
ARTICLE

STRICT LIABILITY AND NEGLIGENCE IN PROPERTY THEORY

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INTRODUCTION

Property theorists typically conceptualize property as a strict liability regime. Blackstone characterized 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.”¹ In more modern terms, property represents what Henry Smith has called an “exclusion strategy”: property law delegates decisions about resource use to an owner, who “is responsible for de-

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¹ 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

cluding on and monitoring specific activities with respect to the resource."² Any interference with the owner's property right in itself gives rise to a legal claim by the owner. The usurper's excuses for the interference are irrelevant and do not serve as defenses.

Tort law, by contrast, combines principles of strict liability with those of negligence. When a firm engages in blasting,³ and increasingly when a firm manufactures or sells potentially dangerous products,⁴ it may be liable for losses caused by its actions regardless of fault. In other instances, however, negligence remains an essential element of a tort claim. If I carelessly drive my car into your car and break your leg while distracted by a cell phone conversation, I am a tortfeasor liable for your loss. However, if I drive the same car into you and cause the same injury while swerving to avoid three children running to retrieve a ball, I am not a tortfeasor.⁵ Negligence rules reflect the ultimate "governance strategy"—a more finely grained analysis of the appropriate behavior of the parties toward one another.⁶

Although some respected academic literature suggests that strict liability should replace negligence as the foundation for tort liability,⁷

² Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454-55, S469 (2002).

³ See, e.g., *Spano v. Perini Corp.*, 250 N.E.2d 31, 33 (N.Y. 1969) (establishing New York State's first strict liability standard for blasting injuries); RESTATEMENT (SECOND) OF TORTS § 519 (1965) (imposing strict liability for harm caused by one who engages in an "abnormally dangerous activity").

⁴ See, e.g., *Salvador v. Atl. Steel Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974) (eliminating the requirement of horizontal privity for Pennsylvania products liability claims). A product "contains a manufacturing defect when [it] departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (1998). Selling or otherwise distributing a defective product likewise subjects a seller or distributor to liability. *Id.* § 1.

⁵ See RESTATEMENT (SECOND) OF TORTS § 295 (1965) (establishing that a reasonableness analysis involves examining the risks of harm in the alternative courses of conduct available to an actor).

⁶ See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 975-80 (2004) (associating tort law with a governance strategy); see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 146-47 (1995) (arguing that corrective justice requires unity of the plaintiff-defendant relationship).

⁷ See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060-62 (1972) (arguing that producers are often better situated than courts to determine whether the costs of accident avoidance exceed the costs of accidents); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 188, 203-04 (1973) (grounding a defense of strict liability in terms of individual liberty, but also arguing that strict liability might "in the end [be] preferable on economic grounds because [it] reduce[s] the administrative costs of decision"); see also STEVEN SHAVELL,

strict liability's proponents have not carried the day.⁸ Negligence still has its strong supporters within the academic community.⁹ For economically oriented tort theorists, the primary advantage of negligence liability is that negligence, unlike strict liability, takes into account a victim's ability to avoid injury by taking precautions.¹⁰ For corrective justice theorists, a victim has no claim to compensation against the person who caused his injury unless that person took actions that were wrongful against him.¹¹

The negligence principles that continue to underlie personal injury law also apply to claims for physical damage to property interests. Indeed, *United States v. Carroll Towing Co.*, the vehicle through which Judge Learned Hand articulated his famous negligence standard,¹² involved claims for property damage.¹³ However, negligence principles are curiously absent from discussion of other claims for infringement of, or encroachment on, property interests. In particular, the prevailing property lore holds that a resource user must bear liability when the user invades the boundaries of a property right—whether mistak-

ECONOMIC ANALYSIS OF ACCIDENT LAW 21-26 (1987) (arguing that a defendant's unreasonable decisions may escape detection in a negligence regime).

⁸ See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 4, scope note, at 228 (2010) ("There is . . . no general rule of strict liability in tort in physical-harm cases. . . . Instead, there are a number of particular rules that impose strict liability in certain circumstances.").

⁹ See WEINRIB, *supra* note 6, at 171-72 (asserting that strict liability is inconsistent with "corrective justice's equality . . . with its idea of agency . . . [and with] its correlativity of right and duty"); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 206 (1973) (claiming that negligence standards typically lead to more efficient outcomes than strict liability standards). For a more recent defense of negligence-based liability, see Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 258-62 (2008).

¹⁰ See Posner, *supra* note 9, at 207 (noting that a strict liability standard lacking the defense of contributory negligence is less efficient than a negligence standard with such a defense).

¹¹ See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 361 (1992) ("A loss falls within the ambit of corrective justice only if it is wrongful."). Coleman, however, concedes that strict liability can sometimes be a matter of justice, as when justifiable conduct "can be contrary to the constraints imposed by the rights of others." *Id.* at 371; see also WEINRIB, *supra* note 6, at 184 ("Fault, consisting in either intentional or negligent harm, is the organizing principle of the common law."); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 545-56 (1972) (grounding strict liability in the notion of imposing nonreciprocal risks on potential victims).

¹² See 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability [of loss] be called P; the injury, L, and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P; i.e., whether $B < PL$.")

¹³ See *id.* at 170 (detailing claims for flour loss, cargo and barge salvage costs, and barge damage following a ship collision).

only or not. Negligence is irrelevant. Thus, if I trespass on your land, your right to recover does not depend on whether I exercised reasonable care to ensure that I remained on my own land.¹⁴ If I sell a product that infringes on your patent, you have an infringement claim regardless of the care I took to ensure that my product did not infringe on any patents.¹⁵

The apparent absence of negligence principles from much of property law merits discussion because most claims for interference with property rights have the same structure as tort claims. Generally speaking, the holder of a right seeks relief from a stranger who has allegedly interfered with that right. Trespass and nuisance are obvious property law examples, but quiet title claims, as well as copyright and patent infringement claims are also akin to tort claims, because the “owner” seeks relief from wrongdoers with whom the owner has no contractual relationship.

The prevailing conception of property is one of clear boundaries, easily and inexpensively ascertainable by owners and potential users. Within that conception, a strict liability regime¹⁶ makes considerable sense: it delegates control over resource use to owners, reducing the need for courts and potential resource users to educate themselves about the value of competing resources.¹⁷ At the same time, strict liabil-

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 164 (1965) (imposing liability on one who intentionally, albeit mistakenly, trespasses on another’s land).

