98</sup> Accordingly, the midnight streaker who dashes unseen across the lawn of another, and who merely bends a few blades of grass in the process, is guilty of the tort of trespass. Moreover, courts have traditionally granted automatic injunctive relief against continuing or episodic trespasses, without regard to any balancing of the equities.<sup>99</sup>

A recent decision of the Wisconsin Supreme Court, *Jacque v. Steenberg Homes, Inc.*,<sup>100</sup> illustrates all these features of the doctrine and highlights the moral nature of judicial decision making in enforcing property rights. The case involved a dispute between an elderly Wisconsin couple, Harvey and Lois Jacque, who lived on 170 acres of rural land near Schleswig, Wisconsin; and a mobile home sales company, Steenberg Homes, which wanted to deliver a mobile home to a neighbor of the Jacques.<sup>101</sup> The private road to the neighbor's land had a sharp curve and was covered with seven feet of snow, so Steenberg Homes sought permission from the Jacques to cut a path across their field.<sup>102</sup> The Jacques refused permission, even when the company offered to pay for temporary access

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95. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 63 (4th ed. 1971) (citing 1 STREET, *FOUNDATION OF LEGAL LIABILITY* 19 (1906)).

96. *RESTATEMENT (SECOND) OF TORTS* § 158 (1965).

97. *See id.*; *id.* § 158 cmt. c.

98. *Id.* § 158 cmt. c.

99. *See, e.g., Nishanian v. Sirohi*, 414 S.E.2d 604 (Va. 1992) (granting injunctive relief for continuing trespass).

100. 563 N.W.2d 154 (Wis. 1997).

101. *Id.* at 156.

102. *Id.* at 157.



rights.<sup>103</sup> Evidently, the couple harbored irrational fears that giving such permission might result in an adverse possession claim against their land.<sup>104</sup> Rather than take “no” for an answer, the company cut across their field anyway, in a manner designed to conceal what they were doing.<sup>105</sup>

Faced with these facts, the Wisconsin Supreme Court not only upheld a jury verdict of \$1 in nominal damages for the trespass, but it reinstated an award of \$100,000 in punitive damages against the company.<sup>106</sup> The opinion’s tone was one of quiet outrage. The Jacques were portrayed as a helpless old couple, whose right to do as they pleased with their land would be rendered meaningless without vigorous judicial intervention. The assistant manager of the mobile home company was portrayed as a scofflaw who was contemptuous of the rights of others.<sup>107</sup> The court’s willingness to impose a large punitive damages award—one hundred times the largest criminal fine that could be imposed for this behavior<sup>108</sup>—spoke for itself.

The court made no attempt to consider whether the trespass would have been cost-justified.<sup>109</sup> Clearly using the Jacques’ field as a temporary delivery path would have been the most efficient outcome. The opportunity costs of the intrusion to the Jacques were apparently zero: they had retired from active farming,<sup>110</sup> and using the land as a temporary delivery path foreclosed no alternative use of it; nor did the Jacques suffer any risk of losing the land by granting permission. The company, in contrast, faced considerable risk, and not a little time and effort, if it had to use rollers to wrestle the ungainly mobile home around a curved private road covered in seven feet of snow. Reasonable persons would have quickly agreed on a temporary license as a solution to the problem; the Jacques

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 156.

107. *Id.* at 160, 164. The Steenberg employees testified that the assistant manager had told them: “I don’t give a ---- what [Mr. Jacques] said, just get the home in there any way you can” and had laughed when he heard of the violation of the Jacques’ property rights, all of which the assistant manager denied. *Id.* at 157 (alteration in original).

108. *Id.* at 165; see WIS. STAT. §§ 943.13(1m)(b), 939.51(3)(b) (2006).

109. See *Jacque*, 563 N.W.2d at 158.

110. *Id.* at 156.

were not reasonable persons. But the court obviously believed that did not matter; the question of comparative utilities simply was irrelevant to the analysis.

When justifying the punitive award, the court spoke in deontological terms. The award was designed to ensure that companies like Steenberg would respect property rights. A small criminal fine or nominal award of actual damages could not have achieved this result.<sup>111</sup> As the court asked, “[W]hat is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting Class B forfeiture, is not more profitable than obeying the law?”<sup>112</sup> This is not the rhetoric of efficient breach or of cost-internalization via liability rules. In the court’s view, Steenberg Homes had an unqualified duty to respect the Jacques’ property rights, without regard to whether their reasons for refusing permission were unfounded or even silly.<sup>113</sup>

Finally, the court did not regard the justification for punitive damages to be reducible to nonproperty values. At one point, the court justified the award on the grounds that it would discourage persons from using self-help to protect their property, which in turn could lead to violence.<sup>114</sup> And the court also laid considerable stress on an English case, *Merest v. Harvey*, which seemed to justify punitive damages for trespasses in terms of the protection of privacy rights.<sup>115</sup> There was no evidence in the opinion, however, suggesting that the trespass in question threatened either of these values. Moreover, the court consistently described the right in question much more broadly; it was “the individual’s legal right to exclude others from private property”—the right of Harvey and Lois Jacque “to tell Steenberg Homes and any other trespasser, ‘No, you cannot cross our land.’”<sup>116</sup> Punitive damages were awarded to vindicate this broader right—a pure property right—not to promote public utility by preventing violence or protecting privacy.

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111. *See id.* at 165.

112. *Id.* at 161.

113. *See id.* at 164.

114. *Id.* at 160-61.

115. *See id.* at 159.

116. *Id.* at 160.

In short, *Jacque*—and the doctrine of intentional trespass it enforced—bears all the features this Part has ascribed to moral decision making in property law. Unlicensed invasions of land often trigger sharp condemnations from courts; the core prohibition applies even when the balance of benefits and costs would seem to favor the invasion; the rationale for the rule is often expressed in deontological terms; and the rule applies without regard to whether the invasion threatens underlying values protected by the doctrine, such as preventing violence to persons or protecting privacy rights.

