

THE MORALITY OF PROPERTY

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I. INTRODUCTION

The relationship between property and morality has been obscured by three elements in our intellectual tradition. First, there is the assumption, which can be traced to Bentham, that property is a pure creature of law.¹ An institution assumed to be wholly dependent for law for its existence is unlikely to be infused with strong moral content. Second, there is the related tradition, also Benthamite, of examining questions about property law from a utilitarian perspective. Utilitarianism is of course a moral theory. But in its modern applications, based on price theory and cost-benefit analysis, it adopts a framework indifferent to questions of individual rights and distributive justice, which many consider the hallmarks of a moral perspective. Third, there is the tradition, stronger perhaps in academic circles than in popular thought, which associates property with immorality. Starting with Proudhon's slogan that property is theft,² and building through Marx and Engels with their call for the abolition of private property,³ this tradition has put property on the defensive in the minds of those who are 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, that no system of property rights can survive unless property ownership is infused with moral significance. By this, we mean that the core attribute 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, and that 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, that the

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, *Principles of the Civil Code*, THEORY OF LEGISLATION 111-13 (Dumont ed., Hildreth trans., 1864).

² PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley and Bonnie G. Smith, eds. and trans. 1994) (1840).

³ KARL MARX AND FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (1848) ("[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property.").

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 – property rights are in rem. Because property rights need to coordinate the behavior of large numbers of far-flung people, they must be easily comprehended and must resist possible misinterpretation. Law, including criminal prosecution and civil enforcement actions, is almost certainly inadequate to achieving this degree of coordination and compliance. Self-help, such as erecting fences and hiring guards, is also too feeble to assure the degree of 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 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. What we do argue is 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 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, it is implausible to say that the essential quality of property is captured by the familiar metaphor of the bundle of sticks. The metaphor implies that the content of property rights is continually mutating from one context to the next, as legislatures and courts add new sticks to the bundle and take others out. But such a process would make it impossible to maintain 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, then it is unlikely that property is 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 solely from law.

Human rights, including rights of bodily security and integrity, are another realm in which rights that are widely held not to be solely 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 rights in rem, which create corresponding obligations of noninterference on a very large and unspecified mass of dutyholders. Moreover, given the communications 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 moral 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 of course, effectively describes the position of the socialist revolutionaries who have excoriated property: They typically have been outsiders seeking to overthrow the existing social order.

We do not offer the in rem feature of property rights as a theory of the morality of property. But recognizing the features of morality that serve this function 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, decisionmakers can afford to let other moral considerations in, including 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 II 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 far-flung 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 III we consider a number of areas of property law that illustrate the role moral intuitions and condemnation play in modern American property law. Part IV 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 a morally grounded exclusion rights at the core of property. Part V concludes.

II. 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 of all other members of the relevant community – require that property rights be regarded as moral rights. The nature of property as a coordination device among far-flung 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 – are 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 all 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.⁴ 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, there are thousands of automobiles circulating about and being 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 all the thousands of other cars they see on the streets and in parking lots. In order to maintain a semblance of stability in this system, it is not only required that each owner recognize and exercise dominion over their own car. It is also necessary that virtually all members of society – owners and nonowners alike – recognize and respect the unique claims of owners to their own particular auto. In other words, it is necessary that virtually everyone recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other – that they not take these others' cars, steal from them, vandalize them, and so forth. Such a system requires that huge numbers of people comprehend that they have such duties with respect to huge numbers of objects identified as cars.

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 damages awards against violators. But it is doubtful that law alone can generate and sustain a system of in rem duties of abstention. For one thing, where legal protection of property is out of sync with common morality, we often

⁴ See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 Stan. L. Rev. 1105 (2003).

see widespread disregard of formal property rights. This was true of mining claims on federal lands in California in the nineteenth century, and is true of downloading copyrighted material from the web today. 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 entrance 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. Thus, law unquestionably performs 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. But self-help alone is unlikely to support a system of property rights. To return to the automobile example, there is no doubt that self-help measures such as locks, alarms, anti-theft devices like “the Club,” and using guarded parking lots 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 persons will call the police when they see someone smashing a window of a parked car. Indeed, we find that even in small group settings where there are no formal property rights, at least third party encouragement if not enforcement seems to be crucial in maintaining stable allocations of resources. 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, and this requires widely shared norms. Otherwise, things can get quickly out of control and descend into a Hobbesian war of all against all.⁵

⁵ A vivid example are 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 in ELINOR OSTROM, *GOVERNING THE COMMONS* (1990).

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 are 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 theories that agree on the relevant property questions). Or they could be conventions which 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 other's thing, and this habit of mutual forbearance spreads and becomes conventional morality.⁶ Some work by modern cognitive scientists suggests that gross violations of property rights involve parts of the brain devoted to automatic emotions rather than general reasoning, as opposed to more general impersonal ethical problems.⁷ Still others have noticed the connection between animal territoriality and the exclusionary aspect of property.⁸ Any of these sources could help explain how property rules have the generality, simplicity, and robustness necessary to coordinate basic expectations of large numbers of interacting members of a community.

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 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

⁶ See DAVID HUME, A TREATISE OF HUMAN NATURE 497-501 (2d ed. L.A. Selby-Bigge ed., 1978).

⁷ See, e.g., Joshua D. Greene, et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *Sci.* 2105 (2001); Joshua Greene & Jonathan Haidt, *How (and where) does moral judgment work?*, 6 *Trends in Cog. Sci.* 517 (2002).