¹⁵ The level of care taken by an infringer is relevant only to determine whether the infringer should be liable for the enhanced damages that can follow from a finding of willful infringement. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (“Because patent infringement is a strict liability offense, the nature of the offense is only relevant in determining whether enhanced damages are warranted.”). As the *Seagate* court noted, even an infringer who relied on advice of counsel cannot always escape liability for willful infringement. *Id.* at 1369 (stating that advice of counsel is “crucial to the analysis,” but is not “dispositive”).

¹⁶ Tort law sometimes categorizes interferences with land or chattels as intentional torts, as opposed to instances of negligence or strict liability, even if the actor is completely unaware that he is interfering with the rights of an owner. This categorization generates more confusion than clarity, and tort scholars do not always treat “intent” and “strict liability” as mutually exclusive. See, e.g., Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L., no. 3, 2011 at 1, 4 (“Modern intentional nuisance law is a canonical instance of a strict liability wrong.”).

¹⁷ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 793-95 (2001) (noting that complex societies recognize in rem rights in order to reduce information costs); Smith, *supra* note 6, at 984-85 (explaining that the exclusion strategy allows courts to focus on simpler issues of whether a landowner’s right to exclude was violated instead of more complex issues of proper usage of land). Merrill and Smith concede that exclusion rules work less well when resources are “diffi-

ity imposes no hardship on encroachers or infringers. An encroacher or infringer only uses a neighbor's rights because he (unlike the paradigmatic tortfeasor) derives economic benefit from those rights. The gains from use of the owner's rights provide a fund from which the encroacher can compensate the owner for his losses. If property boundaries were always clear, however, both strict liability and negligence regimes would generate identical outcomes. If a potential resource user could costlessly determine which rights he needed and who owned those rights, the user would act negligently—if not intentionally—whenever he encroached on an owner's rights.¹⁸

But in fact, it is often costly to determine the title to—and the scope of—property rights. When a potential user makes reasonable, but ultimately unsuccessful, efforts to ascertain property boundaries, a strict liability regime requires the user to compensate the owner for any losses. This compensation must occur even when the user does not derive benefits that correspond to the owner's loss. For instance, if I pay market value for a property interest with the mistaken belief that the seller had good title, requiring me to return the property (or its value) to the true owner leaves me with a substantial out-of-pocket loss. In addition, in the all-too-frequent case in which the seller has died or become insolvent, I must bear the entirety of that loss.

This Article argues that, in cases where ascertaining the scope of boundaries is costly, property law should, and sometimes does, make use of negligence principles. Current doctrine does not directly incorporate the law of negligence into property law. Instead, property law has developed surrogates for negligence-based liability rules. These surrogate rules protect the interests of a usurper who took reasonable care before investing in a property interest he did not own—the same interests a negligence rule would protect. Thus, although explicit discussions of negligence rarely find their way into property law opinions, issues of fault do play a significant role in property cases and perhaps should play a bigger, more explicit role in the future.

cult to package into easily measured and monitored parcels.” Merrill & Smith, *supra*, at 798.

¹⁸ I assume here that a resource user who knowingly infringes or encroaches on another's property is liable to the owner without regard to the reasonableness of the infringing activity.

I. INFORMATION COSTS AND STRICT LIABILITY

Property law and tort law approach similar problems from different angles. Both deal with claims by the holder of a right—such as life, bodily integrity, land, or intellectual property—against someone who has interfered with that right. Property law, however, focuses primarily on the right holder, and assumes that the entire world has a duty to respect the holder's right. As a result, the right holder's claim should prevail regardless of the nature of the interferer's action. Tort law, by contrast, focuses on whether the interferer's action violated a duty to the right holder. If the interferer owed no duty, or if his action did not violate such a duty, the right holder must bear the loss the interference caused.¹⁹

The property law approach relies on markets to allocate resources efficiently. By entrusting all rights in a resource to a single owner with power to coordinate potentially conflicting uses, property law concentrates in that owner the need to become completely informed about the range of uses to which the resource might be put and the values associated with those uses.²⁰ Potential users need know only the value they attach to the resource and can bid accordingly.²¹ Courts need not concern themselves with relative values because they can rely on owners to allocate the resource efficiently.²² As a result, the property law approach, characterized by what Merrill and Smith call "exclusion rules," reduces the information costs associated with promoting efficient use of resources.²³ Without strict liability, however, some poten-

¹⁹ See Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011 at 1, 14 (noting that "property starts with a thing" while "tort law takes action as its starting point").

²⁰ See Smith, *supra* note 6, at 984-85 (demonstrating that "property protection allows the owner to bear the consequences" of his land use choices); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1755 (2004) ("[O]ne of the purposes of property is to internalize the costs and benefits of a wide range of uses of an asset on the owner.").

²¹ See Smith, *supra* note 6, at 984 (noting that potential buyers, under the exclusion regime, know that they are getting the right to exclude when buying real property). For a discussion of information-cost advantages associated with intellectual property rights, see Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1764-65 (2007).

²² See Smith, *supra* note 21, at 1764 (claiming that, in the intellectual property context, "outsiders" need only know when a violation occurs, not exactly what rights owners hold).

²³ Merrill & Smith, *supra* note 17, at 795. Merrill and Smith note that exclusion rules allow "a multitude of individuals with a small amount of information to interact in mutually beneficial ways that would be impossible in a world that had only governance rules." *Id.*

tial users of a resource could bypass the market by engaging in legally privileged use of the resource.²⁴ The potential for market bypass in a world without strict liability would make owner coordination less effective and would introduce the need for courts to determine which uses should be privileged. This, in turn, would reduce the information cost advantages of market allocation.