### *B. Adverse Possession*

The influence of moral values appears in many other places in property law, often without being expressly acknowledged. One prominent example occurs in the law of adverse possession. To gain title to property by adverse possession, the possession must be “adverse” to the true owner.<sup>117</sup> This means, according to most courts, that the possession must be without the true owner’s permission.<sup>118</sup> There is confusion in the case law about the relevance of the possessor’s subjective knowledge about the rights of the true owner. Most jurisdictions do not expressly require good faith—that is, that the possessor have no subjective knowledge of the true owner’s

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117. 16 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 91.05[4] (Michael Allan Wolf ed., 2000).

118. See, e.g., *Shandaken Reformed Church of Mount Tremper v. Leone*, 451 N.Y.S.2d 227, 228 (N.Y. App. Div. 1982) (“When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him.”); ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 11.7, at 760 (1984).

title—but a minority do.<sup>119</sup> And there are even suggestions from time to time that bad faith is required.<sup>120</sup>

Professor Richard Helmholz, nevertheless, argues that good faith is important to courts in deciding adverse possession cases.<sup>121</sup> After surveying a large number of adverse possession decisions, Helmholz concludes that courts are reluctant to award title by adverse possession to persons who act with actual knowledge of the superior claim of another.<sup>122</sup> As the system of adverse possession operates in practice, then, good faith is akin to an unstated requirement of success.

Limiting transfer of title by adverse possession to cases of good faith makes little sense from a utilitarian point of view.<sup>123</sup> Such a requirement means that the statute of limitations will never run on many acts of adverse possession, complicating the titles of many types of durable property, such as land and artwork. Such a requirement also frustrates the expectations of many persons who

119. See POWELL, *supra* note 117, § 91.05[2]-[3]. Oregon passed a statute making good faith a requirement for adverse possession:

(1) A person may acquire fee simple title to real property by adverse possession only if ...

(b) At the time the person claiming by adverse possession or the person's predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:

(A) By the person and the person's predecessor in interest, continued throughout the vesting period;

(B) Had an objective basis; and

(C) Was reasonable under the particular circumstances ....

Act of August 5, 1989, ch. 1069 § 1(1), 1989 Or. Laws 2170 (codified as amended at OR. REV. STAT. § 105.620(1) (1991)); see Per C. Olson, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297 (1993).

120. See *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 30 (N.Y. 1952); R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 339-41 (1983); see also Lee Anne Fennell, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession*, 100 NW. U. L. REV. 1037, 1038 (2006) (arguing in favor of the rule). The "Maine Doctrine," requiring bad faith for adverse possession and so called because of the opinion in the case of *Preble v. Maine Central Railroad*, 27 A. 149 (Me. 1893), has always been the minority rule. See Helmholz, *supra*, at 339 & n.32. Indeed, this doctrine is no longer followed in Maine. See 14 ME. REV. STAT. § 810-A (2006).

121. See Helmholz, *supra* note 120, at 339-41.

122. See *id.* at 347.

123. For a general discussion of the utilitarian foundations of adverse possession, see Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1985).

have been in possession of land or other property for long periods of time. Finally, it undermines the incentives of owners to engage in good custodial practices, because there is less risk of losing their property to squatters or thieves. Courts, nevertheless, seem highly reluctant to strip owners of property in favor of someone who has acted in subjective bad faith in taking it from them.

The impulse is essentially the same as that underlying *Jacque*.<sup>124</sup> Someone who has deliberately taken the property of another is simply a bad person, and should not be rewarded for such behavior. The immorality of the original act of deprivation trumps all considerations of utility that can be arrayed on the other side. Popular morality seems to concur. When proposals are made to restore artwork or other assets to the victims of Nazi persecution,<sup>125</sup> or to restore land taken from Native American tribes in violation of treaty rights,<sup>126</sup> few voices are raised questioning the wisdom of trying to sort out the claims to these assets, which were taken many decades ago. Wrongful dispossession of property should be vindicated, apparently without regard to the costs or inconvenience of attempting to do so after a long passage of time.

This instinct is not limited to American courts. The European Court of Human Rights recently declared the English common law rule of adverse possession to violate the European Convention on Human Rights, insofar as it permits the transfer of title to property to the adverse possessor without notice or compensation to the true owner.<sup>127</sup> Significantly, the possessor in that case was acting in bad faith: from the time of original possession, he had full knowledge of the superior claim and identity of the true owner.<sup>128</sup> Although this feature of the case was not highlighted by the court as an element of its reasoning, we doubt that adverse possession would be held to

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124. See *supra* notes 100-16 and accompanying text.

125. See Michael J. Bazylar & Amber L. Fitzgerald, *Trading With the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 709-12 (2003).

126. See generally Laurence Armand French, *Native American Reparations*, in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999).

127. J.A. Pye (Oxford) Ltd. v. United Kingdom, App. No. 44302/02 14-16 (2005), <http://www.echr.coe.int/echr> (click "Case-Law"; then, the "HUDOC" icon; then, the "Search" tab; then search for "44302/02" in the "Application Number" field).

128. *Id.* at 2.

violate fundamental human rights if it were used to correct an innocent mistake about title. Of course, only time will tell how the European Court will develop this new doctrine.

Adverse possession, unlike intentional trespass, is only a partial illustration of the power of moral precepts in the development of property law. This is most likely because the moral perspective and the utilitarian perspective are in some tension, particularly with respect to the treatment of the bad faith adverse possessor. Yet if we look closely, we can find evidence of an accommodation between these perspectives that gives significant weight to the moral perspective. One obvious accommodation would be to adopt a two-tiered statute of limitations, which would be shorter for good faith possessors and longer for bad faith possessors.<sup>129</sup> Several European countries have explicitly adopted this approach.<sup>130</sup> Although no American jurisdiction to our knowledge has explicitly done so, Helmholz reports that the longer adverse possession lasts, the more likely courts are to ignore bad faith.<sup>131</sup> Moreover, a substantial number of American jurisdictions have adopted "marketable title acts," which eliminate nonrecorded claims after a certain period of time, usually thirty or forty years, without regard to good faith or bad faith.<sup>132</sup> So the American system, in practice, is one in which the doctrine of adverse possession is largely limited to good faith adverse possessors for periods of ten to twenty years, and bad faith possessors get clear titles only if they record their claims before thirty to forty years elapse. If this is even roughly accurate as a description, the law in practice operates in much the way we would expect of a doctrine driven significantly by moral concerns.

