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Climate Change, Sustainability, and the Failure of Modern Property Theory

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Property rights are, I argue, the single largest legal limitation on our ability to respond effectively to the climate change crisis. This is because our understanding of the scope of property rights shapes and limits legal concepts such as regulatory takings, land use law, common law tort and property claims, and statutory environmental regulation. Property sets our cultural norms about how much the government can or should control the uses of land. The goals of this Article are to (1) historically demonstrate the failures of socially-oriented property theory as they are represented in the analytical framework of doctrines such as social utility and (2) advance a sustainable theory of property whose usefulness is demonstrated by that historical examination.

From a common law model of property based on near complete control by private landowners, property theory evolved to a model of viewing property as a vehicle for managing the competing interests of the individual owner and the larger society. From this model of competing interests, modern property theory weighed in on the side of society, reframing property interests largely in terms of the community and social relationships. I argue that the social relations and community approaches as they have developed in the case law have environmentally failed us.

Community-based concepts have permeated the common law of torts and property, nudged into statutes, and undermined and eroded the protections that had been available. This erosion emerged from ostensibly social concepts, such as social utility, that were so neutral and malleable that they became entangled with a norm of industrial productivity. Having developed that association, they proliferated through property and tort law, insulating defendants.

To address climate change, we need strong federal environmental regulation, coupled with local access to effective common law claims as a

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backup and safety net. Both of these must have a foundation on property's key true social utility, which is human survival.

We cannot rely on the paltry and inaccurate framework of private owner against society as our social model of property, but instead we must give community-based concepts like social utility a true normative meaning, centered on sustainability and with land as the unique, finite, and foundational resource.

I. INTRODUCTION

Property rights are, I argue, the single largest limitation on our ability to respond effectively to the climate change crisis. This is because our understanding of the scope of property rights shapes and limits not only relevant legal concepts such as regulatory takings, land use law, common law tort and property claims, and statutory environmental regulation but also cultural norms about how much the government can or should control the uses of land. As a

result, our theories of property—particularly how we define the scope of private rights to land—must change if we want a legal system that is positioned to respond to the climate crisis. The goals of this Article are to (1) demonstrate the failures of modern property theory as it has been incorporated into property doctrine (as concepts such as cost benefit analysis or social utility) and (2) advance a sustainability-focused theory of property whose usefulness is demonstrated by that historical examination.

Property theory underpins and explains property law, which is, I argue, the foundational limit of environmental law. The extraordinary power and significance of property law within American law more generally creates this relationship due to the connections assumed and endorsed between property and liberty or individual freedom.[1] Environmental law is effectively impossible in a system where the theory of property espouses a model of near complete control by private landowners. Thus, when environmental regulation developed in the twentieth century, property scholars re-worked traditional ideas of the meaning of property.[2]

Re-working property theory allowed scholars to argue for increasing levels of regulation based on a different understanding of the nature of those private ownership rights or entitlements. This reoriented property right is not about the relationship between a person and land but instead about the relationship between an individual and the rest of the society.[3] An entitlements model of this sort then tolerated a degree of regulation of private land, pushing back against the prior norm of absolute individual control of private property.[4] In

1. Eduardo Peñalver writes, "Property rights enjoy almost mythical status within American political thought in large part because of this commonly accepted connection to individual freedom." Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890 (2005). Property in America not only has this mythical status but also one that has a commensurate perception of morality. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1849 (2007) (arguing that no system of property can stand without a moral principle and that the American system does in fact operate with the assurance of such a principle).

2. The view of private and social obligations as the defining map of environmental law and property is often shorthanded as the tragedy of the commons. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968) (introducing this metaphor for the two competing interests and arguing that without regulation, the individual owner will exhaust resources to the detriment of society).

3. From the perspective of the individual owner, arguably the value of property lies in the way that "property supposedly facilitates the individual's exit from the demands of community." Peñalver, *supra* note 1, at 1892.

4. As Smith explained, "No longer can the owner of Blackacre claim with much force that ownership entails the right to use the resource without interference." Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1106 (2003). Smith concludes, "Thus, the idea that a property right is a right to a thing that avails against the world has been replaced

this approach, everything is imagined in the context of the competing interests of the individual owner and society. This framework also explains why both courts and property theorists continue to struggle with the degree to which the principle of exclusion is the central feature of property law.[5]

Within the context of environmental law, the social relations theme of property theory could then address externalities, such as pollution, by endorsing more substantial environmental regulations. Society is seen then as the victim of the individual landowner; society is also the vindicator of sustainability through regulation. The idea then is to think of property as social rights, not absolute individual rights, thus promoting the regulation of private land. The value of community trumps the individual right, thus weighing in on the side of more regulation in the conflict between private owner and society.[6] We still often hear this push, as though it has not yet been sufficiently successful. For example, in 2009 Joseph William Singer began an article by arguing, "Property is a social and political institution and not merely an individual entitlement."[7] His statement reflects the continuing need theorists feel to push back against the rights/entitlement/individual side of the spectrum.

Within this model of competing interests, modern and progressive property theory weighed in on the side of society, reframing property interests largely in terms of the community as a quintessential legal value and a defining characteristic of what it means to have property law. While modern property theory has been highly fractured, a central feature, which is retained by the more recent progressive theory, is a social-relations approach that favors community over the individual.[8] This Article focuses on this feature not only because it is

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with the idea that a property right is only one possible entitlement plucked from a wide range of equally privileged results." *Id.*

5. Among current theorists, Smith offers the strongest statement in favor of property as organized primarily around the value created by exclusion. *See, e.g.*, Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012).

6. It is, of course, a fallacy to think that the individual owner and society are always opposed. For example, the value of stable ownership may weigh in favor of both the current owner and society more generally in the long term. *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 538 (2005) (arguing that property law foundationally creates and defends value via stable ownership).

7. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1010 (2009).

8. Progressive property also specifically focuses on social relationships and seeks innovation in terms of reworking concepts to respond to the "underlying human values that property serves," in other words the community values. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009). Similarly, another thread of theory focuses on the idea of human flourishing and, similarly, aligns with the notion of community as a push back against the individual's desires. *See, e.g.*, GREGORY S.

a strong thread in what is otherwise a loosely woven cloth but also because there is more evidence of the social-relations approach being utilized within the courts (via such mechanisms as social utility) and in environmental statutes (via the cost benefit analysis).

This Article demonstrates how courts have adopted social utility as a marker of community. Social utility, which has its origins primarily in nuisance law, has proliferated to a variety of other property, tort, and environmental contexts. The problem is that the social value content in this concept is so broad and vague that it has been shaped into an economic and industrial focus, which ignores all other models of social value, including sustainability.

The evolution and proliferation of the concept of social utility demonstrates how the social relations or community approach to property theory, with society aligned against the individual, is environmentally failing, at least as the courts are employing it. The idea of social utility has, in fact, undermined and eroded the protections that had been available under property and tort law.[9] I argue that the community and social relations value is too general and without scale, both of which allow it to be manipulated by individual parties in litigation, generally in favor of the polluter. Community can be interpreted so narrowly as to potentially create reliance interests of the neighborhood in an existing industry, as seems to be recognized in cases such as the *United Steel Workers* case from Youngstown, Ohio,[10] or so broadly as to support a colossally destructive copper smelting plant due to the job and tax base it created for a large number of people.[11] Community as a value is both too broad and too narrow and may support what are, in fact, incommensurable goals. As a result, the court cases give us a history of the manipulation of community values within tort law. This history, however, also points us to a better framework by providing insights into the kind of property theory that would be necessary to support a legal system responsive to a climate crisis.

ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 81 (2012); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760–72 (2009).

9. *See* Jill M. Fraley, *The Uncompensated Takings of Nuisance Law*, 62 VILL. L. REV. 651 (2017) (explaining how the concept of social utility has diminished the protections of nuisance law to the degree that it creates judicial takings).

10. *See, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 621 (1988) (discussing this case and others in the context of the property rights that might exist in the workers and community due to the existence of a business or industry); *see also* United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1265 (6th Cir. 1980).

11. *See* Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 661, 666–67 (Tenn. 1904).

In the threads of modern and progressive property theory, there are occasional moments when land shines through as a part of the analysis,[12] but these are, I argue, too rare. A coherent language of property theory will be a language of land, a language of sustainability. To better support the efforts of progressive and other modern theorists, we must reorganize the debate altogether around the key values that will provide us with a workable future: conservation, sustainability, and even (I am sorry to say) rationing.

Even without the climate crisis, the polarized owner-society approach is a losing game. It is too paltry of a framework to manage our resource dilemmas successfully in the long-term precisely because the analytical structures of property law have emerged around the assumed to be competing interests of the owner and society without regard to the unique nature of land as a limited and damaged resource, required for both the owner and society, as well as future generations. The underlying normative commitments of the existing scheme quite literally lack common ground.

This Article advances a theory of real property centered on the unique nature of land as our universal and most foundational sustaining and limited resource. This approach should prove useful because to address climate change, we need strong federal environmental regulation coupled with local access to effective common law claims as a backup and safety net—both of which must have a foundation on a redesigned understanding of private property in society. This theory reorganizes the polarized debate around the individual owner and society, which has (perhaps unintentionally but also crucially) omitted land entirely from the equation, reformatting the relationships around the land itself. This theory responds to not only the climate crisis but also the more general failures of the community and social relations approach, which are insufficient for this task for multiple reasons.

Next, and relatedly, community as a social value is too malleable to support a strong statement about property and climate change. Meanwhile, nothing less than a strong statement for sustainable land uses will support the level of change necessary to address the climate crisis. *Social relations and community are about people. A sustainable property theory puts land before people because only by doing so can we ensure a future for the people.* We must understand property as our sustaining landscape that must be protected.

This Article proceeds in four parts. Part I provides the background of property theory necessary to explain our current predicament, including the valuable changes made with modern property law and the challenges modern

12. As much as I appreciate these efforts, I believe they often function more as poetry within philosophy, an aside rather than the central text. For example, Peñalver speaks of land, human activity, and memory. *See* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829–30 (2009).

property law leaves for a sustainable future. Part II first explains the historical lens and then examines the relationship between property theories and environmental law within the first two eras: the common law era and the modern era of viewing the individual and society as competitors before the courts. Because it is the primary case study for the argument, I reserve evaluation of the current era for Part III, which provides a case study of how the community approach, as framed and integrated by the courts in the concept of social utility, has proliferated through the causes of action in tort law, undermining common law claims that could support environmental values. Part III argues that the concept of social utility has been framed in the community values espoused by modern property theory, and yet social utility has repeatedly served to undermine environmental goods by focusing instead on business development, jobs, and tax dollars to the detriment of the environment. Drawing on the history and examination of current property theory, as well as case law, Part IV proposes a new approach to property theory that is grounded in sustainability and reintegrating land into our definitions of property.

II. A BRIEF HISTORY OF PROPERTY THEORY

A. Early Property Theory: The Individual, Possession, and Exclusion

Early property theory focused on the individual private owner's relationship to land. Unsurprisingly, much of early property theory primarily addressed the acquisition of property.[13] Focusing on acquisition meant that, particularly within the British tradition, possession formed the heart of ownership because it was the point at which property was born.[14]

13. *See* CAROL M. ROSE, PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 12 (1994). Initial acquisition of property is a central preoccupation of theorists because any theory of property must ground itself in some account of how initial rights were acquired from the great primordial commons. *See* John T. Sanders, *Justice and the Initial Acquisition of Property*, 10 HARV. J.L. & PUB. POL'Y 367, 368–69 (1987).

14. The British approach drew from the Roman tradition in particular. Under Roman law, land had to be continuously possessed lest another begin occupancy: *quod nullius est, fit occupantis*. 1 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 257 (1871). The Roman approach emphasized labor, focusing on a system of property ownership that maximized utility. *See* Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMPAR. L. REV. 119, 124–25 (1997). Possession effectively claimed not only "things which had not as yet fallen under the power of any proprietor, but [also] those which had been lost or relinquished by the former owner." ERSKINE, *supra*, at 257. Notably, however, Roman law limited each person to the land he could cultivate himself, thus distributing land broadly throughout the community. Gardiner, *supra*, at 124.