⁸ See, e.g., Peter C. Mayer, *Property Rights and Resource Management among Nonhuman Species* (Am. L. & Econ. Ass'n Annual Meetings 2005 paper 47); Jeffrey Evans Stake, *The property 'instinct'*, 359 *Phil. Trans. R. Soc. Lond. B* 1763 (2004).

coordination.⁹ In contrast, if the core of property is the simple right of an owner to exclude the world from the resource,¹⁰ the behavior of each actor will be easy to predict: there will be compliance most of the time and telling what compliance is (and, more importantly, is not) will be easy. Standards incorporating detailed information would also present a temptation for each person to “interpret” the rule in his own favor.¹¹ Even a rule with too many complexities would give rise to opportunistic claims of miscalculation.

We will return to some evidence for the role of morality in property in Part III, but consider two topics at the base of property that usually figure prominently in discussions 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.¹² Property can be regarded as a robust right to possess over time and ultimately the right to exclude is the right to determine who can possess and the thing in question. Hume argued that there is an association in people’s minds between people and things they possess.¹³ 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.¹⁴ Building on Hume’s convention-based account, Robert Sugden has shown that possession can be modeled by

⁹ See, e.g., HUME, supra note 6, at 497, 502; PENNER, supra note 10, at 29-30.

¹⁰ For various approaches taking the right to exclude as basic, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 29-30, 71 (1997); Thomas W. Merrill, *Property and the Right To Exclude*, 77 *Neb. L. Rev.* 730, 737-39 (1998); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. Legal Stud.* S453 (2002).

¹¹ See Louis Kaplow & Steven Shavell, *Human Nature and the Best Consequentialist Moral System* (draft 2002).

¹² See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221 (1979); Dean Lueck, *First Possession as the Basis of Property*, in TERRY L. ANDERSON & FRED S. MCCHESENEY, *PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW* 200 (2003); Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73, 78 (1985); Smith, supra note 4, at 1115-25.

¹³ HUME, supra note 6, at 503-05.

¹⁴ *Id.* at 490-505.

a simple game in which players when challenged fight if they are in possession and defer if they are not in possession.¹⁵ The “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. Further, 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.¹⁶ And the sphere of autonomy starts with 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.¹⁷

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

¹⁵ ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* 153-55 (1986).

¹⁶ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 51 (Allen W. Wood ed. & H.B. Nisbet trans., 1991) (“My inner idea [*Vorstellung*] and will that 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 help constitute the person, and canonical examples (wedding rings, residences) involve possession. See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 959-61, 965-68 (1982).

¹⁷ The Restatement (Second) 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).

regarded as wasteful.¹⁸ 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 interaction for law (or even custom) to recognize another rule.¹⁹ For example, whaling norms track the certain control norms of possession except where whales are too dangerous or too likely to sink to make them practicable.²⁰ And the whaling industry and whaling communities can develop the more specific information at low cost. But the general norms of possession are left in place in a surprisingly wide variety of contexts. The remaining wide scope for general norms allows nonexpert and anonymous parties to interact in a predictable and peaceful way.

2. *Nonreciprocal Causation.* Coase made famous the idea that in any conflict over resources, causation is reciprocal.²¹ If a rancher's cattle are trampling the farmer's corn,²² or the confectioner's pestle is making too much noise for the neighboring doctor,²³ or a factory is sending foul odors onto the land of a resident,²⁴ Coase pointed out

¹⁸ See, e.g., Terry L. Anderson & Peter J. Hill, *Privatizing the Commons: An Improvement?*, 50 *Southern Econ. J.* 438, 441, 447 (1983); Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 *J.L. & Econ.* 425-26 (1995).

¹⁹ Smith, *supra* note 4, at 1115-25.

²⁰ Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 *J.L. Econ. & Org.* 83 (1989); Smith, *supra* note 19, at 1119-22. See *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.").

²¹ R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

²² *Id.* at 2-8.

²³ *Id.* at 19; see also *Sturges v. Bridgman*, 11 *Ch. D.* 852 (1879).

²⁴ Coase discussed, among other cases, *Bass v. Gregory*, 25 *Q.B. D.* 481 (1890), 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.*

that each activity is necessary for there to be a conflict. If either were eliminated, there would be no harmful interaction and therefore, in Coase's view, it makes no sense to speak of "the cause" of the problem.²⁵ 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 other 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.²⁶ Instead, the starting point in property is to ask whose default package of entitlements – 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. Other nuisance rules might eventually call for a balancing of uses, but the balancing type of analysis is less widespread than one might think. At any rate, even in supposed balancing cases, causation is not really regarded as reciprocal.

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

1089, 1116 (1972) and has continued to be a stock example in the literature on property rules and liability rules. See, e.g., Ian Ayres & Paul Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 Mich. L. Rev. 1 (2001) (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) (factory and resident); 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 (2003) (using "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 (1996) (arguing for liability rules in pollution context, as opposed to entitlements to tangible things); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. Rev. 440 (1995) (using pollution example in arguing for importance of administrative costs and for new type of liability rule).

²⁵ Coase, *supra* note 21, at 2.

²⁶ Merrill & Smith, *supra* note 46, at 391-94. 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).

contributed causally to the fist-nose interaction. More generally, some of the most serious moral objections to Coasean analysis have come from those who find the implication for killing and rape to be unacceptable.²⁷

Property rights are in a sense “lumpy” and their lumpiness breaks the symmetry.²⁸ Partly because our moral intuitions are coarse-grained and 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.²⁹ 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.