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129. See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 685-89 (1986).

130. On French law of "prescription" (like adverse possession), see C. CIV. art. 2262 (providing for a thirty-year statute of limitations for prescription of real and personal property); C. CIV. art. 2265 (reducing this period to ten years for one who is in good faith and has color of title, if the true owner lives in the jurisdiction in which the real property is situated, or to twenty years if such owner lives outside the jurisdiction). On Italian law for "usucapione" (like adverse possession) of personal property, see C.c. art. 1161 (providing for ten years for good faith *usucapione* of movable property, twenty years for bad faith); for real property, see C.c. art. 1158 (providing for twenty years for bad faith); C.c. art. 1159 (providing for ten years for good faith).

131. Helmholz, *supra* note 120, at 347-48.

132. HERBERT HOVENKAMP & SHELDON F. KURTZ, *THE LAW OF PROPERTY* § 14.7, at 523-24 (5th ed. 2001).

### *C. Other Bad Faith Actors*

Helmholz's discovery about the significance of good faith and bad faith in adverse possession cases can be generalized to many other areas of property law. Persons who act in bad faith—that is, with knowledge of the superior title of another—are often deprived of the benefit of doctrines that give more favorable treatment to those who act in good faith. Consider some examples.

#### *1. Good Faith Purchasers*

The good faith purchaser for value doctrine allows persons in certain circumstances to take title to property even though their transferee had no such title to give. For example, if *A* sells to *B*, and *B* sells to *C*, and then *B*'s check to *A* bounces because *B* had insufficient funds in the bank, *C* may nevertheless be allowed to retain title.<sup>133</sup> *A* has an action against *B* for damages, of course, but the object remains with *C*. As its name implies, the doctrine applies only to persons like *C* who purchase in good faith, that is, without knowledge of the potential defect in *B*'s title. Persons who act in bad faith, with knowledge of the flaw in the title, are ineligible for this special dispensation.<sup>134</sup>

#### *2. Accession*

The venerable doctrine of accession provides that if *B* takes up an object that belongs to *A*, and through labor and skill significantly transforms the object into something much more valuable than it was when it was taken up, *B* will be given title to the object rather than *A*.<sup>135</sup> Of course, *A* has an action against *B* for damages, equal to the value of the object before the improvements were undertaken, but the object remains with *B*.<sup>136</sup> The doctrine again applies only to

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133. See, e.g., *Kotis v. Nowlin Jewelry, Inc.*, 844 S.W.2d 920, 922-24 (Tex. App. 1992) (applying the doctrine and upholding a finding of lack of good faith).

134. See *id.*

135. See, e.g., *Wetherbee v. Green*, 22 Mich. 311, 312-14 (1871) (involving the conversion of trees into hoops); WILLIAM BLACKSTONE, 2 COMMENTARIES \*\*404-05; Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 118 (1922).

136. See BLACKSTONE, *supra* note 135, at \*404.

persons like *B* who act in good faith, that is, without knowledge that the original object belonged to *A*.

### *3. Building Encroachments*

When someone erects a building that encroaches a few inches onto the property of a neighbor, courts often refuse to enjoin the intrusion, in effect transferring a small slice of land from the true owner to the encroacher.<sup>137</sup> Of course, the true owner has an action against the encroacher for damages, equal to the value of the land taken. This doctrine is available only when the encroacher acts in good faith, that is, without knowledge that the building was encroaching on the neighbor's land at the time of construction. Likewise, some states have passed statutes to protect good faith (and only good faith) improvers.<sup>138</sup>

In each of the foregoing doctrines, the relevance of good faith versus bad faith is expressly acknowledged, and the benefits of the doctrine are reserved for those who act in good faith. These doctrines therefore conform to the model of morality-based decision making to a greater extent than does adverse possession law. Here, we find the decisions expressly condemning the bad faith actor, and refusing to consider whether case-specific considerations of benefits and costs might warrant extending the benefits of the doctrine to those who knowingly deprive others of property rights.

### *D. Takings for Economic Development*

Our next example involves takings by the state. Every sovereign government enjoys the power of eminent domain—the power to take property without the consent of the owner in return for payment of just compensation.<sup>139</sup> We have recently witnessed a major contro

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137. See, e.g., *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 594-95 (Colo. 1951) (en banc) (“[M]andatory injunction ... is not to be issued as a matter of course.”).

138. See *Raab v. Casper*, 124 Cal. Rptr. 590, 593-95 (Cal. Ct. App. 1975) (discussing California good-faith-improver legislation as applied to encroaching cabin on adjacent foothill lot).

139. Not surprisingly, the right to exclude from things plays a large part in regulatory takings law. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“[T]he right to exclude others [is] one of the most essential sticks in the bundle of rights that are commonly characterized



versy, in the wake of the Supreme Court's decision in *Kelo v. City of New London*,<sup>140</sup> about whether this power can be used to promote economic development. Economic development is not precisely defined, but for present purposes can be understood to refer to a taking in which property is acquired by eminent domain and then retransferred to a private commercial entity, in the expectation that this will lead to more jobs or higher tax revenues for the community in question. *Kelo* elicited unprecedented public opposition to the idea of takings of private property for economic development.<sup>141</sup> This public backlash, when translated into the actions of legislators, local public officials, and state and lower federal courts, will probably have a greater impact on the future use of eminent domain than the Court's decision in *Kelo*.<sup>142</sup> Certainly for our purposes, we can take the anti-*Kelo* position to be a more accurate statement of general sentiment about property rights than the opposite position.

What accounts for the public hostility to economic development takings? We think the answer ultimately is the same as that which explains the antipathy to intentional trespass, larceny, bad-faith adverse possession, and the other features of property law we have discussed: economic development takings are regarded as seizures by the state of the property of innocent persons for reasons that are distributionally unjust. Both elements—taking from the innocent and distributional injustice—are necessary to explain the response.

It is instructive to contrast the moral outrage over economic development takings with the utilitarian analysis of compulsory rearrangements of ownership rights coupled with compensation. We

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as property.”).

