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**LOCKE UNLOCKED:  
PRODUCTIVE USE IN TRESPASS,  
ADVERSE POSSESSION, AND  
LABOR THEORY**

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INTRODUCTION

Most American property scholars acknowledge that John Locke's essay "Of Property," Chapter 5 of *The Second Treatise of Government*,<sup>1</sup> deserves a significant place in the canon of property theory.<sup>2</sup> Yet those same scholars agree that Of Property's account of property is indeterminate and unpersuasive. For example, when one leading casebook introduces Of Property's famous labor-mixing argument, it hastens to add: "Locke's labor theory appears in several versions, most of them deficient in one form or another."<sup>3</sup>

Yet it is extremely likely that American law property professors are cutting Locke down to their own size. Locke is still being read and considered more than 400 years after his death. Contemporary property scholars should do so well. In addition, over the last generation, in scholarship about Locke's political philosophy, there has been a renaissance in Lockean

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Most of all, I thank David Schleicher for making "the far greater part of the value" of this manuscript. See John Locke, *Two Treatises of Government* II.40, at 314 (Peter Laslett ed., 1989). Schleicher suggested the pre-colon title.

<sup>1</sup> Because Locke's *Two Treatises* have been published in many different versions and no version has yet been accepted as the sole authoritative version, this Article refers to passages not only by page of the Laslett edition but also by treatise volume and section. Thus, "Of Property" is cited as II.25-.52 (for the volume and section), 285-302 (for the pages from Laslett's edition).

<sup>2</sup> For casebooks introducing Lockean labor theory, see Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 87-88 (2007). For leading books on property theory introducing and critiquing various theories of labor, see Stephen R. Munzer, *A Theory of Property* 254-91 (1990); Jeremy Waldron, *The Right to Private Property* 137-252 (1988); .

<sup>3</sup> Jesse Dukeminier et al., *Property* 14 (6th ed. 2006).

scholarship. Although different studies interpret or critique Locke differently, the cream of that scholarship supplies a much more robust and persuasive account of property than American legal scholarship now realizes.

This Article applies what I regard to be the cream of that scholarship to propose an alternate “Lockean” account of property. This Article abstracts as much as possible from the hermeneutical question what theory Locke intended to propound. Instead, it applies what I consider the most convincing rehabilitations of Locke to the issues that preoccupy legal scholars. When Locke is properly unlocked, his theory of property deserves serious consideration. It may supply one of the best theories to explain, justify, and critique fundamental property doctrines in English and American law.

According to that political-philosophy scholarship, Locke propounds a theory of property grounded in a moral interest I call here “productive labor.” “Labor” refers to “free, intentional, and purposive action aimed at satisfying needs or supplying the conveniences of life.”<sup>4</sup> I refer to the state in which needs are satisfied and conveniences supplied as “prosperity,” or “prosperity rationally understood.” Prosperity obviously encompasses self-preservation and basic sustenance but it also includes the means to pursue sociable ends and virtues displaying individual excellence. “Productive” labor theory judges different legal rules by how effectively the domains of freedom they establish encourage individual citizens to *create* or *increase* rational prosperity, for themselves or others. In a colloquial sense, productive labor theory justifies and structures property rights to give all owners and non-owners alike the widest domains of concurrent, equal, and free opportunity possible to pursue their own individual prosperities.

To make its argument concrete, this Article applies productive labor theory to adverse possession and to basic encroachment doctrine. By “encroachment,” I mean the prima facie theory of liability for trespass to land, the defenses to trespass, and the basic doctrines in equity that determine whether a land owner is entitled to removal of an unconsented structure on his land. Adverse possession and encroachment each illustrate one half of a deep theoretical tension in property. On one hand, property rights are somehow justified by their tendency to reward the use and enjoyment of external assets. Adverse possession seems to accord with this justification, for it eventually rewards the squatter who occupies and uses land by vesting in him title. On the

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<sup>4</sup> A. John Simmons, *Makers’ Rights*, 2 J. Ethics 197, 210 (1998).

other hand, property rights are commonly understood to confer “sole and despotic dominion”<sup>5</sup> over owned assets. That despotic dominion entitles an owner to exclude a stranger even when a stranger is using the asset gainfully and the owner is not. Trespass to land seems to embody this commitment more than any other property doctrine. Yet trespass seems inconsistent with the use interest underlying adverse possession specifically and property generally.

Although its implications may be restated more precisely,<sup>6</sup> this Article generally confirms three suspicions and broad implications. First, to date, contemporary American property scholarship has not been engaging the most robust Lockean justification for property. In property law, there was a boomlet in Lockean scholarship in the 1970s and 1980s, and since then scholars still invoke Lockean arguments from time to time. Yet this legal scholarship has assumed and applied understandings of Locke coming from an earlier generation of political-philosophy scholarship. That earlier scholarship presents Locke in a less than fully-satisfying manner. Since political-philosophy scholars renewed interest in Locke, no legal scholar has yet explained in a sustained way<sup>7</sup> why their renaissance matters to legal property scholarship. This Article takes the first step at filling that gap.<sup>8</sup>

Readers may wonder how a canonical property theorist fell so far out of fashion. This Article’s second implication supplies one plausible answer: Property scholars expect satisfy Lockean theory to satisfy “deontological” criteria that are anachronistic and unrealistic. It is commonly assumed that Lockean property theory states a deontological theory of property. That assumption is true – in *some* respects. Utilitarian scholarship, however, goes on to expect “deontological” theories to bar transfers or rearrangement of moral rights no matter what the consequences. Although many moral scholars find this criterion “irrational, crazy,”<sup>9</sup> their protests have not stopped utilitarian property scholars from holding Lockean property theory to it

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<sup>5</sup> 2 William Blackstone, Commentaries on the Laws of England \*2 (University of Chicago Press 1979) (1766).

<sup>6</sup> See *infra* [Conclusion]

<sup>7</sup> Adam Mossoff suggested these implications in Locke’s Labor Lost, 9 U. Chi. L. Sch. Roundtable 155 (2002). That article showed how Robert Nozick and Jeremy Waldron misconstrued and trivialized Locke’s theory of property in Anarchy, State and Utopia (1974), and Two Worries About Mixing One’s Labour, 33 Phil. Q. 37, 37 (1984), respectively. See Mossoff, *supra*, at 157-58. This Article shows how leading legal property scholarship systematically internalizes Nozick and Waldron’s mistakes.

<sup>8</sup> See *infra* part II.

<sup>9</sup> John Rawls, A Theory of Justice 30 (1971); Samuel Freeman, Utilitarianism, Deontology, and the Priority of Right, 23 Phil. & Pub. Aff. 313, 323 n.15 (1994) (quoting Rawls, *supra*).

anyway. This Article shows how use and abuse of the term “deontological” has led many leading property scholars to dismiss Of Property’s argument.<sup>10</sup>

This dismissal is unfortunate, for productive labor theory has much to offer contemporary property scholars. That potential supplies this Article’s third main implication: Productive labor theory exposes several foundational problems endemic to utilitarian theories of property. Most contemporary property scholars ground their normative arguments in pragmatic utilitarian foundations. In philosophical scholarship, non-utilitarians have complained about several problems with those foundations. Utilitarian legal scholarship on trespass and adverse possession seem to confirm and illustrate those problems; productive labor theory anticipates the problems and supplies alternatives. So before they brush Locke off, contemporary property scholars may want to stop and consider whether his teachings anticipates and avoids blind spots in their approaches to property law.<sup>11</sup>

I. LOCKEAN LABOR THEORY IN CONTEMPORARY AMERICAN PROPERTY SCHOLARSHIP

**A. *Libertarian Lockeanism and Labor-Desert Lockeanism***

Mainline American property scholarship assumes that “Lockean” property theory refers to one of two caricature positions. One rendition of Lockean theory is libertarian. Libertarian principles are often associated with Blackstone,<sup>12</sup> or with the classical liberal political tradition generally.<sup>13</sup> Yet they are also associated with Locke<sup>14</sup> – especially Locke as transmitted by Robert Nozick<sup>15</sup> and Richard Epstein,<sup>16</sup> in the earlier, libertarian, rights-based phase of his scholarship.<sup>17</sup> As Joseph Singer explains, libertarian property theory holds “that owners should

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<sup>10</sup> See *infra* part III.

<sup>11</sup> See *infra* part VIII.

<sup>12</sup> Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1362-63 (1993).

<sup>13</sup> See, e.g., *id.* at 1344.

<sup>14</sup> See Margaret Jane Radin, Time, Possession, and Alienation, 64 Wash U. L.Q. 739, 739-740 (1986) (describing a “neo-Lockean entitlement” conception of property). Accord Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 957-58 (1982) (“Conservatives rely on an absolute conception of property as sacred to personal autonomy.”).

<sup>15</sup> Nozick, *supra* note 7.

<sup>16</sup> Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. U. L.Q. 667 (1986).

<sup>17</sup> Early in his career, Epstein grounded the foundations of his normative arguments in corrective-justice principles informed significantly by Nozick and other sources of libertarian political theory. In the period 1985-87, however, Epstein switched to utilitarian normative foundations. See Richard A. Epstein, Taking Stock of *Takings*: An Author’s Retrospective, 15 Wm. & Mary Bill Rts. J. 407, 417-18 (2006); Eric R. Claeys, *Takings*: An Appreciative Retrospective, 15 Wm. & Mary Bill Rts. J. 439, 452-53 (2006); Larry Alexander & Maimon Schwarzschild, The Uncertain Relationship Between Libertarianism and Utilitarianism, 19 Quinnipiac L. Rev. 657 (2000); Richard A.

presumptively have the freedom to use their property as they wish unless they actually harm others.”<sup>18</sup>

The clearest illustrations of libertarian Lockeanism come from the *prima facie* case and equitable principles associated with trespass to land. Ideally, occupancy of land entitles a land owner to near-absolute dominion over the occupied land.<sup>19</sup> What applies to occupants then carries forward to title owners. So if an encroacher encroaches on a title owner’s property, the former is *prima facie* liable merely for entering the latter’s land without the latter’s consent. It does not matter whether the encroacher mistakenly and in good faith believed he was on his own land.<sup>20</sup> Nor does it matter whether the encroacher inflicts any physical damage to the land,<sup>21</sup> whether the land is going to be put to a higher-value use than the title owner’s current use, or even whether the title owner is deploying or means imminently to deploy the land to any advantageous use.<sup>22</sup> If the title owner suffers an ongoing encroachment, equity strongly presumes in favor of an injunction – again, whether or not the encroachment threatens to damage the land or disrupt any use of it.<sup>23</sup> Indeed, ordinarily, the title owner is entitled to the injunction even if the hardship the encroacher suffers from removing the encroaching structure is far more costly than the hardship the owner would suffer from relinquishing the encroached-on land in a forced sale.<sup>24</sup>

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Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 *Quinnipiac L. Rev.* 783 (2000). Here, I call the libertarian Epstein the “earlier Epstein” and the utilitarian Epstein the “later Epstein.”

<sup>18</sup> Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 *Cornell L. Rev.* 1009, 1038 (2009). Accord Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 *Wash. U. L.Q.* 723, 724 (1986). Neither Singer nor Ellickson calls this view “Lockean,” rather “libertarian,” but others call it “neo-Lockean.” Radin, *supra* note 14, at 740.

<sup>19</sup> Epstein, *supra* note 16, at 676; see *id.* at 669-70, 722 (citing Locke with approval).

<sup>20</sup> When intent is an element of trespass, courts soften the element to refer to intent commit the act that results in an unconsented entry of the plaintiff’s close. See John C. P. Goldberg & Benjamin C. Zipursky, *Torts* 232 (2010). See, e.g., *Brown v. Dellinger*, 355 S.W.2d 742, 747 (Tex. Civ. App. 1962); Restatement (Second) of Torts § 158(a) (defining intent in trespass to cover intent to enter land in the possession of the plaintiff).

<sup>21</sup> See *Longnecker v. Zimmerman*, 267 P.2d 543, 545 (Kan. 1954); *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916); *Dougherty v. Stepp*, 18 N.C. 371, 371 (1835).

<sup>22</sup> In *Jacque v. Steenberg Homes, Inc.*, a company that delivered mobile homes towed such a home across a fallow farm field behind the Jacques’ house, over their objection, to deliver the home on time while the public road was blocked by snow. 563 N.W.2d 144, 157 (Wisc 1997). The Jacques offered no reason to deny the crossing other than “that is what the road is for,” and a mistaken belief that they might suffer adverse possession, and Steenberg Homes caused no physical harm to the Jacques’ field. *Id.* at 156-57. The Wisconsin Supreme Court still affirmed a finding that the Jacques had suffered a *prima facie* if nominal trespass. See *id.* at 160; Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 *Notre Dame L. Rev.* 1379, 1389-90, 1407-09 (2010).

<sup>23</sup> See *Baker v. Howard County Hunt*, 188 A. 223 (Md. App. 1936).

<sup>24</sup> See *Geragosian v. Union Realty*, 193 N.E. 726 (Mass. 1935).

Libertarian theory contrasts starkly with labor-desert theory. Although there are several variations on desert theories, two representative ones prescribe “that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, or industry,” or that people deserve benefits for, “without being required to do so, ‘add[ing] value’ to others’ lives.”<sup>25</sup> If one of these or some similar formulation defines the goals of Lockean property theory, then *trespass* is the doctrine inconsistent with Lockean property theory. After all, trespass endows title owners with broad exclusive rights of control and possession whether or not they have produced any thing or added any value with the land they own.

Instead, it is adverse possession that exemplifies Lockeanism. For ease of exposition, I assume here that the dominant common law approach to adverse possession follows a “prescriptive” approach.<sup>26</sup> According to this approach, a party perfects a complete defense against trespass to land if she occupies the land in question (1) hostilely, (2) exclusively, (3) with notice to the title owner, and (4) continuously for the period specified in the jurisdiction’s statute of limitations for trespass or ejectment. All jurisdictions assign the burden of proving these elements to the trespassing party; many jurisdictions require that party prove them by clear and convincing evidence. Not only does this proof complete a defense against trespass, it also divests the title owner and transfers ownership to the encroaching party.<sup>27</sup> As Eduardo Moisés Peñalver and Sonia Katyal explain:

The intentional adverse possessor, or squatter, has typically been someone without much property but with a great deal of time and a willingness to invest substantial labor in improving the unoccupied property of another. In addition, the intentional adverse possessor seeks to put the property in question . . . to valuable use. Finally, the property must be sufficiently unimportant to its true owner that the owner permits an interloper to intrude on the property and occupy it for a lengthy period of time.<sup>28</sup>

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<sup>25</sup> See Becker, *supra* note 2, at 32, 50-51. See also Munzer, *supra* note 2, at 254-91.

<sup>26</sup> See R.H. Helmholz, Adverse Possession and Subjective Intent, 61 Wash. U. L.Q. 331, 334-35 (1983). The “prescriptive” approach contrasts with the “accrual” approach, which asks simply when a cause of action first accrued against the title owner. See *id.* at 334 (citing 3 James A. Casner, *American Law of Property: A Treatise on the Law of Property in the United States* § 15.4 (1954)).

<sup>27</sup> See 16 Powell on Real Property § 91-01[2], at 91-6 to -7 (Michael Allan Wolf ed., 2009); Herbert Hovenkamp & Sheldon Kurtz, *Principles of Property Law* § 4.3, at 58 (6th ed. 2005). For a sample of state statutes on adverse possession, see 16 Powell on Real Property, *supra*, § 91-01[2], at 91-6 to -7 nn.12-13. For ease of exposition, I am omitting the requirement that an adverse occupancy be “actual” and other variations on the prescriptive theory.

<sup>28</sup> Eduardo Moisés Peñalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* 149 (2010) (emphases added).

Although Peñalver and Katyal do not cite Locke as authority for this passage,<sup>29</sup> they still couch the adverse possessor's moral argument in desert terms – “substantial labor,” “improving,” and “valuable use.”<sup>30</sup>

It is impossible to reconcile labor-desert theory so understood with libertarian theory. If Lockean theory can justify two mutually contradictory accounts of property, it can justify anything. A theory that justifies anything justifies nothing.

### **B. *Lockean Deontology***

Lockean theory is also portrayed as incoherent. This portrait follows if one logic-chops Lockean theory with an argument I have called the “deontology trap.”<sup>31</sup> Although the term “deontology” is difficult to pin down, I assume provisionally<sup>32</sup> that it refers to some combination of “not capable of being diminished by coercive government action” and “prescribing moral rights without regard to those rights' consequences.” Let us also assume (again, provisionally) that “deontological” theories so construed are fundamentally opposed to consequentialist or utilitarian theories.<sup>33</sup> According to the deontology trap, a theory is not genuinely a moral theory of property unless it is deontological in the sense just suggested. Yet any theory that is deontological in that sense is extreme and absurd, because it bars government from undertaking actions that contribute greatly to social welfare on the ground that such actions jeopardize the rights of a few.

This trap features prominently in scholarship on the relation between land boundaries and adverse possession. Margaret Jane Radin used the trap to discredit the early Epstein's account of adverse possession as a narrow exception to libertarian possessory rights of control.<sup>34</sup> In Radin's portrait, “[t]he advantage of Lockean . . . natural rights theory is that it seems proof against noncontractual redistribution,”<sup>35</sup> “superior to all manipulations of the state in the interest of

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<sup>29</sup> Elsewhere, they document how nineteenth-century American land settlers appealed to Lockean labor-desert arguments to justify their claims to auctioned-off lands on which they were squatting. See *id.* at 56.

<sup>30</sup> Accord Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 79 (1985) (rationalizing adverse possession “a reward to the useful laborer at the expense of the sluggard”).

<sup>31</sup> See Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 Cornell L. Rev. 889, 897-901 (2009).

<sup>32</sup> Until *infra* part III.

<sup>33</sup> See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* 52 n.72 (2002).

<sup>34</sup> I apply the deontology trap in the text only to libertarian Lockeanism only for ease of exposition. The trap may be applied just as effectively to labor-desert Lockeanism. If a moral desert claim entitles a squatter to claim ownership whenever the title owner neglects it, adverse possession seems “radically underinclusive” because it protects the squatter only in a tiny fraction of the cases in which he establishes a legitimate desert claim. Peñalver & Katyal, *supra* note 28, at 149.

<sup>35</sup> Margaret Jane Radin, *Reinterpreting Property* 109 (1993).

social welfare,”<sup>36</sup> “as a matter of *fiat justitia, ruat cælum*.”<sup>37</sup> So construed, Lockean boundary rules lead to absurd consequences. Inviolable boundary rules “cannot account for adverse possession, which it appears the functioning legal system . . . cannot do without.”<sup>38</sup> Once it is conceded that adverse possession *should* qualify owners’ possessory interests in control, Lockean property theory collapses into “moral paradox.”<sup>39</sup> And when libertarian Lockeanism concedes that adverse possession must be explained by a utilitarian exception, critics conclude it gives the game away. The polite critics conclude that libertarian Lockeanism must be “normatively untenable.”<sup>40</sup> The trenchant critics say it is “just a confused or Pollyannaish value pluralist [theory that] fail[s] to see that [its] ultimate values are frequently antagonistic.”<sup>41</sup>

### C. *The Utilitarian Alternative*

So Lockean property theory suffers from the worst of both worlds – it seems at once both indeterminate and foundationally incoherent. Obviously, those impressions discourage contemporary scholars from taking Locke’s work seriously. By process of elimination, they also encourage scholars to analyze property issues applying utilitarian normative foundations.<sup>42</sup>

To appreciate this latter point, let us survey preliminarily how contemporary scholarship explains and justifies encroachment and adverse possession. Utilitarian theorists find the *prima facie* case for trespass fairly uncontroversial. Trespass should protect title owners’ control over their land within lots of specified boundaries.<sup>43</sup> Economically, broad property rights secure investment, and they make it easier for land owners to sell, lease, or mortgage land by keeping title and ownership simple.<sup>44</sup> Socially, such rights encourage individual and civic diversity. Politically, they help decentralize political power.<sup>45</sup>

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<sup>36</sup> *Id.* at 108.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 109.

<sup>39</sup> Larissa Katz, *The Moral Paradox of Adverse Possession*, 55 *McGill L.J.* 47, 47, 61-62 (2010).

<sup>40</sup> Ellickson, *supra* note 18, at 723.

<sup>41</sup> Larry Alexander, *Pursuing the Good—Indirectly*, 95 *Ethics* 315, 315 (1985). Although Alexander speaks here of John Stuart Mill’s utilitarian theory of libertarianism, he has raised the same basic question about Epstein’s libertarianism as well. See Alexander & Schwarzchild, *supra* note 16.

<sup>42</sup> See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 *Nw. U. L. Rev.* 1122, 1122 (1984).

<sup>43</sup> See *id.* at 1126-27.