Exclusion rules do not generate the same information cost advantages when, as in the typical tort case, owner coordination of resource use is not feasible. In a tort case, the resource at stake may be the tort victim's life, bodily integrity, reputation, or property. Each potential tort victim faces risk from a vast array of potential tortfeasors. Few of these risks will ultimately result in significant harm. Because of the large number of risks and the reduced expected harm associated with each risk, a potential tort victim will not find it worthwhile to assemble information about each risk or engage in market transactions regarding these risks.²⁵ To take an obvious example, a potential tort victim worried about being hit by a car cannot feasibly negotiate in advance with every potential driver regarding the terms of compensation in the event of a crash.²⁶ Thus, a principal advantage of exclusion rules disappears because owner coordination is not feasible.²⁷

In some circumstances, the *tortfeasor*, rather than the victim, may be in a position to coordinate resource use. For instance, the blaster or the manufacturer of widgets may be best able to research and evaluate the potential harm its activities or goods will cause in the aggregate, without knowing exactly who will suffer that harm. In those circumstances, a strict liability rule creates incentives for the blaster or

²⁴ See Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 415-17 (2002) (arguing that strict liability can encourage property owners to bypass the market in the hope of luring potential infringers to use their property without permission, triggering payments the owners would not be able to induce *ex ante*).

²⁵ Cf. Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 85-86 (2011) (noting the absence of markets in situations involving copyright law and arguing that "accident law" should apply in those instances).

²⁶ Conversely, a driver cannot initiate negotiations with every potential victim. Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1238 (1988) (reviewing WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and SHAVELL, *supra* note 7).

²⁷ Merrill and Smith suggest that, in situations like these, where the number of duty holders is large, those duty holders' identities are indefinite—and they simultaneously hold duties to other numerous and indefinite holders of rights. One would expect resources to be allocated in accordance with majoritarian default rules. These majoritarian rules are those "that most parties would prefer to adopt to govern their relationship, if they could costlessly negotiate on the subject." Merrill & Smith, *supra* note 17, at 800.

manufacturer to account for those harms and relieves courts of the need to perform a cost-benefit analysis.²⁸

In the absence of those circumstances, however, tort law doctrine forgoes exclusion rules in favor of other strategies for controlling information costs. As Smith has observed, proximate cause and foreseeability doctrines reduce information costs to potential actors by ruling out liability for certain classes of injury.²⁹ Tort doctrine likewise reduces information costs when it relies on a reasonable care standard.³⁰ These doctrines form a network of finely grained governance rules that focus on the reasonableness of the tortfeasor and tort victim.³¹

Although owner coordination is generally more feasible within the realm of property law, the information-cost justification is nevertheless unpersuasive in at least two recurring situations. First, information costs do not justify exclusion rules when transaction costs prevent the owner (or anyone else) from allocating resources to users who value those resources most.³² The information-cost rationale for exclusion rules is most compelling when delegation of decisionmaking authority to the owner allows the owner to reallocate resources in ways that maximize value—an assumption that is generally false when transaction costs are high.³³ Second, the information-cost justification for exclusion rules is problematic when the dispute is over *who* enjoys the right to exclude.³⁴ If the cost of that determination is high relative to the

²⁸ See Calabresi & Hirschhoff, *supra* note 7, at 1060, 1062 (asserting that strict liability may be warranted when a goods manufacturer is the “cheapest cost avoider” best able to conduct a cost-benefit analysis).

²⁹ See Smith, *supra* note 19, at 22, 25.

³⁰ See *id.* at 29-30 (describing how both tort and property law “reap[] information cost advantages from relying on moral norms”).

³¹ As Smith notes, “common law tort duties tend to track everyday morality”; that is, the rules focus on whether the actor behaved reasonably or unreasonably. *Id.* at 18.

³² Cf. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14 (1985) (noting that, when transaction costs are high and when market mechanisms fail, “more expensive entitlement-determination rules are necessary in order to give judges the needed discretion” to achieve efficient solutions).

³³ Smith observes that exclusion rules can reduce information costs even when transaction costs prevent the owner from engaging in market transactions. In particular, he notes that the owner can select among uses of the resource. Specifically, the owner can choose when to exploit the resource without having to justify his decision to a court or other third party. See Smith, *supra* note 6, at 982. However, when efficient use of resources would require assembling multiple owners’ property rights, or sharing the rights among owners, the costs of an exclusion regime are more likely to exceed their benefits. As Smith notes, if “the transaction costs of private contracting . . . are high, then judicial governance can be worthwhile.” *Id.* at 996.

³⁴ The justification for exclusion rules assumes that determining who has the right to exclude will be relatively inexpensive. See, e.g., *id.* at 984 (noting that exclusion rules

value of the resources involved, an exclusion rule does not concentrate in any single person the incentive to acquire information about the property. Instead, plausible claimants to a resource will discount the value of information to account for the costs involved in ascertaining the validity and scope of their ownership rights.³⁵

Nuisance law exemplifies the first situation. An easy-to-apply exclusion rule would permit every landowner to stop neighbors from emitting all particulate matter over the landowner's parcel. However, that rule would require an emitter of generally inoffensive particles—such as a bakery whose operation causes the smell of fresh bread to waft through a neighborhood—to obtain consent from all of its neighbors in order to obtain protection against future injunctions. In the absence of transaction costs, the bakery would be able to do this; the value of its operations exceeds the costs imposed on neighbors. In the real world, however, the cost of those negotiations might preclude largely inoffensive bakeries from operating, because any neighbor could hold out for payment in excess of the costs imposed by the bakery's smell. Unsurprisingly, legal doctrine does not impose strict liability for emission of particulate matter, sound waves, or a variety of other kinds of interference.³⁶ Although nuisance liability does not require negligence, nuisance doctrine focuses both on the reasonableness of the defendant's conduct and, through the "coming to the nuisance" doctrine, the reasonableness of the plaintiff-landowner's conduct.³⁷

The second situation occurs in a high percentage of litigated property cases. Because exclusion rules are so well-established in property doctrine, many litigated cases naturally turn on title issues or fuzzy boundaries, such as which deed enjoys priority, whether the parties

are advantageous because they are "simple" and "easy to announce . . . ex ante"); *cf. id.* at 981 ("Exclusion is a low-cost . . . method that relies on rough informational variables like boundaries to define legal entitlements.").

³⁵ See generally Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1294 (2008) (noting that property rules dissipate the information-cost advantages associated with exclusion rules if they require potential claimants to process too much information).

³⁶ See Merrill, *supra* note 32, at 17-20, 26 (noting that one would expect the law of nuisance, marked by significant judicial discretion, "to apply to disputes characterized by high transaction costs").