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.³⁰ 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.³¹ 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.³² Reflecting the reciprocal causation views of Coase, Calabresi and

²⁷ See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 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) (once 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?”).

²⁸ See Henry E. Smith, *Self-Help and the Nature of Property*, 1 *J.L. Econ. & Pol’y* 69, 70-76 (2005).

²⁹ 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 a “trespassory rule”); PENNER, *supra* note 10, at 68-74.

³⁰ Calabresi & Melamed, *supra* note 24.

³¹ *Id.* at 1092.

³² *Id.*

Melamed noted that one could locate the entitlement in either party and protect it by either a property rule or a liability rule. Consider the canonical 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). If the polluter would like to continue polluting it must pay the price demanded by the resident. Or the resident could have the entitlement but only protected by a liability rule (Rule 2). 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.”³³ 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 this mean? The polluter could have a separately negotiated easement for pollution, and in this sense there would be a right to pollute. But what if no such adjustment has occurred to the default package of rights held by the polluter and the resident? It would seem that when commentators speak of a “right to pollute” they mean that a court could deny an injunction to the resident, thus allowing the polluter to pollute.³⁴

But would this really be a “right to pollute”? Before considering the possibility, note that the notion of a right to pollute offends the moral sense of many commentators.³⁵

³³ Id. at 1090.

³⁴ See, e.g., Calabresi & Melamed, *supra* note 24, at 1118-19 (discussing the “right to pollute”); Ayres & Goldbart, *Optimal Delegation*, *supra* note 24, at 46 (discussing the “right to pollute” in the property rule versus liability rule framework); Kaplow & Shavell, *supra* note 24, at 719 n.14 (noting 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 “in effect” that the defendant has “enjoined” 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).

³⁵ 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) (“These environmentalists argue that economic growth cannot be substituted for environmental degradation or that cap-and-trade programs are 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); Michael J. Sandel, *It’s Immoral to Buy the Right to Pollute*, N.Y. Times, Dec. 15, 1997, at A23.

The legislative history behind the Clean Water Act of 1972, assumes a baseline that “[n]o one has the ‘right to pollute.’”³⁶ Interestingly, it also offends the right-to-exclude foundation of the default package of property rights as well. When a court denies a resident an injunction in a nuisance case – which, it should be noted, should be exceptional on the traditional view of property – the polluter is exercising a privilege, not a right to pollute.³⁷ The resident cannot come onto the polluter’s land and smash the factory (that would violate the polluter’s right to exclude), but if the resident exercised its own privileges and built a wall or a fan to stop the fumes from coming over the boundary line a court would not enjoin the wall or the fan.³⁸ The default package of rights – a right to exclude coupled with a wide range of largely unspecified privileges to use – breaks the symmetry between the polluter and resident entitlement possibilities when it is the polluter doing the polluting.

Finally, Calabresi and Melamed’s Rule 4, under which the polluter has the “entitlement to pollute” but which the resident can take upon payment of the polluter’s cost of abatement or shutting down,³⁹ makes little sense on a nonreciprocal view of causation and “Blackstonian” default packages of rights.⁴⁰ 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 for

³⁶ S. Rep. No. 92-414, at 43 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3709, and in Legislative History of the Water Pollution Control Act Amendments Of 1972 (1973).

³⁷ Smith, *supra* note 26, at 1037-45.

³⁸ 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).

³⁹ Calabresi & Melamed, *supra* note 24, at 1115-16.

⁴⁰ What I have been calling 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, 1329, 1362-63 (1993), and I argue that this lumpy “bundle” is unique and has the status of default partly for information-cost reasons. See Smith, *supra* note 10, at S453.

the moment that this is a good idea). But in the case of the possibility of the polluter entitlement there is nothing in the Blackstonian bundle to give the polluter a robust right to pollute (as opposed to a privilege that may de facto win out) and so there is no need to “soften” it with Rule 4.⁴¹ The fact that symmetry has been broken by setting up lumpy Blackstonian rights to exclude in the first place gives additional content to objections to Rule 4 that it ignores the preexisting base lines of property.⁴²

Again, the notion of a right to pollute illustrates our view of the relation of 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.⁴³ Problems like pollution are in the normal course not treated as free-floating use conflicts but as a matter of rights – 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.⁴⁴ Likewise on a larger scale, tradeable emissions permits have been designed so that they do not look like rights to pollute.⁴⁵ 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.

⁴¹ Smith, *supra* note 26, at 1007-21.

⁴² 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”); cf. 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”).

⁴³ See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 152 (1973); see also RICHARD A. EPSTEIN, *TAKINGS* 115-21 (1985); Kenneth R. Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 J. Legal Stud. 149, 152 (1987); see also Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. Cal. L. Rev. 711, 724-25 (1983).

⁴⁴ See, e.g., Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 Minn. L. Rev. 1556, 1580-81 (accusing Michael Sandel of erroneous extension of a moral heuristic in arguing that emissions trading is immoral).

⁴⁵ See Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. Ill. L. Rev. 275. For example, they are declared not to be property for purposes of the Takings Clause.

B. Some Implications

If we are right that 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 we understand the institution. 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. And much of such theorizing has implicitly assumed that property is fully malleable.⁴⁶ On this expert-oriented view,⁴⁷ 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 that is too naïve to stand in the light of sophisticated analysis.⁴⁸ We take issue with these arguments against the importance of rights to exclude and things in property, but we begin by noting that success in justifying an institution on utilitarian grounds does not foreclose a role for deontology in the institution. That utilitarian justification does not foreclose deontology 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; or that people everyday think about them in these terms; or that they make

⁴⁶ For one discussion, see Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 101 Yale L.J. 357 (2001).