Possession, however, did not refer to occupation as much as to enterprise and cultivation.[15] In other words, perfecting a claim of ownership required a change in land use to one that was less sustainable—i.e., from forest to pasture or from bog to field.[16] Philosopher John Locke's approach to labor supported these ideas with a theory of property acquisition that favored land use changes.[17] Locke summarized the rule of possession as follows: "Whatsoever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar [r]ight."[18] Carol M. Rose once explained that "first possession is the root of title" was the "maxim of the common law."[19]

This British colonial approach to property theory settled into the common law via William Blackstone. Blackstone argued, "[O]ccupancy is the thing by

15. *See* PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, 26–27 (1995). Without religious and racial components, the basic legitimacy of claiming empty territory continues in international law. Unoccupied land without an indigenous people appears to be available to first possessors, perhaps even when those claimants are not sponsored by any nation-state (at least so far as property, not sovereignty or jurisdiction, would be concerned). *See* L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 265–66 (1997) ("Despite the absence of a state sovereign to give legal sanction to these rights, customary practice nonetheless has repeatedly recognized private property rights in *terra nullius*.").

16. For example, Pennsylvania's charter granted the right to claim land "not yet cultivated and planted." *Charter for the Province of Pennsylvania-1681*, YALE L. SCH.: THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/pa01.asp [https://perma.cc/36NR-62F3].

The early scholarly tradition agreed. Grotius explained, "[U]ncultivated land ought not to be considered as occupied." HUGO GROTIUS, THE LAW OF WAR AND PEACE 202 (1925). Vinogradoff argued that occupation "for purposes of cultivation gives rise to a possessory right." PAUL VINOGRADOFF, THE GROWTH OF THE MANOR 80 (1905).

Modern scholars have seen similar patterns. Laura Brace argued that the idea of cultivation and land "improvement" has centrally "affected attitudes towards property and ownership." Laura Brace, *Husbanding the Earth and Hedging out the Poor*, *in* LAND AND FREEDOM: LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA 5 (A.R. Buck, John McLaren & Nancy E. Wright eds., 2001). Carol Rose described possession's texts as "those of cultivation, manufacture, and development." ROSE, *supra* note 13, at 20.

17. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988).

18. *Id.* at 295. Of course, Locke limited his theory of property ownership significantly, by limiting acquisition of private rights to only "where there is enough, and as good left in common for others." *Id.* at 288. Locke explained, "[I]f either the [g]rass of his [e]nclosure rotted on the [g]round, or the [f]ruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his [e]nclosure . . . might be the [p]ossession of any other." *Id.* at 295. In terms of the origins of rightful possession, Locke explained "at the beginning, Cain might take as much [g]round as he could till, and make it his own [l]and," but he was obligated to "yet leave enough to Abel's [s]heep." *Id.* (emphasis omitted).

19. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 75 (1985).

which the title was in fact originally gained."[20] Notably, as this approach rooted in British law, occupancy came not just to require residency or changes in land use but specifically to require as much change as possible, meaning a property claim was not established unless there was "full and complete utilization" of the property.[21]

Early American cases emphasize the role of land use in establishing possession or occupancy.[22] Landowners sought to demonstrate their possession by taking land to a more developed state, such as was available within the context of the landscape.[23] Courts sought land use, such as could be "required by the character and situation of the lands"[24] or "the circumstances."[25] Courts particularly sought information about the development of land "for such purposes as it is capable" to establish proof of possession.[26] A successful land use for the purposes of establishing possession was "an occupancy . . . according to its adaptation to use."[27]

The language of these cases emphasizes possession and property in terms of the maximization of development, often with a patriarchal attitude. When it came to land, the role of the owner was "subjecting it to the will and dominion of the occupant."[28] Cases favored changes to the landscape itself when possible: "[C]ultivation, enclosure, or erection of improvements."[29]

Early property theory linked possession with a key right of ownership: the right to exclude others.[30] The right to exclude others connects directly to the

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20. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1766), *reprinted in* PERSPECTIVES ON PROPERTY LAW 45, 51 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 3d ed. 2002).

21. Pat Moloney, *Colonisation, Civilisation and Cultivation: Early Victorians' Theories of Property Rights and Sovereignty*, *in* LAND AND FREEDOM: LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA, *supra* note 16, at 31.

22. Courtney v. Turner, 12 Nev. 345, 352 (Nev. 1877) (requiring a "beneficial" use of the land to establish possession).

23. *See id.*

24. Allaire v. Ketcham, 55 N.J. Eq. 168, 170 (N.J. Ch. 1896).

25. *Courtney*, 12 Nev. at 352.

26. State v. Newbury, 29 S.E. 367, 368 (N.C. 1898).

27. Morrison v. Kelly, 22 Ill. 609, 624 (Ill. 1859).

28. *Courtney*, 12 Nev. at 352.

29. Quatannens v. Tyrrell, 601 S.E.2d 616, 619–20 (Va. 2004) (quoting LaDue v. Currell, 110 S.E.2d 217, 222 (Va. 1959)).

30. Notably, exclusivity has been so soundly regarded as the central feature of property that social scientists tend to define property as a theory that "determines exclusive rights." Timothy Earle, *Archaeology, Property, and Prehistory*, 29 ANN. REV. ANTHROPOLOGY 39, 39–40 (2000).

role of property in sustaining lives.[31] The right to exclude was firmly entrenched in British law before the American Revolution; it has been described as "the bedrock of English land law."[32] Blackstone referred to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[33]

Similarly, American property law has strongly emphasized the right to exclude.[34] James Madison defined property as "dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."[35] Revolutionary era thinkers thought carefully about property and the right to exclude because, for them, property was inherently intertwined with the idea of liberty.[36]

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31. One way of thinking of the right to exclude is to think in terms of scarce resources. "In an anticommons, by my definition, multiple owners may each exclude others from a scarce resource and no one has an effective right to use." Michael Heller, *Empty Moscow Stores: A Cautionary Tale for Property Innovators*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 189, 190 (Charles Geisler & Gail Daneker eds., 2000).

32. Hunter v. Canary Wharf Ltd. [1997] 2 WLR 684 at 706 (Lord Hoffman). With that said, Carol Rose has argued that Blackstone would have seen the right of exclusive possession as an "ideal type rather than [a] reality." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L. J. 601, 604 (1998).

33. Rose, *supra* note 32, at 601.

34. Earle, *supra* note 30, at 40.

35. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

36. Jennifer Nedelsky has written about this intersection:

> To begin with, the problem of property arose for the Framers because their conception of it was inseparably tied to inequality. The link to inequality was liberty. Property was important for the exercise of liberty, and liberty required the free exercise of property rights; this free exercise would inevitably lead in turn to an unequal distribution of property. Property thus posed a problem for popular government because this inequality required protection; those with property had to be protected from those who had less or none. Without security, property lost its value.

Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 164 (1990). In this model the right to exclude also takes center stage. Nedelsky explains: "Property provided an ideal symbol for this vision of autonomy, for it could both literally and figuratively provide the necessary walls. The perverse quality of this conception is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated." *Id.* at 167.

Notably, modern property theorists may also share this attitude toward property and liberty. Joseph Singer wrote, "Property law and property rights have an inescapable distributive component. As Jeremy Waldron explains, '[P]eople need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have had no private property at all.'" Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP, *supra* note 31, at 3, 11.

Property scholars through the first half of the nineteenth century shared Madison's view. For example, Morris Cohen wrote in 1927 that "the essence of private property is always the right to exclude others."[37] And later theorists have understood traditional property theory consistent with this focus. As Joseph Singer explained, "The classical view of property concentrates on protecting those who have property."[38]

The U.S. Supreme Court has continuously supported this emphasis on the right to exclude. In 1979, the Court described the right to exclude as a "fundamental element of the property right."[39] In the same case, the Supreme Court explained that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[40] In 1982, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court noted, "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[41] More recently, in *Lingle v. Chevron USA Inc.*, the court spoke of the right to exclude as "perhaps the most fundamental of all property interests."[42]

Scholars similarly emphasize the importance of the right to exclude in the traditional American concept of property. J.E. Penner and Thomas Merrill both argued that the right to exclude is the centerpiece of the concept of property.[43] Carol Rose agreed, arguing that the right to exclude is often considered a defining characteristic for the institution of property.[44]

B. Modern Property Theory: Social Relationships and Community

Modern property theory conceptualized property rights as rights against others in society. Such a model reduces the emphasis on the owner's private rights and invites more intense regulation of private land. Simultaneously, such a model pushes back against the idea of absolute individual control. Modern property theory is, in the words of Peñalver & Katyal, a "body of literature

37. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927–28).

38. Singer, *supra* note 36, at 12.

39. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

40. *Id.* at 176.

41. 458 U.S. 419, 435 (1982).

42. 544 U.S. 528, 539 (2005).

43. J. E. PENNER, THE IDEA OF PROPERTY IN LAW 103 (1997); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

44. Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711 (1986).

emphasizing the dialogic and social nature of property law and eschewing the . . . static, individualist conception of property rights."[45]

This body of literature generally begins with Wesley Hohfeld, who re-conceptualized property rights in the twentieth century by arguing that the central function of property was not to order the relationship between an individual and an area of land, but rather to order social relationships.[46] His approach was not entirely new,[47] although the social relations approach is seen as defining modern property theory.

Hohfeld's approach became a norm for understanding property in the late twentieth century. Singer,[48] Munzer,[49] and Rose[50] all reformulated property as a set of social relations.

Singer argued "that the traditional classical conception of property centered around absolute control of an owner should be replaced by some version of this social relations model."[51] Singer emphasized the conservative and unyielding framework of traditional property theory, finding that "[t]he image underlying ownership is absolute power of the owner within rigidly defined spatial boundaries."[52] He explained, "The classical conception is furthermore premised on widely shared norms of promoting autonomy, security, and privacy. Yet the classical model of property is distorted and misleading both because it is descriptively inaccurate and because it is normatively flawed."[53] Singer sought a new model because he had significant criticisms of the traditional model for property theory. Singer stated, "The classical model misdescribes the normal functioning of private property systems by vastly oversimplifying both the kinds of property rights that exist and the rules governing the exercise of those rights. It also distorts moral judgment by hiding

45. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1101 (2007).

46. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 720–23 (1916–17). Although Hohfeld's thesis has been highly influential, there are dissenters. *See, e.g.*, PENNER, *supra* note 43, at 2 (arguing that property is best understood as "the right to a thing").

47. Jeremy Bentham wrote, "There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind." Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC'Y REV. 567, 572 (1998).

48. Singer, *supra* note 36, at 8.

49. Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001).

50. ROSE, *supra* note 13, at 4.

51. Singer, *supra* note 36, at 4.

52. *Id.*

53. *Id.* at 5.

from consciousness relevant moral choices about alternative possible property regimes."[54] Singer ultimately proposed a new approach:

> [A] conception of property based on social relations. This model reconceptualizes property as a social system composed of entitlements that shape the contours of social relationships. It involves, not relations between people and things, but among people, both at the level of society as a whole (the macro level) and in the context of particular relationships (the micro level).[55]

Laura S. Underkuffler highlighted the social aspect of property by defining property as "the resolution of conflicting claims and conflicting desires for what are often external, physical, finite goods."[56]

Similarly, Harold Demsetz described property rights as "instrument[s] of society [that] derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in laws, customs, and mores of a society."[57]

Demsetz focuses on what property gives a private party within a social context. According to Demsetz, "An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights."[58]

In many ways, there is nothing new about the social relations approach to property. Blackstone's famous formulation of our affection for property contains words that belie the social nature of property—concepts such as hold, dominate, and control.[59] Such concepts only make sense in relation to other individuals. There is no need to dominate, hold, or control if you have no competitors. Therefore, although Blackstone spoke to private property, he outlined the rights in a way that set them in opposition to others in the community. So perhaps it is no surprise that most recent scholars of property theory situate themselves within the social relations approach to property.[60]

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54. *Id.*

55. *Id.* at 8.

56. LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 143 (2003).

57. Harold Demsetz, *Toward a Theory of Property Rights* (1967), *reprinted in* THE ECONOMICS OF PROPERTY RIGHTS 31 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974).

58. *Id.*

59. *See* BLACKSTONE, *supra* note 20, at 45–52.

60. *See* Peñalver & Katyal, *supra* note 45, at 1101 (citing themselves as members of the ongoing discussion). Peñalver and Kaytal cite to the following scholars and works as contributing to the developing literature on social relations and property:

> GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1 (1997); ERIC T.