³⁷ Section 840D of the Second Restatement of Torts, entitled "Coming to the Nuisance," provides that the fact that a plaintiff has "improved his land after a nuisance interfering with it has come into existence . . . is a factor to be considered in determining whether the nuisance is actionable." RESTATEMENT (SECOND) OF TORTS § 840D (1965). Comment a to that section suggests an analogy to assumption of risk, in effect asking whether a plaintiff's claim should be barred because the plaintiff should have understood the potential for conflict with an existing neighboring use. *Id.* cmt. a.

created an enforceable easement, what uses the license covered, or whether the alleged infringer's work constituted "fair use." When parties dispute title, or when rights to resources have fuzzy boundaries, owner coordination is less likely to result in efficient resource allocation.³⁸ For each competing claimant, the expected value of an investment in information must be discounted to reflect the possibility that his claim will fail. Moreover, the cost of ascertaining ownership will deter some high-valuing users from negotiating for the resource. Therefore, one would expect that when title claims arise, or when disputes revolve around fuzzy boundaries, doctrine would focus on competing claimants' behavior. And, indeed, as Part III shows, courts and statutes do take into account the behavior of the parties, although usually without explicitly citing concepts like "care" and "negligence."

II. UNJUST ENRICHMENT AND STRICT LIABILITY

When property owners seek redress for infringement or interference, the principle of unjust enrichment often supports strict liability. Suppose, for instance, that a landowner farms his neighbor's land, reasonably believing that the land is his own. Once the farmer discovers the error and identifies the true owner, why shouldn't the true owner be entitled to the rental value of the land? If the farmer had known of the true state of title beforehand, he would have had to rent land from his neighbor to derive the same profit. Requiring the farmer to compensate the true owner simply restores the parties to the financial positions they would have occupied had all parties been completely informed about title all along.³⁹ The same idea often applies to an "innocent" copyright or patent infringer who realizes a financial gain from using the owner's rights.⁴⁰ Unjust enrichment principles may require a form of disgorgement independent of any wrong.⁴¹

³⁸ When encroachment results from a mistake about the scope of property rights, denying injunctive relief to encroachers who act on the reasonable belief that they own the rights on which they have encroached is unlikely to result in market bypass or to interfere with owner coordination of resource use. See Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1858 (2009) (noting that nonnegligent good faith improvers do not attempt to circumvent the market).

³⁹ Cf. Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 17 (2000) ("[C]orrective justice requires the wrongdoer to undo the wrong perpetrated against the proprietor. . . . By awarding the value of the use, a court reverses the wrong that consists in the alienation.").

⁴⁰ For instance, the copyright statute authorizes a copyright owner to recover "any profits of the infringer that are attributable to the infringement." 17 U.S.C. § 504(b). The patent statute provides that damages shall be "in no event less than a reasonably

In contrast to the typical property encroacher, the paradigmatic tortfeasor derives no comparable economic benefit from the tort.⁴² Neither the driver who hits a pedestrian nor the physician who misdiagnoses a patient realizes a financial gain that corresponds to the victim's loss.⁴³ Unlike the actions of the farmer or the copyright infringer who appropriates value that can be restored to the owner, the actions of the hypothetical driver or physician destroy value rather than appropriate it. Because the parties are collectively worse off than they were beforehand, they have no resources to restore themselves to their respective positions. In that situation, tort law requires some wrongdoing on the part of the actor—generally negligence—before shifting the loss from the victim to the actor.

There are, of course, instances in which a tortfeasor does derive gain from an activity that results in a victim's loss. Unlike the driver of a defective car who reaps no financial gain from driving it, the manufacturer of a defective car generates significant financial gain from manufacturing the product. But product liability cases—in which the financial gain to the tortfeasor is most evident—have generated the greatest pressure in favor of adopting strict liability rules. Commercial blasting and other ultra-hazardous activities fit the same model: the tort defendant derives benefit from an activity that, by its very nature, poses a risk of harm to others, even if undertaken in an extremely cautious manner. In a sense, the defendant would be unjustly enriched if entitled to retain the benefits from the activity without compensating those harmed by the activity. Moreover, strict liability is most likely to generate efficient levels of the activity because it places costs on the

royalty." 35 U.S.C. § 284. And courts have held that "[t]he key element in setting a reasonable royalty is the necessity for return to the date when the infringement began." *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1158 (6th Cir. 1978).

⁴¹ Peter Birks has distinguished unjust enrichment, which requires restitution in the absence of any wrong, from wrongful enrichment, which requires an act of wrongdoing. Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1789 (2001).

⁴² See Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 278 (1994) ("[M]ost tort cases involving accidental harms feature a loss by the plaintiff from which the defendant realizes no corresponding gain.").

⁴³ Of course, the physician's overall income constitutes a financial gain that could be made available to the misdiagnosed patient, much like how a company's profits constitute a financial gain when it engages in blasting or manufacturing automobiles. But even in the products liability context, courts have generally applied strict liability principles only to manufacturing defects, not to design defects that are often difficult to prove. See generally RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (2005); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 774-76 (1996).

actor best able to determine whether the gains generated by the activity exceed the costs imposed on others.⁴⁴ Strict liability may not be suitable for *all* cases in which a defendant realizes a gain from the activity that injured a plaintiff, but tort law rarely imposes strict liability outside of this context.⁴⁵

Tort cases can therefore be divided between those in which the injury-causer has profited from his action, generating a pool of funds for victim compensation, and those in which the injury-causer has not profited from his action. This division applies to property cases. Although the exemplar case of property infringement or encroachment is one in which the encroacher has been using someone else's property for free (generating economic benefit for himself), other property infringers or encroachers are not free-riders in the same sense. Some have mistakenly bought from the wrong person.⁴⁶ Others have made significant investments believing that they did not need to acquire more rights than they had.⁴⁷ These encroachers and infringers have no pool of money available to compensate owners. Therefore, unjust enrichment principles provide no basis for liability in these cases. Liability would be justified only if the encroacher had engaged in some form of wrongdoing.⁴⁸

Consider, for instance, a landowner who buys property in good faith reliance on an inaccurate title search or land survey. Or consider a film producer who buys the rights to use a song in a film, only to discover that the song's music or lyrics had infringed on someone else's copyright. The encroacher or infringer has not been unjustly enriched by using the owner's resource. Therefore, a successful claim by the owner will require the encroacher to pay twice for the same right. In situations like these, one might expect courts to insist on some form of wrongdoing—negligence, perhaps—before holding the encroacher liable. As the next Part demonstrates, property doctrine does not use

⁴⁴ See generally Calabresi & Hirschhoff, *supra* note 7, at 1062 (noting that the producer of a product is best suited to make a cost-benefit analysis).