⁴⁷ Bruce Ackerman terms this the perspective of the “scientific policymaker.” BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977) (contrasting ordinary observer’s and scientific policymaker’s view of property).

⁴⁸ See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1044 (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 not have in it.”).

decisions involving them using utilitarian calculus. Even many utilitarians, especially those of the rule-utilitarian sort, would recognize as much.

Both property rights and civil or human rights can be justified on utilitarian grounds. The fact that both sets of rights have such justifications 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.⁴⁹ The same general point holds for property rights: just because property has utilitarian ends, it does not follow 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 in their core property rights do not – and, we argue, cannot – display.

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 supportive of the regulatory and welfare 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.”⁵⁰

⁴⁹ See supra note 27.

⁵⁰ Tom Grey, *The Distintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Pennock & J. Chapman eds., 1980).

One prime example is Felix Cohen. He saw the right to exclude as important to defining property.⁵¹ 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 that they rely on everyday notions of “things” and traditional morality.⁵² Drawing on then-contemporary pragmatist and logical-positivist currents in philosophy, he dismissed these conventional views as metaphysical, meaningless and superstitious.⁵³ His essay “Transcendental Nonsense and the Functional Approach,” the title of which echoes Bentham’s critique of natural rights as “nonsense on stilts,” provides a clear indication of the Cohen’s felt need to denigrate traditional morality in order to clear the way a more rational design of the legal system, property rights included.⁵⁴ Indeed the article is stuffed with dismissive references to metaphysical status and the supernatural,⁵⁵ scholastic theologians and medieval popes,⁵⁶ angels on needles,⁵⁷ myths,⁵⁸ “true believers in orthodox legal theology,”⁵⁹ and “moral faiths and prejudices,”⁶⁰ and “otherworldly morality.”⁶¹ Likewise, Edward Robinson pairs advocacy of “scientific” social engineering with disdain for “old ways of thinking” and

⁵¹ Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

⁵² Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 815-17 (1935).

⁵³ Cohen, *supra* note 52.

⁵⁴ *Id.* at 848 (“Since the brilliant achievements of Bentham, descriptive legal science has made almost no progress in determining the consequences of legal rules.”) (footnote omitted).

⁵⁵ *Id.* at 810, 811, 816, 821, 822, 826, 828, 831.

⁵⁶ *Id.* at 810, 813.

⁵⁷ *Id.*

⁵⁸ *Id.* at 812

⁵⁹ *Id.* at 818; see also *id.* at 821, 831.

⁶⁰ *Id.* at 816; see also *id.* at 841.

⁶¹ *Id.* at 840; see also *id.* at 837, 839-40. Cohen advocates a functional approach to religion itself. See *id.* at 830.

(nonrealist) “experts [who] are continually mistaking the vividness of their moral indignation for the probable efficiency of their devices for social control.”⁶²

Interestingly, like the anti-property 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. The technocratic approach is probably clearest where property implicates environmental values. (Again, realism aside, environmentalism tends to be cast in strongly moral but anti-property terms.) Second, the realists claimed to be implementing some more general but largely unspecified moral command, akin to the Golden Rule. The realists envisioned that judges and regulators would devise detailed rules of proper use. They took 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 in such a way as not to injure another’s.”

What these approaches have in common is their context-dependence. They do not rule out any considerations and are fairly plastic in the hand of the enlightened social engineer. This is their main appeal to the realists in the first place. 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.

III. MORALITY AND AMERICAN PROPERTY LAW

Property law often generates outcomes that are strongly conditioned by moral values. In this Part, we discuss doctrines or decisions that reveal the moral side of property law. The features that 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

⁶² Edward S. Robinson, *Law – An Unscientific Science*, 44 Yale L.J. 235, 235-36 (1934).

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 non-property-based interests such as bodily security or privacy, suggesting that the protection of property is viewed as itself a moral good. 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.

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.”⁶³ An intentional trespass occurs when the defendant knowingly or deliberately crosses the boundary lines of another’s land with an object large enough to displace the owner of possession. No inquiry is made into the comparative utility of the invasion as between the intruder and the possessor. What is especially interesting for our purposes is that the tort occurs irrespective of whether the defendant causes any harm to the possessor.⁶⁴ Thus, the midnight stalker 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.

A recent decision of the Wisconsin Supreme Court, *Jacque v. Steenberg Homes, Inc.*,⁶⁵ illustrates all these features of the doctrine, and highlights the moral nature of the 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 had promised to deliver a mobile home to a neighbor of the Jacques. The

⁶³ WILLIAM L. PROSSER, TORTS 63 (4th ed. 1971).

⁶⁴ RESTATEMENT (SECOND) OF TORTS §158.

⁶⁵ 563 N.W.2d 154 (Wis. 1997).

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. The Jacques refused permission, even when the company made an offer to pay for temporary access rights. Evidently the couple harbored irrational fears that giving such permission might result in an adverse possession claim against their land.⁶⁶ Rather than take no for an answer, the company cut across their field any way, in a manner designed to conceal what they were doing.⁶⁷

Faced with these facts, the Wisconsin Supreme Court not only upheld a jury verdict of \$1 in nominal damages for the trespass, it reinstated an award of \$100,000 in punitive damages against the company. The tone of the opinion is one of quiet outrage. The Jacques are portrayed as a helpless old couple whose right to do as they please with their land will be rendered meaningless without vigorous judicial intervention. The Assistant Manager of the mobile home company is portrayed as a scofflaw who is contemptuous of the rights of others.⁶⁸ The court's willingness to impose a large punitive damages award – 100 times the largest criminal fine that could be imposed for this behavior – speaks for itself.