140. 125 S. Ct. 2655 (2005).

141. For an overview, see ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT* 11, 14 (2006), available at [http://www.law.georgetown.edu/gelpi/current\\_research/eminent\\_domain.eminent\\_pub.cfm](http://www.law.georgetown.edu/gelpi/current_research/eminent_domain.eminent_pub.cfm).

142. As of November, 2006, thirty-four States have enacted some kind of reform restricting the exercise of eminent domain in response to the decision in *Kelo*. This includes ten States that have adopted reforms by popular referendum. Information about the status of legislative reforms can be found on the websites of the National Conference of State Legislatures ([www.ncsl.org](http://www.ncsl.org)) and the Castle Coalition ([www.castlecoalition.org](http://www.castlecoalition.org)). Altogether, more than one hundred bills have been introduced at the state legislative level in the wake of *Kelo* to restrict the use of eminent domain for economic development. See Patricia E. Salkin, *Swift Legislative (Over)Reaction to Eminent Domains: Be Careful What You Wish For*, 20 PROB. & PROP. 44 (2006).

can frame the discussion by considering an example cited in Justice O'Connor's dissenting opinion in *Kelo*: a taking by eminent domain for the purpose of replacing a Motel 6 with a Ritz-Carlton.<sup>143</sup> From a utilitarian or economic perspective, the condemnation of a Motel 6 followed by a retransfer to Ritz-Carlton can be easily justified.<sup>144</sup> The land is worth more in terms of willingness to pay, if improved by a Ritz-Carlton as opposed to a Motel 6.

Why should society care whether the property is transferred to an owner who values the site more highly in terms of its willingness to pay? Because the greater willingness to pay means society as a whole will be better off: the pie will be larger, which means that more people can enjoy larger slices. The new wealth generated by the Ritz-Carlton will be distributed in a variety of ways: more workers will be employed at the hotel, perhaps at higher wages; suppliers of inputs to hotels (towels, toiletries, foodstuffs) will have more to sell, perhaps at higher prices; the shareholders of Ritz-Carlton hotels may be better off because the firm earns higher profits; the local government may be better off if it can collect higher property and sales taxes.

Although not critical, the transfer of the Motel 6 to a Ritz-Carlton will also possibly generate positive externalities not captured in priced transactions between the Ritz-Carlton and its workers, suppliers, shareholders, and tax collectors. Suppose the Motel 6 is located on a boulevard that is a particularly choice location for luxury hotels. Various luxury hotels, including Ritz-Carlton, would like to build on the boulevard, but are reluctant to do so because the Motel 6 sends the message that this is an area suited to budget motels. Condemning the Motel 6 and transferring it to Ritz-Carlton in these circumstances may transform the general ambience of the area in a way that leads to a boom in luxury hotel construction,

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143. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

144. We omit from the analysis possible cycling problems or systemic instability that might emerge if any person is allowed to take the property of another upon payment of fair market value. See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 767-68 (1996). These concerns are remote as long as eminent domain has positive transaction costs that exceed the costs of market transaction in most circumstances. In any event, these systemic worries have not been cited by the opponents of economic development takings as a reason for their hostility. See *supra* notes 140-42 and accompanying text.

producing a much larger increase in societal wealth than would be created by the construction of a Ritz-Carlton standing alone.

One objection often interposed at this point is that there is no need to use eminent domain to acquire the Motel 6 and transfer it to the Ritz-Carlton, because the economic self-interest of the parties should lead to a voluntary exchange of rights. By hypothesis, the change in ownership will produce new wealth; the parties, therefore, should agree on a voluntary sale at a price whereby the new wealth is divided between the owners of the Motel 6 and the Ritz-Carlton. Voluntary exchange, of course, will often occur in these circumstances. But notice that the Motel 6 is in the position of a monopolist with respect to the specific location it currently occupies. If this location has certain unique attractions as a site for a luxury hotel, the situation has the features of a bilateral monopoly. The owner of the Motel 6 may hold out for a disproportionate share of the gains from the transaction, leading to a bargaining stalemate.<sup>145</sup> Should this happen, the only way to realize the increased wealth would be to use the power of eminent domain to force a transfer of the site.

Notwithstanding the perfectly plausible utilitarian case for allowing the Motel 6 to be condemned for a Ritz-Carlton, the public appears overwhelmingly opposed to such schemes. Commentators have cited this example repeatedly in the discussions of *Kelo*,<sup>146</sup> and opponents of the decision clearly regard the taking of a Motel 6 for retransfer to a Ritz-Carlton to be the kind of taking that should be impermissible under a well-functioning system of property rights. The opposition rests on basic moral intuitions, not pragmatic balancing or cost-benefit analysis.

The basic moral intuition is the same as that which says intentional trespass or theft is wrong. Eminent domain entails the use of coercion: the state coerces individuals to give up their property in return for just compensation. Of course, states often coerce individuals. We all have to pay taxes and obey general police regulations. But the state ordinarily does not coerce individuals to give up their

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145. See, e.g., Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 93-94 (2005) (complaining that the opinions in *Kelo* fail to discuss the holdout problem).

146. See, e.g., Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 14-15 (2005); Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213, 238 & n.200 (2005).

discrete property rights unless they have done something wrong, such as default on a loan or commit a crime. The owner of a Motel 6 has entered into no prior agreement authorizing seizure of her property, nor has she done anything wrong that would justify the state taking the property in retribution. We have, in short, what looks like *prima facie* immoral conduct—coercion of the innocent.

This helps explain why most *Kelo* opponents would make an exception for takings of a Motel 6 if it is blighted.<sup>147</sup> Blight is not well defined in this discourse, but let us assume that it means the property is a nuisance—it presents a fire hazard or a health hazard or encourages criminal activity or otherwise threatens to impose negative externalities on surrounding owners or the community more generally.<sup>148</sup> Why might condemning blighted property for economic development be acceptable, whereas condemning non-blighted property is not? Because the owner of blighted property has permitted his property to deteriorate below a level of quality considered minimally acceptable within the relevant community. The owner of blighted property is morally blameworthy in a way that the owner of nonblighted property is not, namely because the owner of blighted property is imposing harm on neighboring properties.<sup>149</sup> The taking of blighted property, therefore, can serve as an appropriate collective response to harm-causing or immoral behavior, which is consistent with general intuitions about corrective justice.