Adjusting to viewing property through a social lens did not require modern property scholars to veer away from the primacy of the right to exclude, as it was formulated in the earliest years of the new American Republic. Indeed, in this regard, modern scholars have been quite consistent with traditional property theory, continuing to affirm the right to exclude.[61] As Goldstein and Thompson argued in 2006, "[T]he cornerstone of private property is the right to exclude anyone and anything from your property that you don't want on your property."[62] Maintaining a focus on the right to exclude may be, indeed, quite logical given the history of territorial claims as an instigator of violence. "It may be the case that most trespasses are relatively minor offenses . . . . But, all the same, . . . most wars are fought over territory. Property does matter, as centuries of battles, large and small, to defend it show."[63]

Modern property theory has, however, often treated the right to exclude as insufficient to justify or explain the concept of private property. Adam Mossoff, for example, includes the right to exclude within his understanding of property but finds that it is "essential but insufficient" for explaining property.[64] Therefore, while modern property theorists generally are willing to affirm the importance of the right to exclude, it is but one component of their theories.

One significant strain of modern property theory emphasizes the intersection between law and economics and property.[65] Modern property

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FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 7 (2003); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 11 (2000); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 7 (1989); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 YALE J.L. & FEMINISM 7, 7 (1989); Laura S. Underkuffler-Freund, Response*, Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1034 (1996); Andre J. Van der Walt, Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa § 1.4 (2006) (unpublished manuscript, on file with authors).

Id. at 1101 n.19.

61. *See, e.g.*, Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1836 (2006) (describing the right to exclude as "foremost among the property rights").

62. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 53 (2006).

63. Nicole Stelle Garnett, *Property In-Laws*, 156 U. PA. L. REV. PENNUMBRA 279, 287 (2007); *see also Preface* of PERSPECTIVES ON PROPERTY LAW, *supra* note 20, at xvii ("Wars and revolutions are commonly fought over property rules and property distributions.").

64. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377 (2003).

65. While modern property's social relations approach may seem "soft," the economic component adds a layer of irrefutability. Economics, like other sciences, benefits from the air of scientific certainty. "Scientific knowledge is politically powerful in part because it seems to exclude

theory is consistent with an economic perspective that thinks of pollution as an externality.[66] While a landowner may profit from a specific land use, that use may also generate negative consequences (externalities) for other surrounding landowners.[67]

Law and economics then addresses itself to the problem of competing interests of private landowners, in particular the two competing rights to exclude. One landowner may wish to exclude society from influencing his land uses, while the other wishes to exclude the externalities. Such disputes must be dealt with through property or tort law. Law and economics provides rationales for how such disputes should be resolved. Although the model can be adapted to respond to more national and international interests such as climate change, scholars have primarily conceived of the model and developed the theory in the context of a few neighbors who are all private property owners.[68]

Law and economics approaches are also consistent with modern property theory in maintaining an emphasis on possession. Modern legal theory has not refuted the emphasis on possession and instead acknowledges possession as a key component of American property theory.[69] Similarly, law and economics approaches have favored the rule of first possession, arguing for the rule's efficacy in rewarding labor and promoting active use of resources.[70]

There is a certain symmetry behind law and economics approaches and modern property theory's embrace of the social relationships approach. For example, Abraham Bell and Gideon Parchomovsky have proposed a theory of property based on the idea of organizing property rules to favor "the value inherent in stable ownership."[71] While Bell and Parchomovsky's theory makes sense based on utilitarian economics, a property system that promotes stable ownership is also likely to promote non-violence—at least in its initial setting of distribution with land in abundance. Such an understanding is also an

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the arbitrary and subjective. Scientists seem to provide universally valid, impersonal, nonideological conclusions, transforming questions of power and politics into the subjects of rational, value-neutral inquiry." Joy Rohde, *Gray Matters: Social Scientists, Military Patronage, and Democracy in the Cold War*, 96 J. AM. HIST. 99, 100 (2009).

66. Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859, 1877–78 (2018).

67. *Id.* at 1877.

68. *See* J. William Futrell, *The Transition to Sustainable Development Law*, 21 PACE ENV'T L. REV. 179, 193 (2003).

69. *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221–22 (1979); Rose, *supra* note 19, at 73.

70. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 3.1, at 36 (5th ed. 1988), *reprinted in* PERSPECTIVES ON PROPERTY LAW, *supra* note 20, at 54, 59.

71. Bell & Parchomovsky, *supra* note 6, at 538–39.

intuitive one and can be understood in the short-term as an on-the-ground view that might have influenced the adoption of private property regimes.

One of the first modern property theories to focus on the community and social relations came from Carol Rose, who also incorporated a law and economics perspective in her model. In a 1988 essay, Rose focused on the "hard-edged" doctrines that we tend to prefer in property law.[72] She acknowledged that economics suggest the more important something is, the more inclined we are toward hard and fast rules, but she also argued that "[w]e establish a system of clear entitlements so that we can barter and trade for what we want instead of fighting."[73] Rose did not explore this idea in depth, however, as her primary focus was on the two types of property rules—(1) clear or strict and (2) muddy or blurred—and their increasing tendency to move toward each other.[74]

Ten years later, Rose revisited the issue in the context of discussing Blackstone and the origins of claims to private property.[75] She noted, "Permanent claims allowed the 'occupiers' to avoid conflicts with one another and encouraged them to labor on the things to which they now claimed a durable right. . . . Exclusive dominion is useful because it reduces conflicts and induces productive incentives."[76] Yet, she moved over the connection to violence quickly to focus on the link between established, secure claims and the overall generation of wealth or willingness of occupiers to invest in property.[77] Indeed, she later questioned whether first-possession rules promote or prevent violence, suggesting that "[t]he problem is that a first-occupancy principle invites everyone to grab at everything, and everyone winds up fighting with everyone else."[78] As she later argued, "Blackstone's massive doctrinal sections disclosed very little to remind readers of the reasons of the self-seeking, possibly violent and certainly problematic initial grabs of initial occupancy."[79]

In her influential 1994 book, Rose re-examined Locke's approach to first possession rules and concluded that what society chose to reward was not so much the labor of cultivation but more the labor of "speaking clearly and

72. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988).

73. *Id.* at 578.

74. *Id.* at 580 ("This paper is about the blurring of clear and distinct property rules with the muddy doctrines of 'maybe or maybe not,' and about the reverse tendency to try to clear up the blur with new crystalline rules.").

75. Rose, *supra* note 32, at 601.

76. *Id.* at 606–07.

77. *Id.* at 607.

78. *Id.* at 609.

79. *Id.* at 611.

distinctly about one's claims to property."[80] Rose emphasized communication because of its economic utility; clear communication about ownership minimizes waste and maximizes efficiency in the system.[81] Rose's emphasis was on the economics.[82] As she said, "Economists have the answer: clear titles facilitate trade and minimize resource-wasting conflict."[83] Rose implicitly favored Bentham's view of property as primarily directed toward wealth and prosperity.[84]

In looking to the question of what determines possession, Rose explained rules of possession in terms of social relationships. She argued, "The clear-act principle suggests that the common law defines acts of possession as some kind of statement."[85] More forcefully, she describes, "Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested."[86]

Indeed, by investigating the idea of first possession we can discover some truths about the nature of our concept of property,[87] but we need not necessarily do so by focusing on the value of communication in terms of the economics, primarily referencing wealth and investment as Rose did. A more critical component, and one Rose briefly mentions, is communication's role in preventing violent conflicts.[88] This understanding also dovetails with other approaches that focus on the types of labor that create visible changes on the land.

Rose adopted the communication approach because "it correctly draws attention to the intensely social nature of property."[89] Rose critiqued the traditional view of land as seen through the lens of individual rights. Rose explained, "In a more sophisticated version of property, of course, we see property as a way of defining our relationships with other people."[90] Rose reasoned, "[A] property regime winds up by satisfying even more desires, because it mediates conflicts between individuals and encourages everyone to

80. ROSE, *supra* note 13, at 16.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 3.

85. *Id.* at 13.

86. *Id.* at 16.

87. *See id.* at 16–20.

88. *Id.* at 16.

89. *Id.* at 4.

90. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, *reprinted in* PERSPECTIVES ON PROPERTY LAW, *supra* note 20, at 28, 30.

work and trade instead of fighting."[91] Rose then emphasized that "Locke's major addendum to this picture was to show the relevance of property to the desire to live. He pointed out that life depends on property, in a very primitive sense; if one cannot literally *appropriate* those berries and fruits, one will simply die."[92] For Rose, the link between property and sustenance illustrates the social aspects of property law, particularly the construction of ownership around scarce resources.[93] Overall, Rose's approach joined economics with social relations to create a more communal understanding of property rules.

C. Progressive Property Theory, Modern Property Theory, and Community as Social Value

Progressive property follows modern property law in retaining a central focus on the social nature of property.[94] Joseph Singer began a recent article with a simple statement of this approach: "Property is a social and political institution and not merely an individual entitlement."[95] If we are to distinguish between modern property theory's endorsement of community as a central value, the contribution of progressive property theory may be to push that community value to the more liberal political persuasion. Ezra Rosser describes progressive property theory as taking "on the mantle of a socially minded understanding of property."[96] Progressive property continues the modern focus on social relationships but adds a layer of emphasis on specific "underlying human values that property serves."[97] With that said, arguably, progressive scholars do not, as Ezra Rosser has argued, "have a monopoly on thinking that property should serve human values."[98]

III. PROPERTY THEORY AS ENVIRONMENTAL LAW

Environmental regulation in the United States can be divided roughly into two eras: (1) an initial period with limited regulation except through common law tort and property actions and (2) a later period with centralized environmental statutes taking over the key role of regulation. This Part begins by explaining why a historical perspective is the appropriate lens needed to

91. *Id.* at 31.

92. *Id.*

93. *Id.* at 30.

94. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 116 (2013).

95. Singer, *supra* note 7, at 1010.

96. Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 401–02 (2015).

97. Alexander, Peñalver, Singer & Underkuffler, *supra* note 8, at 743.

98. Rosser, *supra* note 96, at 401.

examine this issue. This Part then discusses those two eras of American environmental law and how particular concepts of property theory have supported those approaches to environmental regulation.

To understand how property theory impacts environmental law, this Article adopts a historical perspective. Such a perspective is critical for an accurate analysis of the law as well as for building theory in the context of the climate crisis.[99]

Recently, historians have become particularly aware of their lack of a role in the work of policy change surrounding the climate crisis. Yet, a role for historians in this discussion is critical: "Historical analysis allows us to move beyond scientific and technical findings to contextualize them."[100] Paul Sabin recently examined this problem. He argued "that historical thinking and analogies already powerfully influence energy and climate policy—but with little participation from historians. Historians have allowed myths that valorize

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99. Our understanding of history and our focus on landscape impacts how we approach environmental regulation generally. For example, consider how the German historical view of property contrasts with the American perspective:

> Unlike the American wilderness ethic, an ideal that has valued spaces devoid of human influence, the Germans' concept of *Landschaft* envisioned the ideal environment in a pastoral sense, as a cultivated garden that blends the natural, cultivated, and built environments in an aesthetically harmonious whole. Reinforcing this sense of *Landschaft* as both a cultural and a natural space is the political meaning of the world, which refers to a unit of territorial administration, such as a province or region. The two meanings of the word were often intertwined, so that the visual state of the *Landschaft* was thought to mirror the spiritual condition of the community. The German trajectory of environmental preservation also placed the cultural landscapes of home, not the sublime places of the distant wilderness, at the center of environmental perception and care.

THOMAS M. LEKAN, IMAGINING THE NATION IN NATURE: LANDSCAPE PRESERVATION AND GERMAN IDENTITY, 1885–1945, at 15 (2004) (footnote omitted).

In American history, misconceptions of places have prevented action to preserve nature. As David Robertson wrote, "Myth often obscures the complex realities of place, and this observation holds equally true for locales occupying unfavored perceptual territory. For example, symbols of difficult and unwholesome living, impoverished central cities, and isolated rural boondocks are also burdened by misperception." DAVID ROBERTSON, HARD AS THE ROCK ITSELF: PLACE AND IDENTITY IN THE AMERICAN MINING TOWN 1 (2006). Robertson explains, "Mining has created a symbolic landscape similarly stigmatized. In the popular imagination, mining landscapes—mineral extraction and processing areas and the adjacent settlements for mine workers—have become icons of dereliction and decay. For those who live in these places, however, these landscapes may function as meaningful communities and homes." *Id.* at 2. As a result, "[t]here exists a long tradition of scholarly and literary description equating mining landscapes with dereliction and decay." *Id.* at 4.