<sup>44</sup> See, e.g., Richard A. Posner, *Economic Analysis of Law* § 3.7, at 55-56 (7th ed. 2007); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 *J. Leg. Stud.* 13 (1985); Epstein, *Temporal Dimension*, *supra* note 16, at 670; Merrill, *supra* note 42, at 1126-27.

<sup>45</sup> See, e.g., Epstein, *Temporal Dimension*, *supra* note 16, at 669-70; Merrill, *supra* note 42, at 1127.

Contemporary utilitarian scholarship varies more when studying trespass's remedies. Many if not most utilitarian studies assume and apply Guido Calabresi and A. Douglas Melamed's taxonomy of property rules and liability rules. "Property rules" refer to injunctions and other legal entitlements incentivizing non-owners to bargain *ex ante* with owners; "liability rules" refer to market-value damage awards and other legal remedies letting non-owners take some or all of an owner's property rights upon payment of market-value compensation.<sup>46</sup> Many law and economics authorities prefer property rules as a starting default, which may be refuted when many parties are involved in the dispute.<sup>47</sup> A few works prefer to make liability rules the starting default, on the ground that such rules force the owner and non-owners to reveal to one another how much they really value the encroached-on property.<sup>48</sup> A substantial minority prefer property rules strongly. In their view, in particular cases, liability rules encourage non-owners to expropriate owner subjective value more often than property rules encourage owners to expropriate non-owner assembly gains by holding out. More generally, liability rules also encourage non-owners to bypass markets and all parties to dissipate rent in litigation.<sup>49</sup>

Utilitarian scholarship tends to be quite sympathetic toward adverse possession, even if different authorities stress different rationales. Many articles justify adverse possession on the ground that it enlarges the joint utility of the title owner and the encroacher. Since the title owner's behavior strongly suggests he values the land little, adverse possession assigns the land to the higher-valuing encroacher while avoiding the hold-out losses and other transactions costs the parties would create by bargaining.<sup>50</sup> Adverse possession also spares the encroacher the *disutility* of suffering extremely high psychic costs from losing lands she has occupied for a long time.<sup>51</sup> Adverse possession clears false claims out of the title system,<sup>52</sup> diminishes the need for

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<sup>46</sup> See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1096-97 (1972).

<sup>47</sup> See, e.g., Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713, 759-66 (1996); Calabresi & Melamed, *supra* note 46, at 1110.

<sup>48</sup> See, e.g., Posner, *supra* note 44, §§ 3.10, -12, at 69-70, 78-79. Cf. Ian Ayres & J.M. Balkin, Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond, 106 Yale L.J. 703 (1996); Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade, 104 Yale L.J. 1027 (1995).

<sup>49</sup> See, e.g., Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 William & M. L. Rev. 1849, 1878-79 (2007); Richard A. Epstein, A Clear View of the Cathedral: The Dominance of Property Rules, 106 Yale L.J. 2091 (1997).

<sup>50</sup> See Posner, *supra* note 44, §3.12, at 78-79; Robert Cooter & Thomas Ulen, Law and Economics 162 (3d ed. 2000); Jeffrey Evans Stake, The Uneasy Case for Adverse Possession, 89 Geo. L.J. 2419, 2420 (2001).

<sup>51</sup> See Stake, *supra* note 50, at 2455-66; Merrill, *supra* note 42, at 1131; Ellickson, *supra* note 18, at 728-29.

<sup>52</sup> Stake, *supra* note 50, at 2450-51.

later parties to expend “time and effort in the search for possessors,”<sup>53</sup> and diminishes error costs created by litigation about old transfers with old and cold evidence.<sup>54</sup> Adverse possession also creates “incentives [for] owners to engage in good custodial practices”<sup>55</sup> and rewards encroachers for investing in or improving land.<sup>56</sup>

**D. *Rehabilitating Lockean Theory***

Again, however, if Locke’s thought were as facile or incoherent as sections A and B suggested, it is unlikely that Of Property would have been as durable as it has been. And over the last twenty years, scholarship on government and political philosophy scholarship has heightened these suspicions. Locke’s account property has been the subject of at least two complete books and substantial portions of at least four others,<sup>57</sup> and political-philosophy scholars have debated and clarified the normative foundations of Locke’s theories of rights and morality.<sup>58</sup>

Of course, as academic work often does, these works have expanded rather than contracted the range of plausible “Lockean” theories of property and political philosophy. Yet some of them seem, on one hand, to accord quite closely with the concerns about labor latent in property doctrines while, on the other hand, to avoid the criticisms of Lockean theory described in the previous Part. Those authorities start with a moral interest actors hold in their own survival and moral flourishing (here, “prosperity,” or “prosperity rationally understood”). Those works then justify property because and to the extent that it encourages individuals to consume or transform external assets to make them produce prosperity so understood. Hence, Adam Mossoff describes property in relation to “*production*,”<sup>59</sup> Peter Myers in terms of “productive” “appropriation,” “acquisition,” “industry,” or “laboring,”<sup>60</sup> A. John Simmons in terms of

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<sup>53</sup> Id. at 2433; Ellickson, *supra* note 18, at 727.

<sup>54</sup> See Stake, *supra* note 50, at 2437-38; Epstein, *supra* note 16, at 676-77; Merrill, *supra* note 42, at 1128; Ellickson, *supra* note 18, at 731.

<sup>55</sup> Merrill, *supra* note 42, at 1130. Accord Stake, *supra* note 50, at 2433-37.

<sup>56</sup> See Cooter & Ulen, *supra* note 50, at 162.

<sup>57</sup> See Matthew H. Kramer, *John Locke and the Origins of Private Property* (1997); Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (1995); James Tully, *An Approach to Political Philosophy: Locke in Contexts* 71-176 (1993); A. John Simmons, *The Lockean Theory of Rights* 222-352 (1992); Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* 125-90 (1991); Waldron, *supra* note 2, at 137-253.

<sup>58</sup> See, e.g., Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of Locke’s Political Thought* (2002); Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (2002); Peter C. Myers, *Our Only Star and Compass: Locke and the Struggle for Political Rationality* (1998); Peter A. Schouls, *Reasoned Freedom, John Locke and Enlightenment* (1992).

<sup>59</sup> Adam Mossoff, *supra* note 7, at 159.

<sup>60</sup> Myers, *supra* note 58, at 191-95.

“productive use,”<sup>61</sup> and Stephen Buckle in terms of “productive labor.”<sup>62</sup> Following these authors, I call the rendition of Lockean property theory I present here “productive labor theory.”

With that background, let me therefore restate this Article’s intentions more precisely. This Article introduces American property scholars to some of the fruits of recent scholarship on Locke’s theory of property. This introduction is partial in at least three significant respects. First, by focusing on the impressions about and objections to labor theory recounted in the last Part, this Article necessarily abstracts from many other objections to Lockean labor theory. Second, since trespass and adverse possession seem lightning rods for those impressions and objections, I focus only on those doctrines (and only the most revealing features of both at that). This Article’s argument suggests that Lockean property theory may apply more persuasively and widely than these doctrines, but precisely speaking it abstracts from many other property doctrines.<sup>63</sup> Finally, by focusing on the recent scholarship that presents a “productive labor” theory of property, this Article necessarily gives shorter shrift to other recent Lockean scholarship. I acknowledge that scholarship by citation, but for reasons of space and focus this Article restates productive labor theory only as necessary to contrast it with labor-desert and libertarian accounts of property.

Readers may wonder to what extent this Article’s claims are hermeneutical. I do suspect that the portrait presented here approximates Locke’s own teachings on property more charitably and accurately than other prominent accounts. Yet hermeneutical analysis sounds more properly in scholarship on political philosophy and intellectual history. In any case, this Article relies heavily on hermeneutical scholarship by Simmons, Buckle, Myers, and others. All the same, in an article on Lockean theory, it is inevitable that readers will ask how “Lockean” my presentation of productive labor theory really is. As a compromise, in footnotes, I provide

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<sup>61</sup> Simmons, *supra* note 57, at 273, 285.

<sup>62</sup> Buckle, *supra* note 57, at 151.

<sup>63</sup> Rachel Godsil has shown how the same political morality has justified and explained courts’ aversion to using nuisance law to exclude black prospective home buyers from white neighborhoods in southern states after the Civil War. See *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 *Mich. L. Rev.* 505 (2006). Mark P. McKenna has shown how the same morality explains the original conception of trade mark law, see *The Normative Foundations of Trademark Law*, 82 *Notre Dame L. Rev.* 1839 (2007). Adam Mossoff has suggested that Anglo-American patent law rests on natural-law/natural-rights principles similar to Locke’s. See Adam Mossoff, *Who Cares What Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Context*, 92 *Cornell L. Rev.* 953 (2007); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 *Hastings L.J.* 1255 (2001).

citations to Locke's writings<sup>64</sup> and the relevant secondary hermeneutical scholarship. In the text, I will allude briefly to a few significant points of disagreement among the Locke scholars on whose work I rely. In general, however, I assume that my restatement of productive labor theory is a more or less accurate and common-denominator interpretation of Locke's intentions.

That said, whether that common-denominator interpretation accurately reflects *Locke's* intended teaching, it may be useful to contemporary property scholars as yet another *Lockean* theory of property. Productive labor theory's hermeneutical fidelity is separate from its justificatory power – its ability to defend, critique, and/or explain contemporary American property law. Among other things, it is extremely likely that the seminal English and American cases that developed these doctrines assumed and applied understandings of “labor” extremely similar to the account proposed here.<sup>65</sup> Productive labor theory also provides a convincing account why land law should institute broad rights of trespass and narrow exceptions for adverse possessors and other non-owners whose claims we have not yet covered. Of course, productive labor theory cannot explain every subsidiary detail of trespass or adverse possession. Yet it explains and justifies the basic institutions, it clarifies how subsidiary details should be settled within those basics, and it accomplishes these feats with normative concepts and policy arguments that are grounded closely in the law. These accomplishments suffice for our purposes here.

With that background, let me sketch the rest of this Article's argument. Part II restates the normative interest in productive use at the core of productive labor theory. Part III clears away all the mistaken assumptions that contribute to the “deontology trap.” Part IV explains how productive labor theory can justify not only property rights shaped narrowly around use claims but also ones shaped broadly around rights of exclusive control and possession. Part V, VI, and VII illustrate the normative interest in productive use by applying it (respectively) to the

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<sup>64</sup> This Article focuses primarily on the *Two Treatises*, occasionally on John Locke, *Essay Concerning Human Understanding* (Peter H. Nidditch ed., 1979) (1690) [hereinafter, “Locke, ECHU”], and extremely selectively on John Locke, *Some Thoughts Concerning Education* (Ruth W. Grant & Nathan Tarcov eds., 1996) (1693) [hereinafter, “Locke, STCE”], *Reasonableness of Christianity* (George W. Ewing ed. 1965) (1695), and *A Letter Concerning Toleration* (Prometheus Books, 1990) (1689) [“LT”]. Locke propounds an integrated and coherent theory of political morality across his mature published works. To answer questions raised by contemporary issues, one must consult all of these works taking into account their different arguments and intended audiences. See Myers, *supra* note 58, at 18-26; Eric R. Claeys, *The Private Society and Liberal Public Good in John Locke's Thought*, 21 *Soc. Phil. & Pol'y* 200, 207-08 (2008). The *Two Treatises* simply make property central where the other main works do not.

<sup>65</sup> See Eric R. Claeys, *Jefferson Meets Coase*, 85 *Notre Dame Law Review* 1379, 1398-1430 (2009).

general possessory interest in trespass, the principles of equity that regulate encroachment disputes, and adverse possession. Having reconstructed a productive labor-based justification for encroachment and adverse possession, Part VIII reconsiders how utilitarians justify the same doctrines and criticize Lockean property theory.

## II. LABOR AND THE NORMATIVE INTEREST IN PRODUCTIVE USE

### A. *Labor in Corrective Justice and Moral Theory*

Productive labor theory presents a theory of practical morality. It prescribes that a civil order should secure to citizens a moral right to labor freely, both when they labor solely with their bodies and also when they labor using external assets.

These suggestions beg some basic questions about how labor theory is best categorized in law and philosophy. For example, in his early, Nozickean phase, Richard Epstein suggested that Lockean property theory fit within a “framework of corrective justice.”<sup>66</sup> That categorization makes sense within loose usages of “corrective justice” but not stricter usages. In a loose sense, a theory sounds in “corrective justice” if it posits that individuals have moral rights separate from the law, and that the object of the private law is to institute a series of legal relationships embodying those rights and securing them against wrongs.<sup>67</sup> In this sense, Locke’s account of the state of nature is certainly corrective. “All Men are naturally in ... a *State of perfect Freedom*,” and when one person invades another’s rightful freedom the law of nature entitles the victim to “a particular Right to seek *Reparation* from him that has done it.”<sup>68</sup>

In philosophical tort scholarship, however, scholars who find tort “corrective” in the loose sense just covered break out into three different factions depending on what they find to be tort’s highest priority. In this debate, “corrective justice” refers to the position that “the core of tort law”<sup>69</sup> lies in a wrongdoer’s obligation to make a victim whole for the wrong he inflicts on her. In another approach, the “recourse” approach, tort’s highest priority is to institute a legal proceeding tracking the bilateral normative relationship in which a victim demands reparation

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<sup>66</sup> Epstein, *supra* note 16, at 674.

<sup>67</sup> See, e.g., Ernest Weinrib, *The Idea of Private Law* 114–44 (1995); Jules L. Coleman, *Risks and Wrongs* 311–24 (1992).

<sup>68</sup> Locke, *TT*, *supra* note 1, II.4, II.10, at 287, 291. Cf. Goldberg & Zipursky, *supra* note 20, at 64; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *Yale L.J.* 524, 541–44 (2005).

<sup>69</sup> Jules L. Coleman, *The Practice of Principle*, at xiii (2001). See also *id.* at 9–10, 36.

from the wrongdoer who made her into a victim.<sup>70</sup> In the last view, the “protective” or “preventive” view, the main aim of tort is to prevent wrongs from happening in the first place. In this view, the tort system’s primary responsibilities are to declare persons’ legal rights and to impose duties on others not to violate those rights. If some actors violate duties and wrong rights, the tort system then imposes contiguous, secondary duties on the wrongdoers to rectify their wrongs.<sup>71</sup>

Productive labor theory (and, for that matter, most Lockean theories of property) focuses on questions separate from this specialized and tort-centric debate. Although the partisans in these debates dispute what tort’s most urgent function is, they all agree that tort secures normative interests in the form of “rights,” and that tort is designed to embody and enforce such rights. Specific subject areas in tort cannot work out the details of different rights and wrongs in their fields without a normative baseline. That baseline must specify in what circumstances a right-claimant has a right; what particular powers, immunities, privileges, disabilities, and so forth constitute the right; and what correlative interests non-claimants are bound to respect and when.<sup>72</sup> Productive labor theory supplies such a baseline, in relation to common law doctrines at the interface of property and tort where land is involved.<sup>73</sup> As a result, however, productive labor theory is separate from tort’s “corrective” structure – because its prescriptions are logically prior to the prescriptions of tort.

## **B. Labor**

In productive labor theory, “labor” consists of a moral right justifying an agent’s using his liberty and personal talents to produce prosperity rationally understood. A moral “right” consists of a strong normative interest.<sup>74</sup> I assume here such an interest is “moral” if it has

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<sup>70</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917, 919 (2010); Benjamin C. Zipursky, Rights, Wrongs, and Recourse in the Law of Torts, 51 Vand. L. Rev. 1 (1998)

<sup>71</sup> See John Gardner, What Is Tort Law For? Part 1: The Place of Corrective Justice, 30 L. & Phil. 1 (2011); Gregory C. Keating, "The Priority of Respect Over Repair (forthcoming)" *Legal Theory* (2012), <http://works.bepress.com/gregorykeating/26>.

<sup>72</sup> See Eric R. Claeys, Private Law Theory and Corrective Justice in Trade Secrecy, 4 J. Tort L. 1, 17-27, 41-43 (iss. 2, no. 2, 2011).

<sup>73</sup> See Claeys, supra note 22.

<sup>74</sup> In my usage of “right” I follow Simmons, supra note 57; Jules L. Coleman & Jody Kraus, Rethinking the Legal Theory of Rights, 95 Yale L.J. 1335, 1342-43 (1986). I use the term “interest” simultaneously in a commonsensical and philosophical sense. In this sense, an “interest” refers to a reason that both psychologically motivates and normatively justifies the actor’s taking a certain course of action. The bounds of the interest also signpost to others that they should abstain from the sphere of decisional freedom the actor expects to enjoy in relation to the asset. See Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others 33-34 (1984); Eric R. Claeys, The Private Law and the Crisis in Catholic Legal Scholarship in the American Legal Academy, 2 J. Catholic Soc. Thought 253,

binding force, its force is pre-political, and that force is also non-conventional. Such a norm is “pre-political” if it could have obligatory force even if there existed no laws, executive authorities, or other political institutions to make the norm obligatory. Such a norm is “non-conventional” if its content binds whether or not parties have agreed to that content. In this sense, civil laws, social norms, and religious dogmas (to the extent they are informed not wholly by revelation but at least partially by human practical reason) are all judged by how well they secure or promote states of affairs prescribed by non-conventional norms.<sup>75</sup>

“Prosperity” sets the standard for flourishing against which productive labor theory evaluates and measures different moral rules. In principle, prosperity can encompass a wide range of different forms of human flourishing – “any advantage of life.”<sup>76</sup> Prosperity encompasses intrinsically-valuable forms of flourishing – all of which lead up to happiness, man’s “chief end.”<sup>77</sup> At the same time, “prosperity” describes human flourishing in narrower terms. It is an “instrumental condition and a central, indispensable constituent element of happiness,” but it is not happiness itself.<sup>78</sup> That said, “prosperity” sets a more humane standard for political practice than happiness does.<sup>79</sup> Because different individuals are born with different personality traits or raised with different upbringings, some find no satisfaction in ways of life that others reasonably find quite satisfying. Different citizens can and inevitably will fall out in factional warfare about “happiness.” Yet all individuals share to a considerable extent a “natural Inclination . . . to preserve [their] Beings.”<sup>80</sup> Even when individuals cultivate rarified individual virtues or talents, they cannot do so without first acquiring considerable material support. For most practical purposes, then, “prosperity” focuses considerably on low goods

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256-57 (2010). This usage differs significantly from many legal usages of “interest” – for example, as a placeholder for any legal right or responsibility an actor has in relation to property. See [supra in part III.A]; American Law Institute, *A Concise Restatement of Property* § 5 (2001).

<sup>75</sup> See Simmons, supra note 57, at 87-94; Locke, ECHU, supra note 64, II.xxviii.6-16, at 351-60 (discussing the divine law, the civil law, and the law of reputation as three different laws contributing to community happiness). Because this *Essay* comes in many different editions, I provide not only page citations to the Nidditch edition but also citations to the book, chapter, and section of the *Essay*. “II.xxviii.6” refers to the second book, 28th chapter, 6th paragraph, and “351” refers to the page of the Nidditch edition.

<sup>76</sup> Locke, TT, supra note 1, II.31, at 308 (emphasis added). Accord Buckle, supra note 57, at 150-51; Simmons, supra note 57, at 273.

<sup>77</sup> Locke, RC, supra note 64, ¶ 245, at 182. Because *The Reasonableness of Christianity* comes in many editions, I refer to page 182 of the Ewing edition and “¶” for the paragraph numbers in Locke’s original text.

<sup>78</sup> Peter C. Myers, On Michael Zuckert’s *Launching Liberalism*, 32 *Interpretation: A Journal of Political Philosophy* 231, 234 (2005) (book review). Here, Myers criticizes and defends the term “self-ownership” as a possible foundation of Lockean practical theory; “prosperity” is subject to the same criticism and defense.

<sup>79</sup> See Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 *Cornell L. Rev.* 889, 916-46 (2009).