⁴⁵ In cases of product defect, strict liability is limited to manufacturing defects, while the Third Restatement of Torts adopts a negligence-like standard for design defects and failure to warn. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2. The Restatement justifies its position by noting that “[s]ociety does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky.” *Id.* cmt. a.

⁴⁶ *E.g.*, Harper v. Paradise, 210 S.E.2d 710, 711 (Ga. 1974).

⁴⁷ *E.g.*, Somerville v. Jacobs, 170 S.E.2d 805, 805-06 (W. Va. 1969).

⁴⁸ As Birks asserted, “strict liability is only appropriate so long as the assets of the recipient are . . . swollen.” Birks, *supra* note 41, at 1787.

the language of negligence, but nevertheless incorporates “negligence-like” principles to protect encroachers in some of these situations.

III. THE EMERGENCE OF NEGLIGENCE-BASED PROPERTY RULES

Where potential resource users make reasonable mistakes about the steps necessary to acquire desired resources, neither the information-cost rationale nor the unjust enrichment rationale explains why those users should be strictly liable for damages they cause to the resource owner. I argue that property law has developed “negligence-like” principles to confront these situations. The principles are more rule-based than an open-ended reasonable person standard, but they incorporate notions of fault and cost avoidance familiar from tort law.

A. *Protection of Bona Fide Purchasers*

Common law courts resolved competing claims to land ownership in accordance with a rigid rule of “the first in time is first in right.”⁴⁹ If *O* transferred title first to *A* and then to *B*, *A* would prevail against *B*—and against any purchasers from *B*—even though neither *B* nor his purchasers had any effective way to learn of the prior transfer to *A*.

Recording acts developed as a response to this problem.⁵⁰ The earliest recording acts retained the rigidity of the “first in time” rule but shifted focus to the order in which deeds were recorded rather than the order in which they were delivered.⁵¹ Under these early race-to-the-recording-office statutes, a subsequent purchaser who knew of a prior transfer could prevail over the prior transferor if the subsequent purchaser won the “race.”

Over time, however, most states abandoned race statutes in favor of statutes that protect only “bona fide purchasers”—those who bought

⁴⁹ 4 AMERICAN LAW OF PROPERTY § 17.1, at 523 (A. James Casner ed. 1952). This rule applied to all claims not covered by statute. *Id.*

⁵⁰ Modern recording statutes are of two types: notice statutes, which protect subsequent purchasers who take without notice even if those subsequent purchasers do not themselves record, and “race-notice” statutes, which protect subsequent purchasers without notice only if those subsequent purchasers record before the prior, competing transferee records. Compare FLA. STAT. ANN. § 695.01(1) (West 2010) (requiring “notice”), with N.Y. REAL PROP. LAW § 291 (McKinney 2006) (stating that purchasers without notice are protected if they purchased “in good faith and for a valuable consideration”). Neither type of statute confers protection on a subsequent purchaser who took with actual knowledge of a prior competing deed.

⁵¹ See 4 AMERICAN LAW OF PROPERTY, *supra* note 49, § 17.1 at 538 (noting that, under the earliest acts, “the matter was to be determined solely by a race to the record”).

property without actual knowledge of a prior transfer.⁵² Of course, if the prior deed had been recorded properly, the subsequent purchaser could not assert the protection of the recording act because the subsequent purchaser had “constructive notice” of the prior deed. These “notice” statutes protect true owners against subsequent purchasers whose interference with the true owner’s rights is intentional or negligent. However, they do not protect true owners against subsequent purchasers who have acted with reasonable care.⁵³

Various recording act doctrines highlight the subsequent purchaser’s “fault” in determining whether she is liable to the true owner. For instance, consider the treatment of so-called “wild deeds.” Even if the true owner has recorded his own deed, he is not fully protected against subsequent purchasers if the record includes gaps in his chain of title from the common source. In light of the grantor–grantee indexes prevalent in many states, a reasonable title search might not uncover the true owner’s “wild” deed.⁵⁴ If a reasonable title search would not uncover the deed, the subsequent purchaser who bought in reliance on that title search is not at fault.⁵⁵

Conversely, even when the true owner has entirely failed to record his deed, the true owner may be protected against subsequent purchasers who should have discovered the true owner’s interest from facts outside the record. For instance, if the true owner was in possession of the premises at the time of the subsequent purchase, courts

⁵² See, e.g., FLA. STAT. ANN. § 695.01(1) (providing that an unrecorded transfer shall not be valid against “subsequent purchasers for a valuable consideration and without notice”). For a classic account of the movement from a pure recording system to a “muddier” system that considered what the buyer knew or should have known, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 585-90 (1988).

⁵³ Subsequent purchasers act with reasonable care when they conduct a careful title search.

⁵⁴ See, e.g., *First Props., L.L.C. v. JPMorgan Chase Bank, N.A.*, 993 So. 2d 438, 422 (Ala. 2008) (“[U]ndisputed evidence before the trial court showed that a search of the grantor-grantee index in the Jefferson County Probate Office would not have uncovered the foreclosure-sale deed. Consequently, the foreclosure-sale deed is a ‘wild deed’ . . .”).

⁵⁵ Other recording act doctrines also protect subsequent purchasers who conduct reasonable title searches. For instance, when a purchaser records a deed but does not describe the property adequately, the deed may not put subsequent purchasers on notice. See, e.g., *Luthi v. Evans*, 576 P.2d 1064, 1070 (Kan. 1978) (finding that a deed with an inadequate property description is enforceable between contracting parties but does not provide constructive notice to subsequent purchasers). For a discussion of the impact computerized, searchable systems might have on these doctrines, see Emily Bayer-Pacht, Note, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrines*, 32 CARDOZO L. REV. 337, 361-68 (2010).

hold that the subsequent purchaser was on “inquiry notice” of the true owner’s interest.⁵⁶ Put another way, a reasonable purchaser would have asked enough questions to discover the true owner’s interest; if this purchaser did not, the purchaser was at fault, and is not protected by the true owner’s failure to record.