The court makes no attempt to consider whether the trespass would be cost-justified. It is abundantly clear that using the Jacques' field as a temporary delivery path is the most efficient outcome. The opportunity costs of the intrusion to the Jacques are apparently zero: they have retired from active farming and there is no alternative use of the land foreclosed by using it as a temporary delivery path. Nor do they suffer any risk of losing the land by granting permission. The company, in contrast, faces considerable risk and not a little time and effort if it must wrestle the ungainly mobile home around a curved private road covered in seven feet of snow using rollers. Reasonable persons would have quickly agreed on a temporary license as a solution to the problem. The

⁶⁶ Id. at 157.

⁶⁷ Id. at 611-12.

⁶⁸ The Steenberg employees testified that the assistant manager had told them “‘I don't give a ---- what [Mr. Jacque] 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 611.

Jacques are not reasonable persons. But the court obviously believes that this does not matter; the question of comparative utilities is simply irrelevant to the analysis.

When it does frame a justification for the punitive award, the court speaks in deontological terms. The award is designed to ensure that companies like Steenberg respect property rights. A small criminal fine or nominal award of actual damages will not achieve this result. As the court asks, “what 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?”⁶⁹ This is not the rhetoric of efficient breach or of cost-internalization via liability rules. In the court’s view, Steenberg had an unqualified duty to respect the Jacques’ property rights, without regard to whether their reasons for refusing permission were unfounded or even silly.

Finally, the court does not regard the justification for punitive damages to be reducible to nonproperty values. It is true that the court at one point justifies the award on the ground that it will discourage persons from using self-help to protect their property, which might in turn lead to violence.⁷⁰ And it is also true that the court lays considerable stress on an English case, *Merest v. Harvey*,⁷¹ which seems to justify punitive damages for trespasses in terms of the protection of privacy rights.⁷² But there is no evidence from the opinion that the trespass in question threatened either of these values. Moreover, the court consistently describes the right in question much more broadly. It is the “individual’s legal right to exclude other from private property” – the right of Harvey and Lois Jacque “to tell Steenberg Homes and any other trespasser, ‘No, you cannot cross our land.’”⁷³ Punitive damages are awarded to vindicate this broader right – a pure property right – not to promote public utility by preventing violence or protecting privacy.

⁶⁹ Id. at 161.

⁷⁰ Id. at 160-61.

⁷¹ 128 Eng. Rep. 761 (C.P. 1814).

⁷² 563 N.W.2d at 159.

⁷³ Id. at 160.

In short, *Jacque* – and the doctrine of intentional trespass it enforces – bears all the features we have 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. This means, according to most courts, that the possession must be without the true owner’s permission.⁷⁴ 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 title; but a minority do.⁷⁵ And there are even suggestions from time to time that bad faith is required.⁷⁶

⁷⁴ See, e.g., *Shandaken Reformed Church of Mount Tremper v. Leone*, 451 N.Y.S.2d 227, 228 (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).

⁷⁵ See 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* ¶ 1012[3], at 91-11 to 91-12 (Patrick J. Rohan ed., 1992 revision, 1993). Oregon passed a statute making good faith a requirement for adverse possession:

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 at Or. Rev. Stat. § 105.620(1) (1991)); see Per C. Olson, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 *Env’tl. L.* 1297 (1993).

Nevertheless, Professor Richard Helmholz has argued in a persuasive article that good faith is important to courts in deciding adverse possession cases.⁷⁷ 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. Thus, as the system of adverse possession operates in practice, good faith is something like 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.⁷⁸ Such a requirement would mean that the statute of limitations would 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 would also frustrate the expectations of many persons who have been in possession of land or other property for long periods of time. Finally, it would undermine the incentives of owners to engage in good custodial practices, because there would be less risk of their losing their property to squatters or thieves. Nevertheless, courts 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 which underlies *Jacque v. Steenberg Homes*. Someone who has deliberately taken the property of another is simply a bad person, and should not be rewarded for their 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, or to restore land taken from Native American tribes in violation of treaty rights, few voices are raised questioning the wisdom of trying to sort out claims to assets that were taken many decades ago. Wrongful dispossession of

⁷⁶ See *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952); Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U. L. Q. 331, 339-341 (1983); Lee Anne Fennell, *Efficient Trespass: The Case for 'Bad Faith' Adverse Possession* (forthcoming, Nw. U. L. Rev. 2006); see also *Predham v. Holfester*, 108 A.2d 458 (1954).

⁷⁷ Helmholz, *supra* note 76.

⁷⁸ 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. 1123 (1985).

property should be vindicated, apparently without regard to the costs or inconvenience of attempting to do so after the long passage of time.

The instinct is not limited to American courts. The European Court of Human Rights recently declared the English common law rule of adverse possession to be in violation of 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.⁷⁹ Significantly, the possessor in this 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. 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 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. Because the distinction between good faith and bad faith possessors is not officially recognized as part of the doctrine, judicial opinions often do not contain the same sharp condemnation of persons who intentionally take the property of others that we find in trespass cases like *Jacque*. Still, the law operates in practice in much the way we would expect of a doctrine driven by moral concerns, especially in its indifference to utilitarian considerations, either in case-specific balancing of interests or in terms of general justification.