<sup>80</sup> Locke, TT, supra note 1, I.86, at 223.

appreciated by most members of a community – self-preservation and the acquisition of basic material support, or “the Subsistence and Comfort of [Man’s] Life.”<sup>81</sup>

“Use” consists of the application of one’s own person or other inputs to pursue prosperity. Descriptively, individuals may “use” their own persons or other inputs in many ways significantly inconsistent with their prosperities rationally understood. A master has the power to “use” a slave by castrating the slave merely to take gratification from the slave’s pain and misery.<sup>82</sup> That social fact, however, merely states one of the most urgent problems in ethics and politics. Without socialization, it is almost inevitable that most individuals will follow innate selfish or authoritarian tendencies. Unsocialized mature adults will fail to appreciate that their real interests lie in a more enlightened, sociable, generous, and demanding conception of prosperity. Politically, this conception requires citizens to respect the equality of other citizens as the price for enjoying their own civil equality.<sup>83</sup> Ethically, this conception also requires each citizen to forswear ideologies or extreme religious dogmas, which enslave men by making them psychologically dependent on others’ imaginative propaganda.<sup>84</sup>

These general imperatives shape the moral limits on how citizens should “use” things. Without socialization in a decent moral order, many if not most individuals will find “use” in whatever strikes their “Fancy and Covetousness.” When individuals are socialized correctly, however, they find “use” instead in being “Rational and Industrious.” Rational industry requires acquisitiveness, to the extent necessary to gather material support. It requires creativity, to imagine how to transform that support to personal use. It requires diligence, to complete such transformations. It also requires intelligent planning, to coordinate things and other people into plans that redound to the benefit of the planner and others involved. The acquisition, creativity, diligence, and planning all help laborers extract from the natural world “the greatest Conveniences of Life they were capable to draw.”<sup>85</sup> Rational and industrious citizens therefore insist in their own lives on the right to engage freely in “purposeful activity, directed toward useful ends, and which secures preservation in the primitive state and improves human life once

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<sup>81</sup> Id. I.92, at 227.

<sup>82</sup> See id. I.9, at 166.

<sup>83</sup> See id. II.4, at 269; Locke, LT, *supra* note 64, at 66-69.

<sup>84</sup> See, e.g., Locke, TT, I.56-.58, at 180-83; Locke, ECHU, II.xxi.64-.68, at 276-80.

<sup>85</sup> Locke, TT, *supra* note 1, II.34, at 291. Accord id. II.31, at 290 (construing the right to property to be bounded “[a]s much as any one can make use of to any advantage of life,” or “by reason of what might serve for his use”).

basic human necessities have been met.”<sup>86</sup> Such citizens respect the same rights in others as the condition of insisting on such rights for themselves.

### C. *Property*

Once labor is so construed and justified, “property” consists of a moral right endowing the holder with exclusive dominion over an external asset to labor on the asset. Since labor “is the improving, value-adding activity required by the duty to preserve oneself and others,”<sup>87</sup> the normative interests that justify labor *a fortiori* justify labor on assets. “We may first labor ‘internally’ to produce a plan, idea, theory, or invention; but we must eventually labor on what nature provided to realize the plan.”<sup>88</sup> “Exclusive dominion” refers to the legitimate sphere of freedom which an individual legitimately enjoys to labor on an external asset. “Dominion” is morally ambiguous for all the same reasons that “use” is.<sup>89</sup> When justified in a moral scheme of political equality, however,<sup>90</sup> “dominion” comes to mean “that *equal Right* that every Man hath, *to his Natural Freedom*, without being subjected to the Will or Authority of any other Man.”<sup>91</sup>

This interest in property is exclusive—but only in a secondary sense. James Penner has argued that the concept “property” establishes a social and legal right to exclude, which protects and enlarges an underlying right of use.<sup>92</sup> Penner’s conception puts the cart before the horse.<sup>93</sup> In the first instance, property declares a “moral power,” a justified prerogative to “alter the moral situation of others” in their rights and duties.<sup>94</sup> In this sense, the right to property confers on the owner a “*liberty to use*”<sup>95</sup> or a “right . . . to make use of those things that were necessary or

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<sup>86</sup> Buckle, *supra* note 57, at 150; accord Simmons, *supra* note 57, at 271 (“free, intentional, purposive action . . . satisfying human needs or making human life more comfortable or convenient”).

<sup>87</sup> Buckle, *supra* note 57, at 151.

<sup>88</sup> Simmons, *supra* note 57, at 273.

<sup>89</sup> Strictly descriptively, “dominion” refers to man’s intellectual capacities, for assembling any external assets (or inferior creatures) into a complex plan advancing his own chosen ends. See Locke, TT, *supra* note 1, at I.30, at 180.

<sup>90</sup> See *id.* II.4, at 269 (justifying “A *State . . . of Equality*, wherein all the Power and Jurisdiction is reciprocal,” on the ground that “Creatures of the same species and rank promiscuously born to all the same advantages of Nature . . . should also be equal amongst another without Subordination or Subjection”); accord *id.* I.67, at 189-90.

<sup>91</sup> *Id.* II.54, at 304.

<sup>92</sup> See James E. Penner, *The Idea of Property in Law* 8-16, 66-74 (1996).

<sup>93</sup> On the relation between the positive and negative aspects of a liberty of action over an asset, ordered for productive use, see Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 *Ariz. L. Rev.* (forthcoming 2011); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *Ariz. L. Rev.* 371, 378-403 (2004). Cite Adam’s Econ J Watch piece.

<sup>94</sup> See Simmons, *supra* note 57, at 72. Accord Buckle, *supra* note 57, at 92 (describing Pufendorf’s theory of property in light of a moral power); *id.* at 169-71 (explaining Locke’s account of the moral interest in property in light of the concept of the *suum*).

<sup>95</sup> Locke, TT, *supra* note 1, I.38, at 166-67.

useful to his Being.”<sup>96</sup> The right to use things entails the Hohfeldian privilege to use things. It also entails a Hohfeldian power to make those things unavailable to others who might otherwise have appropriated them.<sup>97</sup> In the second sense, dominion declares a “claim right,” meaning a “protected liberty” in which “others have a duty . . . to allow the exercise of” the liberty and owe that duty specifically “to the holder of the liberty . . . so that the rightholder . . . has a claim against the duty-bound parties.”<sup>98</sup> So when an owner justly exercises a moral power over an external asset, the power comes with correlative rights to deny “Title” to others over the asset, to complain justly of “injury” if they assert title anyway,<sup>99</sup> and also to repel forcibly those who try to assert such unjust title.<sup>100</sup> These rights are rights to exclude. Yet owners do not know when, why, and from what uses they are entitled to exclude others from a thing without knowing when, why, and how they may use the thing.

In order to assert a moral right over property, an actor must satisfy two main requirements. The actor must use the asset productively – that is, use the property in the course of “rational (or purposeful), value-creating activity.”<sup>101</sup> The actor may consume the asset (say, eat a deer). He may transform it into a form likely to produce some form of prosperity (skin the deer and make a coat out of its hide). He may transform it in such a manner that he “increase[s] the common stock of mankind” (make a stew capable of feeding many associates).<sup>102</sup> Since “prosperity” is not limited strictly to physical and material well-being, justifiable “use” even encompasses aesthetic enjoyment – being “pleased with [the] colour” of a thing. It also includes social uses –giving “away a part” of an owned asset “to any body else.”<sup>103</sup>

Separately, the actor must assert dominion – that is, stake a claim over the asset that other members of society reasonably understand as an act of appropriation. (In the case of the deer, a hunter would need to capture the deer consistently with conventional norms about capture.<sup>104</sup>) As Simmons explains, “[l]abor must show enough seriousness of purpose to ‘overbalance’ the

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<sup>96</sup> Id. I.86, at 205.

<sup>97</sup> See id. II.26-.27, at 286-88.

<sup>98</sup> Simmons, supra note 57, at 71 n.15 (relying on W.N. Hohfeld, *Fundamental Conceptions as Applied to Judicial Reasoning* 35-64 (1964)).

<sup>99</sup> Locke, TT, supra note 1, II.32, at 291.

<sup>100</sup> See id. II.18, at 279-80.

<sup>101</sup> Buckle, supra note 57, at 151.

<sup>102</sup> Locke, TT, supra note 1, II.37, at 312.

<sup>103</sup> Id. II.46, at 300. Accord id. II.4, at 269 (including among natural rights a right of people to “dispose of their Possessions . . . as they think fit”); Waldron, [Right to Private Property], supra note --, at 220, 300.

<sup>104</sup> See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805); Rose.

community of things” that would otherwise exist.<sup>105</sup> Ordinarily, “appropriation” refers to an act that signals reasonably clearly to observers that the actor is “bring[ing] things within the immediate range of *use* for our purposes.”<sup>106</sup>

So justified, the moral interest in property has two internal normative limitations. One is the “enough and as good” proviso.<sup>107</sup> Because “all persons possess *equal* rights to make property and not to be excluded by others from doing so,” each person’s moral interest in property is limited “by the conditions necessary for *all* to do so.”<sup>108</sup> (The deer hunter must abstain from claiming sole dominion over a population of deer if another seeks to hunt as well.) The second separate limit relates to charity. Ordinarily, when two different people seek to labor on an asset, there is no practical way to sort their claims by the merits of their uses. Because different people have different talents, tastes, dispositions, life situations and “degrees of Industry,” normally, property necessarily and justifiably lends itself to “Possessions in different Proportions.”<sup>109</sup> However, if one individual suffers from “extream want” and another enjoys “Plenty,” and if no other relevant moral conditions come into play, the former may justifiably take from the latter.<sup>110</sup> The former’s need for self-preservation reasonably takes priority over the latter’s pursuit of some more refined aspect of prosperity.<sup>111</sup> (So if a starving person can prove that she has no other way to feed herself except to share in deer a hunter has caught, she is justified in taking some of the hunter’s venison even after he has appropriated it.)

A third characteristic does *not* state a separate limit on property – waste. Waste is merely the flip side or denial of the normative imperative that justifies property – productive use. Property is given to humankind “*To enjoy*,” which is to say “[a]s much as any one can make any use of to any advantage of life before it spoils.”<sup>112</sup> Even so, the bar against “waste” clarifies what “use” means. Ordinarily, an owner’s use of her own asset does not “prejudice” her neighbors.<sup>113</sup> If she fails to use an asset before it perishes, however, or (more generally) if she

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<sup>105</sup> Simmons, *supra* note 57, at 272.

<sup>106</sup> *Id.* Accord Locke, TT, *supra* note 1, II.32-33, at 308-09.

<sup>107</sup> See Locke, TT, *supra* note 1, II.27, -.33, at 288, 309.

<sup>108</sup> Simmons, *supra* note 57, at 279. Accord Buckle, *supra* note 57, at 157-59.

<sup>109</sup> Locke, TT, *supra* note 1, II.48, at 319.

<sup>110</sup> *Id.* I.42, at 188.

<sup>111</sup> See Buckle, *supra* note 57, at 159-60; Simmons, *supra* note 57, at 343-47.

<sup>112</sup> Locke, TT, *supra* note 1, II.31, at 290. Accord *id.* I.39, II.37, -.38, -.46, at 167, 294, 295, 299-300.

<sup>113</sup> *Id.* II.33, -.36, -.37, at 291, 292, 294.

destroys it frivolously, she does harm her neighbors, by “deny[ing] others the opportunity of productive use.”<sup>114</sup>

**D. *Labor-Desert Lockeanism Reconsidered***

It is understandable why labor-desert principles seem to accord with Of Property’s argument. After all, Locke does say: “Whatsoever then [any man] removes out of the state that nature hath provided, and left it in, he hath mixed his labour with it, and joynd to it something that is his own, and thereby makes it his property.”<sup>115</sup> This passage seems to suggest that labor claims look backward, to acts of appropriation previously conducted.

Taken as a whole, however, Of Property portrays productive labor in a forward-looking light. “Productive labor” identifies an activity that is valuable to human life, and it then exhorts legislators to encourage that activity. Because all members of a political society are political equals, however, no one person can claim ownership solely on the basis of previous labor. The political community is just to the extent that it encourages all citizens to labor concurrently with equal opportunity.

Because it focuses on encouraging “production” when production is morally justified, productive labor theory avoids many of the absurdities commonly associated with labor-desert claims. Robert Nozick asked sarcastically whether someone could claim ownership of the Atlantic Ocean by pouring tomato juice marked with traceable radioactive molecules in it;<sup>116</sup> Jeremy Waldron asked in the same spirit whether someone could claim ownership of an unowned slab of hardening cement by embedding a ham sandwich in it.<sup>117</sup> These and other examples are used to suggest that labor theory is incoherent because it creates category mistakes, especially by claiming to mix an action with an object.<sup>118</sup> Yet productive labor theory avoids the category mistake. Productive labor theory establishes a non-conventional normative interest not in the appropriation of a thing but in the intended use – in taking actions reasonably likely to satisfy some deficiency in the prosperity of the actor or some associate of the actor. That interest justifies not only a laborer’s labor but also the acquisition and use of external assets reasonably necessary to complete the labor. So construed, productive labor theory also makes short work of

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<sup>114</sup> Simmons, *supra* note 57, at 285-96; see also Buckle, *supra* note 57, at 155.

<sup>115</sup> Locke, *supra* note 1, II.27, at 185. See Dukeminier et al., *supra* note 3, at 14 (quoting the passage from section 27 quoted in text); Rose, *supra* note 30, at 79.

<sup>116</sup> See Nozick, *supra* note 7, at 174-75.

<sup>117</sup> See Waldron, *supra* note 7, at 43.

<sup>118</sup> See Waldron, *supra* note 2, at 184-91; Nozick, *supra* note 7, at 174-75; Waldron, *supra* note 7, at 40.

Nozick and Waldron’s hypotheticals. An actor does not feed anyone or accomplish any other productive use by burying a ham sandwich or pouring off tomato juice. Because those acts are obviously unproductive, no reasonable onlooker would construe them as appropriation claims. Both normatively and socially, the actor has “chosen foolishly to waste [his] tomato juice and ham sandwich.”<sup>119</sup>

For the same reasons, productive labor theory avoids overbreadth criticisms commonly associated with labor-desert theory. Assume B builds an encroaching structure on a vacant portion of land A has fenced but not yet cultivated, in a deliberate attempt to dispossess A. Labor-desert theory could be construed to suggest that B’s transformation of A’s land counts as normatively-valuable labor-mixing. That construction makes Peñalver and Katyal’s defense of adverse possession seem more plausible,<sup>120</sup> but it strikes other observers as perverse.<sup>121</sup> Productive labor theory explains why: B neither deserves nor receives a property right in the occupied land. Since all members of a political community are political equals, in that community the non-conventional interest in labor justifies a “right only to such freedom as is compatible with the equal freedom of others. To try to control for one’s own projects external goods that have already been incorporated into the legitimate plans of others, would be to deny others that equal right.”<sup>122</sup> By “meddl[ing] with what was already improved by [A’s] Labour . . . ’tis plain [B] desired the benefit of another’s Pains, which he had no right to.”<sup>123</sup>

### ***E. Libertarian Lockeanism Reconsidered***

Productive labor theory entitles a property claimant to a narrower moral interest than does libertarian Lockean theory. Many contemporary property scholars do not appreciate this difference because they assume that the Nozickean Locke is the only Locke worth considering.<sup>124</sup> Many scholars describe and criticize property understood as “a right to exclude

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<sup>119</sup> Mossoff, *supra* note 7, at 163.

<sup>120</sup> See *supra* notes 28-29 and accompanying text.

<sup>121</sup> See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* 98-105 (2009).

<sup>122</sup> Simmons, *supra* note 57, at 275.

<sup>123</sup> Locke, *TT*, *supra* note 1, II.34, at 291.

<sup>124</sup> See, e.g., Ripstein, *supra* note 121, at 86-106, 145-81 (criticizing defects in the Lockean state of nature while assuming that property rights acquired in the state of nature confer complete control and dominion on the owner); Radin, *supra* note 14, at 739-40 (situating Epstein’s arguments in relation “to the prominent neo-Lockean, Robert Nozick”); Carol M. Rose, ‘Enough and As Good’ of What?, 81 *Nw. U. L. Rev.* 417, 417 (1987) (discussing interchangeably “Nozickean” and “neo-Lockean” views on property entitlements).

others, with no obligation owed to them.”<sup>125</sup> Nozick’s account of Locke contributes to these impressions, for in it no internal limitations impose a productive-use requirement or (what amounts to the same thing) a waste/spoilage proviso.<sup>126</sup> To be fair, Nozick acknowledges that there are *some* limits to moral property – in particular, “[c]onsiderations internal to the theory of property itself” require the enough and as good proviso.<sup>127</sup> Nevertheless, for Nozick (as interpreted by the early Epstein), when the enough and as good proviso is not implicated, “the party who takes first possession of a thing is entitled to exclude the rest of the world from it, forever.”<sup>128</sup>

By contrast, productive labor theory leaves a substantial justificatory gap between moral interest and legal right.<sup>129</sup> Some philosophers contrast “will” theories of rights with “interest” theories of rights. In the former, a right declares a domain of autonomy with relatively little regard for how the agent uses the autonomy; in the latter, the autonomy is justified and limited by how well it contributes to normative interests constitutive of the agent’s flourishing.<sup>130</sup> Nozick’s conception of property partakes of a will-based right; by contrast, in productive labor theory, property is grounded at least in substantial part in an interest-based account.<sup>131</sup> This grounding in interests supplies the foundations on which productive labor theory propounds property as a sphere of dominion declaring and specifying a moral power.<sup>132</sup> When property consists of “a Right to make use of the Food and Rayment, and other Conveniencies of Life, the

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<sup>125</sup> Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev.* 745, 745 (2009). Accord Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. U. L. Rev.* 1283 (1986).

<sup>126</sup> See Onora O’Neill, *Nozick’s Entitlements*, 19 *Inquiry* 468, 478 (1976) (criticizing Nozick for propounding a theory of “complete control of [propertized] resources” from a Lockean moral principle of appropriation). See also Buckle, *supra* note 57, at 155 (warning that the waste proviso is not “an *ad hoc* condition tacked on” to the right of productive use).

<sup>127</sup> See Nozick, *supra* note 7, at 178-81.

<sup>128</sup> Epstein, *supra* note 16, at 669.

<sup>129</sup> See Simmons, *supra* note 57, at 277 (“[j]ustifiable property must be far more severely limited than is demanded by most existing (positive) systems of property”).

<sup>130</sup> See Leif Wenar, *Rights*, in *Stanford Encyclopedia of Philosophy* § 2.2 (2007), <http://plato.stanford.edu/entries/rights>.

<sup>131</sup> Simmons suggests, *supra* note 57, at 92-94, that “both choice [will] and benefit [interest] are central to the idea of right” in Locke’s thought. By contrast, Myers, *supra* note 58, at 138, argues that Locke’s normative philosophy “declines to effect a strict separation between the normative and the empirical” and also that “Locke holds in the final analysis that a broadened, liberalized conception of the good is indeed prior to right.” If Myers is correct (and I think he is), in Locke’s account the defensible normative interest that justifies a right is logically prior to the choice, will, or autonomy with which the right endows the actor. Both accounts, however, make the normative interest in productive labor hinge at least in substantial part on a philosophical account of human flourishing. Both accounts are therefore distinct from extremely will-reliant accounts like Nozick’s.

<sup>132</sup> See *supra* Section IV.C.

Materials whereof [God] had so plentifully provided” humankind,<sup>133</sup> that right simultaneously folds “*claims against* others to act or refrain from acting in certain ways” – namely, freedom from interference with one’s control over food, raiment, or other assets – into “*entitlements to do*” – namely, the actor’s moral power to use those resources actively for his own or an associate’s prosperity rationally understood.<sup>134</sup> Yet both the claim-rights and the entitlements come with an imperative – to make productive use.

That imperative gives non-owners legitimate moral interests in others’ assets. To illustrate, imagine that Marshall has fenced off Whiteacre and converted it into a forest park. Marshall has done so in order that he and other conservationists may enjoy the forest’s beauty. Taney and Chase are poor and landless, however, and they claim rights to appropriate Whiteacre to farm and to herd animals.<sup>135</sup> Presumptively, Marshall has a stronger claim than Taney or Chase to Whiteacre. When “prosperity” is understood capaciously and rationally, Marshall enhances his own and others’ prosperity by creating a forum where they may all enjoy and be ennobled by the forest’s beauty. To be sure, Taney and Chase’s intended uses are also productive. Yet Marshall’s ongoing use is still productive in some sense, and Marshall did fence off Whiteacre first.

Yet this moral analysis is still more intricate than libertarian ideals might suggest. Even though Marshall has a presumptive claim over Whiteacre, morally, Taney and Chase may overcome Marshall’s presumptive right if they can prove that neither Marshall nor any of his associates are actually visiting the park. They may then may appropriate all of Marshall’s land for themselves. Separately, the enough and as good proviso limits the scope of Marshall’s presumptive right. If Marshall has appropriated all available land for conservation and recreational uses and left none for agriculture or herding, Taney and Chase may justifiably break Marshall’s fences and appropriate enough land for their intended uses. Similarly, if Taney and Chase were starving, they could justifiably enter A’s property. Their charity-claims would not entitle them to oust Taney and claim ownership for themselves. Yet those claims would entitle them at least to take “so much out of [Marshall’s] Plenty, as w[ould] keep [them] from extream want.” But then again, depending on the facts, Marshall might be able to prove that he left land

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<sup>133</sup> Locke, TT, supra note 1, I.41, at 169.

<sup>134</sup> Joel Feinberg, The Nature and Value of Rights, 4 J. Value Inquiry 243, 256 (1970). Accord Simmons, supra note 57, at 92 (quoting and endorsing Feinberg).