The basic immorality of coercing the innocent to give up their property also helps explain why the payment of compensation to the owner does not validate the taking in the eyes of the public. Debate about the limits of eminent domain has long singled out the taking of property from *A* and the giving to *B* as being particularly objectionable.<sup>150</sup> This objection is readily understandable if *A* is not

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147. See *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting) (arguing that takings for economic development are permissible only when the property entails some "extraordinary, precondemnation use" that "inflict[s] affirmative harm on society").

148. In short, a blighted property is one that is "the source of any social harm." *Id.* at 2675 (O'Connor, J., dissenting).

149. See *id.*

150. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that takes *property* from *A* and gives it to *B* ... is against all reason and justice ...."); see also *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (finding an unconstitutional taking when state required railroad company to give up land so that farmers could build a grain elevator).

compensated for the taking. In that event, one person is being singled out for an especially oppressive burden, only to provide an especially large benefit for another. Opponents of economic development takings, however, also condemn *A-to-B* transfers, even if *A* is assumed to receive full and complete indemnification for the loss. What remains objectionable about *A-to-B* transfers, even if fully compensated, is that the transaction is perceived to confer unduly *concentrated benefits* on *B*. The state's power of coercion is being used to confer disproportionate benefits on one or a small number of individuals.

Standing alone, the conferring of disproportionate benefits would not give rise to much objection.<sup>151</sup> But conferring benefits on a select few is not regarded as a morally acceptable use of the state's power of coercion.<sup>152</sup> Forcing innocent people to give up their property, even in return for just compensation, is regarded as morally acceptable only if the benefits of the transaction will redound to all members of the community. Economists may come up with fancy arguments for why transferring the property to Ritz-Carlton will benefit the whole community, but to the ordinary citizen it looks like pure favoritism. Some favoritism is to be expected in any form of government. Coercing innocent persons to give up their homes and farms in order to bestow favors on the select few, however, crosses the line of what most persons are prepared to countenance, consistent with popular perceptions of morality.

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151. As commentators have noted, government often acts in ways that result in conferring disproportionate benefits on the few at the expense of the many. See, e.g., Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549-51 (2001); Eric Kades, *Windfalls*, 108 YALE L.J. 1489 (1999). Yet doctrine does not require systematic disgorgement of these disproportionate benefits. This is another example of nonreciprocity in the law. Takings of rights (here property) are regarded as problematic in a way that givings are not.

152. When the transferee (*B*) is a common carrier, like a railroad; or a public utility, like an electric distribution company, we seem less concerned about the concentration of benefits. See *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (generally disapproving takings for economic development, but carving out an exception for takings by common carriers and utilities subject to pervasive regulation). This is because common carrier and public utility regulations require that the company make its services available to the entire community on a nondiscriminatory basis thereby assuring that the benefits are widely distributed. Also, such entities have historically been subject to rate regulation, which limits the gain they can obtain through the use of coerced property transactions.

*E. Criminalization of Nonviolent Property Crimes*

One telling sign of the relationship between property and morality is the degree to which interferences with property are punished as criminal acts. Although functional arguments exist for criminalizing takings of property,<sup>153</sup> we usually think of criminal law as condemning acts that are regarded as unambiguously immoral. Thus, when we find, as we do, a broad consensus in support of criminalizing intentional takings of property, this evidence strongly supports the proposition that property rights are infused with moral significance.<sup>154</sup>

Also significant is that criminal prohibitions of takings of property have expanded rather than contracted over time. At one time, takings of property arguably were criminalized only in situations that might lead to a breach of the peace.<sup>155</sup> If this were true, one could say that what the law regards as a matter of moral concern are violations of personal security, with violations of property being criminalized only insofar as they are likely to lead to violations of personal security. Many authors influenced by Legal Realism, including the drafters of the Model Penal Code, were drawn to this position.<sup>156</sup> Today, this argument is not plausible. Violations of property rights are criminalized in many contexts with no likelihood of any breach of the peace accompanying the taking. To judge by the pattern of the law, the intentional taking of the

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153. See Calabresi & Melamed, *supra* note 36, at 1124-27 (explaining criminal law as a mechanism for preventing "property rules" from being unilaterally converted into "liability rules"); Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON. 367, 375-77 (1997) (explaining criminal law of theft in terms of indirect costs and transaction costs); Alvin K. Klevorick, *On the Economic Theory of Crime*, in CRIMINAL JUSTICE: NOMOS XXVII 289, 301-04 (J. Roland Pennock & John W. Chapman eds., 1985) (explaining the function of criminal law in maintaining the "transaction structure" of legal entitlements including property rights).

154. On the close relationship between criminal law and everyday conceptions of morality, see Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U.L. REV. 453 (1997). Robinson and Darley argue that the criminal law functions best when it reflects and reinforces common conceptions of morality, and functions worst when it tries to create incentives for persons that conflict with those conceptions.

155. WAYNE R. LAFAVE, CRIMINAL LAW § 19.1(a) (4th ed. 2003).

156. See *infra* note 158 and accompanying text.

property of another is regarded as a moral wrong sufficiently grave in itself to warrant criminalization.

The history of the crime of larceny reveals this pattern very clearly. Larceny at common law was defined as a taking of property from the possession of another with intent to convert it to one's own use.<sup>157</sup> Given the heavy emphasis on the taking from possession, the common law courts can plausibly be said to have viewed larceny as defending society against breach of the peace, rather than protecting individual property rights *per se*.<sup>158</sup> For example, a bailee who rightfully obtained possession of property from its owner could not be guilty of larceny.<sup>159</sup> The result was that the crime of larceny was quite narrow in scope.