100. Paul Sabin, *The Ultimate Environmental Dilemma: Making a Place for Historians in the Climate Change and Energy Debates*, *in* 15 ENVIRONMENTAL HISTORY 76, 77 (2010).

a free market in energy to dominate the public discourse, presenting current production and consumption patterns as largely unchangeable."[101]

The role of historians is particularly important in understating the history of energy usage in the United States as well as the history of regulations that have either discouraged or encouraged this use. Sabin argued:

> Historians can help ensure that climate and energy debates better reflect a fundamental historical truth—the energy system reflects political power and social values as much as the latest engineering and science. A greater appreciation for that history can enable greater understanding of the potential routes to addressing the climate problem.[102]

A historical perspective can also illuminate the role of tort decisions in establishing and encouraging energy markets. For example:

> Judicial rulings during the oil era often deferred to oil's privileged position and importance. As the California Supreme Court ruled in a 1928 court case opening the coastline to oil drilling, "the development of the mineral resources, of which oil and gas are among the most important, is the settled policy of state and nation, and the courts should not hamper this manifest policy except upon the existence of most practical and substantial grounds."[103]

There is a similar narrative for coal, showing how the market for coal declined as a fuel—when it was being burned in homes for energy—but then increased again as an energy source for electricity. These narratives emphasized the importance of industrial land uses and stigmatized less invasive land uses.[104] Notably, there was no lack of awareness of the devastating environmental impacts of mining throughout these decades. David Robertson has written about this part of mining history. Robertson explains, "Mining has

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101. *Id.*

102. *Id.*

103. *Id.* at 85 (citing Boone v. Kingsbury, 206 Cal. 148, 181–82 (Cal. 1928)).

104. Assuming that development is the best use, and that natural land is not being put to any use, a resident manager of a coal company explained: "We just donated 150 acres for a new regional airport, and we're open to other ideas. We don't intend to walk off and leave this land to the Indians." John Egerton, *Boom or Bust in the Hollows of Appalachia*, N.Y. TIMES, Oct. 18, 1981, at 57. This represents the majority view at the time, a false dichotomy suggesting that those who are not dominant over nature are subjected to it or submissive. *See* RODGER CUNNINGHAM, APPLES ON THE FLOOD: MINORITY DISCOURSE AND APPALACHIA 96 (1991). It also illustrates the continuing problem of the mentality of land that is not developed is not being used—precisely the argument that was used to remove lands from Native Americans on the theory that land wasn't "discovered" until a white man found and used it. It is again, a cultural view that was enshrined by judicial opinion—*Johnson v. M'Intosh*, which essentially argued it was a waste to leave land as wilderness. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

also created some of the country's most environmentally troubled landscapes. Few industries have such a profound and visible impact on the environment."[105] Our awareness of these problems began centuries ago: "As early as the sixteenth century, mining was recognized as a destructive force in Europe; and environmental problems created by mining began to concern the U.S. public in the 1880s."[106] Additionally, environmental law largely emerged in response to the problems created specifically by the mining industry; such regulation was desperately needed.[107] "Indeed, mining was among the nation's first industries to be regulated on the basis of environmental concerns, and as the industry's footprint spread into the nation's diminishing wild lands so did awareness that mining severely impaired the quality of land, water, and air."[108] Despite the development of regulation, however, the level of consumption for key mining goods such as coal continued to increase.[109]

This story, however, is not just a story of public consumption. "As these coal stories show, executive, legislative, and judicial branches set public energy policies together."[110] These mining increases were, in part, also fueled by specific legal policies, not just in terms of federal and state statutes but also by specific judicial decisions. For example, one property decision by the Kentucky Supreme Court—a jurisdiction located in the heart of coal country—revolutionized the ability of coal companies to access mineral reserves and push aside the rights of land-owners and neighbors.[111] The 1987 ruling by the Kentucky Supreme Court "reinstated the provisions of the antiquated broad-form deed, a document that awards virtually all mineral rights claims to coal companies and not to landowners."[112]

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105. ROBERTSON, *supra* note 99, at 3.

106. *Id.*

107. By 1920, Professor Ronald Eller, a historian, described the transformation of the Appalachian landscape: "The once majestic earth was scarred and ugly, and the streams ran brown with garbage and acid runoff from the mines. A black dust covered everything. Huge mounds of coal and 'gob' piles of discarded mine waste lay about." Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENV'T L. 21, 26 (2004). And this theft of resources continues to threaten Appalachians. Mountaintop mining has "stripped their hillsides of vegetation, obliterated streams and drainage patterns and turned the hollow into an overflowing funnel every time rain drains off the mining plateau being created above their houses." Francis X. Clines, *Flooding in Appalachia Stirs Outrage Over a Mining Method*, N.Y. TIMES, Aug. 12, 2002, at A8.

108. ROBERTSON, *supra* note 99, at 3.

109. *See id.* at 2–3.

110. Sabin, *supra* note 100, at 86.

111. Akers v. Baldwin, 736 S.W.2d 294, 304–05 (Ky. 1987).

112. DONALD EDWARD DAVIS, HOMEPLACE GEOGRAPHY: ESSAYS FOR APPALACHIA 21 (2006).

History is critical to developing theory because "[p]ivotal decisions shaping the energy system are found not just under the rubric of 'energy' policy, but also as tax policy, regulation, property rights, and public infrastructure. Energy intersects with virtually every aspect of our economy and social organization, so energy policy often is made in unexpected places."[113] Additionally, a historical perspective lends depth to an analysis of how new sources of energy fare on the market: "Wind energy and other renewable forms of energy continue to suffer comparisons based on their relative market price. The political history of energy in the United States shows clearly, however, that relative market prices reflect past politics as much as current economic factors."[114]

A similar argument can be made for the role of not only culture and markets but also statutes and judicial decisions in creating an automobile and roads focused culture that drove up the consumption of both oil and gasoline within the United States. The automobile and roadways of America became "a visual symbol of the American dream of individual freedom through mobility."[115] Thus, "an auto- and truck-oriented roadside landscape began to emerge by the mid-1920s."[116] This focus on the gas-guzzling automobile did not emerge simply from a good Ford marketing campaign. Instead, "[t]he single most important development occurred in 1956 with the creation of the Federal Aid to Highways Act, which established the Interstate Highway System."[117] The road network changed the market for oil and gas and the American orientation toward our landscapes. "The building of the impressive road network across the vastness of American space has accomplished more than spatial control; it has been a fundamental reordering of the American economy and society."[118] The development of the vast highway network also immunized the American public to recognizing and rejecting environmental destruction. "Road cuts through hills exposed steep slopes to erosion; highways interrupted traditional paths for wildlife; roadside vegetation allowed the introduction of nonnative species."[119] This created a particular narrative of nature, environment, and the

113. Sabin, *supra* note 100, at 86–87.

114. *Id.* at 87.

115. Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 118 (1997).

116. *Id.* at 119.

117. *Id.*

118. *Id.* at 120.

119. *Id.*

proper future of development. Such narratives critically reinforce future behaviors.[120]

This is because "[s]ocial constructions of nature reveal much about 'not just the natural world but the human cultures that lend meaning and moral imperatives to that world.'"[121]

Additionally, the road network was a significant part of establishing favored and disfavored areas of the country—the urban and rural divide that we now speak of so easily and naturally as though it were an unforeseen product of random human behaviors.[122] That creation of road accessible and

120. Katrina Schwartz has written about the power of these environmental narratives, examining them in the context of post-communism environmental regulation. *See* KATRINA Z. S. SCHWARTZ, NATURE AND NATIONAL IDENTITY AFTER COMMUNISM: GLOBALIZING THE ETHNOSCAPE 1 (2006). Schwartz wrote that "each narrative in its heyday commands tremendous influence over perceptions of nature and agendas for nature management." *Id.* at 4. Schwartz explained, "Scholars in the interdisciplinary field of political ecology have shown that those who control environmental narratives also wield power over land and natural resources." *Id.* at 4–5.

121. *Id.* at 3 (quoting William Cronon, *Introduction: In Search of Nature*, *in* UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 23, 26 (William Cronon ed., 1996)).

122. Cultural perceptions of Appalachians developed to suit this rural-urban divide and to justify environmental exploitation of the Appalachian Mountains in pursuit of coal. Appalachians were approached by other whites with an "attitude . . . of superiority and paternalism." DEBORAH VANSAU MCCAULEY, APPALACHIAN MOUNTAIN RELIGION: A HISTORY 12 (1995). "[O]ther Americans needed to see Appalachians as ignorant hillbillies in order not to feel guilty for having plundered our timber and coal, wrecked our environment, and exploited our labor. Victors always portray the vanquished in unflattering terms in order to rationalize their own brutality." Lisa Alther, *Border States*, *in* BLOODROOT: REFLECTIONS ON PLACE BY APPALACHIAN WOMEN WRITERS 21, 27 (Joyce Dyer ed., 1998). Ronald Eller, a key scholar of Appalachian history and sociology wrote that America's image of Appalachia is "feuds, . . . stills, mine wars, environmental destruction, joblessness and human depredation." Ronald D. Eller, *Forward* to BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES 3, 9 (Dwight B. Billings, Gurney Norman & Katherine Ledford eds., 1999). In the American cultural norm, Appalachia became "a place where dirty children sat listlessly on the porches of old shacks, a place that only existed in black and white." Anne Shelby, *The "R" Word: What's So Funny (and Not So Funny) About Redneck Jokes*, *in* BACK TALK FROM APPALACHIA: CONFRONTING STEREOTYPES, *supra*, at 153–54.

Such stereotypes culturally justify a world American and yet not American, a larger culture that tolerates "injustice and exploitation . . . monopolization of land by absentee owners, political domination, taxation inequalities, poor working conditions and low wages, deindustrialization, environmental ruin, and social neglect." Dwight B. Billings, *Appalachian Studies and the Sociology of Appalachia*, *in* 2 21ST CENTURY SOCIOLOGY: A REFERENCE HANDBOOK 390, 394 (Clifton D. Bryant & Dennis L. Peck eds., 2007).

As a result, even scholarship on these areas frequently reflects an extremely negative bias toward rural inhabitants. Donald Davis explained one, relatively recent, example of this phenomenon:

> Shelby Lee Adam's book *Appalachian Portraits* (Oxford: University of Mississippi Press, 1993), is no exception. . . . Adams has given us another macabre version of the region and its rural inhabitants. Almost all of his

inaccessible areas would also support the more environmentally destructive energy markets such as those for coal, oil, and natural gas.[123]

> The fate of rural roadscapes in the twenty-first century hinges on what changes may occur to the "two rural Americas"—the rural-urban fringe regions near major metropolitan centers, and the more remote, or "deep," rural areas far from regions of economic growth and vitality. Planning for either of these two rural landscapes will have to consider how to address the economic and social forces at work nationally and regionally, but an even more comprehensive view will require integrating a concern for the natural and cultural landscapes as places to live, work, and visit. If the landscape[124] mirrors the values of

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> photographs—which are admittedly technically and compositionally striking—border on the grotesque. Adams gives little dignity to his subjects, showing them in stereotypical poses, often with blank, mentally incapacitated facial expressions and from angles that accentuate their peculiarity and marginality.

DAVIS, *supra* note 112, at 97.

123. There are no removals of goods such as coal, oil, and natural gas without impact. As Wendell Berry put it, "The industrial economy thus is inherently violent. It impoverishes one place in order to be extravagant in another, true to its colonialist ambition. . . . Industrialists are always ready to ignore, sell, or destroy the past." Wendell Berry, *The Agrarian Standard*, *in* THE ESSENTIAL AGRARIAN READER: THE FUTURE OF CULTURE, COMMUNITY, AND THE LAND 23, 26 (Norman Wirzba ed., 2003). Additionally, these burdens fall more heavily on already disadvantaged populations. In addition to raising concerns about exacerbating poverty, the geography of mining, oil, and natural gas also places Native American populations at greater risk of taking the brunt of the negative environmental consequences of these markets. Daniel Brook argued that the impact is so severe that we should, in fact, regard these acts as environmental genocide. "In the modern era, these forms of genocide have been superseded by a more insidious, and ultimately more destructive, form. Environmental genocide is perpetrated by the U.S. government and by private corporations alike; some of their methods are legal, while others are not." Daniel Brook, *Environmental Genocide: Native Americans and Toxic Waste*, 57 AM. J. ECON. SOCIO. 105, 105 (1998). Brook explained, because of the low socioeconomic level of Native Americans, "they are most at risk for toxic exposure." *Id.* The link to poverty is obvious: "[D]isadvantages are multiplied by dependence on food supplies closely tied to the land in which [toxic] materials . . . have been shown to accumulate." *Id.* (quoting RON GLASS, BY OUR OWN LIVES: MOVING THE FOUNDATION STONE OF RACISM (mimeo)).