Thus, despite the absence of negligence language in recording-act opinions, property doctrine has developed in ways that track negligence principles. Like the defendant in a typical negligence case, a subsequent purchaser bears liability only when he did not act reasonably in ascertaining the state of the title. Reasonableness may be framed by reference to compliance with concrete standards, but a focus on standards may also be true in many ordinary tort cases.⁵⁷ Moreover, as in tort cases, limiting liability to cases of negligence creates incentives for the potential victim (the true owner) to take precautions that would be unnecessary under a strict liability regime. As a result, the regime tends to place the cost of conflict on the party who can most cheaply avoid it—an underlying economic goal of negligence law.⁵⁸

B. “Reasonable” Encroachers

Property law generally requires a neighbor who wants to use another’s land to rely on market transactions to acquire the rights she wants. And to avoid evidentiary issues and remove uncertainty for future purchasers, the statute of frauds requires that those transactions be in writing.⁵⁹ If a neighbor bypasses the market and uses resources she does not own, she is strictly liable to the owner for damages she causes, including lost rental value.

⁵⁶ See *Waldorf Ins. & Bonding, Inc. v. Eglin Nat’l Bank*, 453 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1984) (holding that occupying a condominium unit provided notice to a subsequent purchaser sufficient to put an inquiry responsibility on the purchaser (citing *Phelan v. Brady*, 23 N.E. 1109 (N.Y. 1890))).

⁵⁷ In many tort cases, for example, industry standards are admissible as probative evidence on the issue of the defendant’s duty. See Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 660 (2001).

⁵⁸ See Herbert Hovenkamp, *Response, Notice and Patent Remedies*, 88 TEX. L. REV. SEE ALSO 221, 225 (2011), <http://texasrev.com/seealso/vol/88/pdf/88TexasLRevSeeAlso221.pdf> (observing that the duty “to provide or obtain” notice should “generally be imposed on the person who can do so at the lowest cost” (often the property owner himself)).

⁵⁹ See, e.g., N.Y. GEN. OBLIG. LAW § 5-703(1) (McKinney 2001) (“An estate or interest in real property . . . cannot be . . . assigned . . . unless by act or operation of law, or by a deed or conveyance in writing . . .”).

Outside the settings governed by this general rule, a variety of property doctrines protect a neighbor who encroached on an owner's rights in the reasonable belief that he was entitled to use those rights without buying them on the market.⁶⁰ These doctrines have developed in response to situations in which it is reasonable for resource users to bypass formal rules because both demarcation of boundaries and compliance with legal requirements can be costly.⁶¹ When the value of the legal rights at stake is high, the reasonable neighbor will take more steps to avoid potential conflict with nearby owners. By contrast, when the value of the rights at stake is low, a reasonable owner will cut more corners.⁶²

Consider boundary-dispute cases. A landowner wants to plant shrubs, or to build a wall or a fence near the boundary between his lot and his neighbor's lot. The landowner can proceed with three different courses of action: he can commission a survey, he can discuss his proposed use with his neighbor, or he can guess at the boundary and act on that assumption.

If a landowner commissions a survey and then plants or builds in accordance with what the survey shows, the true owner will not be entitled to remove the encroacher from his land even if the survey later proves to be erroneous.⁶³ Courts recognize that the improver has acted

⁶⁰ Cf. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1135-36 (1985) (noting that intentional dispossessors have more clearly avoided market mechanisms for transfer of property rights and there is thus a greater interest in discouraging intentional rather than negligent dispossessors).

⁶¹ See generally Sterk, *supra* note 35, at 1296-97 (asserting that discovering the owner of property rights often requires costly "search and expenditure of resources").

⁶² Cf. *id.* at 1299-304 (discussing the inefficiencies of excessive searches for the boundaries of legal rights).

⁶³ See, e.g., *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595-96 (Colo. 1951) (holding that, where both the encroacher and the owner commissioned surveys during construction, the true owner was not entitled to injunctive relief when he did not bring suit until long after the building was complete); *Arnold v. Melani*, 449 P.2d 800, 805-06 (Wash. 1968) (denying injunctive relief when improvements were made in reliance on a survey that turned out to be erroneous); see also *David M. Cox, Inc. v. Pitts*, 29 So. 3d 795, 803, 806 (Miss. Ct. App. 2009) (denying an owner injunctive relief when an encroacher had relied on markers from an erroneous survey commissioned by the true owner). Some older cases, in contrast, awarded injunctive relief even when the encroacher had relied on a survey. E.g., *Pile v. Pedrick*, 31 A. 646, 647 (Pa. 1895).

Some states deal with the good-faith improver by statute, empowering courts to deny injunctive relief against good-faith improvers but nevertheless subjecting them to damage liability. See, e.g., CAL. CIV. PROC. CODE § 871.5 & cmt. (West 1980) (giving courts great discretion to adjust the "rights, equities, and interests" of good-faith improvers and other interested parties); *Parchomovsky & Stein, supra* note 38, at 1857-58 ("Good faith improver statutes . . . permit courts to give the encroached-upon owner a

reasonably and apply doctrines like “relative hardship” to defeat claims advanced by the true owner.⁶⁴ By contrast, if the improver commissions the survey and acts in ways that are inconsistent with that survey, the improver has intentionally or negligently ignored the true owner’s rights and a court will require the improver to remove any encroachments.⁶⁵

Sometimes, however, the cost of a survey may seem disproportionate to the scope of the improvements the landowner contemplates. What if the improving landowner consults the neighbor, and the two agree informally to set a boundary between the parcels or act as if they have acquiesced to a particular boundary? In these situations, courts often hold that the improving landowner has acted reasonably, and that the boundary binds both the neighbor⁶⁶ and the neighbor’s successors.⁶⁷ Courts apply either the doctrine of estoppel or of “agreed boundaries” to reach that result, but the foundations of both doctrines are similar. They are grounded in the fact that the improving landowner acted reasonably—i.e., nonnegligently—and that the reasonable actions of the improver triggered an obligation on the part of the neighbor to object immediately if she wanted to protect her formal legal rights.⁶⁸

choice between buying the encroaching structure and selling the property . . .”). In many encroachment cases, however, the damages suffered by the owner are de minimis. *E.g.*, *Tramonte v. Colarusso*, 152 N.E. 90, 90 (Mass. 1926).