Gradually, the courts began to expand the reach of the offense, initially by subtle alterations in the common law concept of possession.<sup>160</sup> Thus, for instance, a general rule emerged that goods entrusted to an employee were not deemed to be in his possession, but were only considered to be in his custody, so long as he remained on the employer's premises.<sup>161</sup> Similarly, the case of *Chisser* held that a shop owner retained legal possession of merchandise being examined by a prospective customer until the actual sale was made.<sup>162</sup> By holding that the customer had not acquired possession, but merely "custody," the court was able to sustain a larceny conviction.<sup>163</sup>

As the reach of larceny expanded, the intent element of the crime became increasingly important, whereas the requirement of a taking of possession became less significant. As a result, the bar against convicting a person who had initially obtained lawful

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157. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 85; see also WILLIAM BLACKSTONE, 4 *COMMENTARIES* \*\*229-43 (distinguishing between "simple" larceny and "mixt or compound" larceny).

158. See MODEL PENAL CODE § 206 app. A, at 101 (Tentative Draft No. 1, 1953); LAFAVE & SCOTT, *supra* note 157, § 85; George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 497-98 (1976).

159. See, e.g., GLANVILL, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 128-29 (G.D.G. Hall ed., 1965); *Carrier's Case*, Y.B. 13 Edw. 4, fol. 9, Pasch, pl. 5 (1473), reprinted in 2 SELDEN SOCIETY 30, 30-31 (M. Hemmant ed., 1948).

160. See, e.g., MODEL PENAL CODE § 206 app. A, at 101 (Tentative Draft No. 1, 1953).

161. See, e.g., 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 364-65 (3d ed., 1923).

162. (1678) 83 Eng. Rep. 142, 142-43 (K.B.).

163. *Id.*

possession of property faded. In *King v. Pear*, for instance, a defendant who had lied about his address and ultimate destination when renting a horse was found guilty of larceny for later converting the horse.<sup>164</sup> Because of the fraudulent misrepresentation, the court reasoned, the defendant had never obtained legal possession.<sup>165</sup> Thus, "larceny by trick" was born.<sup>166</sup>

Later cases went even further, often ignoring that a defendant had initially obtained possession lawfully, and instead focussing on his later intent.<sup>167</sup> The crime of larceny then encompassed not only situations in which the defendant initially obtained property by a taking from possession, but many situations where an individual, possessing the requisite intent, exercised control over property inconsistent with the continued rights of the owner.<sup>168</sup> As a result of this evolutionary process, the scope of the crime of larceny expanded to such an extent that protecting the peace could no longer provide a plausible justification. Instead, larceny clearly was designed to protect the general security of property rights.<sup>169</sup>

Today, penal statutes and case law tend to focus on the actor's intent and the exercise of dominion and control over the property.<sup>170</sup> The owner's consent to transfer of possession does not preclude a conviction for larceny. If the defendant exercises dominion and control wholly inconsistent with the continued rights of the owner,

164. (1779) 168 Eng. Rep. 208, 209 (K.B.).

165. *Id.*; see also *King v. Semple*, (1785) 168 Eng. Rep. 312, 313-14 (K.B.) (citing *King v. Pear*); 1 WILLIAM HAWKINS, *PLEAS OF THE CROWN* 135 n.1 (Thomas Leach ed., 6th ed. 1787) (defining larceny using the case of the rented horse as an example).

166. See JEROME HALL, *THEFT, LAW AND SOCIETY* 40 (2d ed. 1952).

167. See, e.g., *Queen v. Middleton*, (1873) 2 L.R.C.C.R. 38 (holding that transfer by mistake is inoperative, and that no property passed); *Queen v. Ashwell*, (1885) 16 Q.B.D. 190 (holding that man who kept a sovereign mistakenly loaned in place of a shilling was not guilty of larceny as a bailee, but splitting on whether he was guilty of larceny at common law).

168. Parliament also played a role in this development. Thus, for example, in 1857 a statute extended larceny to all conversions by bailees. An Act To Make Better Provision for the Punishment of Frauds Committed by Trustees, Bankers, and Other Persons Intrusted with Property, 20 & 21 Vict., c. 54 (1857) (Eng.).

169. LAFAYE & SCOTT, *supra* note 157, § 84; Fletcher, *supra* note 158, at 519-20.

170. See, e.g., *People v. Baker*, 6 N.E.2d 665, 668 (Ill. 1937) (holding that larceny is complete when control is shifted to the thief with the intent to steal); *People v. Alamo*, 315 N.E.2d 446, 450 (N.Y. 1974) (noting that "unauthorized use" statute is not different from larceny in terms of means used to effect taking); *People v. Britto*, 402 N.Y.S.2d 546 (N.Y. Crim. Ct. 1978) (denying motion to dismiss shoplifting case in which defendant had not yet left the store).



and otherwise manifests the requisite culpable state of mind to establish criminality, a larceny has occurred. Thus, for example, shoplifting is a crime, without regard to whether the shoplifter succeeds in depriving the shop owner of possession of the goods in question.<sup>171</sup>

In addition to larceny, persons who damage, but do not take, personal property can be charged today with the crime of criminal mischief.<sup>172</sup> Purposely destroying property worth more than \$5000 is a felony punishable by imprisonment.<sup>173</sup> This type of punishment is a clear indication of moral condemnation.

Real property crimes reflect a similar, if less dramatic pattern. Traditionally, real property offences were confined to actions that threatened buildings or occupied structures, and thus could plausibly be said to jeopardize persons found in these structures. The crime of arson, for example, is defined as causing a fire or explosion that destroys "a building or occupied structure of another,"<sup>174</sup> and is subject to very severe penalties. The crime of burglary occurs when a person "enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter."<sup>175</sup> It too is a felony subject to severe penalties.<sup>176</sup> The penalties for criminal trespass are also frequently more severe if the trespass involves a building or occupied structure.<sup>177</sup> This overall pattern also led earlier commentators to suggest that the criminal law is systematically more concerned with protection of persons than protection of property, because occupied structures by definition include persons, and persons are more likely to be found in buildings.<sup>178</sup>

But the law has not stopped at criminalizing real property offences that threaten personal security. Trespass to land is

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171. See, e.g., *People v. Olivo*, 420 N.E.2d 40 (N.Y. 1981) (involving defendants who were suspiciously concealing goods before leaving the store).

172. MODEL PENAL CODE § 220.3(1)(a) (1962).

173. *Id.* §§ 6.06(3), 220.3(2).

174. *Id.* § 220.1(1).