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

⁷⁹ Case of J.A. Pye (Oxford) Ltd. V. The United Kingdom, No. 44302/02 (Strasbourg, Nov. 15, 2005).

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.⁸⁰ Of course, A has an action against B for damages, 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.

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.⁸¹ 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. The doctrine again applies only to 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.⁸² Of course, the true owner has an action against the encroacher for damages, equal to the value of the land taken. This doctrine, the courts all agree, 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.⁸³

⁸⁰ See, e.g., *Kotis v. Nowlin Jewelry, Inc.*, 844 S.W. 2d 920 (Tex. App. 1992).

⁸¹ See, e.g., *Wetherbee v. Green*, 22 Mich. 311 (1871); see also 2 William Blackstone, *Commentaries on the Laws of England* *404-07; Earl C. Arnold, *The Law of Accession of Personal Property*, 22 Colum. L. Rev. 103 (1922).

⁸² See, e.g., *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951).

⁸³ See *Raab v. Casper*, 124 Cal. Rptr. 590 (Cal. App. 1975) (discussing California Good Faith Improver Act as applied to encroaching cabin on adjacent foothill lot).

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.⁸⁴ We have recently witnessed a major controversy, in the wake of the Supreme Court’s decision in *Kelo v. City of New London*,⁸⁵ 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. 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*.⁸⁶ 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.

⁸⁴ 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 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“the right to exclude others’ is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”); Leif Wenar, *The Concept of Property and the Takings Clause*, 97 Colum. L. Rev. 1923 (1997).

⁸⁵ 125 S. Ct. 2655 (2005).

⁸⁶ Over 100 bills have introduced at the state legislative level in the wake of *Kelo* to restrict the use of eminent domain for economic development. See Patricia Salkin [forthcoming survey article].

What accounts for the public hostility to economic development takings? We 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.⁸⁷ This example has been cited repeatedly in the commentary on *Kelo*,⁸⁸ and it is clear that opponents of the decision regard the taking of a Motel 6 for retransfer to a Ritz-Carlton to be the kind of taking that should not be permitted under a well-functioning system of property rights.

To see why, it is useful to begin with possible utilitarian or economic justifications for taking a Motel 6 for retransfer to the Ritz-Carlton. The property on which the Motel 6 is located is presumably worth more if a Ritz-Carlton is built there – worth more in terms of the dollars that the owners of Ritz-Carlton hotels are willing to pay for the site, relative to what the owners of the Motel 6 would be willing to pay. Why should society care whether the property is transferred to an owner that values the site more highly in terms of its willingness to pay? Because society as a whole will be better off: The pie will be larger, and this will mean 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.

It is also possible, although this is not critical, that the transfer of the Motel 6 to a Ritz-Carlton will 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

⁸⁷ Id. at 2676 (O'Connor, J. dissenting).

⁸⁸ 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, *Increment Financing: Public Use or Private Abuse?*, 90 Minn. L. Rev. 213, 238 & n.200 (2005).

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 in these circumstances may transform the general ambience of the area in a way that leads to a boom in luxury hotel construction, producing a much larger increase in societal wealth than would be created by the construction of a Ritz-Carlton standing alone.

One objection that is 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. Since, by hypothesis, the change in ownership will produce new wealth, the parties should agree on a voluntary sale at a price whereby the new wealth (at least that portion captured by the owners of the Ritz-Carlton) is divided between the owners of the Motel 6 and the Ritz-Carlton. It is true that voluntary exchange 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 (perhaps because it is blocking development of a boulevard of luxury hotels), then the situation has the features of a localized 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.⁸⁹ Should this happen, the only way to realize the increased wealth is 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. 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 the individual to give up her 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

⁸⁹ See, e.g., Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 Harv. L. Rev. 31, 83-94 (2005) (complaining that the opinions in *Kelo* fail to discuss the holdout problem).

state ordinarily does not coerce individuals to give up their discrete property rights, unless they have done something wrong, like 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 *prima facie* looks like 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.⁹⁰ 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. 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. The taking of blighted property can therefore be seen as an appropriate collective response to harm-causing or immoral behavior, 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 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.⁹¹ This is readily understandable if A is not compensated for the taking. In that event, one person is being singled out for an especially harsh loss only to provide an especially large benefit

⁹⁰ 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 inflicts “affirmative harm on society”).

⁹¹ See *Calder v. Bull*, 3 Dall. 386, 388 (1798) (Chase, J.) (describing a law “that takes property from A. and gives it to B.” as “against all reason and justice”); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896).

for another. But opponents of economic development takings 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 benefits of the transaction are unduly concentrated on B. The state's power of coercion is being used to confer unique benefits on one or a small number of individuals. This too is regarded as a morally unacceptable use of the state's power of coercion.⁹²

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 it looks to the ordinary citizen like pure favoritism. Some favoritism is to be expected in any form of government. But coercing innocent persons to give up their homes and farms in order to bestow favors on the select few crosses the line of what most persons are prepared to countenance, consistent with popular perceptions of morality.

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 there are functional arguments for criminalizing takings of property,⁹³ 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

⁹² 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) (disapproving in general of takings for economic development, but carving out an exception for takings by common carrier 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. So the entire community benefits to some degree from the coerced transaction. It may also be because such entities have historically been subject to rate regulation, which limits the gain they can obtain through the use of coerced property transactions.

⁹³ See Alvin K. Klevorick, *On the Economic Theory of Crime*, in *CRIMINAL JUSTICE: NOMOS 27*, 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); Calabresi & Melamed, *supra* note 24, at 1124-27 (explaining criminal law as a mechanism for preventing "property rules" from being unilaterally converted into "liability rules").

property, this is strong evidence supporting the proposition that property rights are infused with moral significance.