Simultaneously, Native American populations find themselves unable to establish control over these exploitations of resources, often within their own territorial lands. Sovereignty over reservation resources remains limited. John S. Harbison, *The Broken Promise Land: An Essay on Native American Tribal Sovereignty over Reservation Resources*, 14 STAN. ENV'T L.J. 347, 348–49 (1995).

124. Landscape itself is a contested concept. Kenneth Olwig argued "that much of the confusion generated by these diverging approaches can be clarified by re-examining, in historical and geographical context, the substantive meaning of landscape as a place of human habitation and environmental interaction." Kenneth R. Olwig, *Recovering the Substantive Nature of Landscape*, 86 ANNALS ASS'N AM. GEOGRAPHERS 630, 630 (1996). He focused specifically on the concept of landscape, which he said "need not be understood as being either territory or scenery; it can also be conceived as a nexus of community, justice, nature, and environmental equity, a contested territory

that is as pertinent today as it was when the term entered the modern English language at the end of the sixteenth century." *Id.* at 630–31.

Cosgrove suggested a similar interpretation of landscape. The scholar argued:

> In geographical usage landscape is an imprecise and ambiguous concept whose meaning has defied the many attempts to define it with the specificity generally expected of a science. While landscape obviously refers to the surface of the earth, or a part thereof, and thus to the chosen field of geographical enquiry, it incorporates far more than merely the visual and functional arrangement of natural and human phenomena which the discipline can identify, classify, map and analyse. Landscape shares but extends the meaning of "area" or "region," both concepts which have been claimed as its geographical equivalents. As a term widely employed in painting and imaginative literature as well as in environmental design and planning, landscape carries multiple layers of meaning.

DENIS E. COSGROVE, SOCIAL FORMATION AND SYMBOLIC LANDSCAPE 13 (1984).

Geographer David Delaney wrote about the social construction of key terms such as nature and landscape and the relationship between those constructions and law, as it exists not only in statutes and judicial opinions but also in cultural norms. In a seminal article on the topic, Delaney explained:

> The primary objective of this article is to engage and extend the discussion within geography on the social production or construction of nature through an exploration of a particular and highly significant set of practices—those associated with legal argument—through which such constructions are attempted and provisionally accomplished. This article also extends the range of material sites that are the objects of production beyond those usually treated by geographers. I aim to examine episodes, not only in the social construction of landscapes, but also of animals, human bodies, and "mind."

David Delaney, *Making Nature/Marking Humans: Law as a Site of (Cultural) Production*, 91 ANNALS ASS'N AM. GEOGRAPHERS 487, 487 (2001). Delaney argued, "Nature . . . is produced in a number of cultural domains. . . . The representations and images that are crafted and put into circulation have material consequences." *Id.* at 488 (citing BRUCE BRAUN & NOEL CASTREE, REMAKING REALITY: NATURE AT THE MILLENNIUM (1998)). According to Delaney, "As ideological fragments or elements of consciousness, they inform actions. They are part of seeing the material and social world in particular ways and not others. They provide the basis for justification and critique, for business-as-usual and resistance." *Id.* at 488. As a result, "like these other discourses, law may have a tendency to read nature in light of a set of peculiar or local anxieties and concerns. The very idea of (modern, liberal) law can be seen to be reliant on a particular conception of humanness." *Id.* (citing Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience, and the Criminal Law*, 141 U. PA. L. REV. 1471 (1993); John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289 (1997)). Delaney argued, "To the extent that modem understandings of what it is to be human are dependent on particular conceptions of nature, it is reasonable to suggest that legal discourse cannot be 'neutral' with respect to competing conceptions of nature." *Id.* at 488. Therefore, "legal texts are significant artifacts through which we can glimpse how conceptions of nature are contested, validated, repudiated, modified, and—more importantly—deployed by situated actors in countless ways." *Id.* at 489. Law's rule is key: "Attention to law sharpens our awareness that control over the word, over meaning, over the terms of categorical inclusion and exclusion, is strongly conducive to—if not determinative of—control over segments of the material world that are given meaning by reference to categories." *Id.* Delaney explains:

> To speak of law as "a site of cultural production or political contestation" is, of course, shorthand for indicating the social projects and practices wherein nature

> a culture, then policies and implementation strategies that focus on the aesthetics of transportation are surely significant factors toward enhancing a higher quality of life.[125]

If landscapes mirror social values, then rural America became the place that citizens were happy to sacrifice to the markets for coal, oil, and natural gas. This was not an accident but rather a foreseeable result of federal practices that spent money on building the highway infrastructure and, simultaneously, rejected other, more sustainable alternatives.

The critical insight from history then is the degree to which legal mechanisms shape our energy markets, not just through regulation but also through our interpretation of common law claims within tort, property, and other fields.[126] Sabin explained, "One of the most important lessons from the nation's oil history, then, is that there never has been a free market in energy. Frankly, there never could be. Public choices inevitably shape the energy sector through tax policy, property rights, labor law, and many other unavoidable decisions."[127]

> and its surrogates and opposites are deployed in efforts to enlist the power of the state to validate some versions in preference to other competing versions. The question, then, is not what is nature, but what work does "nature" do in instances of legal rhetoric?

Id. at 490. In legal discourse, "Nature as a trope may signify, among other things, negativity, absence, necessity, the determined, timelessness or pastness, order or disorder, wildness, essence, permanence, and universality." *Id.*

125. Flad, *supra* note 115, at 128–29 (footnotes omitted).

126. Notably, without history, we may also misjudge some legal institutions and infer a more ecologically favorable outcome or intent than, in fact, ever existed. A great example of this is the forest laws of England:

> A "forest" in the Middle Ages meant something quite different from how we think of it today: It mainly existed for our medieval forbears as a legal entity, rather than as an economic or ecological one. Therefore, a forest could actually include treeless fields of arable or pasture if these came within the purview of property rights and laws that defined it as such, according to the customs and traditions of the locality.

JOHN ABERTH, AN ENVIRONMENTAL HISTORY OF THE MIDDLE AGES: THE CRUCIBLE OF NATURE 87 (2013). Aberth explained, "The Weald, one of the largest blocks of uncleared woodland in Anglo-Saxon England, was nonetheless from the eighth century heavily exploited as woodland pasture, mainly for pigs, a fact that is known from royal charters granted to ecclesiastical institutions for the right of pannage." *Id.* at 88. "[I]t is quite evident that the main concern of crown policy was to exploit the forest law for its revenue-raising potential and not necessarily for the sake of the best interests of the woods themselves." *Id.* at 115.

127. Sabin, *supra* note 100, at 84.

With an emphasis on possession and exclusion, traditional property law supported the centuries of law without statutory environmental regulation.[128] During these years, the only source of environmental regulation was generally property-tort claims such as trespass and nuisance.[129] Both trespass and nuisance were uniquely situated for the task of bringing about environmental regulation within an era when there is almost complete focus on the individual as the center of property rights and very little sense of the social context for those rights. In such a context, trespass and nuisance could act as limits on land use precisely because suits were brought by neighboring, injured landowners. In other words, the environmental regulation did not come from a centralized source, vindicating rights for the general public, but instead from a similarly situated private owner of land. Nuisance and trespass provided a way of controlling one particularly badly-behaved neighbor.

Nuisance and trespass, of course, came with their limitations. Neither effectuated a system of zoning, which would limit problematic land uses from ever beginning, but instead the two causes of action worked as fixes to existing problems. Each came with its own doctrinal limitations, including statutes of limitation,[130] rules on entry,[131] and limited recognition of pollution as an injury without demonstrating physical harm.[132]

Although a few environmental statutes predate the environmental movement of the 1960s, the bulk of environmental regulation went into place within this era.[133] Key statutory frameworks began to address water pollution, air pollution, toxins, workplace safety, and other key issues.[134] Additionally,

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128. In this time period, scholars tended to think less actively about the natural world, particularly as a force with the power to shape our life experience. "In writing human history, scholars have largely over-looked the role that nature has played in shaping American life and culture. Their arrogance in exaggerating differences between humans and other organisms, between human history and the natural environment, has created an enormous intellectual gap in our present understanding of the human condition." DONALD EDWARD DAVIS, WHERE THERE ARE MOUNTAINS: AN ENVIRONMENTAL HISTORY OF THE SOUTHERN APPALACHIANS 201 (2000).

129. Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 737 (2011) ("Tort law has historically provided the principal mechanism for remedying harms to the environment.").

130. *See* Osborne M. Reynolds Jr., *Distinguishing Trespass and Nuisance: A Journey Through a Shifting Borderland*, 44 OKLA. L. REV. 227, 244 (1991).

131. *Id.* at 235–43.

132. *See, e.g.*, John P. S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155, 157 (1983).

133. *See* Sarah T. Phillips, *Environmental History*, *in* AMERICAN HISTORY NOW 285, 306 (Eric Foner & Lisa McGirr eds., 2011).

134. *Id.*

zoning became more and more common at the city and county level, which served to move less favorable land uses to areas of towns away from housing.[135]

Such more intense regulation of land use was not entirely consistent with the earlier understanding of property, which had emphasized the individual as the sole party in control of the use of private property. By refocusing property away from the individual's rights and toward the idea of property as a set of social relationships, property theory supported the development of a more extensive set of environmental regulations. Focusing on social relationships allowed property rights to be rearticulated as contingent on greater social goods such as air and water quality.

IV. THE FAILURE OF PROGRESSIVE AND MODERN PROPERTY THEORY FOR ENVIRONMENTAL LAW: THE EROSION OF TORTS FOR ENVIRONMENTAL PROBLEMS

A. Why Torts Matter in the Era of Statutory Environmental Regulation

Federal and state environmental statutes changed the property-environmental law relationship substantially. In doing so, however, the statutes did not entirely erode the role of tort claims such as nuisance and trespass. Those basic common law claims continue to play an important role in maintaining environmental protections.

Some scholars have argued for a narrower role for torts in the context of environmental issues.[136] More commonly, scholars have seen tort claims as continuing to play a substantial role in environmental regulation. David Westbrook, for example, cites tort claims as one of the three central components of environmental law. Westbrook explains, "Environmental law is organized around three fundamental approaches to environmental problems: (i) common law actions (tort, particularly nuisance); (ii) the governmental aggregation of externalities whose harms are valued below the costs of their contractual resolution or judicial prosecution (administration); and (iii) the establishment of markets in order to achieve societal ends (constructed markets, such as those envisaged by the Clean Air Act)."[137] There are a number of reasons scholars continue to see torts as a key part of environmental regulation. As Lynda

135. *See* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 91–92, 99–100 (2014).

136. Latham, Schwartz & Appel, *supra* note 129, at 773 (concluding that the line between torts and environmental law should be narrowly drawn and that "[w]here there is overlap, traditional tort law principles, as outlined in this Article, can result in statutory and common law working in harmony").

137. David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621 (1994).

Collins has observed, "First, notwithstanding its size and clout, statutory environmental law sometimes proves inadequate" and in some cases "tort may be the only means to provide redress to injured victims and deter environmental wrongdoing. Second, even where a strong regulatory regime exists, tort's unique characteristics enable it to supplement, and in some cases even outperform, statutory environmental law."[138]

That said, nuisance law is not the heart of environmental law. Yet, a better understanding of nuisance law can help us understand the relationship between property and environmental law. It might have been, but for the reasons detailed in the remainder of this Part, nuisance law is being eroded. It is less powerful than it used to be for multiple reasons. One of these—which I will address later—stems from the more community focused view of property. The other—which I will address here—emerges from the odd situation of nuisance at the boundary between property and tort law. Two critical transformations have happened in nuisance law in recent decades. If nuisance law does indeed have an important role to play in environmental law, these transformations matter especially because they may make nuisance law less able to address environmental concerns effectively. First, social utility moved from being a discretionary injunction factor to a part of the basic case for public and private nuisance. This removed remedies for many plaintiffs and made the prima facie case much more difficult to prove. Second, the Restatement of Torts has pushed various claims at the property-tort line (like nuisance and premises liability) more toward torts and less property.[139] The outcome of this push is less strict liability, more negligence. I have previously criticized the rise of the tort view of nuisance—meaning that proving a claim would require proving negligent behavior.[140] This stands out in sharp contrast to the property view of nuisance, which focuses not on the behavior that caused the problem but on the impacts to the neighboring property. In such a model, intent is not particularly important, but land values are. The odd placement of nuisance at the intersection of tort and property has befuddled scholars for years.