175. *Id.*

176. *Id.* § 221.1(2).

177. *Id.* § 221.2(1).

178. See LAFAYE, *supra* note 155, at 1078.

nowadays a crime in every jurisdiction, although often only a misdemeanor if the trespass occurs on land that is unoccupied.<sup>179</sup> Criminal mischief also applies to real property, and for willful and malicious damage over a threshold value is a felony punishable by imprisonment.<sup>180</sup> Thus, we see general movement in the direction of expanding criminal sanctions for interferences with rights to land, even in circumstances that pose no plausible threat to personal security. This too confirms that unlicensed interferences with property are perceived to be morally wrong, without regard to whether such interferences threaten other values such as the sanctity of persons.

In short, the history of property crimes broadly supports the proposition that core property rights are regarded as moral rights. Although criminal law sometimes is used for purely instrumental purposes, certainly the long history of criminalization of property crimes is related in substantial measure to popular moral beliefs. Moreover, the scope of criminalization of property offenses strongly suggests the invasion or taking of property is itself regarded as morally wrong, without regard to whether other moral interests, such as the interest in protecting bodily security or preserving the peace, also are implicated.

#### *F. The Dominance of "Property Rule" Protection*

The remedies for violations of core property rights also partake of a moral flavor. Many have remarked on how property law employs property rules and sanctions, rather than liability rules and prices, far more than one might expect under some efficiency-based theories.<sup>181</sup> Some of the explanations for the law's reliance on property rules track the reasons we have offered for why property must be moral as well as legal. The more that property rights must

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179. *Id.* at 1036.

180. *See, e.g.*, FLA. STAT. ANN. §§ 806.13(1)(a), (3) (West 2006); MONT. CODE ANN. § 45-6-101 (2005).

181. *See, e.g.*, Epstein, *supra* note 61, 2092 (arguing that undercompensation concerns usually outweigh holdout problems, making property rules dominant); Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2194-97 (1997) (analyzing liability under average harm rule as a common-pool problem in some circumstances); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004) (arguing for information cost advantages of property rules).

be respected by a large, heterogeneous, and unconnected group of dutyholders, the more we should expect the remedy to be a simple one.<sup>182</sup> Exclusion by its nature protects a wide variety of uses, and the signal for violation is a simple on/off signal easily perceived by all—a boundary crossing in the case of land. Respecting the autonomy of the owner and the delegation of authority to the owner to choose among uses requires robust protection. A property rule does just that.<sup>183</sup>

Property rules also can be viewed as sanctions; once a violation occurs, the liability cost to the violator jumps from zero to a supracompensatory amount.<sup>184</sup> By contrast, a liability rule or a price tries to tailor liability costs to the amount of harm inflicted in a particular case. Interestingly, a sanction is also reserved for behavior that is not permitted—often because it is viewed as morally wrong. A sanction is designed, theoretically, to deter completely rather than to hold an actor in equipoise,<sup>185</sup> which is just what we would expect of rights recognized by traditional morality.

Our brief survey has already revealed examples of the preference for property rules. The court in *Jacque* imposed a supracompensatory penalty precisely to assure that the defendant would not think property rights are subject to a “take and pay” regime, however efficient this might be.<sup>186</sup> The widespread demand for limits on the use of eminent domain for private commercial development reflects similar intuitions. In both contexts, we find a general demand to preserve property rule protection for core property rights. This demand reflects deep-seated moral as well as legal assumptions about the sanctity of property.

### III. SITUATIONAL MORALITY AND NONCORE PROPERTY

Simple and robust everyday moral intuitions provide crucial support for the core of property—the right to exclude from a thing,

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182. Smith, *supra* note 181, at 1753-74.

183. *See id.* at 1754 (“[P]roperty rules are particularly suited to the protection of things ....”).

184. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523-24 (1984).

185. *Id.* at 1523.

186. *See supra* note 111-13 and accompanying text.

good against the world.<sup>187</sup> This basic setup takes care of a lot of problems but leaves many that must be solved in more nuanced ways.<sup>188</sup> The law of nuisance, landlord-tenant, future interests, servitudes, trusts, private contracting, and regulation can at various times soften and supplement exclusion rights. Such refinements outside of the core of property respond to a wider range of moral concerns, and entail judgments that reflect pragmatism, expert knowledge, and balancing. Perhaps not surprisingly, these problems and their possible solutions have attracted a large—we would say disproportionate—share of commentators' attention. Indeed, starting with the Legal Realists, the dominant assumption has been that the need to refine the exclusionary regime calls everything into question. A better view would be that efforts to supplement exclusion with various devices governing proper use respond to moral considerations that supplement those backing exclusion, but that exclusion retains its presumptive moral and legal force. The relation of foundation and refinement is reflected deep in the structure of the law of possession and the role that causation plays in property law. Precisely because entitlements retain a morally-grounded bedrock of exclusion rights, the law does not regard causation in resource conflicts agnostically.<sup>189</sup> Property rights, like moral rights, are lumpy and give rise to strong intuitions about who causes harm to whom, conditioned in property law on spatial boundaries and things.<sup>190</sup>

The bundle of rights view gains some of its plausibility from the fact that what we call property law covers a lot of ground. Not all of property is about exclusion of all others from a thing. Some of property law entails finely tailored regulations about use, and some of property law governs use among a narrower class of people, such as future interest holders, neighboring landowners, or even contractual partners.<sup>191</sup> Uncontroversially, the right to exclude from

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187. See *supra* notes 19-21 and accompanying text.

188. There has been a need to allow, for example, airplane overflights and a host of less obvious exceptions. See *United States v. Causby*, 328 U.S. 256, 260-61 (1946) (asserting that the ancient *ad coelum* doctrine "has no place in the modern world"); *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 757 (9th Cir. 1936) (stating that *ad coelum* rule "is not the law, and that it never was the law").

189. See *supra* notes 40-45 and accompanying text.

190. See *supra* notes 42-44 and accompanying text.

191. See *Merrill & Smith*, *supra* note 38, at 394-97, 398; *Smith*, *supra* note 21, at 455-56.

land does not include the right to exclude high-altitude airplane flights.<sup>192</sup> Similarly, nuisance law permits some low-level invasions and allows others to occur upon the payment of damages. Let us briefly mention some other examples of how core property rights give way in what we would regard as noncore circumstances.