<sup>135</sup> I thank Larry Alexander for encouraging me to discuss this hypothetical.

enough and as good for Taney and Chase. Or perhaps he could prove that there was enough land available (for occupancy, or by purchase) that Taney and Chase really did have “means to subsist otherwise” and were not entitled to take the drastic step of encroaching on his property.<sup>136</sup>

As this back-and-forth suggests, productive labor theory makes owners’ and non-owners’ normative interests far more interdependent than libertarian Lockean theory does. In addition, the example illustrates *how* property disputes must be reconciled in practice. Libertarian Lockeanism might settle the dispute by giving Marshall broad rights to exclude Taney and Chase. Labor-desert theory might settle the dispute by rewarding Marshall for fencing and maintaining Whiteacre as a park — or, perhaps, by comparing the worth or value of Marshall’s actual and Taney and Chase’s intended uses. In contrast, in productive labor theory, “the great art of government” consists of “the increase of lands and the right . . . employing of them,” and “by established laws of liberty to secure protection and encouragement to the honest industry of mankind.”<sup>137</sup> Positive law should institute those rights that are practically certain to encourage Marshall and other owners to labor as productively as possible on their land and Taney, Chase, and other non-owners to labor as productively as possible with their personal talents.

### III. THE NORMATIVE FOUNDATIONS OF THE INTEREST IN PRODUCTIVE USE

To many property scholars, however, the terms “practically” and “encourage” are weasel words. They invite consequentialist analysis, conventional impressions hold, and a theory cannot be moral if it is consequentialist.

This objection is difficult to pin down or confront. It presumes that moral theories of law have one or a few characteristics of “deontology,” but that term is used in too many different senses to have one commonly-accepted meaning.<sup>138</sup> At the same time, no matter what precise form this objection takes, it is inapposite as applied to productive labor theory. To explain why, I consider here whether the moral right to productive labor is “deontological” in relation to three possible usages of deontology.

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<sup>136</sup> Locke, TT, *supra* note 1, I.42, at 170.

<sup>137</sup> Locke, TT, *supra* note 1, II.42, at 316.

<sup>138</sup> Barbara Herman identifies at least six different prominent definitions of “deontology” in different scholarly quarters, see Barbara Herman, *The Practice of Moral Judgment* 209–10 & nn. 1, 5 (1993), and her list does not cover all the definitions I consider in this Part.

**A. Deontology as Inviolability**

The term “deontological” is sometimes used as a term describing norms with a feature also called “non-appropriation,” “imprescriptibility,”<sup>139</sup> “inviolability”<sup>140</sup> (the term I use here) or “non-appropriation.” For example, Jeffrey Stake assumes at one point that “[t]he fundamental idea of property is that it cannot be taken against the owner’s wishes. I could not call my house my property if the law allowed someone else to wrest ownership from me against my will.”<sup>141</sup> Property is “deontological” in Stake’s assumed usage if it applies the following imperative to ownership: “Do not appropriate another’s existence without her consent to make yourself better off than you would be had she not existed, and her worse off than she would be had you not existed.”<sup>142</sup>

Although productive labor theory often generates property rights that seem as Stake describes them, strictly speaking neither the theory nor the rights are inviolable. Productive labor theory does not conceive of human autonomy, dignity, freedom, or any other penumbra of “existence” as “a nonderivative and fundamental element of morality.”<sup>143</sup> In moral principle, property rights are always subject to qualifications. If a house is burning through no fault of the owner’s, others (and the local sheriff on their behalves) justly have moral powers to tear it down to protect their own structures and lots.<sup>144</sup> If a state establishes an irrigation system for a river valley, it has legitimate authority to condemn land or impose easements if it can show that the canals secure an average reciprocity of advantage to the affected owners.<sup>145</sup>

A generation ago, labor-desert theory and libertarian theories of property were criticized strongly for problems associated with inviolability – recall “*fiat justitia, ruat caelum.*”<sup>146</sup> Most or all of these criticisms were made, however, before political-philosophy scholars rediscovered

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<sup>139</sup> See Waldron, [right to private property], supra note --, at 158.

<sup>140</sup> See 2 F.A. Kamm, *Morality, Mortality: Rights, Duties, Status* 279-80 (1996); Thomas Nagel, *Personal Rights and Public Space*, 24 *Phil. & Pub. Aff.* 83, 89-95 (1995).

<sup>141</sup> Stake, supra note 50, at 2420.

<sup>142</sup> Larry Alexander, *Is Morality Like the Tax Code?*, 95 *Mich. L. Rev.* 1839, 1845 (1997). Accord Larry Alexander & Michael Moore, *Deontological Ethics*, in *Stanford Encyclopedia of Philosophy*, supra note 130, § 2.2 <http://plato.stanford.edu/entries/ethics-deontological/> (“the right against being used only as means for producing good consequences without one’s consent”).

<sup>143</sup> Nagel, supra note 140, at 87.

<sup>144</sup> See Locke, *TT*, supra note 1, II.159, at 375.

<sup>145</sup> See *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112 (1896); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 *Mich. St. L. Rev.* 877, 923. The phrase “securing an average reciprocity of advantage” is usually attributed to *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>146</sup> Radin, supra note 35, at 108.

productive labor theory in Locke. Such criticisms do not apply to productive labor theory. Of course, we must specify when and why productive labor theory prescribes that “the interest of [an] original owner should be sacrificed for the greater good of others.”<sup>147</sup> But that issue presents a subtler question.

**B. Deontology as a Possible Normative Foundation**

Perhaps productive labor theory is “foundationally” deontological. A normative foundation refers to the characteristic of normative obligations that a particular theory makes logically prior to other possible characteristics. In this usage, a “deontological” theory judges the rightness of a given action primarily by whether “its whole motivating power derives from the thought that it is *required by duty*” or some other feature inherent in moral agency.<sup>148</sup> Deontological theories in this sense judge the obligatoriness of external consequences and internal habits of character by how well they help actors act with the intention of fulfilling their duties. By contrast, consequentialist theories make external goods primary, and virtue-theoretic theories give ultimate priority to virtue and character.<sup>149</sup>

Foundational deontological theories can be problematic in practice. They attract criticisms similar to those leveled at inviolability deontological theories, about whether actors must respect rights when doing so makes the world worse. In addition, by focusing so much on the logical structure of moral agency and duties, they neglect the anthropology and psychology one must know to understand human motivation and gratification.<sup>150</sup> These criticisms apply to other foundationally deontological theories of property – Hegelian personhood theory<sup>151</sup> or Kantian will theories<sup>152</sup> -- but they could also be lodged against exclusively deontological accounts of Lockean theory. For example, productive labor theory builds on seemingly deontological claims about self-ownership<sup>153</sup> and equality.<sup>154</sup> These claims are difficult – some would say impossible – to demonstrate strictly by deduction from the logic of moral obligation.

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<sup>147</sup> Ellickson, *supra* note 18, at 725.

<sup>148</sup> Feinberg, *supra* note 134, at 243.

<sup>149</sup> See, e.g., Rosalind Hursthouse, *On Virtue Ethics* 1 (1999); Lawrence C. Becker, *The Neglect of Virtue*, 85 *Ethics* 110, 110–11 & n.1 (1975).

<sup>150</sup> See Claeys, *supra* note 31, at 897-901; Alexander & Moore, *supra* note 142, § 4.

<sup>151</sup> See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 958, 971 (1982) (deducing normative obligations from “an abstract autonomous entity capable of holding rights, a device for abstracting universal principles and hence by definition devoid of individuating characteristics”).

<sup>152</sup> See Ripstein, *supra* note 121, at 86-106; Weinrib, *supra* note --**Error! Bookmark not defined.**, at 175-203.

<sup>153</sup> See Locke, *TT*, *supra* note 1, II.27, -.44, at 287-88, 294-95.

<sup>154</sup> *Id.* II.4, at 269. Simmons treats this line of argument sympathetically *supra* note 57, at 39-44.

“How does ‘logic’ require my own sense of self-ownership to respect that sense in others?”<sup>155</sup>  
And why should actors with “*Excellency of Parts and Merit*” stoop to respect the equal rights of  
“others [at] the common level” – let alone of the quarrelsome and contentious?<sup>156</sup>

This Article cannot answer these criticisms fully, for the political-philosophy scholars who agree on productive labor theory disagree about its foundations. Simmons suggests that Locke’s theory of morality is pluralistic and appeals concurrently to deontological, consequentialist, and virtue-theoretic considerations.<sup>157</sup> In contrast, Myers and West suggest that Locke’s political theory is grounded in “none of the above” – a fourth foundation, eudaimonism, a rational account of human happiness or well-being.<sup>158</sup> Here, it suffices to say that all of these scholars agree that productive labor theory does not rest exclusively on deontological foundations. Productive labor theory is part of a more comprehensive political philosophy in which “law” is understood “not so much the Limitation *as the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the *Law* as a useless thing would of itself vanish.”<sup>159</sup> Law’s obligatory or deontological character is derivative of its tendency to promote the “interest” of the individual and the “good” of the community of those individuals. As long as the interest and good are justified at least in part in relation to external consequences, virtue, or a eudaimonistic account of happiness, the interest and good need not get entangled in any problems tied closely to deontological normative foundations.

### **C. *Deontology as a Guide to Political Action***

So the real issue is how productive labor theory reconciles each individual’s interests and rights to society’s good. This issue takes us to one last usage of deontology, “political deontology.” A political theory is deontological only if it makes the Right lexically prior to the Good. In this usage (made popular by Rawls), deontological theories are contrasted with teleological theories, which make the Good prior to the Right. In addition, the Good and “good

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<sup>155</sup> West, *supra* note 64. For some answers, see Michael Otsuka, *Self-Ownership and Equality: A Lockean Reconciliation*, 27 *Phil. & Pub. Aff.* 65 (1998).

<sup>156</sup> Locke, *TT*, *supra* note 1, II.54, at 322.

<sup>157</sup> See Simmons, *supra* note 57, at 11.

<sup>158</sup> See Myers, *supra* note 58, at 137-72; Myers, *On Michael Zuckert’s Launching Liberalism*, at 236-38; West, *supra* note 64. I think they interpret Locke correctly. See *infra* notes – and accompanying text.

<sup>159</sup> Locke, *TT*, *supra* note 1, II.57, at 305. Accord Locke, *ECHU*, *supra* note 64, II.xxviii.5-16, at 351-60 (explaining why religious dogmas about human behavior, civil laws, and social norms must all be justified and judged by their tendencies to promote good and prevent evil in actors, where goodness and evil relate back to actors’ senses of pleasure and pain).

consequences” are usually understood as they are in standard act utilitarianism, as the welfare of the political community “as defined independently of any moral concepts or principles.”<sup>160</sup> This usage is “political” because it explains how the law builds legal and political obligations on top of moral interests grounded in individual moral rights.

In this sense, productive labor theory is theoretically teleological but practically deontological.<sup>161</sup> Theoretically, in extreme cases, when the interests of any single citizen do not “consist with the publick good,”<sup>162</sup> the aggregated concurrent interests of the vast majority of the society may take priority. Recall how the sheriff may “pull down an innocent Man’s House to stop [a] fire.”<sup>163</sup> Practically, however, such cases are extreme cases. Ordinarily, the Lockean “public good” consists of “the good of every particular Member of that Society, as far as by common Rules, it can be provided for.”<sup>164</sup> Ideally, a government claims legitimate authority to compel individuals because it claims to “direct” them to courses of conduct that they would agree to be in their “proper interests” if they were morally “free and intelligent” enough to appreciate the action’s purposes.<sup>165</sup>

This framework establishes an egoist framework for political action.<sup>166</sup> The state may compel citizens to follow legal rules, but it lacks legitimate authority to do so unless it can justify such rules in relation to “the good of every particular Member of that Society,” or each citizen’s “proper” interests. The state may do so on the ground that it is in each citizen’s good or interest rightly understood not to use his own rights in ways that threaten the “public good.” On that basis, the state may order Taney and Chase to get off of Marshall’s land, because they are asserting claims of ownership inconsistent with the legal regime most likely to give all citizens equal opportunity to secure their own prosperities. In this conception, however, the “public good” rightly understood consists of the concurrent exercise by all citizens of their free and equal rights. So in an irrigation-canal dispute, if the state means to condemn for the use of a private canal company the lot of a farmer, it may do so in the name of the public good – but the

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<sup>160</sup> Rawls, *supra* note 9, at 30-32.

<sup>161</sup> See Myers, *supra* note 58, at 12; Myers, [Interpretation], at 235.

<sup>162</sup> Locke, TT, *supra* note 1, II.134, at 356. See also *id.*

<sup>163</sup> *Id.* II.159, at 375. Accord *id.* II.208, at 404 (suggesting that a populace need not and should not revolt if a series of unlawful acts “reach no farther than some private Mens Cases”).

<sup>164</sup> Locke, TT, *supra* note 1, I.92, at 210; *id.* II.134, at 356.

<sup>165</sup> See *supra* note 159 and accompanying text.

<sup>166</sup> Even if “good be the proper object of *Desire* in general; yet all good, even seen, and confessed to be so, does not necessarily move every particular Man’s *desire*; but only that part, or so much of it, as is consider’d, and taken to make a necessary part of his happiness.” Locke, ECHU, *supra* note 64, II.xxviii.43, at 259.

condemnation must be strictly necessary, the farmer must be compensated, and “the public good” in fact be construed so that he is guaranteed *pro rata* benefits to offset the extreme dislocation caused by interfering with his ordinary property rights.<sup>167</sup> Here, the “public good” is Rawls’s “Good,” owners’ property rights correspond to Rawls’s “Right,” and Locke’s Right is therefore lexically prior to his Good.<sup>168</sup>

**D. *Deontology in Contrast with Pragmatic Utilitarianism***

Many of the criticisms just considered come from utilitarian scholars. So let us explain how productive labor theory considers consequences by contrasting it with one particularly well-known rendition of utilitarianism, subjective and welfare-maximizing act utilitarianism (for short, “pragmatic utilitarianism”).

Pragmatic utilitarianism imposes on citizens a more demanding duty of beneficence than productive labor theory does. Pragmatic utilitarianism requires actors to decide how to act without distinguishing between the consequences on the subject or subjects of the contemplated action and those on the actor.<sup>169</sup> If an action redounds to the greatest net good for the greatest number, the state has legitimate authority to take the action,<sup>170</sup> and a citizen must allow it to proceed even if it detracts from his individual good. By contrast, because productive labor theory assumes an egoist normative framework, it endows citizens with stronger rights claims and imposes on the state a more demanding burden of justification. The state may still claim legitimate authority to compel citizens to rearrange rights, but the compulsion must be justified back in relation to harm-prevention or reciprocity-of-advantage arguments. Those arguments justify state action by tying it to an account of the public good coterminous with individuals’ concurrent interests and rights.

Separately, pragmatic utilitarianism and productive labor theory differ sharply in how they treat “utility” or “value,” because the latter assumes an epistemology much more tentative and modest than the former. Pragmatic utilitarianism takes “utilities,” “preferences,” or individual “welfare profiles” as they come without scrutinizing them too deeply, and it tends to

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<sup>167</sup> See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 *Mich. St. L. Rev.* 877.

<sup>168</sup> I thank Dennis Klimchuk for helping me clarify this point.

<sup>169</sup> See Walter Sinnott-Armstrong, *Consequentialism*, in *Stanford Encyclopedia of Philosophy*, supra note 130, § 1 (2006), <http://plato.stanford.edu/entries/consequentialism/> (discussing agent-neutrality).

<sup>170</sup> See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1986) (1780)

assume that utility profiles are commensurable.<sup>171</sup> These features lower the state's burden for justifying coercion. Imagine that a lady named Kelo owns a home in a New London neighborhood and that a commercial developer named Corcoran Jennison wants to acquire it from her to build retail store space or parking.<sup>172</sup> Corcoran Jennison may try to convince public officials that it intends to put the lot to a higher and better use. It might prepare feasibility studies suggesting that its intended retail and parking uses will generate \$500,000 (attributable specifically to the uses on Kelo's lot), while Kelo's ongoing residential use generates only \$200,000. On pragmatic utilitarian premises, it is reasonable to use these monetary figures as commensurable indicators of value. The local development commission may thus justifiably order Kelo's lot to be condemned and reassigned to the higher-valuing Corcoran Jennison.<sup>173</sup> Even after taking transaction and administrative costs off of the \$300,000 difference, the transfer should still increase net social wealth.

In contrast, productive labor theory is extremely reluctant to make such forecasts. Productive labor theory assumes that, in political and ethical practice, people operate in a "state of mediocrity," in which they can learn only with "judgment and opinion, not knowledge and certainty."<sup>174</sup> People's knowledge is especially limited in relation to moral ideas, which "are commonly more complex than those of the figures ordinarily considered in Mathematicks."<sup>175</sup> This epistemological mediocrity significantly limits the extent to which practical politics can perfect society. After all, "pleasant Tastes," "Happiness," and other sources of value all "depend not on the things themselves" that generate value for people "but [on] their agreeableness to this or that particular Palate, wherein there is great variety."<sup>176</sup>

Separately, Locke's comprehensive political program (of which productive labor theory is one component) stresses much more than pragmatic utilitarianism law's teaching function. The state may not have a comparative advantage at rating land uses, but it *does* have an advantage at shaping governing norms and opinions. Individually, citizens are systematically

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<sup>171</sup> See Sinnott-Armstrong, *supra* note 169, § 4. I am grateful to Lior Strahilevitz for helping me clarify the following point.

<sup>172</sup> Cf. *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>173</sup> See Posner, *supra* note 55, § 3.7, at 56-58.

<sup>174</sup> Locke, ECHU, *supra* note 64, IV.xii.10, at 645.

<sup>175</sup> *Id.* IV.iii.19, at 550.

<sup>176</sup> *Id.*

prone toward “mistak[ing] imaginary for real happiness.”<sup>177</sup> Even if human reason can discern the true bases for flourishing in principle, in practice, “by the little that has hitherto been done in it, ... it is too hard a task for unassisted reason to establish morality in all its parts upon its true foundations.”<sup>178</sup> Consider property. Citizens may take at least three separate sources of pleasure from owning or using assets. Two of them are not morally defensible – “covetousness,”<sup>179</sup> or “the desire of having more than Men needed,”<sup>180</sup> and “fancy,” a tendency to ascribe “Phantastical imaginary value” to things based on capricious or silly social conventions.<sup>181</sup> The only morally defensible source of normative value consists of “the *use* of the Industrious and Rational”<sup>182</sup> – that is, consuming or deploying assets to make them generate prosperity rationally understood. A modest and just state therefore focuses considerably on shaming and civilizing citizens -- to use things productively and to respect similar uses by other citizens.

Finally, pragmatic utilitarianism focuses on consequences at a more direct and specific level than productive labor theory does. When used as part of a decisional process, pragmatic utilitarianism focuses primarily on the consequences of particular actions. Although utilitarian can accommodate indirect forms of utilitarian forecasting – rule utilitarianism, or two-level utilitarianism – pragmatic, act-centered utilitarianism states the norm and these are exceptions.<sup>183</sup> By contrast, since it assumes a state of epistemological mediocrity, productive labor theory avoids the act-centered ideal.<sup>184</sup> It prescribes practical rules with a (loosely) consequentialist approach – but an indirect approach. Once productive labor theory identifies the ends most often associated with property, it seeks to identify prescriptions for human behavior likely to encourage people in political communities voluntarily and non-confrontationally to achieve those ends with a high degree of regularity. Simmons presents productive labor theory similarly, except that he describes this general approach as “rule-consequentialist.”<sup>185</sup> I prefer the term “indirect” consequentialism because it is capacious to include virtue formation.<sup>186</sup> Productive-

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<sup>177</sup> Id. II.xxi.51, at 266.

<sup>178</sup> Locke, Reasonableness of Christianity, ¶ 245.

<sup>179</sup> Locke, TT, II.34, at 191.

<sup>180</sup> Id. II.37, at 312.

<sup>181</sup> Id. II.184, at 409.

<sup>182</sup> Id. II.34, at 291.

<sup>183</sup> See [Smart]

<sup>184</sup> See Sinnott-Armstrong, *supra* note 169, § 4.

<sup>185</sup> As Simmons does, see Simmons, *supra* note 57, at 247-49.