Tort and property form two of the largest and most central fields of law, and yet we remain unable to define with precision the outlines and foundations

138. Lynda M. Collins, *Strange Bedfellows? The Precautionary Principle and Toxic Tort: A Tort Paradigm for the 21st Century*, 35 ENV'T L. REP. NEWS & ANALYSIS 10361, 10362 (2005).

139. RESTATEMENT (SECOND) OF TORTS §§ 343, 822 (AM. LAW INST. 1965, 1979).

140. Jill M. Fraley, *Liability for Unintentional Nuisances: How the Restatement of Torts Almost Negligently Killed the Right to Exclude in Property Law*, 121 W. VA. L. REV. 419, 458 (2018).

of either concept.[141] Henry Smith describes our impatience with this situation, finding that "[m]ost of us have a sense that property is doing something important, but it does it in a somewhat mysterious way."[142] Approaching the question from the torts perspective, Nicholas McBride finds that "[t]he vast amount of academic writing on the nature and basis of tort law that has been produced in the last few decades is . . . a sign of sickness," indicating that we are incapable of understanding tort law.[143] Indeed, McBride concludes that, by the early 1990s, "the community of tort academics was stuck firmly in the wilderness."[144] If we were lost by the mid-1990s, recent encounters with climate change have only revealed how much we struggle with central concepts such as harm, causation, and responsibility in tort.[145] Having failed to define either property or tort to our satisfaction, we struggle all the more when we try to articulate their boundaries.

Guido Calabresi and A. Douglas Melamed proposed demarcating this boundary by distinguishing between property and liability rules.[146] Their seminal article on the subject focused on how entitlements change hands, explaining how the level of protection received by the entitlement depends on whether property or liability rules are applied.[147] If an entitlement is protected by a property rule, it will change hands only through consent of the owner.[148] If an entitlement is only protected by a liability rule, then it can be taken without the owner's consent, so long as a collectively set price is paid to the owner.[149] Calabresi and Melamed then elaborated circumstances that would encourage choosing one set of rules over the other, focusing on an economic perspective, which prioritizes the efficiency of exchanges.[150]

Thus, when it came to elaborating the property-tort divide, Calabresi and Melamed's scheme focused on the remedies, or "the manner in which entitlements are protected," as a primary point of distinction between property

141. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) (illuminating first the intertwined problems of defining property and tort). Calabresi and Melamed note that prior to their article, property and torts were very rarely approached from any unified perspective. *Id.*

142. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 959 (2009).

143. Nicholas J. McBride, *Rights and the Basis of Tort Law*, *in* RIGHTS AND PRIVATE LAW 331, 333 (Donal Nolan & Andrew Robertson eds., 2012).

144. *Id.*

145. Douglas A. Kysar, *What Climate Change Can Do about Tort Law*, 41 ENV'T L. 1, 1 (2011).

146. Calabresi & Melamed, *supra* note 141, at 1092.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1106–07.

rules and tort rules.[151] Property remedies (i.e. injunctions and supra-compensatory remedies) made taking the entitlement effectively impossible or set the remedy so high that taking would be illogical.[152] Such remedies emphasized the quintessential property characteristic of the owner's right to exclude. On the other hand, liability rules allowed for violation of the owner's right to exclude. Remedies did not punish so much as set compensation at a collectively determined price. As a result, liability rules provided some relief against the "holdout" problem of a single owner refusing to sell and preventing a larger socially valued project from proceeding.[153] Liability rules would be less attractive than property rules due to the procedural costs but would allow for non-consensual takings. The two rules then align with the basic setup of property rules as focused on protecting entitlements and allowing takings only in the narrowest of circumstances and tort rules as focused on compensating when a taking has occurred accidentally or must occur to facilitate another social good.

Calabresi and Melamed's article has remained a central point of discussion since publication.[154] Yet, scholars have never been comfortable accepting that the property versus liability rules framework fully and accurately articulates the property-tort divide. Richard Epstein concludes that Calabresi and Melamed failed to point us in any direction for systematically determining when property or liability rules should prevail.[155] Lee Anne Fennell argues that a failure to distinguish between risk and harm in applying Calabresi and Melamed's framework leads scholars to distort our understanding of the relationship between property and torts.[156] This past year, Calabresi again highlighted this issue by tackling the problem of the "resurgence of torts viewed as a purely private legal arrangement," and arguing for a "public meaning" of torts via liability rules that are collectively set.[157]

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151. *Id.* at 1092.

152. *See id.* at 1106–08.

153. *See id.* at 1107–09.

154. *See generally* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

155. Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092 (1997).

156. Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1400 (2007).

157. Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 L. & CONTEMP. PROBS. 1, 4 (2014). For a taxonomy of the private

At the moment, progress in elaborating the property-tort divide does not look particularly promising. A recent focus in property theory on the relationship between property and morality has deemphasized the problem of the property-tort divide. When elaborating a theory of property and morality, Merrill and Smith argue that the relationship between the two had been obscured in scholarship.[158] One of the reasons the authors cite is the law and economics approaches that have blossomed since Calabresi and Melamed's article.[159] Another factor may be that articles following their lead have focused much more on liability rules than on property rules, and therefore have been less conscious about articulating the implications of their arguments for the property-tort divide.[160]

The property-tort divide matters particularly within the context of this Article. If we begin with the basic premise that property theory informs and provides a foundation for law itself, both in common law and statutory forms, then to the degree that judges and scholars think of nuisance as a tort claim rather than a property claim, they may be more likely to think in terms of central torts concepts such as harm and negligence rather than in terms of property theory concepts such as possession and exclusion. It is only by making sure that property retains its claim on nuisance law that we can ensure that property theory is critically effective as an instrument of change.

B. Courts Integrate Community with Social Utility

Social utility is a legal concept introduced within the nineteenth century to address the social benefits of an action that may otherwise be actionable. Specifically, social utility described the positive externalities or aspects of an action or land use that had significant negative externalities. Social utility is particularly important when thinking about property theory because social utility is a concept rooted in social relations.

Courts worked out their concepts of social utility within the context of nuisance cases. For example, in *York v. Stallings*,[161] the court said that "[a]lthough [it] found that the fallout of sawdust and cinders on plaintiff's premises and the noise at night entitled plaintiff to some relief," against the

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or individual rights views of property, see Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 856–63 (2013).

158. Merrill & Smith, *supra* note 1, at 1849.

159. *Id.*

160. *See* Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1828–29 (2009) (describing the influence of liability rules via damage awards); Calabresi & Melamed, *supra* note 141, at 1105; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

161. York v. Stallings, 341 P.2d 529 (Or. 1959).

operation of defendant's lumber mill, "it [did] not follow that an injunction should issue as a matter of course," because the "court may refuse an injunction in certain cases where the hardship caused to the defendant by the injunction would greatly outweigh the benefit resulting to the plaintiff."[162] The court found evidence of the fallout but could not determine sufficiently its amount and frequency.[163] The court adopted the Restatement of Torts position that embraced considering hardship to the defendant when granting injunctions.[164]

Similarly, in *Storey v. Central Hide & Rendering Co.*,[165] the court faced the problem of how to balance the equities in the context of a nuisance action. The court reasoned:

> According to the doctrine of "comparative injury" or "balancing of equities" the court will consider the injury which may result to the defendant and the public by granting the injunction as well as the injury to be sustained by the complainant if the writ be denied. If the court finds that the injury to the complainant is slight in comparison to the injury caused the defendant and the public by enjoining the nuisance, relief will ordinarily be refused. It has been pointed out that the cases in which a nuisance is permitted to exist under this doctrine are based on the stern rule of necessity rather than on the right of the author of the nuisance to work a hurt, or injury to his neighbor. The necessity of others may compel the injured party to seek relief by way of an action at law for damages rather than by a suit in equity to abate the nuisance.[166]

As a result, the court stated:

> Some one must suffer these inconveniences rather than that the public interest should suffer. . . . These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property.[167]

A nineteenth century Alabama case provides a bit of contrast. In *Clifton Iron Co. v. Dye*, the court reversed injunctive relief in favor of an adjoining

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162. *Id.* at 534.

163. *Id.* at 532.

164. *Id.* at 534.

165. Storey v. Central Hide & Rendering Co., 226 S.W.2d 615 (Tex. 1950).

166. *Id.* at 618–19.

167. *Id.* at 619.

landowner for the pollution of his stream by iron ore washing operations.[168] The injunction was improper because the lower court should have taken notice of the very large investments in mining, which necessarily involves washing of ores, and therefore sediment flowing into streams.[169] The court recognized the injury to the landowner via sediment pollution, and his right to damages, but concluded that an injunction decision must take into account the public interest.[170]

In *Johnson v. Independent School District.*,[171] the court addressed a septic tank. Recognizing that defendant school district's septic tank constituted a nuisance as to an adjoining landowner upon whose land the overflow was passed, the court said that the general rule, as supported by the weight of authorities, seemed to be that "when the issuance of an injunction [would] cause serious public inconvenience or loss without a correspondingly great advantage to the complainant no injunction [would] be granted."[172] "Injunctions are never granted," said the court, "when they are against good conscience, or productive of hardship, oppression, injustice or public or private mischief."[173] The court continued:

> It seems to be well established that whenever an injunction is asked of a court of equity in cases of this nature . . . [the court] must take into consideration not only the dry, strict rights of the plaintiff and defendant, but must have regard to the surrounding circumstances—to the rights and interests of other persons which may be more or less involved, which, in the instant case, would be every citizen of the defendant school district.[174]

In *Heppenstall Co. v. Berkshire Chemical Co.*,[175] the court addressed a castor bean processing facility. While the defendant's processing of castor beans was found to constitute a nuisance, the court nevertheless refused to grant an adjoining factory owner injunctive relief, noting that both castor oil and nitrogen were

> [H]ighly essential in modern war; that the defendant's plant [was] one of three such plants in the United States and [was] under army supervision as to the production of the oil; that the

168. Clifton Iron Co. v. Dye, 6 So. 192, 193 (Ala. 1889).

169. *Id.*

170. *Id.*

171. Johnson v. Indep. Sch. Dist., 199 S.W.2d 421 (Mo. Ct. App. 1947).

172. *Id.* at 424.

173. *Id.* (citing Johnson v. United Rys. Co. of St. Louis, 127 S.W. 63 (Mo. 1910)).

174. *Id.*

175. Heppenstall Co. v. Berkshire Chem. Co., 35 A.2d 845 (Conn. 1944).

> defendant [had] exhausted every means to lessen the emanation of the dust from its plant; that it [had] removed its machinery for grinding the castor bean[s]; that the only further means to prevent the dust [was] to stop the processing of the bean[s]; and that it would require six months to a year to remove the plant to another location . . . and would entail considerable expense.[176]

The West Virginia Supreme Court addressed social utility in 1940. In *Board of Commissioners. v. Elm Grove Mining Co.*,[177] the court ruled on a mining nuisance case. Enjoining as a public nuisance certain activities of a mining company with respect to its maintenance of a burning pile of refuse materials taken from the mine, the court said that "[e]ven in as useful and important an industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public [were] impaired thereby."[178] The court said that "[n]otwithstanding a business [is] conducted in [a] regular manner, yet if in the operation thereof it is shown by facts and circumstances to constitute a nuisance affecting public health 'no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law.'"[179] The court continued that the comparative injury doctrine should be applied with great caution in nuisance cases, even though not involving public health; "[w]ith all the more reason," said the court, "there is [an] extremely narrow basis for undertaking to balance conveniences where people's health is involved."[180]

Such cases as these provided the context for adopting the social utility concept in other areas of law. This spread began in the mid-twentieth century but is accelerating in recent years.