Our first example is restraints on the future alienation of property. The primacy of owner autonomy means that the law starts with a broad presumption that owners can dispose of property as they wish. They can retain it or sell it, or direct that it be transmitted on their death to Aunt Tilley or to the Society for the Prevention of Cruelty to Animals. When owners attempt to restrict the alienation of property for long periods after they have died, however, the law steps in with restrictions. Here we find the familiar rules against direct restraints on alienation, the Rule Against Perpetuities, and so forth. These can be seen either as efficiency constraints on owner autonomy, or as constraints on owner autonomy reflecting competing moral concerns about excessive dead hand control of future generations. The main point we would make is that the basic proposition—owner autonomy to dispose of property—looms large and forms the basic foundation for understanding how property works. Rules limiting restraints on alienation reflect a balancing of owner autonomy with other competing concerns, but they come into play only in relatively rare and extreme circumstances.

The law of trusts provides our second illustration. Trust law is tremendously flexible and allows settlors to confer a wide range of powers on trustees, who in turn can take into account a wide range of circumstances affecting beneficiaries. In default of specific instructions by the settlor, the law has developed a complex set of fiduciary obligations that attach to trustees for resolving these issues. All of this seems to reflect an intricate balancing of interests that takes into account a variety of concerns beyond basic moral

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See generally Smith, *supra* note 38.

192. See, e.g., *Brown v. United States*, 73 F.3d 1100, 1103-04 (Fed. Cir. 1996); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 36 (1985). The Supreme Court has held that federal statutes have created a public highway at certain minimum altitudes. *Causby*, 328 U.S. at 261. For a general discussion of the various theories initially used to soften the *ad coelum* rule in the context of overflights and subsequent statutory developments, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 79-82 (5th ed. 1984); Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157 (1990).

intuitions about owner autonomy and the right to exclude. Nearly always overlooked in legal accounts of trust law, however, is that from the perspective of persons standing outside the triangular relationship between settlor, trustee, and beneficiary, trust assets look very much like ordinary property.<sup>193</sup> The trustee retains legal title to the trust assets, and can exercise nearly the same rights to exclude, sell, develop, mortgage, or otherwise utilize the property that an ordinary owner would have. An automobile owned by a trust, for example, is subject to the same duties of abstention and noninterference as any other owned automobile. We see how trust law reflects an elaborate edifice governing the relationship among settlor, trustee, and beneficiary, but from a larger perspective retains with respect to trust assets the same core in rem attributes we associate with nontrust property.

Landlord-tenant law furnishes a third illustration. The law governing landlord and tenant relations is also notoriously complicated, and appears to reflect a number of tradeoffs that go far beyond the basic moral intuitions surrounding the exclusion right. For example, the implied warranty of habitability in residential tenancies appears to reflect concern about asymmetric information between landlords and tenants, as well as general moral intuitions about the importance of assuring a minimal level of decent housing for all renters, regardless of their ability to pay. As in the case of trust law, however, the complexities and the balancing nearly all pertain to the bilateral relationship between the landlord and the tenant. As far as people standing outside this relationship are concerned, the critical aspect of landlord-tenant law is simply that the landlord has transferred possession to the tenant for the duration of the lease. This means that the tenant, not the landlord, is now empowered to act as gatekeeper of the leased premises, exercising the right to exclude, deciding who to include, and for most purposes determining how the property will be used. Thus, landlord-tenant law also does not fundamentally alter the core aspect of property, insofar as relations between the person uniquely entitled to possession and the rest of the world are concerned. Landlord-tenant law provides yet another example of how core rights of

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193. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 843-49 (2001).

exclusion provide the foundation for understanding the institution of property. Complexities of intense interest to a small number of concerned actors are erected on top of this foundation, but they do not alter the fundamental nature of property insofar as it applies to all other actors in the community.

As these examples suggest, property may rest on a foundation of exclusion that as a first cut takes care of a vast number of coordination problems among many unconnected and anonymous parties. Property law also engages in fine-tuning this picture. In these noncore areas of property, prudential considerations supplement, or even sometimes override, the core exclusionary aspects of property that rest on ordinary morality. Yet it does not appear that the more complex picture that emerges when we consider this fine-tuning calls into question the analysis of the importance of the core, or the centrality of morality in maintaining the core.

### CONCLUSION

As an *in rem* coordination device, property depends on morality. The core of property depends on robust and automatic prelegal intuitions that it is wrong to violate property rights, especially by stealing, crossing boundaries, and interfering with possession. Property may serve utilitarian ends but in order to serve its basic *in rem* function property cannot be reducible to case-by-case pragmatic calculation of those ends. Like civil and human rights, which are also *in rem*, property rights must draw on morality. This dependence of property law on morality can be seen in the foundational role of possession and the asymmetry of basic exclusionary entitlements. Even the move to refine the basic exclusionary structure depends on a type of harm-based morality, most clearly in the case of nuisance. Courts and ordinary observers alike condemn violations of property rights—such as trespasses, bad faith adverse possession, takings for economic development, and nonviolent property crimes—and are reluctant to treat those acting in bad faith as favorably as those who are laboring under an excusable mistake.

These points establish, we believe, that property rights must be moral rights if they are to exist at all, and that the moral right to property is not qualitatively different from those moral rights we describe as human or civil rights. We do not claim more. We do not

offer here a specific moral theory of property rights expressed in nonutilitarian terms, such as Locke or Hegel sought to develop. Nor do we claim that property must be regarded as being a moral right on the same plane as other moral rights. One quite possibly could develop a coherent moral philosophy that would put the moral right to property on a lower (or conceivably higher) plane than the moral rights associated with human or civil rights. What we do claim is that property cannot exist if property is not regarded as a moral right, and that the morality of property will—if only for information cost and collective action reasons—partake of the nature of deontological commands to a much greater degree than situational pragmatism would seem to suggest. These reasons of information cost and collective action provide a justification for those aspects of property that have been seen as most consistent with deontological views such as corrective justice.