⁶⁴ See *Golden Press, Inc.*, 235 P.2d at 595 (“[R]elative hardship may properly be considered and the court should not become a party to extortion.”).

⁶⁵ Cf. *The Highlands, Inc. v. Hosac*, 936 P.2d 1309, 1314 (Idaho 1997) (enjoining encroachment when the encroacher was a surveyor who knew or should have known of the encroachment on land where boundaries had been staked). Similarly, if the improver asks his neighbor, who instructs him to proceed at his own risk, and the improver then moves forward without a survey, courts do not protect the improver. See, *e.g.*, *Grant v. Warren Bros.*, 405 A.2d 213, 217 (Me. 1979) (finding that an encroacher could not claim estoppel where the record owner stated, “You say the line’s up there and I say that’s not right” to the encroacher after his encroachment had begun).

⁶⁶ See, *e.g.*, *Bahr v. Imus*, 250 P.3d 56, 60, 68-69 (Utah 2011) (relying on the boundary-by-agreement doctrine to hold that neighbors are estopped from challenging a boundary marked by a mutually-agreed-upon fence); see also *Dunn v. Fletcher*, 96 So. 2d 257, 260-62 (Ala. 1957) (relying on both estoppel and agreed boundaries); *Nunley v. Orsburn*, 847 S.W.2d 702, 704-05 (Ark. 1993) (finding valid an “oral boundary line agreement”).

⁶⁷ See, *e.g.*, *Reid v. Duzet*, 94 P.3d 694, 698 (Idaho 2004) (finding that even if a successor-owner did not know about an agreement, she did have notice that the encroacher claimed part of her property); *Schultz v. Plate*, 739 P.2d 95, 98 (Wash. Ct. App. 1987) (“[T]he location of the barn should have put [an encroacher] on inquiry notice as to the boundary line agreed upon previously.”).

⁶⁸ See Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 61, 98 (1987) (emphasizing that a course of dealing between neighboring landowners generally triggers a duty owed by each to the other and noting that “[o]nce a landowner has

Even when the improving landowner acts without consulting the neighbor and without commissioning a survey, courts sometimes invoke the “relative hardship” doctrine to preclude the true owner from obtaining injunctive relief, and instead limit the owner to trivial money damages. This doctrine applies when the encroachment generates little harm to the true owner, but its removal would impose significant costs on the encroacher.⁶⁹ More often, however, courts conclude that the improver’s behavior was wrongful, and afford relief to the true owner—at least until enough time has passed that the court’s focus shifts from the improver’s wrongdoing to the true owner’s negligence in failing to catch the mistake.⁷⁰ These approaches demonstrate that in boundary dispute cases, courts have developed doctrines that focus on the reasonableness of the parties’ behavior.

A different set of doctrines protects the “reasonable” encroacher when the encroachment involves not a boundary strip but use of a roadway across a neighbor’s land. Suppose the neighbor discovers that the encroacher has no express easement and seeks to enjoin further use of the roadway. Does the neighbor prevail without regard to the reasonableness of the encroacher’s use? No. Although opinions do not explicitly discuss reasonableness, various implied-easement doctrines protect encroachers who have acted on a reasonable belief that they enjoy a continued right to use the roadway.

First, assume that the roadway user’s parcel and the neighbor’s parcel were once held in common, and that upon severance, the roadway user had no practical way to reach his parcel. In this situation, courts hold that the roadway user acquires an easement by necessity or by implication, based on the assumption that the roadway user (and his predecessors) had a reasonable basis for believing that the

dealt with his neighbor, he is obliged to resolve any ambiguities in their dealings that might put the neighbor in a serious predicament”).

⁶⁹ See, e.g., *Stuttgart Elec. Co. v. Riceland Seed Co.*, 802 S.W.2d 484, 485, 488-89 (Ark. Ct. App. 1991) (applying the “relative hardship” doctrine to deny injunctive relief for a building encroachment even though the encroacher had never conducted a survey); *Hirshfield v. Schwartz*, 110 Cal. Rptr. 2d 861, 864, 875-77 (Ct. App. 2001) (distinguishing between negligent and willful encroachers and denying injunctive relief for an encroachment when the encroacher mistakenly believed that an existing fence represented the boundary line).

⁷⁰ Thus, where the true owner has failed to object for a significant period of time, even if that time is not sufficient to result in loss of title by adverse possession, courts may hold that failure to object constitutes acquiescence to the boundary. See, e.g., *Myers v. Yingling*, 279 S.W.3d 83, 89 (Ark. 2008) (finding that a “boundary by acquiescence” could be inferred from a landowner’s “conduct over many years”).

parcels would not have been severed in such a way without providing adequate access roads for both parcels.⁷¹

Second, assume that the neighbor created a revocable license by once giving oral permission to use the roadway. If the roadway user makes expenditures in the mistaken belief that the oral grant created a permanent right, easement-by-estoppel doctrine imposes on the neighbor an obligation to object quickly. If the neighbor does not act swiftly, courts assume the roadway user reasonably believed both that the grant created a permanent right and that the roadway user should be entitled to continued use of the roadway.⁷²

Like recording-act doctrines, these boundary-dispute and implied-easement doctrines are not explicitly framed in negligence terms. Courts do not ask whether an owner was “negligent” in failing to warn his neighbor that the neighbor should not expect access to his parcel or whether the neighbor undertook boundary-line improvements at his own “risk.” But the doctrines are crafted to protect reasonable encroachers from liability for their actions. These concerns parallel those underlying negligence doctrine in tort law.