<sup>186</sup> See, e.g., Sinnott-Armstrong, *supra* note 169, § 5 (treating rule consequentialism as a genus of a broader family of indirect theories of consequentialism).

labor theory definitely favors rules -- “*promulgated standing Laws*” or “*Stated Rules of Right and Property*”<sup>187</sup> – but it also encourages the state to focus on moral formation. The prudent legislator should delegitimize “Quarrelsome and Contentious” tendencies and inculcate “Industrious and Rational” dispositions.<sup>188</sup>

These three features lead productive labor theory to treat the redevelopment hypothetical extremely differently. Local public officials should focus on the little they know. Because Kelo hasn’t sold her land, officials can know that Kelo values her land and its uses more than \$200,000. They cannot know how much higher. Regulators cannot really know whether Corcoran Jennison’s intended use will really generate \$500,000 on Kelo’s lot.<sup>189</sup> They can know, or at least suspect with reasonable certainty, that Corcoran Jennison may be greedy. They can also know or suspect reasonably that if they approve Corcoran Jennison’s proposal with lax standards they will reward greed and destabilize property rights. On that basis, if Kelo uses her land in any minimally productive way, officials they should presume her intended uses and Corcoran Jennison’s are practically incommensurable and focus on protecting each owner’s property rights.<sup>190</sup>

#### IV. THE JUSTIFICATION FOR TRESPASS’S EXCLUSIVE RIGHTS OF CONTROL

Yet for land, should those property rights come in the form of a near-absolute right to exclude? In productive labor theory, yes. Because productive labor theory is (loosely) consequentialist, however, it can supply the justification for broad rights of exclusion that inviolably-deontological renditions of labor theory cannot.

##### A. *Legal Control Rights and Moral Use Rights*

This claim may sound paradoxical. Productive labor theory declares in morality an interest that has the characteristics of a legal usufructuary interest – here, a “use right.” A use right is a limited interest a user has to continue using an asset he has appropriated and has started

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<sup>187</sup> Id. II.135-37, at 239-42.

<sup>188</sup> Locke, TT, *supra* note 1, II.34, at 291.

<sup>189</sup> After Connecticut courts and the U.S. Supreme Court upheld the project challenged in the *Kelo* litigation, the city of New London cancelled the project because Corcoran Jennison failed to keep pace with the development commission’s benchmarks for success. See Eric Gershon, “Pfizer to Close New London Headquarters,” *The Hartford Courant*, November 9, 2009; “Fort Trumbull Developer Asks for More Time, Misses Deadline,” *The Day*, Nov. 27, 2007, *Region News*.

<sup>190</sup> As already acknowledged, regulators may condemn private property and redistribute it to other private owners in extreme cases – say, an irrigation-canal system. That system differs from the ordinary case discussed in text because the building of the canal creates a *bona fide* bilateral monopoly and the monopoly is strictly necessary in the sense that it is unavoidable and not created by opportunistic behavior by the relevant parties. See Claeys, *Public-Use Limitations*, 2004 *Mich. St. L. Rev.* at 919-28.

to use. A use right expires when the user's use ceases. In addition, a use right does not entitle the user to blockade others from appropriating the same asset to the extent they can do so without interfering with his use.<sup>191</sup> In the rest of this Article, I will refer to the "sole and despotic dominion"<sup>192</sup> associated with land as "control rights." Control rights provide a shorthand for exclusive rights of control and possession. These are the rights that entitle an owner to exclude others *without* needing to prove that their intrusions threaten some ongoing use she is currently conducting with the asset in question.

It seems illogical that moral use rights can justify legal control rights. This *non sequitur* justifies many contemporary criticisms of Lockean property rights. For example, Joseph Singer has argued: "[I]f property is needed for liberty, then each person must have a realistic opportunity to acquire the material bases for exercising those liberties."<sup>193</sup> Many theories of natural law or rights have struggled to explain why legal control rights accord with and secure moral use rights;<sup>194</sup> "Of Property" treats this question as a starting point.<sup>195</sup>

Productive labor theory answers that question: Many species of assets store use potential far greater than can be extracted by legal use rights. Productive labor theory prescribes control rights when and *only* to the extent that the assignment seems practically certain to unleash use potential.

Productive labor theory justifies that prescription with several distinct but complementary arguments. Political-philosophy scholars stress a virtue-theoretic argument. As Simmons puts it: "[P]roperty is not merely for self-preservation, but also for self-government. . . . Self-government is only possible . . . if the external things necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require. Use rights will not suffice for any even moderately elaborate plans or projects."<sup>196</sup> Simmons is right, although he understates the force

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<sup>191</sup> See 2 Blackstone, *supra* note 5, at \*14; Eric R. Claeys, "Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at IP Common Law," in *Intellectual Property and the Common Law* (Shyamkrishna Balganesh ed., forthcoming 2012), <http://ssrn.com/abstract=1889231>. I thank Steve Eagle for suggesting the distinction between use and control rights.

<sup>192</sup> See 2 *id.* \*2. Cf. 3 *id.* at \*209.

<sup>193</sup> Joseph W. Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 *Ind. L.J.* 763, 776 (2011) (citing Waldron, [right to private property], *supra* note --, at 408-15).

<sup>194</sup> See, e.g., 2 Blackstone, *supra* note 5, at \*1-\*14; see also Buckle, *supra* note 57, at 12-16 (recounting attempts by Grotius and Seneca to make this justification).

<sup>195</sup> See Locke, *TT*, *supra* note 1, II.25, at 304.

<sup>196</sup> Simmons, *supra* note 57, at 275. Accord Penner, *supra* note 92, at 49 ("Our interests in exclusively determining the use of things may serve our interests even if we burn the roast or squander our money on a terrible holiday. We can benefit from our failures as well as our successes.").

of the argument. As Myers explains,<sup>197</sup> a political community that decides not to use technology to overcome its natural necessity is likely to breed subjects who are far more superstitious, needy and incapable of mature decisions than citizens in a commercial and liberal republic. Productive labor encourages people to produce goods that reduce or eliminate natural scarcity. As they eliminate that scarcity, people become accustomed to making longer-range plans and taking responsibilities over their lives. In short, each citizen learns to become “Master of himself, and Proprietor of his own Person.”<sup>198</sup>

From the lawyer’s point of view, however, these virtue-theoretic arguments are not particularly useful. They explain why a political community should create wealth and give citizens control rights over *some* assets – but they do not identify *which* assets most deserve control rights. Lawyers are thus more interested in more practical, asset-specific considerations.

The most important consideration is to encourage labor-intensive uses.<sup>199</sup> This encouragement may not be necessary or appropriate. The ocean must stay “that great and still remaining Common of Mankind”<sup>200</sup> for the foreseeable future, because there are few if any productive and labor-intensive uses one can make with salt water, and the oceans have great use potential in common property for navigation and fishing. Even with land, however, local social and economic conditions may make labor-intensive uses inappropriate or impossible. In communities in which fruit-gathering and hunting supply most basic human needs, it makes sense to reserve control rights for chattels (tools and weapons) but keep land in held in common. In any such aboriginal community, land is used most productively as a thing to be traversed to chase animals or gather fruits; it has little or no independent use value.

Yet assume that members of an aboriginal community discover agriculture and animal husbandry. If people can work fields or fence in animals for long periods of time without disturbance, they can produce more crops or animals for consumption than they could just by living off the land. At this point, the community may reasonably institute use rights for land. When use rights control, “[a]s much Land as a man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*.”<sup>201</sup> Use rights give shepherds and subsistence

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<sup>198</sup> Locke, TT, supra note 1, II.44, at 316; Myers, supra note 58, at 123-26, 129-31, 190-96.

<sup>199</sup> See Locke, TT, supra note 1, II.40 to -.43, at 314-16.

<sup>200</sup> See id. II.30, at 289.

<sup>201</sup> Id. II.32, at 290.

farmers security that no one will steal the fruits of their husbandry and farming. Yet shepherds and subsistence farmers produce only a few life conveniences for others. As a result, in such communities, control rights do threaten to restrain the equal liberty and opportunities of non-owners, as Singer and others fear. Use rights tailor, in positive law, owners' legitimate claims to the fruits of their labor to the enough and as good claims of non-owners.

However, land may also be used for much more resource-intensive and productive uses—a ship foundry,<sup>202</sup> or a 100,000-acre ranch in the American West.<sup>203</sup> If fruit-gathering and carcass-using add 9 times the value to the fruits and animals used,<sup>204</sup> and if subsistence farming and simple herding add 99 times that value,<sup>205</sup> these last activities produce 999 times more “useful Products”<sup>206</sup> than natural value. If it is impossible to produce products so useful if non-owners could assert use rights and interlope, the law may justly extinguish use rights on land. It may instead entitle owners to control their lots completely by excluding all others.

Control rights unleash use potential in several ways. Obviously, they provide owners with more security over land than use rights do. Ellickson stresses that “detecting the presence of a trespasser is much less demanding than evaluating the conduct of a person who is privileged to be where he is.”<sup>207</sup> Although Ellickson makes this argument as part of an economic justification for control rights, it is just as relevant and probative to a consequentialist labor-based justification. Separately, control rights serve a settlement function.<sup>208</sup> In a society that relies primarily on subsistence farming or simple herding, this settlement function may not justify control rights, either. In such a society, the produce from the land is too small to justify the time and effort it takes for neighbors to agree on and monitor abstract boundaries. In a society relying on manufacture and commerce, however, land owners cannot enjoy the security they need without such boundaries. In addition, control rights serve a commercialization function. If land is subject to use rights, all users are stakeholders in the land. All must be consulted before the land is sold, rented, or subdivided. Because control rights vest control in one owner or a few co-owners, they simplify these commercial transactions.

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<sup>202</sup> See *id.* II.43, at 298.

<sup>203</sup> See *id.* II.48, at 301.

<sup>204</sup> See *id.*, II.40, at 314.

<sup>205</sup> See *id.*; *id.* II.43, at 316; *id.* II.48, at 301.

<sup>206</sup> See II.43, at 316.

<sup>207</sup> Ellickson, *supra* note 12, at 1327 (emphasis removed).

<sup>208</sup> *Id.* II.38, -.45, -.51, at 295, 299, 320.

All of these factors in turn contribute to one last factor – specialization. In a commercial economy, where coinage has been instituted, a ship-foundry’s owner may coordinate land with trees, tar, cloth, iron, and many other raw materials. He may then coordinate these inputs with the labor of architects, smiths, and ship-builders. The ships produced can travel to other ports and obtain in commerce life conveniences the ship builder could not acquire on their own. The payments suppliers receive for their supplies allow them to acquire more life conveniences as well. The same goes for the workers who design and build the ship.<sup>209</sup>

Of course, not every use of land in a modern commercial economy may be as productive as the ship factory. Yet apartment buildings create life conveniences for many non-owners, by making it easier for them to acquire shelter. Modern farms and ranches supply life conveniences in the form of cheap and plentiful foods. As “different degrees of Industry ... give Men Possessions in different proportions,” and as “Money [gives] them the opportunity to enlarge them,” individuals specialize.<sup>210</sup> Freed from supplying their own food and shelter, other citizens become free to produce more specialized life conveniences for themselves and others. They also become also free to pursue other aspects of a prosperous life that are too refined to enjoy in a subsistence community.

### ***B. The Empirical Justification for Control Rights***

Readers may wonder whether or to what extent these predictions are well-founded. Although the question is perfectly reasonable, there is no better way to make practical decisions than to make predictions like the ones just made. Because human knowledge is stuck in epistemological mediocrity, the prudent legislator must make legal rules only on the basis of the empirical certainty that is realistically possible. This section illustrates. It canvasses the kinds of evidence that counts, by Locke’s criteria, as good enough for government work.

In principle, any evidence relevant to the issues raised in the last section is morally admissible. In practice, fairly general evidence can suffice – say, watching how many “*things really useful* to the life of Man” an owner may get depending on how much dominion law and custom assign over a given asset.<sup>211</sup> Dominion may enlarge the quality of the goods an owners extracts from the asset (nuts versus bread, or loose animal skins versus well-fitting leather

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<sup>209</sup> See *id.* II.43, at 316.

<sup>210</sup> *Id.* II.48, at 319.

<sup>211</sup> See LOCKE, TT, *supra* note 1, II.45, at 299.

clothing<sup>212</sup>), or the sheer quantity (cultivated land's producing 99 or 999 times the harvest of uncultivated land<sup>213</sup>).

Another source of evidence consists of anthropological data. Locke compares the rights and prosperity of aboriginal native American tribe members to those of English subjects.<sup>214</sup> Contemporary utilitarian scholarship treats respectfully works with similar empirical data. In the seminal economic account of the genesis of control rights, Demsetz relies substantially on how the customs of native American fur-hunting tribes evolved in response to changes in the commercial value of furs.<sup>215</sup> Ellickson substantiates his theoretical account of the pros and cons of control and use rights in land by studying five communes. Three flipped from group rights to control rights to avoid starvation (all famous white American pioneer settlements),<sup>216</sup> while two that managed to make group rights work (Hutterite Protestant colonies in Pennsylvania, and kibbutzim in Israel).<sup>217</sup>

Yet productive labor theory does not make “empirical” findings by relying solely on empirical information. Productive labor theory supplies a general set of background normative assumptions against which evidence ought to be interpreted. In this matter, the theory operates more or less like one of the legislative opinions on which administrative agencies rely to resolve conflicts in evidence or fill the gaps in incomplete evidence.<sup>218</sup> Recall that some of the colonies Ellickson described worked better than others. The legislative opinion expressed by productive labor theory supplies a tiebreaker explaining why failed American communes deserve to be treated as normal cases and the Hutterite and kibbutzim cases as the narrow exceptions. If, however, a political community rejected the republican and libertarian opinions intertwined with productive labor theory and embraced communitarian opinions, it might interpret the same data differently.<sup>219</sup> The communitarian interpretation might lead to bad policy, but the problems with the interpretations would arise at least as much from normative priors as from the data being interpreted.

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<sup>212</sup> See *id.* II.42, at 297.

<sup>213</sup> See *id.* II.40, at 296.

<sup>214</sup> See *id.* II.41, at 296-97.

<sup>215</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 351-53 (1967). For criticisms of Demsetz's empirics, see Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 *J. Leg. Stud.* S331, S333 (2002).

<sup>216</sup> Ellickson, *supra* note 12, at 1335-41.

<sup>217</sup> See *id.* at 1346-52.

<sup>218</sup> See, e.g., *Industrial Union Dep't v. Hodgson*, 499 F.2d 407 (D.C. Cir. 1973).

<sup>219</sup> As Ellickson points out, see *supra* note 12, at 1354-56.

In a similar spirit, productive labor theory makes relevant another kind of evidence entangled with normative policy – evidence that a customary practice has become accepted. In contemporary law and economics, scholars sometimes cite broad acceptance of a particular legal regime as proof of its efficiency.<sup>220</sup> Similarly, in productive labor theory, assume that a hypothesis explains convincingly why an institution seems to enlarge the concurrent prosperities (“Right and conveniency”) of group members. If the institution is embraced “without compact,” the explanation and the likely “tacit and voluntary consent” to it provide empirical evidence confirming that the practice is normatively desirable.<sup>221</sup>

**C. *Inequality, Charity, and Enough and As Good***

Yet readers may protest: Section A may have proven that control rights may generate many life conveniences in the right economy – but for owners, not non-owners.<sup>222</sup> Indeed, this argument has grounds in a Lockean theory of labor. If control rights fail to leave non-owners with enough and as good, non-owners may justly assert their rights of revolution.<sup>223</sup>

Here, there is not total consensus among the scholars who propound productive labor theory. Let me offer two different responses: one from a reconstructed Locke, and another from an unreconstructed Locke.<sup>224</sup>

In the unreconstructed Locke, in a community with a money economy, control rights and money together expand opportunities for non-owners to labor far more than they could in a primitive economy. Money plays a crucial role in unleashing labor’s potential. Many assets perish quickly. Coinage gives citizens a way to capture more of the use potential from producing such assets than they themselves could consume by consuming the assets.<sup>225</sup> An official coinage gives owners opportunity and motive to produce far more goods than what “contented themselves with what un-assisted Nature offered to their Necessities.”<sup>226</sup> Those goods free non-owners from subsistence labor. The non-owners must come up with money to acquire those conveniences, but the money also supplies everyone with a medium with which owners may reward non-owners for their labor. That is why the designers and builders of a ship and the

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<sup>220</sup> See infra [cite to Epstein in section VIII.E].

<sup>221</sup> See Locke, TT, supra note 1, II.50-51, at 302.

<sup>222</sup> See, e.g., Peñalver & Katyal, supra note 28, at 129, 149.

<sup>223</sup> See Locke, TT, supra note 1, II.221 to -.222, at 430-32.

<sup>224</sup> I borrow this distinction from Simmons, supra note 57, at 306.

<sup>225</sup> Id. II.37, at 312; accord id. II.46, at 300.

<sup>226</sup> Id. II.45, at 299.

buyers of its product all end up with far more opportunities to acquire life conveniences and enlarge their own individual prosperities than they would have in a subsistence economy. As Buckle concludes, “The bounty produced by the propertied extends unpropertied, improving their condition, so that they actually benefit from the appropriative acts of the propertied.”<sup>227</sup>

Another point deserves notice: Control rights unleash use potential in such a beneficial manner because they encourage owners to get the most out of their assets with inventive ideas. In my ship hypothetical, it is the ship’s design that generates the most intrinsic use value for all the relevant suppliers, workers, owners, and consumers. That design provides the master plan that integrates all the subsidiary planning by architects, engineers, workers, vendors, and consumers. If that design “is the primary source of wealth . . . then the actual origin of the existing distribution of property becomes unimportant.”<sup>228</sup> What becomes primary is “security of property, because security of property is a promise to the industrious and talented that they will be able to keep what they earn”<sup>229</sup> – by applying their “intellectual” faculties to exercise productive “Dominion” over a wide range of assets and workers.<sup>230</sup>

The unreconstructed Locke justifies private property even in the absence of a safety net. “[S]ince the baseline for comparison is so low as compared to the productiveness of a society with private appropriation,” the enough and as good proviso limits property rights “only in the case of catastrophe (or a desert-island situation).”<sup>231</sup> By contrast, the reconstructed Locke leaves room for a safety net. That Locke occupies a “middle ground, calling neither for unfettered accumulation of property nor for radical redistribution of holdings.” A just government need not institute “leveling redistributions of property; but at the very least [it should support] the creation of genuine avenues of opportunity.”<sup>232</sup> To institutionalize the enough and as good and charity rights, a just government should also establish a welfare safety net, supported by general taxation, to support those who are not supported by private charity.<sup>233</sup>

Yet even this account refrains from locking in a particular distribution of property. In it too, equal opportunity to work and save go a long way in diminishing the force of the inequality

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<sup>227</sup> Buckle, *supra* note 57, at 154. See also Locke, TT, *supra* note 1, II.41 (comparing the conditions of day laborers in England with native tribes in America).

<sup>228</sup> Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 44 (1997).

<sup>229</sup> *Id.*

<sup>230</sup> Locke, TT, I.30, at 162.

<sup>231</sup> Nozick, ASU, at 181.

<sup>232</sup> Simmons, *supra* note 57, at 305-06.

<sup>233</sup> See *id.* at 333.

criticism. And to the extent that a safety net is necessary or appropriate, it probably should not be instituted through basic common law rules declaring property rights. The government may establish entitlements or discretionary administrative schemes to support the needy. It is better to establish such schemes in public law, to avoid upsetting declare and secure broad rights to control and dispose of land in private law. In that manner, the government may relieve the needy from “extream want” without undermining the basic institutions that do the most to relieve that want.<sup>234</sup>

## V. THE POSSESSORY INTEREST IN CONTROL OVER LAND AT LAW

### A. *Control-Based Boundaries*

The last Part’s justification for control rights carries forward into trespass doctrine. As Blackstone explains, trespass presumes that “every entry” on a plaintiff’s close “without the owner’s leave, and especially if contrary to his express order, is a trespass or transgression.”<sup>235</sup> If it is imperative to encourage land owners to unleash the use potential in their land, legal doctrine must vest owners with positive-law rights giving them as much autonomy as possible. Once “the right of *meum* and *tuum*, or property, [is] established, it follows as a necessary consequence . . . that the owner may retain to himself the sole use and occupation of his soil.”<sup>236</sup> That “*sole* use and occupation” encourages owners to use land in specialized ways, to coordinate land with other factors of production, to make extremely sophisticated plans for land, and to internalize the land’s long-range use potential.

This imperative explains why land owners may exclude non-owners for virtually any reason, why they need not prove they are using the land reasonably, and why they need not prove that a non-owner’s entry damages the land or any ongoing use on it. Consider again the hypothetical between Kelo and Corcoran Jennison. The public law of urban renewal and economic development encourages local planners and regulators to consider the costs and benefits of Kelo’s ongoing and Corcoran Jennison’s proposed uses.<sup>237</sup> By contrast, the private law of trespass requires the trier of fact to conduct simple, apolitical inquiries—does Corcoran Jennison’s conduct invade or threaten to invade Kelo’s ground or space without her consent?

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<sup>234</sup> Locke, TT, supra note 1, I.42, at 170.

<sup>235</sup> 3 Blackstone, supra note 5, at \*209.

<sup>236</sup> Id.