It is also significant that criminal prohibitions of takings of property have expanded rather than contracted over time. At one time, it could plausibly be argued that takings of property were criminalized only in situations that might lead to a breach of the peace.⁹⁴ If this were true, then 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. Today, this argument is not plausible. Violations of property rights are criminalized in many contexts where there is no likelihood of any breach of the peace accompanying the taking. To judge by the pattern of the law, the intentional taking of the property of another is regarded as a moral wrong sufficiently grave in and of 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 property from the possession of another with intent to convert it to one's own use.⁹⁵ Given the heavy emphasis on the taking from possession, it could plausibly be said that the common-law courts viewed larceny as defending society against breach of the peace, rather than protecting individual property rights per se.⁹⁶ Thus, for example, a bailee who had rightfully obtained possession of property from its owner could not be guilty of larceny.⁹⁷ The result was that the crime of larceny was quite narrow in scope.

⁹⁴ WAYNE R. LAFAVE, CRIMINAL LAW § 19.1(a), at 919-20 (4th ed. 2003).

⁹⁵ See, e.g., LA FAVE, CRIMINAL LAW, § 85, at 622; see 4 WILLIAM BLACKSTONE, COMMENTARIES *229-50.

⁹⁶ See, e.g., Goerge P. Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469 (1976); American Law Institute, Model Penal Code [Tent Draft No. 1], art. 206, app. A, at 101; LA FAVE, CRIMINAL LAW § 85, at 622-623.

⁹⁷ See, e.g., GLANVILL, TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 128-30 (Hall ed., 1965) [Book 10, at pp. 13-14]; *Carrier's Case*, Y B Pasch 13 Edw. IV, f.9, pl 5 [1473].

Gradually, the courts began to expand the reach of the offense, initially by subtle alterations in the common-law concept of possession.⁹⁸ Thus, for instance, it became a general rule 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.⁹⁹ Similarly, in the case of *Chisser*,¹⁰⁰ it was held that a shop owner retained legal possession of merchandise being examined by a prospective customer until the actual sale was made. By holding that the employee and the customer had not acquired possession, but merely custody, the court was able to sustain a larceny conviction.

As the reach of larceny expanded, the intent element of the crime became of increasing importance, while the requirement of a taking of possession became less significant. As a result, the bar against convicting a person who had initially obtained lawful possession of property faded. In *King v. Pear*,¹⁰¹ 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. Because of the fraudulent misrepresentation, the court reasoned, the defendant had never obtained legal possession.¹⁰² Thus, "larceny by trick" was born.¹⁰³

Later cases went even further, often ignoring the fact that a defendant had initially obtained possession lawfully, and instead focused upon his later intent.¹⁰⁴ The crime of larceny then encompassed not only situations where 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

⁹⁸ See, e.g., American Law Institute, Model Penal Code [Tent Draft No. 1], art 206, app. A, p. 101.

⁹⁹ See, e.g., 3 Holdsworth, A History of English Law 365 (3d ed., 1923).

¹⁰⁰ Raym. Sir.T. 275, 83 Eng. Rep. 142.

¹⁰¹ 1 Leach 212, 168 Eng. Rep. 208.

¹⁰² *Id.*, see *King v. Semple*, 1 Leach 420, 421-324, 168 Eng. Rep. 312, 313; 1 HAWKINS, PLEAS OF THE CROWN 135 n.1 (Leach 6th ed.).

¹⁰³ See JEROME HALL, THEFT, LAW AND SOCIETY 40 (2d ed. 1952).

¹⁰⁴ See, e.g., *Queen v. Middleton*, LR 2 Cr.Cas.Res. 38 [1873]; *Queen v. Ashwell*, 16 QBD 190 [1885]

continued rights of the owner.¹⁰⁵ 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, it was clear that larceny was designed to protect the general security of property rights¹⁰⁶

Today, penal statutes and case law tend to focus on the actor's intent and the exercise of dominion and control over the property.¹⁰⁷ 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, 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.¹⁰⁸

In addition to larceny, persons who damage, but do not take, personal property can be charged today with the crime of criminal mischief.¹⁰⁹ Purposely destroying property worth more than \$5000 is a felony punishable by imprisonment.¹¹⁰ This type of punishment is a clear indication of moral condemnation.¹¹¹

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

¹⁰⁵ Parliament also played a role in this development. Thus, for example, in 1857 a statute extended larceny to all conversions by bailees (20 & 21 Vict., ch. 54).

¹⁰⁶ Fletcher, *supra* note 96, at 519-20; LA FAVE, CRIMINAL LAW § 84, at 618-619.

¹⁰⁷ See, e.g., *People v. Alamo*, 34 N.Y.2d 453, 358 N.Y.S.2d 375, 315 N.E.2d 446; *People v. Baker*, 365 Ill. 323; *People v. Britto*, 93 Misc.2d 151, 154, 402 N.Y.S.2d 546.

¹⁰⁸ E.g., *People v. Olivo*, 420 N.E. 2d 40 (N.Y. 1981).

¹⁰⁹ MODEL PENAL CODE § 220.3(1)(a).

¹¹⁰ *Id.* at § 220.3(2), 6.06(3).