C. The Spread of Social Utility through the Tort Causes of Action

Social utility initially informed the court's analysis of the equities when determining whether to grant an injunction in a nuisance case. Unsurprisingly, most of the cases addressing social utility were land use cases where the land use at issue produced pollution, but also other community goods such as jobs and tax dollars. The use of social utility analysis has expanded significantly within the context of nuisance claims. Notably, however, social utility has spread throughout tort claims more generally. This Section tracks the

176. *Id.* at 847.

177. Bd. of Comm'rs v. Elm Grove Mining Co., 9 S.E.2d 813 (W. Va. 1940).

178. *Id.* at 817.

179. *Id.* (quoting H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES 41 (3d. ed. 1893)).

180. *Id.*

continuing expansion of social utility analysis throughout a variety of tort claims.

i. Premises Liability

For premises liability, the court considers social utility when determining whether a condition is unreasonably dangerous. This risk-utility balancing test includes four factors: (1) the utility of the things; (2) the likelihood and magnitude of the harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. Other courts do a balancing: decide whether the social value and utility of the hazard outweigh, and thus justify its potential harm to others.

The first reported cases using social utility as a legal concept when evaluating the claim began in the 1970s.[181] Notably, use of the concept was sporadic for decades but has been rising in reported cases since approximately 2010.

Louisiana has applied social utility to two recent premises liability cases. In *Pryor v. Iberia Parish School Board*, the plaintiff brought a premises liability action against the school board for damages suffered as result of a fall on bleachers at stadium owned by board.[182] The court described the test for premises liability saying, "In determining whether a defect presents an unreasonable risk of harm, the trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair."[183] Additionally, the court explained that social utility was a part of the relevant balancing test:

> In determining whether a condition is unreasonably dangerous, courts have adopted a risk-utility balancing test. This test encompasses four factors: (1) the utility of the thing[s]; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility, or whether it is dangerous by nature.[184]

Notably, the court cited a lack of clarity on how social utility factored into the test for premises liability: "Our jurisprudence has not been entirely

181. *See* Furrer v. Talent Irrigation Dist., 466 P.2d 605 (Or. 1970) (applying social utility within the context of a property damage claim).

182. *See* Pryor v. Iberia Par. Sch. Bd., 60 So. 3d 594 (La. 2011).

183. *Id.* at 596.

184. *Id.* at 597.

consistent on this point."[185] There is language in *Reed v. Wal-Mart Stores, Inc.* suggesting the "trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others."[186] However, other decisions focused on the social utility of the thing as a whole, notwithstanding the presence of the defect.[187]

After establishing the test, the court applied the test to the facts of the case, which involved the injury on the bleachers.[188] The court found:

> For purposes of the first factor, it is undisputed that the bleachers serve a social utility purpose by providing seating for patrons of the stadium. However, in a brief to this court, plaintiff argues we should focus on the hazard which caused her injury—the eighteen-inch gap between the first and second seat—which she claims provides no social utility.[189]

The second Louisiana case is *Dowdy v. City of Monroe*.[190] In *Dowdy*, the court explained:

> There is no fixed rule for determining whether the thing presents an unreasonable risk of harm. The trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair. Simply put, the trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify its potential harm to others.[191]

The court further reasoned:

> In determining the reasonableness of a risk, the court must consider the broad range of social, economic and moral factors and the social utility of the plaintiff's conduct at the time of the accident. . . . One cannot be protected from all risks. The court

185. *Id.*

186. Reed v. Wal-Mart Stores, Inc., 708 So. 2d 362, 365 (La. 1998) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984)).

187. *See* Dauzat v. Curnest Guillot Logging, Inc., 995 So. 2d 1184, 1187 (La. 2008) ("[I]t is undisputed that the logging road has a strong social utility for purposes of the first factor, as it is the only method for removing harvested timber from Lake Pearl's land."); Boyle v. Bd. of Supervisors, La. State Univ., 685 So. 2d 1080, 1083 (La. 1997) ("The utility of sidewalks on university campuses is clear as pointed out by the court of appeal."); Pitre v. La. Tech Univ., 673 So. 2d 585, 591 (La. 1996) ("We begin our analysis by examining the utility of the light pole.").

188. *Pryor*, 60 So. 3d at 596.

189. *Id.* at 597.

190. Dowdy v. City of Monroe, 78 So. 3d 791 (La. Ct. App. 2011).

191. *Id.* at 794–95 (citing *Reed*, 708 So. 2d 362).

must decide what risks are unreasonable.[192]

ii. Negligence

From the 1990s forward a number of cases include social utility as a part of a negligence analysis. The trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair.

In *Althaus v. Cohen*,[193] the court addressed the duty of care in the context of health. With respect to the appropriate rule to apply, the court held:

> The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.[194]

The court found that a trier of fact "must weigh the social utility of Dr. Cohen's actions against the nature of the risk and foreseeability of harm."[195] In this particular context, the court noted the need for the particular treatment provided by the practice.[196] The court observed that "[t]he need for prevention of child abuse is unquestionable, as is the importance of adequate psychological treatment for children who have been sexually abused."[197] Similarly, the court noted, "[T]herapists who treat sexually abused children perform a valuable and useful activity to society."[198] When thinking in terms of social utility, the court found that "social utility disfavors expanding therapists' duty of care to non-patients, especially where the non-patients are the accused victimizers. However, we must also weigh this factor against the potential risk and foreseeability of harm stemming from improper treatment for children who have been sexually abused."[199] The court ultimately concluded: "[A]fter weighing the social utility of effective therapeutic treatment for the child

192. *Id.* at 795 (citing Graves v. Page, 703 So. 2d 566 (La. 1997); Oster v. Dep't of Transp. & Dev., 582 So. 2d 1285 (La. 1991)).

193. Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000).

194. *Id.* at 1169; *see also* Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994) ("In determining whether to impose a duty, this Court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor.").

195. *Althaus*, 756 A.2d at 1170.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

against the nature and foreseeability of the harm, we find that these factors weigh against imposing a duty of care to non-patients upon a therapist who treats sexually abused children."[200]

Beckham v. Jungle Gym, L.L.C.,[201] similarly applies social utility in the context of negligence. *Beckham* was a slip and fall negligence case.[202] In beginning the analysis, the court noted their predicament: "There [was] no fixed rule for determining whether the thing presents an unreasonable risk of harm."[203] Instead, the "trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair."[204] Additionally, the "trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify its potential harm to others."[205] The court further noted:

> With the "mixed questions of law and fact" present for the examination for an unreasonable risk of harm, the legal side of that inquiry suggests that unpaved parking lots are expected to have variations and irregularities in their surfaces in providing social utility in many settings. From the factual side of the inquiry, however, a particular irregularity might be weighed by the trier-of-fact and found out of the ordinary so that a person might experience an unsuspected change in surface causing a fall. Thus, while loose gravel might be expected to be a feature that would seldom, if ever, present an unreasonable risk of harm, larger materials included on the surface might be less stable, posing an unsuspected trip or slip hazard."[206]

In this particular case, the court ultimately concluded:

> The mixed question of law and fact there required facts to be weighed, allowing for the possibility of differing fact assessments and a genuine issue of material fact. While a gravel parking lot is generally better understood and its social utility clearly known, the particular facts of this parking lot will in our opinion be better assessed at a trial on the merits for the determination of whether an unreasonable risk of harm was present.[207]

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200. *Id.*

201. Beckham v. Jungle Gym, L.L.C., 37 So. 3d 564 (La. Ct. App. 2010).

202. *Id.* at 566.

203. *Id.* at 568.

204. *Id.*

205. *Id.* (citing Reed v. Wal-Mart Stores, Inc., 708 So. 2d 362 (La. 1998)).

206. *Id.* at 569.

207. *Id.*

Williams v. Jones[208] involved, again, a fall and a claim of negligence. The court began by observing that the Louisiana Supreme Court has explained the following (in another case—the *Reed* case cited in this footnote):

> The unreasonable risk of harm criterion entails a myriad of considerations and cannot be applied mechanically . . . . The concept, which requires a balancing of the risk and utility of the condition, is not a simple rule of law which can be applied mechanically to the facts of the case . . . . Because of the plethora of factual questions and other considerations involved, the issue necessarily must be resolved on a case-by-case basis.[209]

Here, the court concluded:

> The fact an accident occurred because of a defect does not elevate the condition of the thing to that of an unreasonably dangerous defect. The defect must be of such a nature as to constitute a dangerous condition that would be reasonably expected to cause injury to a prudent person using ordinary care under the circumstances.[210]

iii. Intentional Infliction of Emotional Distress

From the 1980s forward, some cases include social utility as a part of the analysis of claims for intentional infliction of emotional distress. In *Mallozzi v. Philadelphia Daily Newspapers, Inc.*,[211] the court examined a newspaper's social utility. The court concluded that "[i]n holding that reasonable minds could not find defendants' conduct sufficiently outrageous, the court should consider the social utility of newspaper reporting."[212]

Similarly, in *Lucas v. Firine*,[213] a Connecticut Superior Court found that "[l]iability exists only 'for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does

208. Williams v. Jones, 34 So. 3d 926 (La. Ct. App. 2010).

209. *Id.* at 931 (quoting *Reed*, 708 So. 2d at 364).

210. *Id.* (citing Lasyone v. Kansas City Southern R. R., 786 So. 2d 682, 694 (La. 2001)).

211. Mallozzi v. Philadelphia Daily Newspapers, Inc., 23 Pa. D. & C.3d 761, 761 (Pa. D. & C. 1981).

212. *Id.* at 764 (citing Knierim v. Izzo, 174 N.E.2d 157, 164 (Ill. 1961)) ("drawing a line between slight hurts common to a complex society and severe mental disturbances resulting from intentional acts wholly lacking in social utility"); Forster v. Manchester, 189 A.2d 147, 151 (Pa. 1963) (finding that this tort is designed for acts of an especially flagrant character, as opposed to conduct having social value).

213. Lucas v. Firine, No. CV 92–0335703, 1993 WL 280306, at *1 (Conn. Super. Ct. July 15, 1993).

cause mental distress of a very serious kind.'"[214] The court focused on the purpose of the conduct at issue in terms of its social utility: "[A] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility."[215] Focusing on social utility, the court made it a limitation on emotional distress claims: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[216]

iv. Invasion of Privacy

A 1963 case presents a rather different use of the social utility concept. In a case for invasion of privacy—where a woman was followed, her whereabouts noted, and her movements filmed—the court stated that such conduct is reasonable because it believed that there was much social utility to be gained from investigations for personal injury.[217] In *Forster v. Manchester*,[218] the court held that there was "much social utility to be gained from these investigations."[219] The court reasoned that "[i]t is in the best interests of society that valid claims be ascertained and fabricated claims be exposed."[220]

The court further justified this position by pointing to an act of the legislature:

> The legislature recognized the importance of these investigative activities in the Private Detective Act of 1953 when it defined the business of a licensed private detective to include investigations of the "identity, habits, conduct, movements, whereabouts . . . of any person" and, in another subsection when it authorized the "securing of evidence to be used . . . in the trial of civil . . . cases."[221]

Relying on the act for a social utility, the court explained that "[c]ertainly, following the subject during her daily activities and recording on film her movements and whereabouts is consonant with the wording of the Act and

214. *Id.* (quoting Whelan v. Whelan, 588 A.2d 251, 253 (Conn. Super. Ct. 1991)).

215. *Id.* (internal quotation marks omitted) (quoting *Knierim*, 174 N.E.2d at 164).

216. *Id.* (internal quotation marks omitted) (quoting RESTATEMENT (SECOND) TORTS § 46 cmt. d (AM. L. INST. 1965)).

217. *Forster*, 189 A.2d at 150.

218. *Id.* at 147.

219. *Id.* at 150.

220. *Id.*

221. *Id.* (quoting Private Detective Act of 1953, Pub. L. No. 1273, § 2(b)(2), (10), 22 P.S. § 12(b)(2), (10)).

aforementioned social purpose."[222] The court was careful to also observe that "[t]here was nothing unreasonable in the manner in which appellant was followed nor in the taking of motion pictures. In regard to the surveillance, it was conducted by experienced investigators who did not use improper techniques."[223] The court held that "the social value resulting from investigations of personal injury claims and the absence of any willfulness on the part of appellee require[d] [it] to deny redress in this case."[224]

v. Wrongful Death

From the 1990s, wrongful death actions in multiple jurisdictions include an analysis of social utility of the actions at issue. For wrongful death complaints, to determine whether a duty exists requires that a court consider various factors including the risk involved, the foreseeability of harm as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the harm, and the consequences of placing the burden upon the actor.