<sup>237</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005). For a critique of this cost-benefit analysis, see Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 *Ariz. L. Rev.* 9, 44-48 (2011).

Obviously, this inquiry restrains the trier of fact from comparing land uses. All the normative discretion that this boundary rule steers away from the trier of fact is steered instead to Kelo, in relation to her lot, to Corcoran Jennison, in relation to lots it currently owns, and so on.

To be sure, in some cases, boundary rules may generate results that seem controversial or difficult to justify. Consider again the hypothetical involving conservationist Marshall, prospective farmer Taney, and prospective herder Chase. It is difficult to forecast which use is the most popular or lucrative use locally. Some (blue-collar) locales would probably value Taney and Chase's useful uses more highly; other (more elite) locales might value Marshall's conservation more highly. These differences underscore one of the attractions of simple physical-boundary tests. If the law left a jury to prioritize uses, the jury might deadlock along socioeconomic class lines.

Separately, in practice, physical-boundary tests have some tendency to favor Taney and Chase's more active uses of property over Marshall's more passive use. By limiting owner discretion only when an owner invades another owner's property, trespass denies owners the power to veto neighbors' intended land uses on the ground that such uses will upset common conservation or aesthetic plans. At the same time, neither Taney nor Chase places as high a value on such uses as Marshall does. Boundary rules give Marshall security that he can enjoy at least *his own* property for aesthetic uses, even if Taney and Chase might like to convert his land to more active uses. Thus, the notion of "control" secures social and political diversity. By restraining judges and juries from valuing land uses themselves, trespass channels to owners great discretion to decide for themselves how they value and use their land.

### ***B. Qualifications, and Affirmative Defenses***

Yet although trespass refrains from choosing among particular land-use choices to a large extent, it does not refrain from such comparisons totally. Productive labor theory presumes against making such comparisons because it presumes that legal practice is ordinarily stuck in epistemological mediocrity. Yet that forecast may be rebutted. So trespass is actually a hybrid, in morality and then in law. In some situations, a non-owner may claim justification to remain on an owner's lot without her consent -- on the ground that his intended use deserves higher priority than her abstract control.

Although the *prima facie* case for trespass does not reflect these exceptions, it does not need to. No single tort doctrine perfectly reflects the substance of the normative interests tort

protects. In any field of tort, the *prima facie* case provides a first approximation, affirmative defenses sift out false positives mistakenly caught by the *prima facie* case, and plaintiff-side responses then restore some true positives mistakenly treated as negatives under the affirmative defenses. In land-use torts as elsewhere, the normative “use” interests protected by trespass emerge from “the interplay among substantive rules” and “positive defenses.”<sup>238</sup>

### C. *Necessity*

The most powerful confirmation comes from the privilege of necessity. A defendant may justify a *prima facie* trespass if he must commandeer the plaintiff’s property temporarily to avoid an emergency created by nature or some third party. The defendant must compensate the plaintiff for any damage he inflicts on her property, but necessity still justifies his entry without the plaintiff’s consent.<sup>239</sup>

Although much more could be said about necessity, the privilege is revealing for three reasons relevant here. First, it reinforces the insight that property rights are not absolute. Even if property rights in land seem to lack any connection to the flourishing or rationally-prosperous life, in extremely clear cases, they do. The *prima facie* case for trespass is structured to anticipate ordinary property-on-property conflicts. When the defendant has a justifiable necessity claim, however, he proves that he means to avert near-total destruction of property or loss of life. In a well-ordered prioritization of different prosperous lives, these claims take priority over the “mere” right to determine the future use of one’s land.

Second, however, necessity is hemmed in by limitations to stop it from engulfing the control rights declared in trespass’s *prima facie* case. One obvious limit is the necessitous trespasser’s duty to hold the owner harmless for any damage caused to her land.<sup>240</sup> Separately, when necessity law requires the defendant to prove that the emergency was created “by forces beyond human control,”<sup>241</sup> it prevents abuse of the privilege in the same manner in which Locke hems in charity claims – by making the charity claimant prove “he has no means to subsist otherwise.”<sup>242</sup>

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<sup>238</sup> Jules L. Coleman, *Risks and Wrongs* 216 (1992). See Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 *J. Leg. Stud.* 165 (1974).

<sup>239</sup> See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

<sup>240</sup> See *id.*

<sup>241</sup> *Id.* at 221.

<sup>242</sup> Locke, *TT*, I.42, at 170.

Finally, the necessity privilege confirms the conceptual structure of the natural moral rights grounding and hemming in legal property rights. As section II.C explained, conceptually, property rights, like all other moral rights, combine affirmative moral powers with exclusive claim rights. At least a matter of natural right, property rights are hemmed in by others' legitimate rights claims. A claim of necessity gives a necessitous trespasser just such a "right." A necessitous trespasser has more than a mere shield against the land owner's lawsuit for trespass to land; he also has a sword – in Lockean terms, a "Title" or a "Right to the Surplusage of" the owner's land "when his pressing Wants call for it."<sup>243</sup>

For example, in *Ploof v. Putnam*, a boat owner (Ploof) exercised the privilege of necessity to commandeer the dock of a lake-shore owner (Putnam) during a storm. If necessity's only function were to excuse Ploof's conduct, he should not have had a cause of action against Putnam but only a complete defense against liability to Putnam for a *prima facie* trespass to land. (In Hohfeldian terms, he should have enjoyed only a privilege and an immunity for his entry.) In *Ploof*, however, the Vermont Supreme Court held that Ploof had his own a cause of action against Putnam. If Ploof's right were a strong social entitlement, Ploof should have been able to sue Putnam for not helping rescue his boat and passengers. (In Hohfeldian terms, Putnam should have owed a duty to rescue correlative to Ploof's right.) Yet Ploof's cause of action was for trespass to chattels, on the allegation that Putnam's servant damaged his boat by pushing away his boat during the storm without his consent.<sup>244</sup> In Hohfeldian terms, during the pendency of the storm, Ploof enjoyed a privilege to commandeer the dock, a power to suspend Putnam's property rights temporarily, and a claim-right to complain about any interference with the privilege and the power. That combination of privilege, power, and claim-right illustrates extremely powerfully the substance in a Lockean "right."

#### ***D. Use-Based Affirmative Defenses***

Several defenses to trespass endow defendant non-owners with similar rights of use and access on an owner's land. These defenses raise closer issues. In necessity cases, the land owner's moral control rights are overridden by normative interests that take higher priority in any rational moral ranking -- bodily security, or the prevention of property's total destruction. Yet moral control rights may also justifiably be limited to secure normative interests on the same

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<sup>243</sup> Id.

<sup>244</sup> See 71 A. 188 (Vt. 1908).

plane as the owner's interest in use. Legal control rights are always a presumptive means to an end, enlarging moral use rights. When it is practically certain that a group of individuals have common interests much stronger than most individuals usually share, productive labor theory may relax strict control rights to advance the individuals' common use interests.<sup>245</sup>

Although our discussion cannot be exhaustive, consider two representative defenses, one old and one new.<sup>246</sup> In Blackstone's day, English law qualified control rights in land to leave neighbors use rights for pasturage, fishing, wood-gathering, and easements for passage.<sup>247</sup> In at least some rural American jurisdictions, at least some pasturage rights are still recognized.<sup>248</sup> In an agricultural society, land is used for many common subsistence uses – not only farming but also hunting and the gathering of wood and other materials conducive to maintaining a home and farm. All inhabitants more or less share all of these intended uses in common. The agricultural use is time- and labor-intensive, but the other activities are not. So land-use tort law institutes general control rights to secure farming and other long-range planning in relation to land, but it institutes easements to allow the productive appropriation and use of basic life necessities.<sup>249</sup>

Again, however, productive labor theory prescribes such easements only to the extent that they seem likely to encourage the concurrent productive labor of most or all citizens. As industrial and other commercial non-agricultural uses take over, political deontology sets a more demanding standard. In developed economies, owners do not all share common interests in sustenance uses of land; many owners, especially commercial and industrial owners, need more exclusivity and security for their land uses. In such economies, implied easements of use or access become harder to justify and drop out of the law. Of course, productive labor theory cannot predict exactly when or where the law should change for these and other possible limitations on trespassory control rights. For example, a community of citizens who are culturally, ethnically, and religiously homogeneous may have better able to enforce easements of use or access than a community diverse in the same respects. Nevertheless, productive labor

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<sup>245</sup> I thank James Penner for encouraging me to explain this relation more fully.

<sup>246</sup> In previous scholarship, I have used arguments similar to the one developed in text to justify the choice between “fence in” and “fence out” rules for animal trespass. See Claeys, *Jefferson Meets Coase*, supra note --, 1423-24. Similar arguments could apply to implied-consent defenses as they apply to entries onto land. Similar principles apply, with adjustments, to defense of property and rescue of property.

<sup>247</sup> See 2 Blackstone, supra note 5, at \*32-\*36.

<sup>248</sup> See Claeys, supra note 22, at 1423-24.

<sup>249</sup> For similar economic interpretations and justifications of mixed-rights regimes in Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. Leg. Stud.* S131 to S169 (2000); Ellickson, supra note 12, at 1387-91.

theory manages to explain the general spectrum covering different land regimes – and the most important factors a statesman should consider before deciding where on the spectrum to situate his community’s laws.

Similar principles explain the defense that exists for airplane overflights. Pre-1900 common law presumed that owners held property in the air columns over their land, but contemporary law divests them of them property above ceilings set by state and federal aviation regulations. Before a community develops air travel, it is marginally more likely that land owners will exploit the air columns over their properties than that anyone else will. It thus makes sense to use accession principles to endow land owners with ownership of their respective air columns. Once air travel exists, however, property rights may and should be qualified on sound Lockean grounds -- to enlarge productive use. Some cases justified these qualifications with a pragmatic utilitarian analysis. In this analysis, the (large) social value of air travel outweighs the (minimal) utility of abstract rights to control the use of air 2000 feet above the ground.<sup>250</sup> Yet other cases justified airplane servitudes within the politically-deontological constraints of productive labor theory—and reasonably so. Behind the veil of ignorance, for most or all land owners, “the possibility of [their] actual occupation and separate enjoyment of it as a feasible accomplishment has through all periods of private ownership of land been extremely limited.” That being so, “[i]t would be vain” to insist that “property in airspace [be treated] on the same footing as property that can be seized, touched, occupied, handled, cultivated, built upon and utilized” – that is, used productively – “in its every feature.”<sup>251</sup> On the other side of the ledger, if the political community socializes land owners’ air columns, it can create flight paths that make air travel cheap and easy. Accessible air travel enlarges the liberties of action of land-owners in other aspects of their lives – by enlarging the available “means of transportation of persons and commodities.”<sup>252</sup> That contrast justifies overflight easements -- as long as the overflights are not low and loud enough to disrupt land uses on the ground.<sup>253</sup>

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<sup>250</sup> See, e.g., *Hinman v. Pac. Air Transp.*, 84 F.2d 755 (9<sup>th</sup> Cir. 1936);

<sup>251</sup> *Smith v. New England Aircraft Co.*, 170 N.E. 385, 390 (Mass. 1930).

<sup>252</sup> *Smith*, 170 N.E. at 388.

<sup>253</sup> See *id.* at 391-94.

Some contemporary property scholars cite airplane overflights as a knock-down refutation of absolute and unqualified property rights.<sup>254</sup> On one hand, these scholars anticipate and confirm one of this Article’s points: Property rights need not and should not be absolute or “Blackstonian” in the cartoonish rendition of Blackstone.<sup>255</sup> On the other hand, these scholars press their point too far. Property rights are not and need not be instruments of any social policy simply because they are not absolute in the inviolably-deontological sense. In productive labor theory, property rights can be strong most of the time yet supple when they need to be, if they are focused on securing for all interested parties their concurrent normative use interests.

## VI. ENCROACHMENT REMEDIES

### A. *Remedies and Ordinary Damages in Trespass*

To appreciate fully the interplay between the property at the core of trespass and the tort doctrines that secure it, one must also consider the relevant remedies. Like affirmative defenses, remedies also presuppose and apply “norms partially specifying the *content* of the entitlements that individuals have.” In the field of land-use law, remedy doctrines specify owners’ land rights in “situations in which a non-owner has transacted (voluntarily or forcibly) with the rights of the title owner.”<sup>256</sup> Remedy law reinforces the two lessons from the last part: Trespass ordinarily protects an owner’s seemingly-absolute interest in controlling and determining the future use of land; but in exceptional cases, remedy doctrines may protect and secure non-owners’ justifiable interests in using a title owner’s land productively.

The damages ordinarily available in trespass confirm the first of these lessons. When a defendant is liable for trespassing on a land-owning plaintiff’s close, his wrong is to usurp the plaintiff’s exclusive control to determine the future use of her land. Trespass’s damages attempt to put the plaintiff in the same position in which she would have been if the defendant had never usurped. If the defendant damages the plaintiff’s property, the defendant is liable for all damages he causes – no matter how unforeseeable or remote they happen to be.<sup>257</sup> Since it is

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<sup>254</sup> Compare Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 1-3 (2004) (using airplane overflights as described in text) with Claeys, [Exclusivity in Gridlock], 53 *Ariz. L.* at 30-34 (criticizing Lessig’s argument).

<sup>255</sup> Accord Daniel B. Schorr, *Who Said Blackstone Was a Blackstonian?*, *Th. Inq. in L.* (2009); Dean B. Lueck, *The Rule of First Possession and the Design of the Law*, 38 *J. L. Econ.* 393, 422-23 (1995).

<sup>256</sup> Jules L. Coleman, *Some Reflections on Richard Brooks’s “Efficient Performance Hypothesis,”* 116 *Yale L.J. Pocket Part* 416, 419 (2007), <http://www.thepocketpart.org/2007/07/23/coleman.html>. See also Jules L. Coleman & Jody Kraus, *Rethinking the Legal Theory of Rights*, 95 *Yale L.J.* 1335, 1343-47 (1986).

<sup>257</sup> See *Crook v. Sheehan Enterps., Inc.*, 740 S.W.2d 333 (Mo. Ct. App. 1987).

wrongful for the defendant to usurp the plaintiff's control merely by entering, the defendant should be held responsible for all damages, no matter how unexpected, that follow from his usurpation of use. If the defendant uses the plaintiff's lot for a substantial length of time without damaging it, he is liable for a fair measure of the rent – to restore to the plaintiff the likely uses she could otherwise have made of the land.<sup>258</sup> If the defendant stands to profit after paying actual or lost-rental damages, trespass also makes available disgorgement or restitutionary damages. Since the right to control and determine the future use of land encompasses the right to make profitable use of the land, when the defendant invades the former he is just as responsible for invading the latter.<sup>259</sup>

**B. *Equity and the Innocent De Minimis Encroachment***

In its dominant features, trespass equity law reinforces this same portrait. Again, equity awards an injunction if the plaintiff is suffering an ongoing trespass – no matter whether the trespass threatens actual damage or interference to an existing use of the plaintiff.<sup>260</sup> Yet equity also leaves open the possibility that an encroachment may be justifiable, if it is *de minimis*, if it is made in good faith, and if the encroacher pays permanent damages to acquire the land.<sup>261</sup>

As hunters' rights of access and overflight easements both confirm, the prudent statesman must always consider possible exceptions to clear boundaries. At the same time, when considering further exceptions, productive labor theory demands that the law never destabilize the moral formation that inculcates “Industrious and Rational” behavior and deters “Quarrelsome and Contentious” behavior. This insight goes a long way in explaining why property law *refrains* to enforce labor-desert intuitions in many cases in which they might otherwise seem to apply.

These social concerns explain why trespass and equity enjoin most encroachments and virtually all deliberate encroachments. Because control rights are strongly presumed to encourage the productive use of land, legal rules should signal to encroachers that they may not incorporate into their plans title owners' property. Practically, the burden should therefore lie on

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<sup>258</sup> See Restatement (Second) of Torts § 931 & cmt. b (1979).

<sup>259</sup> See Eric R. Claeys, The Right to Exclude in the Shadow of the *Cathedral*: A Comment on Parchomovsky and Stein, 104 Nw. U. L. Rev. 391, 392-402 (2010); Ernest J. Weinrib, Restitutionary Damages as Corrective Justice, 1 Theoretical Inq. L. 1 (2000).

<sup>260</sup> Cite back to sec. I.A.

<sup>261</sup> See *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951); Am. Jur. *Adjoining Landowners* § 136 (2010); 9 Powell on Real Property, *supra* note 27, § 64A.5[8], at 64A-62; 5 Pomeroy's Equity Jurisprudence [2d Ed.] § 1922.

an encroacher to prove he took extra care to steer his activities around a title owner's prerogative. Equity embodies this burden. It denies the encroacher denying him any relief from an injunction unless his encroachment was neither intentional, knowing, nor accidental – but rather made only in *good* faith, after conducting due diligence.

If the encroacher builds innocently, however, equity may consider the hardships more closely without destabilizing property rights. Morally, the title owner should continue to get *some* benefit of the doubt. The society encourages productive use of many other lots, indirectly and in the future, if it reinforces general respect for formal title in cases in which a particular owner is not using formal title as productively as he should. To be sure, productive labor theory cannot generate any precise ratio quantifying the benefit of the doubt the owner deserves. Yet it can explain owners get a strong presumption of irreparable harm from ongoing encroachments.<sup>262</sup> As one case put it:

A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money.<sup>263</sup>

The right to the injunction protects the owner's "rights," and specifically his right to choose to deploy the land "for a specific use."

Libertarian Lockeanism could explain that same presumption -- but it strains to explain when and why the presumption gets overridden. Legally, courts have discretion to refrain from enjoining an ongoing innocent encroachment if the encroachment is minor and if it is far more expensive to remove than it would be to transfer the land to the encroacher.<sup>264</sup> If the encroachment is cost-prohibitive to remove, that fact suggests that the encroacher is using the encroached-on land productively. If the encroachment is *de minimis*, that is another way of saying it does not "interfere in any way with the value or use of the rest of the plaintiff's land."<sup>265</sup> And when the title owner is not "deprived the owner "of any beneficial use"<sup>266</sup> of her land and

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<sup>262</sup> See Golden Press, Inc., 235 P.2d at 594-95; Am. Jur. Adjoining Landowners, supra note **Error! Bookmark not defined.**, § 133; 9 Powell on Real Property, supra note 27, § 64A.5[8], at 64A-61 to -62.

<sup>263</sup> Lynch v. Union Institution for Savings, 34 N.E. 364, 364-65 (1893).

<sup>264</sup> See Golden Press, Inc., 235 P.2d at 595; Am. Jur. Adjoining Landowners, supra note **Error! Bookmark not defined.**, § 133; 9 Powell on Real Property, supra note 27, § 64A.5[8], at 64A-62.

<sup>265</sup> Methodist Epis. Soc. v. Akers, 46 N.E. 381, 383 (Mass. 1897).

<sup>266</sup> Loughlin v. Wright Mach. Co., 173 N.E. 534, 535 (1930).

the encroacher acted mistakenly and in good faith, the law may justly protect the encroacher's valuable, beneficial, or productive use.

In this inquiry, the parties' legal rights are not inviolably deontological, but they remain politically deontological. Equity can enlarge the productive-use interests of all land owners and users if it compels them to sacrifice the right to assert bare control over small increments of land they are not using and give them property rights when they innocently and mistakenly improve a small amount of land they do not own.

### **C. Punitive Damages**

As the preceding section just showed, equity doctrine places heavy emphasis on the relation between law and moral formation. That same relation explains one last significant remedy for trespass – punitive damages.

Trespass entitles a land owner to punitive damages if a trespasser trespasses deliberately – even if the owner suffers no actual damage. For example, in *Jacque v. Steenberg Homes*,<sup>267</sup> Steenberg Homes asked the Jacques for permission to tow a home across a vacant field they owned, while the public road was blocked by a snow drift, so the company could complete a delivery on time. The Jacques refused to grant permission under any circumstances, because they mistakenly believed that they would help Steenberg Homes adversely possess their field if they consented.<sup>268</sup> Steenberg Homes towed the home across their field anyway, did so knowing that the Jacques objected, completed the delivery on time, and caused no damage to the field.<sup>269</sup> Yet in a trial, a jury found a trespass, awarded the Jacques a dollar in nominal damages, and then awarded them \$100,000 in punitive damages. The Wisconsin Supreme Court affirmed the liability and punitive judgments both.

*Jacque* is a close case. In economic jargon, Thomas Merrill and Henry Smith conclude (probably correctly) that "using the Jacques' field as a temporary delivery path would have been the most efficient outcome," for "using the land as a temporary delivery path foreclosed no alternative use of it," while Steenberg Homes "faced considerable risk, and not a little time and effort, if it had to use rollers to wrestle the ungainly mobile home around a curved private road covered in seven feet of snow."<sup>270</sup> The case is even closer because Steenberg Homes was not

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<sup>267</sup> 563 N.W.2d 144 (Wisc 1997).