¹¹¹ See Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency To Face Execution Requirement*, 51 La. L. Rev. 995, 1029 (1991).

building or occupied structure of another,”¹¹² and is subject to very severe penalties. The crime of burglary occurs when a person “enters a building or 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.”¹¹³ It too is a felony subject to severe penalties. And the penalties for criminal trespass are also frequently more severe if the trespass involves a building or occupied structure. 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, since occupied structures by definition include persons, and persons are more likely to be found in buildings.

But the law has not stopped at criminalizing real property offences that threaten personal security. Trespass to land is nowadays a crime in every jurisdiction, although often only a misdemeanor if the trespass occurs on land that is unoccupied. Criminal mischief also applies to real property, and for willful and malicious damage over a threshold value is a felony punishable by imprisonment.¹¹⁴ Thus, we see general movement in the direction of expanding criminal sanctions for interferences with rights to land, even in circumstances in which there is 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 is sometime used for purely instrumental or preference shaping purposes, it is implausible that the long history of criminalization of property crimes is not related in substantial measure to popular moral beliefs. Moreover, the scope of criminalization of property offenses strongly suggests that the invasion or taking of property is itself regarded as morally wrong,

¹¹² MODEL PENAL CODE § 220.1(1).

¹¹³ Id. § 221.1(1).

¹¹⁴ See, e.g., Fla. Stat. Ann. § 806.13(1)(a); Mont. Code Ann. § 45-6-101(1).

without regard to whether other moral interests, such as the interest in protecting bodily security or preserving the peace, are also 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.¹¹⁵ 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 be respected by a large, heterogeneous, and indefinite group of dutyholders, the more we should expect the remedy to be a simple one.¹¹⁶ Exclusion by its nature protects a wide variety of uses, and the signal for violation is a simple on/off switch 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.

Property rules can also be viewed as sanctions; once a violation occurs, the liability cost to the violator jumps from zero to a supracompensatory amount.¹¹⁷ By contrast a liability rule or a price tries to tailor liability costs to the amount of harm inflicted in a particular case (or on average in some category of cases, preferably fairly narrow). Interestingly, a sanction is also reserved for behavior that is not permitted – often because it is viewed as morally wrong. And a sanction is designed theoretically to deter completely rather than to hold an actor in equipoise¹¹⁸ – again in just the fashion we expect traditional morality to do.

¹¹⁵ See, e.g., Epstein, *supra* note 42 (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 (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).

¹¹⁶ *Id.* at 1753-74.

¹¹⁷ Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984).

¹¹⁸ *Id.* at 1523.

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. And 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 a legal assumptions about the sanctity of property.

IV. SITUATIONAL MORALITY AND NON-CORE PROPERTY

Simple and robust everyday moral intuitions provide crucial support for the core of property – the right to exclude from a thing, good against the world. This basic set up takes care of a lot of problems but leaves many – and causes some – to be solved in more nuanced ways. 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 a disproportionate – share of commentators’ attention. Indeed, starting with the Legal Realists, the dominant assumption has been that the need to refine the exclusionary regime – to allow, for example, airplane overflights and a host of less obvious exceptions – calls everything into question.¹¹⁹ 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

¹¹⁹ See *United States v. Causby*, 328 U.S. 256, 261 (1942) (asserting that the ancient “ad coelum” doctrine “has no place in the modern world”); *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936) (stating that ad coelum rule “is not the law, and that it never was the law.”).

property law. Precisely because “entitlements” retain a morally grounded bedrock of exclusion rights, the law does not regard causation in resource conflicts agnostically. 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.

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 does finely tailor regulations about use and some of property law does govern use among a narrower class of people, such as future interest holders, neighboring landowners or even contractual partners.¹²⁰

Uncontroversially, the right to exclude from land does not include the right to exclude high-altitude airplane flights.¹²¹ 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, direct that it be transmitted on their death to Aunt Tilley or to the Society for Prevention of Cruelty to Animals. But when owners attempt to restrict the alienation of property for long periods after they have died, 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 a competing moral concerns about excessive dead hand control of future generations. The main point we would make is that the basic proposition – owner

¹²⁰ See Merrill & Smith, *supra* note 46, at 394-97, 398; Smith, *supra* note 40; Smith, *supra* note 26.

¹²¹ See, e.g., *Brown v. United States*, 73 F.3d 110, 1103 (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 deferral statutes have created a public highway at certain minimum altitudes. *United States v. Causby*, 328 U.S. 256 (1946). 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).

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 intuitions about owner autonomy and the right to exclude. What is nearly always overlooked in legal accounts of trust law, however, is that from the perspective of persons standing outside the triangular relationship between settler, trustee, and beneficiary, trust assets look very much like ordinary property. 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. Thus, we see how trust law reflects an elaborate edifice governing the relationship among settler, trustee, and beneficiary, but from a larger perspective retains with respect to trust assets the same core in rem attributes we associate with non-trust 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 trade-offs 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 a 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 person 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, 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 is concerned. Landlord-tenant law provides yet another example of how core rights of 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 which 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 problems in a giant coordination between many anonymous parties. But property law also engages in finetuning this picture. In these non-core areas of property, prudential considerations do 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 the finetuning calls into question the analysis of the importance of the core, or the centrality to morality in maintaining the core.

V. 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 this 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 – especially trespasses, bad faith adverse possession, takings for economic development, nonviolent property crimes – and are reluctant to treat those acting in bad faith as well 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, such as Locke or Hegel sought to develop, expressed in nonutilitarian terms. Nor do we claim that property must be regarded as being a moral right on the same plane as other moral rights. It is quite possible that one 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 of those aspects of property that have been seen as most consistent with the deontological views such as corrective justice.