In *Campbell v. Burt Toyota-Diahatsu, Inc.*,[225] the court addressed a problem of an alleged failure to warn. The court explained:

> We first consider the foreseeability of harm resulting from Burt's failure to warn the Campbells that the modified seatbelt posed a danger to them as weighed against the social utility of imposing a legal duty on Burt to warn against such danger when it was already known to the Campbells or should have been known.[226]

The court found that even if it assumed "that the foreseeability of harm resulting from a seat-belt modification was great, it [was] outweighed here by the lack of social utility in imposing a legal duty on Burt to warn of a safety hazard that was known or should have been known to the Campbells."[227] The court concluded, "The safety of automobiles is of great concern, and maintaining safe vehicles serves an important social function. Repair shops such as Burt's serve that function for most of the public."[228] In summary, the court held that "the social utility of not imposing a legal duty on Burt to warn of an obvious danger outweigh[ed] the foreseeability of harm in this case."[229]

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222. *Id.*
223. *Id.*
224. *Id.* at 152.
225. Campbell v. Burt Toyota-Diahatsu, Inc., 983 P.2d 95 (Colo. Ct. App. 1998).
226. *Id.* at 97.
227. *Id.*
228. *Id.* at 97–98.
229. *Id.* at 98.

D. Social Utility, Community, and the Problem of Definition

The expansion of social utility throughout the many common law tort claims holds a significant risk for environmental law for three distinct reasons.

First, social utility interjects a pro-defendant slant into tort cases. In other words, social utility analyses, when added to a tort analyses, will weigh in favor of defendants and make it more difficult for plaintiffs to win claims, however meritorious those claims are. This is particularly important in the context of the intersection of torts and environmental law.

Environmental law lacks one significant feature at the federal level—statutes almost never provide for any individual remedies for plaintiffs who have been harmed by violation of the statutes. In other words, if a plaintiff has developed a lung disease as a result of a toxin, which was released from a neighboring manufacturing facility, the plaintiff will need to file a common law action to be compensated for the injury. Social utility, however, may bar those plaintiffs from a successful claim, resulting in a justice gap for those plaintiffs.

Second, social utility is largely undefined and left to the whims of individual courts. There is no standardized definition. Because social utility rose as a method of considering equities, it was never intended to have a specific definition. It was meant to be used contextually to sort out the various factors that might be relevant to an inquiry by a court sitting in equity. In the modern context, however, there is a great deal of risk to having social utility undefined. One can easily regard social utility as a value that fits with modern property theory. Social utility is about community goods and social relationships around property. At the same time, social utility will consistently favor defendants as it has been interpreted in the courts. When the courts tally social utility in terms of the jobs created, the tax dollars for the community, the GDP of the country, etc., those things are always going to favor a corporate or industrial defendant rather than an injured individual neighbor. That's how social utility works within the cases. Because social utility is undefined, it tends to be defined in terms of those things that are easily counted within a community: jobs, incomes, and tax dollars. Sustainability doesn't generally compete well in that field because it cannot be reduced to concrete numbers for this tax year.

Third, social utility can be evaluated at any scale the judge chooses to consider. What scale do we use for evaluating benefits? Local? State? National? Unsurprisingly, benefits of a particular land use are often drastically different at those scales. And law has a bad habit of ignoring scale or treating jurisdiction (state and federal) as the answer to the question.

Consider, for example, the history of the Tennessee Valley Authority's (TVA) mission and the environmental consequences of the agency in the twentieth century. When the TVA was founded, the original mission focused

on the local area and the provision of hydroelectricity.[230] Additionally, the original mission was a highly socialist manifesto of addressing poverty in the lower Appalachian Mountains.[231] The game plan was to take electricity and utility coops to those who didn't have them. At the same time, the statute mentioned plans for national replication of this experiment.[232] But with the rise of socialism as a threat before and during World War II, the agency reformulated its priorities. The agency dropped any interest in Appalachian poverty and refocused its efforts on the national defense.[233] In the process, the agency switched to coal-powered plants and the purchase of millions of tons of strip-mined coal from the region.[234] Between the purchase of strip-mined coal and the pollution created by the coal-fired power plants (both in terms of air pollution and coal ash releases), the TVA became one of the greatest environmental threats to the region. And this was an agency whose mission was once clean hydroelectric power and poverty relief. What changed? Scale. The original mission did not define scale well, and the agency changed the scale for self-preservation with the rise of the World War II threat.

Social utility presents exactly the same problem in many ways. To the degree that there is no set scale for evaluating utility, a judge is free to evaluate in any way. And the larger one evaluates utility, the less important local environmental impacts become. Of course, you can imagine how malleable social utility is and how much it fits with corporate and political norms, such as job creation and tax revenue.

Enough social benefits and the plaintiff may not even be able to prove nuisance now, when the same case would have been decided differently traditionally.

V. FORMULATING A SUSTAINABLE PROPERTY THEORY

In the social sciences, many researchers have moved to a methodology known as grounded theory. Grounded theory comes from the work of Barney Glaser and Anselm Strauss.[235] Grounded theory originates in qualitative sources, specifically actual experiences.[236] In the context of law, grounded

230. TENN. VALLEY AUTH., TVA TODAY 1, 7 (1975).

231. *Id.* at 1.

232. *Id.* at 2.

233. TENN. VALLEY AUTH. INFO. OFF., TENN. VALLEY AUTH., A HISTORY OF THE TENNESSEE VALLEY AUTHORITY 19 (1983).

234. TENN. VALLEY AUTH., *supra* note 230, at 42.

235. *See generally* BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH (1967).

236. *Id.*

theory serves to remind us of the importance of the cases themselves over scholarly commentary.[237]

This Article has proceeded under a grounded theory model. Discussions have not focused on the nuances of how scholars want modern property theory to be interpreted. These discussions admittedly ignore aspirations and ideals of many of those authors. The point instead was to engage the modern turn toward social relations as it is represented, accepted, and utilized within the law, and particularly the case law, through recent years.

Grounded theory pushes us away from armchair speculation and toward concrete experience. Climate change doesn't leave us with time for the armchair speculation. What is important now is how the courts treat socially-oriented concepts of property.

This Article has demonstrated that social relations approaches, as represented in the case law, have failed environmental law by (1) supporting such malleable concepts as social utility and (2) thinking in terms of the individual as opposed to society, while ignoring the land itself. Without a different approach to property, there is no good evidence to suggest that sustainability can ever win. The cards are stacked against it.

Worse, the stakes are high when we cannot rely on federal and state enforcement due to either politics or economics. Common law claims give the American people a route to local enforcement of environmental norms when federal and state enforcement fails. In other words, there are moments when there is less enforcement because of national politics. Sometimes, there are key reversals of protective policies that were not enshrined in statutes. Alternatively, sometimes there is just a failure of enforcement. With too few employees, an agency simply does not have the workforce power to accomplish critical tasks like monitoring water quality throughout a large region. Regulations give us a very limited and federal or state enforcer—one that is highly reactive to politics. Additionally, we rely on agencies who may care but don't have much of a stake and who are vulnerable to lobbyists.

With so many opportunities for legal concepts to be stretched, spun, and shoved just enough, key property concepts in statutes and the common law need explicit normative content. The failure of social relations concepts is in their generality, which makes them highly malleable and responsive to political pressures. Too much malleability means a legal concept is not truly normative.

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237. Using a grounded theory approach in this context remains somewhat novel. As Noah Weisbord said, "The qualitative methods of Glaser and Strauss, in spite of their internalization in other areas of social research, have not yet penetrated the field of law." Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMPAR. & INT'L L. 1, 11 (2009).

What is of greater utility than providing for human survival? *Social utility and other similar concepts must be understood in terms of sustainability*. Land is our most fundamental home and worthy of a unique status from other types of property. Land is the foundation of our survival and the possibility of survival in the future. There isn't a plan B. Resources may be used, of course, but thoughtfully, with particular emphasis on the climate-related externalities.

Survival and sustainability should unite the landowner and the public. The original model of traditional property theory was a model of dominion and control, often justified by highly sexist and exclusionary religious rhetoric. It set up a world that was owner against others, emphasizing individual rights as against the rest of society.

Modern property theory refocused on the community and a social relations model of property. Notably, this is a conflict-based model—it assumes the best for others is never (or rarely) best for the owner. It is a model that assumes the tragedy of the commons. Moreover, such a model depends on a particular view of human nature: one that is, ironically, highly individualistic and pessimistic. People want to care about only themselves and we force them to care about others, or at least correct them when they don't. *In a way, it is almost self-defeating: community-based solutions are employed precisely because people are, allegedly, individualist and resistant to community, if not incapable of it.*

This model places society in the position of the interferer with those original ownership and dominion rights. Additionally, given that modern property theory really didn't push back significantly against the prized right to exclude, there is constant pushback on those grounds. Regulation is seen as a violation of that right to exclude: regulation is seen as a reaching into property rights.[238]

The conflict model is unhelpful, leaving us constantly figuring out how to best allocate rights and maneuver fairly through the conflict. We need a new model that will function for us in a climate crisis.

The challenge isn't so insurmountable as it may seem: All of our interests have become united, to some degree. Wherever you live, climate change is a problem within your own lifetime. No location avoids all the storms, droughts, sea level rise, and unprecedented temperatures. No location avoids the increased likelihood of new pandemic viruses. Even oil and gas executives

238. Joseph Singer made a similar argument: "The ownership model of property utterly fails to incorporate an understanding of property rights as inherently limited both by the property rights of others and by public policies designed to ensure that property rights are exercised in a manner compatible with the public good." Singer, *supra* note 36, at 7. Singer concluded, "It makes regulations of property appear inherently suspect. It presumes that when property rights are limited by government regulation, an evil has been effectuated that bears a heavy burden of justification." *Id.*

have to care when the whole world instantly goes on lockdown for months at a time and oil prices actually go negative.[239]

The challenge of our lifetimes is to become the communal creature that I optimistically believe we are. The new model must prioritize the land before either the individual or the rest of society. Society and the individual are important because they are *acting on land*, separately and together. Focusing on ourselves, not the land, was central to creating the climate change era. We worried about pollution mostly when it impacted our own health and only occasionally when it impacted ecosystems. We minimized health problems that weren't directly human problems. Fixing the problem requires reversing that thought process. The focus has to be first on the land's wellbeing. Our wellbeing will be the critical but indirect outcome.

If we must reword this theory in terms of social relations and community, survival is social; sustainable is social. If we must reword in terms of social utility, choices create a variety of social goods from happiness to tax dollars, but in the era of climate change, sustainability should weigh heavier in the analysis and set firm limits for externalities.

VI. CONCLUSION

As a final matter, watching the evolution of tort and property doctrine where social utility is concerned should remind us that fuzziness and amenability to change in any legal concept is a part of our ongoing jurisprudence. Slippage is the norm, not the variation. Our baseline is change over time. The only effective way to steer that change is to imbue key legal concepts with explicit norms.

Property should not be theorized in terms of amorphous progressive social relations but instead in terms of stewardship and survival. That survival relationship was more obviously true in agrarian centuries past. Economic and social changes have made the relationship less intuitive over time. Climate change is making the link more intuitive again.

If we do not think in terms of stewardship and survival, then we are stuck with the status quo, where every single regulation is a fight against that norm of complete individual control. Every lawsuit is the owner against the world. Our jurisprudence entangled the malleable idea of social utility with a norm of industrial productivity. The tangle was less intentional, more accidental and political. Sometimes the tangle came from nothing more than fuzzy analysis and misplaced reliance on precedents. We must face these tangles and reclaim

239. Justin Worland, *Oil Prices Won't Be Negative Forever. But the Oil Industry Will Never Be the Same*, TIME (Apr. 20, 2020, 10:50 PM), https://time.com/5824263/coronavirus-negative-oil-prices-consolidation/ [https://perma.cc/QYX9-K873].

the idea of social utility by recognizing that sustainability is not only a core human value but a requirement for survival.

I want to raise this concern about property theory now because I believe we are about to expend a very, very precious resource that will take another fifty years to re-build. That resource is an increasingly mobilized society that is deeply concerned about human survival on this planet. I don't want to waste that social energy on legal changes that erode quickly.