<sup>268</sup> See *Jacque*, 563 N.W.2d at 157.

<sup>269</sup> *Id.* [*Jacque*, 563 N.W.2d] at 611.

<sup>270</sup> Merrill & Smith, *supra* note --, 48 Wm. & M. LR at 1872.

responsible for the snow storm. One could conclude reasonably that Steenberg Homes was likely to labor more deservedly or productively with the Jacques' field than the Jacques meant to. Larissa Katz relies on such a ground to pronounce the case wrongly decided. In her opinion, Steenberg Homes should not have been liable because its intentions of "crossing the snow-covered field with the mobile home did not interfere with the Jacques' agenda, farming."<sup>271</sup> On the other hand, Steenberg Homes' mobile home never faced destruction. Steenberg Homes could have waited the storm out or (at considerably more cost, to be sure) tried to plow the public road. And if the Wisconsin Supreme Court had created some sort of defense for Steenberg Homes, the defense would have been difficult to confine in other cases where landowner interests were threatened more severely.

And if the Jacques' had a legitimate possessory interest at risk, they deserved punitive damages once that interest was taken. The assistant manager in charge of Steenberg Homes' delivery efforts deliberately disregarded the Jacques' property rights. He instructed workers at the site: "I don't give a ---- what [Mr. Jacque] said, just get the home in there any way you can."<sup>272</sup>

Now, productive labor theory does not ineluctably require the Wisconsin Supreme Court's conclusion. Yet productive labor theory does frame the normative interests and political considerations at stake in *Jacque*. On one hand, it identifies all the factors relevant to deciding whether the Jacques deserved property in the right to exclude Steenberg Homes or Steenberg Homes deserved a limited use rights. On the other hand, the theory identifies virtue-based reasons why Steenberg Homes' claims threatened property generally. And, once it is granted that the Jacques deserved to control the use of their field, productive labor theory explains why it is necessary to protect the Jacques rights as inviolably deontological rights – with damages punishing intentional disrespect for rights.

## VII. ADVERSE POSSESSION

The foregoing explanation for trespass and its remedies clarify the role adverse possession in land-use common law. Adverse possession simply establishes another affirmative

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<sup>271</sup> Larissa M. Katz, *Exclusion and Exclusivity in Property Law*, 58 U. Toronto L.J. 275, 303 (2009).

<sup>272</sup> *Jacque*, 563 N.W. at 611.

defense slicing a few unproductive assertions of land ownership out of an owner's legal control rights.<sup>273</sup>

**A. *The Wrong in Owner Neglect***

Theories of adverse possession are often classified depending on how much they stress each of three considerations. In Henry Ballantine's list: (1) "the demerit of the one out of possession" (that is, the title owner); (2) "the 'merit of the possessor'" (that is, the encroacher); or (3) a series of general public policies "to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and to correct errors in conveyancing."<sup>274</sup> Although productive labor theory relies on all three of these factors, it makes the first fundamental. A title owner loses a moral right in relation to land by neglecting it.

When trespass establishes control rights, it presumes that title owners are the most likely individuals to deploy those control rights productively. Ordinarily, that presumption justifies owners' enjoying "sovereignty" in relation to their land.<sup>275</sup> In principle, however, sovereignty can be understood as Part IV described dominion and property – as a negative exterior of an interior moral power structured to encourage an agent actively to pursue his own prosperity. If a title owner does not pursue such prosperity, however, sooner or later she disentitles herself to both the sovereignty and the underlying normative interest in property. If "either the Grass of [a title owner's] Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other."<sup>276</sup>

Ballantine's term for such disentanglement – "demerit" – raises a question: Is the owner disentitled internally or externally? In other words, is the owner disentitled because his moral interest in productive *expires* when he ceases to use the land, or because others legitimately *divest* his still-continuing claim?<sup>277</sup> A little of both, but primarily the former. In principle, adverse possession extinguishes a presumption that control rights ordinarily make in a title owner's favor. Since productive labor theory (like labor-desert theory, and unlike libertarian theory) conditions property on a responsibility to "*enjoy*," "to make use of to any advantage of

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<sup>273</sup> See supra section VII.0.

<sup>274</sup> Henry W. Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 135 (1918) (quoting Ames, Lectures, Legal History 197).

<sup>275</sup> See Katz, supra note 39, at 67-68.

<sup>276</sup> Locke, TT, supra note 1, II.38, at 313; accord id. II.42, at 297.

<sup>277</sup> I thank Dennis Klimchuk for encouraging me to consider this question.

life,”<sup>278</sup> and to “increase the common stock of mankind,”<sup>279</sup> non-use undermines the legitimacy of an owner’s property.

That said, “neglect” is a difficult concept to codify when dealing with control rights. As Lee Anne Fennell explains, “an owner does not have to do violence to the land in order to use it in a socially valuable way; passive uses that might look to the untutored like ‘sleeping’ may actually increase overall societal value.”<sup>280</sup> Locke confirms as much by conceding that an asset is “used” by an owner even if he is only “pleased with its colour.”<sup>281</sup> On the other hand, while all non-owners may claim some general harm from being excluded from fertile land, no non-owner has an especially strong claim. As a result, in practice, it is difficult to institute a test to distinguish true cases of “waste” while avoiding situations in which non-owners trump up neglect allegations to oust true owners.

Adverse possession doctrine specifies one set of conditions establishing genuine “waste.” Recall that the dominant theory of adverse possession requires the encroacher to prove he occupied the title owner’s land actually, exclusively, and notoriously.<sup>282</sup> The encroacher undertakes an act of “prescription,” which is to say an act tantamount to “appropriation” in the social sense if the land were unoccupied.<sup>283</sup> Larissa Katz has likened adverse possession to a “bloodless *coup d’etat*.”<sup>284</sup> An encroacher’s prescription is not necessarily revolutionary, however. The encroacher is *justified* in asserting sovereignty, because the title owner has forfeited her legitimate claim to sovereignty.

This account puts what Ballantine calls the encroacher’s “merit” in proper perspective. Ordinarily, the encroacher’s conduct *lacks* merit; the law normally presumes that a *prima facie* trespasser is a wrongdoer. Once the title owner disentitles herself, however, the encroacher’s prescriptive occupancy qualifies him better than any other non-owner to divest the title owner of

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<sup>278</sup> Locke, TT, supra note 1, II.31, at 308.

<sup>279</sup> Id. II.37, at 294.

<sup>280</sup> Lee Anne Fennell, Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession, 100 Nw. U. L. Rev. 1037, 1059, 1064 (2006).

<sup>281</sup> TT II.46, at 318.

<sup>282</sup> See, e.g., *Lessees of Ewing v. Burnet*, 36 U.S. 41, 51-52 (1837).

<sup>283</sup> See *Eads v. Brazelton*, 22 Ark. 499 (1861); Lueck, supra note 255, at 415-16.

<sup>284</sup> Katz, supra note 39, at 51.

ownership. The encroacher's long occupancy is a simple and reliable proxy for her future productive use – just as a first-possessor's occupancy is in relation to unowned land.<sup>285</sup>

This owner-neglect justification may strike some readers as “radically underinclusive.”<sup>286</sup> It is easy to imagine other kinds of neglect as extreme as adverse possession – say, absence coupled with failure to pay taxes for a long period of time.<sup>287</sup> Adverse possession does not reach those other kinds of neglect, and other property doctrines do so haphazardly if at all. Nevertheless, because productive labor theory deploys an indirect consequentialist approach, it refrains from making the best the enemy of the good. Other, more encompassing legal definitions of neglect might encourage speculators to pressure governments to extinguish the ownership rights of title owners to allegedly “underused” land. If such arguments succeeded, governments might then need to pick and choose among several speculators lobbying to take the land over. Adverse possession avoids the first conflict by focusing on a narrow disuse fact pattern incontrovertibly close to abandonment. It avoids the second by transferring title cleanly to the adverse occupant whose assertion of ownership corresponds most closely to natural intuitions and social practices regarding ownership.

### ***B. Adverse Possession and Public Policy***

Of course, adverse possession is judged by how it affects not only the title owner and encroacher but also the broader public. Ballantine recounts the relevant public policies -- “to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and to correct errors in conveyancing”<sup>288</sup> – as utilitarian welfare policies not tied closely to the interests of individual owners or citizens. Since productive labor theory is politically deontological, however, for adverse possession to promote the public good, it must be justified in relation to a conception of the “public interest” coterminous with citizens' concurrent moral interests in productive use. Obviously, adverse possession benefits encroachers. Adverse possession also enlarges the productive-use interests of some third parties – especially neighbors who need to know who the owner is to report land-use complaints. After that, the determinations get closer.

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<sup>285</sup> See *Lessees of Ewing v. Burnet*, 36 U.S. 41, 53 (1837); Powell on Real Property, *supra* note 27, § 91.05[1], at 91-21 to -22; Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

<sup>286</sup> Peñalver & Katyal, *supra* note 28, at 149.

<sup>287</sup> Cf., e.g., *Pocono Springs Civic Ass'n v. MacKenzie*, 667 A.2d 233 (Pa. 1995) (holding that an owner does not abandon real estate by neglecting the property and failing to pay taxes on it).

<sup>288</sup> Ballantine, *supra* note 274, at 135 (quoting Ames, *Lectures, Legal History* 197).

Adverse possession *may* enlarge the interests of owners and another set of third parties, buyers, by quieting title. Title quieting enlarges property rights by eliminating clouds over the title of lots that owners seek to assign.<sup>289</sup> The sticking point is to show that owners' interests are enlarged. Because productive labor theory is politically deontological, it must be practically certain that adverse possession enlarges owners' use interests (by enlarging their powers to alienate land with clean title) than it diminishes those interests (by extinguishing their control rights when they are ousted notoriously enough for long enough). Here, the moral standard needs empirical supplementation.

One empirical issue seems easy to establish without much evidence: If a title owner does not complain about an encroachment for a period of years, his quiet provides objective proof that his interest in the land is not really that strong. The question then becomes whether adverse possession's effects on conveyancing inflict extra harms or countervailing benefits to all owners. That question does not have an empirically incontrovertible answer. On one hand, adverse possession eliminates disputes about many "old and cold" title claims by using actual occupancy as a proxy for ownership. On the other hand, it complicates title searches by requiring buyers and owners to investigate not only paper title records but also evidence of actual occupancy.<sup>290</sup> The law and most of the authorities agree that the former effect dominates the latter.<sup>291</sup> At an intuitive and practical level, that comparison seems right. In principle, however, the intuitive and practical judgment just made could be rebutted by concrete evidence.

### ***C. Tacking and Tolling***

Because productive labor theory fills in broad normative goals and empirical presumptions for adverse possession, it can inform some but not all details of the doctrine. To illustrate the theory's reach and limits, consider tacking and tolling.<sup>292</sup> Assume that Waite encroaches on Fuller's estate Greenacre, Waite quitclaims later to White, and Fuller conveys title to Taft. Under the principle of "tacking," White is in privity with Waite, and Taft with Fuller. Thus, as long as Waite and White encroach continuously and notoriously, White perfects his claim of adverse possession when the limitations period ends after *Waite's* first encroachment.<sup>293</sup>

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<sup>289</sup> See 1 Blackstone, *supra* note 5, at \*134 (suggesting how laws regulating the process of "translating [civil property] from man to man" secure moral labor interests).

<sup>290</sup> Posner, *supra* note 44, § 3.12, at 79.

<sup>291</sup> See, e.g., *id.*

<sup>292</sup> I thank Bob Ellickson for exhorting me to consider these doctrines.

<sup>293</sup> See *Howard v. Kunto*, 477 P.2d 210 (Wash. Ct. App. 1970).

Assume, however, that Taft is disabled by infancy, imprisonment or insanity. Subject to variations in different local statutes, Taft may be able to delay or suspend – “toll” – the running of Waite and White’s clock while he is disabled.<sup>294</sup>

Although productive labor theory cannot determine whether tacking is definitely necessary in adverse possession, it can at least supply a weak presumption that tacking should be available. Again, in productive labor theory, an action involving property is productive if it enhances the rational prosperity of *anyone* – not only the claimant but also any associate. According to Locke, when a claimant “gave away a part [of his store] to any body else, so that it perished not uselessly in his Possession, these he also made use of.”<sup>295</sup> So if Waite and White decide they will be better off if White is left to occupy and use Greenacre, it is reasonable to presume that they are causing the estate to be used more productively and that Waite’s conveyance is a productive use. That presumption justifies tacking on the encroachers’ side. By the same token, ordinarily, Fuller should be presumed to convey land productively to Taft. Yet if the community of Fuller and Taft turns out to neglect the land for the applicable limitations period, this neglect rebuts that presumption for all the reasons described in this part. Productive labor theory cannot make these presumptions dispositive. In a particular case, Taft conceivably could start using Greenacre diligently in her 6<sup>th</sup> year of ownership but a year after White perfected his claim of adverse possession. Other things being equal, however, it is reasonable to presume that a series of title owners are just as culpable as a single owner if they all convey voluntarily to one another and none defends her control rights diligently. The same goes for a series of squatters conveying voluntarily to one another.

By contrast, productive labor theory has little to say about tolling. On one hand, perhaps a disabled owner is not as culpable as a competent owner who neglects her land for the limitations period. That argument probably explains why legislatures write tolling statutes and excuse disabled owners. On the other hand, having two adverse-possession rules complicates land transfers, and it inhibits the opportunities non-owners may justly claim to acquire land. In addition, many disabled individuals have guardians, and any neglect by the guardians may reasonably be imputed to the person with the disability. On these bases, prudent statesmen could reasonably decide not to create any disability-based exceptions to adverse possession.

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<sup>294</sup> See Dukeminier et al., *supra* note --, at 142-43.

<sup>295</sup>

Productive labor theory can frame the relevant inquiries, but it cannot settle the empirical or practical issues needed to resolve those inquiries.

**D. *Scienter***

There is a similar gap between theory and practice in how adverse possession treats scienter. As the last part explained, encroachment remedy doctrine is strongly punitive toward encroachers. By contrast, two of the three most prominent lines of adverse possession doctrine treat bad faith fairly leniently. The “objective” position holds that the encroacher’s scienter in relation to the title owner is irrelevant as long as the former asserts dominion over the latter’s land without the latter’s consent. The “aggressive trespass” position requires the encroacher to stake his claim to the land intending to dispossess and disentitle the title owner. In contrast, the “good faith” position bars an encroacher from perfecting a claim from ownership unless he occupies the land mistakenly but justifiably believing he owns it.<sup>296</sup> Some may wonder whether this difference renders productive labor theory inconsistent or incoherent. Not necessarily.

These three rules present three different solutions to the same problem that arises in equity in encroachment disputes: how to accommodate inconsistent legitimate property claims retail without undermining property-respecting moral formation wholesale. I think the objective standard accommodates the interests correctly. In equity, there are strong reasons for erring in favor of moral formation. Trespass declares and specifies in advance the rights and responsibilities that owners and strangers have in relation to one another. Ex ante, it is much more reasonable for strangers to assume their neighbors will assert the control rights trespass declares they have and not carelessly lay the foundations for an adverse possession. Adverse possession’s standards implicate these formation considerations much more weakly. Ex post, after an encroacher has perfected a claim of adverse possession, any similar deterrent message will have been weakened by the lag between the initial encroachment and the deterring ouster.

On that basis, it makes sense to disregard scienter in adverse possession. In an ordinary trespass dispute, the law inquires only whether, by statement or by implication from conduct, the alleged encroacher intends to assert dominion over the land his act allegedly appropriates.<sup>297</sup> Here, scienter protects the title owner, by conferring on her a broad power and right to treat any unconsented entries as potential threats to her ownership. Yet the title owner must take the bitter

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<sup>296</sup> See Radin, *supra* note 14, at 746-47. Accord Dukeminier et al., *supra* note 3, at 126.

<sup>297</sup> See, e.g., *Eads v. Brazelton*, 22 Ark. 499 (1861). This test goes back to Roman Law. See Katz, *supra* note 39, at 65.

with the sweet.<sup>298</sup> If a title owner does not react to what a reasonably vigilant owner would take to be a challenge to his possession, she makes herself culpable by her “neglect to seek recovery of possession, within the requisite time.”<sup>299</sup> As was explained in one of the most influential early cases favoring the objective standard:

The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the *motive* of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no enquiry is made. It is for this obvious reason; that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.<sup>300</sup>

As a general matter, it is also plausible to suspect that the objective standard will not undermine the socializing lessons trespass’s *prima facie* case and remedy principles teach. By the time an encroacher perfects a claim of adverse possession, the title owner has disintitiled himself to the land in dispute and the encroacher has a strong desert-claim to the land. If and when a title owner brings a late challenge to the encroacher’s claim, he has already compromised property-respecting social norms significantly. In addition, it is reasonable to suspect that general norms respond to and can be qualified to accommodate the exceptional circumstances that arise in exceptional cases. To state the point more strongly, if the law enforces a categorical line too strictly in cases people strongly suspect to be exceptional, the law may trigger citizen backlash.<sup>301</sup> Depending on the facts of the case, the title owner may seem presumptuous to assert claims over land long neglected. The encroacher may have desert claims on the land, a personal attachment to it, or a longer track record in the local community.<sup>302</sup> These impressions and factors can motivate triers of fact to engage in nullification tactics against efforts to enforce anti-encroachment policies strictly. The law may destabilize respect for property rights more by

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<sup>298</sup> Accord Helmholz, *supra* note 26, at 357 (concluding that explorations of bad faith “are not to be wished for. . . . Hostility and ‘claim of right can be, and are, judged by external manifestations of dominion.”). Contra Katz, *supra* note 39, at 65-66 (suggesting that the deliberateness of an appropriation significantly complicates the claim of a bad faith squatter).

<sup>299</sup> *Mannillo v. Gorski*, 255 A.2d 258, 22 (N.J. 1969).

<sup>300</sup> *French v. Pearce*, 8 Conn. 439 (1831).

<sup>301</sup> See, e.g., Merrill & Smith, *supra* note 49, at 1854 (“when legal protection of property is out of sync with common morality, we often see widespread disregard of legally recognized property rights.”).

<sup>302</sup> Holmes justified prescription as being “in the nature of man’s mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 110 Harv. L. Rev. 991, 1008 (1997) (reprinting 10 Harv. L. Rev. 457 (1897)).

enforcing a rule in the face of pro-encroacher sympathies than it does by accommodating those sympathies to make an exception in a situation that should not arise very often.

These predictions are just intuitive practical forecasts, however, and they may be refuted by more specific evidence when available. For example, in a survey of reported American adverse possession decisions ranging from 1966 until 1983, Richard Helmholz discovered that many appeal courts paid lip service to the objective standard but then sabotaged it in practice. Instead of disintitling the encroacher on the basis of his bad faith, courts preferred instead to hold that his occupation was not substantial enough to count as legal “occupancy” or “possession,” or that it was not under a “claim of right” sufficient to satisfy the hostility requirement, or so on.<sup>303</sup> Helmholz’s findings certainly supplies to an interested lawmaker or judge the common law’s version of substantial evidence in administrative law. A reasonable lawmaker or judge might decide this evidence is not strong enough to justify changing the objective standard. Productive labor theory establishes a presumption for the objective standard on the basis of a legislative policy judgment described thus far in this section, and such judgments can reasonably discount contrary evidence if it seems too trivial. I would discount Helmholz’s findings in this manner.<sup>304</sup>

All the same, a conscientious legislator could reasonably apply Helmholz’s findings to decide that the objective standard is counterproductive – and institute a good-faith requirement in adverse possession, a requirement that bad-faith adverse possessors be required to indemnify title owners for market value,<sup>305</sup> or a two-tiered adverse possession system with a longer limitations period for bad-faith occupants than good-faith ones.<sup>306</sup> Each of these approaches has attractive and problematic features. My points here are more general. Productive labor theory is not determinate enough to favor one of these alternatives definitely over the others because it asks consequentialist questions that are difficult to answer in practice. Yet productive labor theory does put the choice in a helpful context – which scienter regime will best promote a regime in which all owners and non-owners use available property as well as possible?

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<sup>303</sup> See Helmholz, *supra* note 26, at 342-49.

<sup>304</sup> In part, I doubt the evidence is as conclusive as Helmholz suggests. In part, the alternatives seem to me worse in practice, for reasons set forth in the next two paragraphs.

<sup>305</sup> See Merrill, *supra* note 42, at 1145-46.

<sup>306</sup> See Merrill & Smith, *supra* note 49, at 1877; Epstein, *supra* note 16, at 685-88.

## VIII. LABOR THEORY AND CONTEMPORARY PROPERTY THEORY

### A. *Utilitarianism and Its Alternatives*

As the last three Parts show, productive labor theory seems to explain and justify the basics of trespass and adverse possession, and it does so applying a deontological criterion that allows it to consider more or less the same consequences as those one sees in the cases and the leading utilitarian commentary. Yet readers may still wonder: Since that commentary also considers consequences, why not prefer the wholly-consequentialist commentary to a half-consequentialist alternative? Although this question raises issues far broader than we can cover comprehensively here, I can at least highlight the nerves of an answer.

When scholars assume the truth of impressions like the ones recounted in Part I, they lull themselves into a false sense of complacency. The theoretical blinders such scholars wear screen out tough choices between pragmatic utilitarianism and its alternatives. Rather than confront tough choices about first principles, utilitarians may pretend they have no choices to make.

Whether or not utilitarian property scholars choose to confront it, such a choice exists. In his debate with J.J.C. Smart in *Utilitarianism: For and Against*, philosophy scholar Bernard Williams enumerated several problems that follow when practical decision making relies on utilitarianism, and particularly on a theory that prefers to consider direct consequences and conceive of normative values in subjective terms.<sup>307</sup> Contemporary utilitarian justifications for trespass liability and remedy rules and adverse possession confirm Williams's criticisms. Productive labor theory anticipates and corrects for those criticisms. To be sure, utilitarian scholars may have responses for Williams's criticisms, and productive labor theory may suffer from defects I have not discussed here. I can settle neither issue here.

That said, in trespass, encroachment, and adverse possession, utilitarian scholarship confirms and illustrates problems that Williams identified in utilitarianism generally. Even if utilitarian philosophers have responses to Williams' critique, it is telling that utilitarian *property* scholars have not adapted. It is fair to judge the tree by its fruits.

### B. *Utility as a Normative Criterion*

Pragmatic utilitarian approaches often have difficulty determining what courses of conduct have utility – or, perhaps, whether the consequences of different courses of conduct generate positive or negative social utilities. “[U]tilitarianism really does make do with fewer . .

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<sup>307</sup> Accord Peñalver & Katyal, *supra* note 28, at 149, 153.

. moral notions, but . . . the lightness of its burden in this respect to a great extent merely shows how little of the world’s moral luggage it is prepared to pick up.”<sup>308</sup>

One could say the same of contemporary utilitarian scholarship on trespass and adverse possession. Again, utilitarian scholars justify trespassory control rights because they promote such utilitarian goals as investment, commercialization, civic diversity, and political decentralization.<sup>309</sup> Yet it is surprisingly difficult to nail down why these are the utilities that count the most. In particular, society now routinely enforces and, one presumes, places social utility in conservation and preservation restrictions. As Stake wonders, perhaps now “there is little justification today for legal rules that force the use of land” and “less ‘productive’ uses may be best for society.”<sup>310</sup> Separately, land is distributed unevenly. In utilitarian terms, does unequal distribution count as a disutility, a fairness-based side constraint on utility, or a factor irrelevant to social utility? And when authorities rate social utility, should they regard as commensurable or incommensurable the individual utility profiles of owners who have different amounts of land?<sup>311</sup>

### **C. *Empirical Overload***

Pragmatic utilitarianism suffers from another tendency: informational overload. Direct theories of utilitarianism “make enormous demands on supposed empirical information[, which] is . . . largely unavailable.”<sup>312</sup> When a utilitarian theory does not explain satisfactorily whether and why an unconsented encroachment is welfare-enhancing or –diminishing, it can paralyze a public decision-maker. This problem gets even worse when combined with the problem described in the last section. If a decision-maker is free to consider any and all relevant consequences, but she cannot confidently assign plus or minus signs to those consequences, she has not freedom but a paralyzing burden.

Some utilitarian property scholarship seems unaware of this problem. Consider Richard Posner’s treatment of the choice between permanent damages and injunctions in property disputes. Posner starts with the presumptions set forth in Calabresi and Melamed’s *Cathedral* framework: Property rules are preferable when transaction costs are low and parties can bargain

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<sup>308</sup> Williams, *supra* note --, at 137.

<sup>309</sup> See *supra* notes 44-45 and accompanying text.

<sup>310</sup> Stake, *supra* note 50, at 2435.

<sup>311</sup> See Williams, *supra* note --, at 141-42.

<sup>312</sup> Williams, *supra* note -- at 137; Alexander, *supra* note 41, at 317.

to allocate rights to higher-valuing users; liability rules are preferable when transaction costs are high and bargaining is impracticable. Posner then rebuts that presumption in one direction (to favor injunctions) when perfect information is available, and in the other direction (for damages) when perfect information is *not* available. In that latter case, “especially when subjective values are involved,” “[a]s long as the court is no more likely to overestimate than to underestimate damages,” “the average award . . . will be a reasonable approximation of the average harm to the plaintiff’s property.” Yet Posner suggests this pro-damage presumption should not be absolute, because “it would be inefficient never to award injunctive relief.” On that ground, Posner suggests the second-level pro-damage presumption should be overridden if and when it would be too costly for courts to determine damages in every case, if over- or under-compensatory payments might create moral hazards, or if under-compensatory awards might encourage the property to “cycle” back and forth between the parties as they tried to outbid one another.<sup>313</sup>

This analysis could justify anything. The analysis is indeterminate in several ways. Important here, it is indeterminate because all of the factors – most of all, the claims about party value, moral-hazard problems, and cycling – are “implicitly empirical but not capable of precise justification.”<sup>314</sup> A trier of fact could justify any combination of damages and injunctions if he made the right assumptions in the absence of complete empirical data. In their candid moments, utilitarian property scholars admit as much. Thus, in his treatment of adverse possession, Ellickson tallies twelve relevant costs,<sup>315</sup> which may reduce the utilities of title owners, squatters, interested third parties, or the court system.<sup>316</sup> The curves seem to justify a sensible justification of adverse possession. Yet Ellickson – wisely – warns that “no one should take th[e] particular outcome” he sketches in his curves figure “seriously,” because he “drew the curves” “from intuition”<sup>317</sup> and because “[m]any of these costs are difficult or impossible to quantify.”<sup>318</sup> Without quantitative verification, his curves seem sensible largely because they set the relevant

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<sup>313</sup> Posner, *Economic Analysis of Law*, § 3.10, at 87.

<sup>314</sup> *Id.* at 2095.

<sup>315</sup> See Ellickson, *supra* note 18, at 725-34; *supra* note -- and accompanying text.

<sup>316</sup> See Ellickson, *supra* note 18, at 728, 729, 731, 732, 733, Figures 1-5.

<sup>317</sup> *Id.* at 733.

<sup>318</sup> See *id.* at 726.

costs with predictions “blindingly obvious that they could better be described as stemming from common sense than economic analysis.”<sup>319</sup>

**D. Moral Formation**

When a utilitarian decisional process suffers both from normative uncertainty and empirical overload, it then experiences an urge to focus on “those considerations which respected intellectual techniques can seem, or at least promise, to handle.”<sup>320</sup> Colloquially, Williams suggests utilitarianism focuses normative analysis the same way a streetlamp focuses an owner’s search for his lost keys at night. Both encourage the searcher to look only where the light is.

Utilitarian property scholarship exhibits this tendency. A substantial portion of law and economic scholarship prefer to analyze land disputes in the most concrete way possible—as transactions that could and should be consummated if only a disinterested judge with economic training could circumvent the transaction costs for the parties. On that basis, many articles in the *Cathedral* genre favor legal rules that institute “liability rule” payments, in the form of fair market value damages. These rules are supposed to provide a substitute for Coasean bargaining. If there are many sellers and one buyer, a liability rule gives the buyer power to circumvent the sellers’ coordination problems and force a transaction.<sup>321</sup> Or, as the auction literature suggests,<sup>322</sup> a series of liability-rule payments allow the parties to hone in on the true value of an asset while playing a game of purchase-option ping-pong.

These and other utilitarian authorities abstract away from a significant possibility: The more the law allows forced purchases at fair market value through permanent-damage awards in particular cases, the more it encourages aggression by commercial developers, retailers, and other prospective property assemblers against other property owners. This possibility stokes much of the popular opposition to the *Kelo* decision, for *Kelo* seems to embody and legitimate aggressive use of eminent domain in urban redevelopment – to *circumvent* the aspects of encroachment liability and remedy doctrine that deter aggression in the acquisition of property.<sup>323</sup>

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<sup>319</sup> David B. Sentelle, Law and Economics Should Be Used for Economic Questions, 21 Harv. J. L. & Pub. Pol’y 121, 121 (1997).

<sup>320</sup> Williams, *supra* note --, at 148.

<sup>321</sup> See, e.g., Posner, *supra* note 44, § 3.10, at 69-70; Cooter & Ulen, *supra* note 50, at 99-107.

<sup>322</sup> See Ayres & Talley, *supra* note --; Ayres & Balkin, *supra* note --; Ayres in Valp.

<sup>323</sup> I thank Ted Seto for encouraging me to make this point more explicit.

Although many utilitarian authorities show little or no attention to this problem, a few do and confirm the scope of the problem. For example, in *Good-Faith Error and Intentional Trespassing in Adverse Possession*, Jeong-Yoo Kim criticizes trespass's harsh rules against intentional encroachers.<sup>324</sup> Kim describes these rules as products of intuitions about justice and proceeds to critique them according to efficiency criteria. According to Kim, the anti-bad-faith rules are inefficient because they they "overlook[]" the possibility "that the [adverse] possessor's actual belief can be endogenous, rather than exogenous." The adverse possessor may "choose to be either in good faith or in bad faith by deciding whether to make the effort to acquire information about the true boundary."<sup>325</sup> Kim argues that it is inefficient for an adverse possessor to remain ignorant, for his ignorance prevents him from gathering the information he needs to avoid "wasteful social costs due to specific investments."<sup>326</sup> Yet Kim does not consider all the possible effects of endogeneity. Many non-owners are probably deterred by trespass's harsh *scienter* rules. If the only penalty for a knowing trespass were the market-value price for a comparable rental or sale of the land, non-owners might encroach on more land, gambling that they can profit after paying fair-market value to ousted owners. That norm could easily encourage the volume of encroachments, which in turn might undermine jeopardizing investment in land generally. Kim focuses narrowly on the detrimental static effects of bad-faith rules on current adverse possessors. Yet he does not consider the possibility that the same rules are designed to avoid transmitting broader, dynamic social-norm-shaping lessons.

Kim's article illustrates a broader and ominous trend. Fennell illustrates when she suggests that, under current trespass and adverse possession law, an encroacher "does far better to remain in ignorance (or pretend to) and never broach the [encroachment] with the record owner."<sup>327</sup> Kaplow and Shavell avoid Kim and Fennell's extreme claims. They are relatively sympathetic to property rule remedies (injunctions) and critical of the auction concept, on the ground that iterative auctions and damage awards generally encourage administratively-expensive "cycling" of property.<sup>328</sup> Yet Kaplow and Shavell are correcting for a problem much

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<sup>324</sup> Jeong-Yoo Kim, *Good-Faith Error and Intentional Trespassing in Adverse Possession*, 24 *Int'l Rev. L. & Econ.* 1 (2004).

<sup>325</sup> *Id.* at 3.

<sup>326</sup> *Id.* at 10.

<sup>327</sup> Fennell, *supra* note --, 100 *Nw. U. L. Rev.* at 1043.

<sup>328</sup> See Kaplow & Shavell, *supra* note --, 109 *Harv. L. Rev.* at 765-66. Posner deserves attribution for describing Kaplow & Shavell's argument in terms of "cycling." *EAL* § 3.10, at 70.

smaller than the main problem. The danger is not that Kelo, Corcoran Jennison, and a third developer will dissipate rent in an endless bidding war for Kelo's home. Rather, the problem is that that bidding war will encourage Corcoran Jennison and hundreds of other prospective property purchasers to use trespass (or eminent domain) to bypass markets altogether.<sup>329</sup> As the later Epstein warns, remedy doctrine punishes deliberate encroachments and excuses accidental ones because only the latter "pose no danger of multiple sequential transformations of property rights. The scenario in which A takes from B who took from C depends on deliberate interactions."<sup>330</sup>

*E. Lockean Utilitarianism?*

Of course, some utilitarian scholars have avoided "a crude, narrowly focused utilitarianism in which individual situations or specific legal rules are evaluating in wealth-maximizing or welfare terms." Instead, they have focused on "solving problems wholesale and coordinating the activities of often-anonymous actors" and accepted that property inevitably "has gappiness at its core."<sup>331</sup> If scholars can adapt a generally indirect utilitarian approach to account for the criticisms consequentialist moral theories expose, do those adaptations make such moral theories unnecessary or superfluous?

I have three responses. First, if this is the only question remaining, this Article has proved most of what it set out to accomplish. If the choice is between Lockean property theory and an epistemologically-modest form of indirect utilitarianism, the choice is extremely close. Most contemporary scholars will be surprised that the choice is close.

Second, Lockean political theory has two slight redeeming advantages: modesty, and candor. Law and economic and other utilitarian approaches are supposed to have an advantage over practical theories of morality. The former are supposed to trade in "empirically sound methods" and the latter trade in mere "intuition and any available facts."<sup>332</sup> When Ellickson, Smith, the later Epstein and others acknowledge that utilitarian issues are "implicitly empirical but not capable of precise justification,"<sup>333</sup> however, they concede that advantage away. At that

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<sup>329</sup> See Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 88-89 (1986).

<sup>330</sup> Epstein, *supra* note 49, at 2100.

<sup>331</sup> Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 *Cornell L. Rev.* 959, 962-63 (2009).

<sup>332</sup> Cooter & Ulen, *supra* note 50, at 3.

<sup>333</sup> *Id.* at 2095.

point, productive labor theory is slightly more attractive if only because it has the modesty to put its epistemological mediocrity front and center.

Last, and most important, I still wonder whether these indirect utilitarian accounts of trespass and adverse possession are parasitic on productive labor theory. When utilitarian property trade-offs “are difficult or impossible to quantify,”<sup>334</sup> utilitarian scholars must take one or more of several possible shortcuts. One shortcut is to ask whether a possible explanation of doctrine accords with existing legal practices. If the law has a “strong set of practices” favoring property rules, the strength of those practices “suggests that [a] judgment has been made, perhaps unconsciously, by large numbers of persons who have been forced to confront just these choices.”<sup>335</sup> Yet what if—as Parts V through VII showed—those practices can be explained on the ground that a large number of judges *consciously* chose to write into the common law principles of “labor” operationally similar to the account rendered here? If the case law gives indirect-utilitarian property scholars a trump over pragmatic-utilitarian alternatives, it gives labor theory an even more devastating trump over indirect utilitarianism. After all, the seminal cases talk in terms of “rights” ordered to secure and promote concurrent interests in “use” – not the information-cost-saving or other welfare-promoting aspects of property.

More generally, indirect-utilitarian accounts of trespass and adverse possession may bootstrap on notions of “morality” or “socialization” that limit the focus of “utility” in productive labor theory. For example, Ellickson reconciles trespass to adverse possession by suggesting that trespass’ strict and boundary-driven structure minimizes “demoralization costs”<sup>336</sup> not relevant in adverse possession disputes. Yet “demoralization costs” are in no way easy to ground or explain in subjective utilitarian terms. With all respect to Ellickson (and Frank Michelman, who coined the phrase “demoralization costs”), if a utilitarian approach makes “demoralization” the trumping social costs, it is a moral approach in utilitarian window dressing. When a certain course of action “demoralizes” citizens, it means that the citizens are suffering psychic pain or behaving barbarically – which is to say, they are not enjoying the utility that a well-socialized and –civilized citizen would and should enjoy in a well-ordered political community. Those criteria of “socialization,” “civilization,” and “order” cannot be reduced to utils or raw pleasure.

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<sup>334</sup> Ellickson, *supra* note 18, at 726.

<sup>335</sup> Epstein, *supra* note 49, at 2095.

<sup>336</sup> Ellickson, *supra* note 18, at 727. Merrill’s account of market bypass, see 72 Cornell L Rev at 68-69, is subject to the same criticism.

To the extent Ellickson and others disregard this problem, they make their utilitarian approaches subtly parasitic on theories of practical morality that do focus on the problem.

To appreciate this parasitism, consider *Jacque v. Steenberg Homes*. When the Wisconsin Supreme Court justified the jury's \$100,000 punitive damage award, it justified that award with the following utilitarian argument:

Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. ... Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.<sup>337</sup>

Superficially, this argument makes sense. In utilitarian terms, dueling diminishes social welfare. The Jacques didn't suffer any private losses. If Mr. Jacque had challenged a Steenberg Homes official to a duel, the duel would have wasted time and possibly generated great personal and social losses if Jacque had killed the officer. The same calculation explains why would have been inefficient at a superficial level if Mr. Jacque had burnt down a Steenberg Homes building secretly in retaliation. At a deeper level, however, this cost-benefit analysis begs the most crucial questions. Why couldn't the law prevent dueling or revenges simply by outlawing dueling and punishing vindictive conduct severely as malicious conduct? To be more pointed, if dueling and retaliatory arson are not inefficient, why must the law punish the likely victims of the duel or the arson – to deter future conduct by owners in Mr. Jacque's shoes? Implicitly, the Wisconsin Supreme Court assumed,<sup>338</sup> Steenberg Homes's conduct was anti-social, so much so that the law must realistically expect owners in the Jacques' shoes to take the law into their own hands if the law does not deter the conduct. In other words, when the Wisconsin Supreme Court asserted that intentional but harmless encroachments detract from social welfare, it assumed that social welfare consists of a state of affairs in which most citizens reasonably expect other citizens to respect and the law to uphold their equal rights.

Here, the Wisconsin Supreme Court recast in utilitarian jargon phenomena that make far more sense as prescriptions of political deontology. One of the most basic tests of legitimacy for

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<sup>337</sup> *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160-61 (Wisc. 1997).

<sup>338</sup> As do *Merrill & Smith, Morality*, 48 Wm. & M. L. Rev. at 1855; see *id.* at 1871-74 (approving of *Jacque*'s holding).

any political system is whether it can tame the passion for revenge, to make it a desire for justice under the system's laws. When a political community has bad laws or incompetent law-enforcement officers, those facts can undermine obedience for the law<sup>339</sup> or stoke "Passion and Revenge."<sup>340</sup> Civil society secures rights better than the state of nature, in which all individuals must "be Judges in their own Case."<sup>341</sup> In a civilized community, the police officer and the judge get pride of place. In an uncivilized community, honor-lovers take law into their own hands – as the Wisconsin Supreme Court apprehended by making an analogy to dueling. If an to the extent that intentional trespasses generate social *disutilities*, they do so because well-socialized citizens see such acts as fundamentally threatening to the social order. Here, it is impossible to explain what social utility requires without appealing back to a philosophical account of how civility, revenge, industry, and covetousness all interact in a well-socialized person and a decent political community.

#### CONCLUSION

I hope that this Article has demonstrated four broad lessons. First, and most important, there are good reasons to suspect that Lockean property theory is much more robust than it now seems to most American property scholars. Libertarian Lockeanism explains why property is associated with broad domains of autonomy, but it lacks internal principles explaining how far property rights should extend or why they should be qualified. Although labor-desert theory explains the connection between work and ownership, it cannot explain why property law does and often should assign ownership rights to people who have not proven desert. Productive labor theory is more supple and comprehensive than both. It describes a civil society in which citizens are socialized to be industrious with their own assets and not covetous of their neighbors'.

Second, productive labor theory has remained out of sight for a generation at least in part because it has been trivialized by loose assumptions about "deontology." This development is understandable. Nozick's libertarian theory is inviolably deontological, and labor-desert theory could easily be construed to be deontological in that sense as well. Yet productive labor theory is neither inviolably nor exclusively foundationally deontological. Productive labor theory is politically deontological – but it is a gross philosophical mistake to assume political deontology stops a normative theory from considering consequences.

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<sup>339</sup> See Locke, TT, II.219, at 429-30, II.222, at 430-32.

<sup>340</sup> Id. II.13, at 293.

<sup>341</sup> Locke, TT, supra note 1, II.13, at 276.

Third, the accounts of productive labor, trespass, and adverse possession ought to dispel an impression many property scholars have, that classical liberal theories of property generate “overly boosterish” defenses of control rights. If the account of productive labor theory presented here is representative, some interpretations of classical liberal thought are far “more pragmatic” than most property scholars realize.<sup>342</sup>

Finally, contemporary property scholarship is more impoverished than it needs to be. Contemporary scholarship continues to assume that pragmatic utilitarianism provides the most reliable foundation for normative analysis of policy issues. Pragmatic utilitarianism, however, has more trouble in deciding whether to treat different consequences as utilities or disutilities; in making prescriptions in the absence of complete information; and in reconciling social utility to moral formation and socialization. To appreciate more clearly the strengths and weaknesses of the normative approach they prefer, American property scholars may want to consult Locke as a guide.

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<sup>342</sup> Ellickson, *supra* note 12, at 1397.