C. Nuisance Law

Suppose a landowner encroaches not by physically intruding on a neighbor’s parcel, but by conducting activities that impose external costs on the neighbor. The historical starting point for nuisance doctrine is the oft-criticized maxim *sic utere tuo ut alienum non laedas*: “use your own property in such manner as not to injure that of another.”⁷³ Of course, nearly any use of land has the potential to cause injury to a neighbor. For instance, building a house on one’s land may obscure an immediate neighbor’s view or block his sunlight.⁷⁴ The maxim’s

⁷¹ See, e.g., *Finn v. Williams*, 33 N.E.2d 226, 228 (Ill. 1941) (“Where an owner of land conveys a parcel thereof which has no outlet to a highway except over the remaining lands of the grantor or over the land of strangers, a way by necessity exists over the remaining lands of the grantor.”). See generally *Sterk*, *supra* note 68, at 63-64 (discussing justifications for easement by implication and necessity).

⁷² See, e.g., *Cleek v. Povia*, 515 So. 2d 1246, 1247-48 (Ala. 1987) (finding an implied easement by oral contract where a plaintiff did not file suit disputing use of a roadway until nearly twenty years after the roadway was built). See generally *Stewart E. Sterk, Estoppel in Property Law*, 77 NEB. L. REV. 756, 776-84 (1998) (describing a set of cases in which courts used estoppel doctrine to resolve disputes between neighbors).

⁷³ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987).

⁷⁴ Although the potential for injury exists in these types of cases, courts have disagreed over whether (or when) such injury is redressable. Compare *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (holding that, because there is no legal right to the flow of light and air from neighboring

overbreadth has led the Restatement and many modern courts to focus on a comparative evaluation of harms and benefits. The Restatement deems an intentional invasion of another's interest in use and enjoyment of land unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct."⁷⁵ Even that formulation, however, suggests an objective calculus. It operates on the assumption that a court—and presumably the offending landowner—can determine the harm the activity will cause. In fact, a landowner is not always in a good position to know whether his actions will cause harm, or how much harm the actions will cause. When the loss that a landowner's actions cause is not inevitable or apparent, nuisance doctrine focuses less on the harm itself and more on whether the landowner exercised reasonable care in attempting to avoid the harm.

First, in determining whether a landowner exercised reasonable care, nuisance law does not protect the abnormally sensitive victim.⁷⁶ And the landowner bears no liability if he could not have reasonably anticipated the harm that occurred.⁷⁷ For instance, if a landowner operates machinery that would have no effect on an ordinary neighboring house, a neighbor whose house is old and poorly constructed cannot maintain a nuisance action for the vibration caused by the machinery.⁷⁸ A landowner whose operations would not harm an ordinary user has exercised reasonable care.⁷⁹

property, "where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or an injunction"), *with Prah v. Maretti*, 321 N.W.2d 182, 184-85, 191 (Wis. 1982) (recognizing a nuisance claim for unreasonable obstruction of access to sunlight where the defendant built a house on his own land with the effect of obstructing solar panels on the roof of the plaintiff's home).

⁷⁵ RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). The Restatement provides that a person is liable for a private nuisance if his conduct invades another's interest in use and enjoyment of land, and is "intentional and unreasonable." *Id.* § 822(a); *see also, e.g., Fla. E. Coast Props., Inc. v. Metro. Dade Cnty.*, 572 F.2d 1108, 1112 (5th Cir. 1978) ("In every case, the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of harm to the plaintiff must be weighed against the utility of the defendant's conduct.").

⁷⁶ *See* RESTATEMENT (SECOND) OF TORTS § 821F (indicating that liability exists only for significant harm "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose").

⁷⁷ *See id.* cmt. d ("[A] hypersensitive nervous invalid cannot found an action for a private nuisance upon the normal ringing of a church bell . . . on the ground that the noise has become so unbearable to him that it throws him into convulsions and threatens his health or even his life . . ."). For the situation discussed in the Restatement's comment, *see Rogers v. Elliott*, 15 N.E. 768 (Mass. 1888).

⁷⁸ *Cremidas v. Fenton*, 111 N.E. 855, 856 (Mass. 1916).

⁷⁹ *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 821F cmt. d ("If normal persons in that locality would not be substantially annoyed or disturbed by the situation,

Second, a nuisance plaintiff who “comes to the nuisance” may be barred from relief if he should have anticipated that a pre-existing use of neighboring land might interfere with the use he intended for his own parcel. As the Supreme Court recognized in *Village of Euclid v. Ambler Realty Co.*, “[a] nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.”⁸⁰ But how is a court to determine whether an offending use is “in the wrong place”? Although “coming to the nuisance” is not a complete bar to a nuisance action, courts consider which use was “first in time” in determining whether a nuisance defendant’s operations constitute an actionable nuisance.⁸¹ A landowner does not exercise reasonable care when she places an operation where it will cause harm to a neighbor’s existing use,⁸² but the landowner may not be able to anticipate all conflicts with every neighbor’s potential future use.

Both the treatment of abnormally sensitive victims and the “coming to the nuisance” defense embody crude versions of the Learned Hand formula for determining whether an alleged tortfeasor has exercised reasonable care in locating its activities.⁸³ That formula, largely embraced by the Third Restatement of Torts, requires a consideration of three factors: “the foreseeable likelihood that the person’s conduct will result in harm [*P*], the foreseeable severity of any harm that may ensue [*L*], and the burden of precautions to eliminate or reduce the risk of harm [*B*].”⁸⁴ In Hand’s terms, liability should attach when $B < PL$.⁸⁵ In a nuisance case where the neighbor is an abnormally sensitive user, the foreseeable likelihood of harm is very small; thus, *PL* will be small, which will result in no liability even if the cost of guarding against harm is trivial. Similarly, in “coming to the nuisance” cases, if a landowner engages in activities with the potential to harm some neighboring uses but not others, the likelihood of harm from the landowner’s activities will inevitably be less than one hundred percent. The more

then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.”)

⁸⁰ 272 U.S. 365, 388 (1926).

⁸¹ RESTATEMENT (SECOND) OF TORTS § 840D.

⁸² Sometimes, however, courts hold that a neighbor who should have foreseen that future development of the area would make it unsuitable for his current use should not prevail on a nuisance claim, even though the neighbor preceded the offending landowner. See Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance,”* 9 J. LEGAL STUD. 557, 565 (1980).

⁸³ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

⁸⁴ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (2010).

⁸⁵ *Carroll Towing*, 159 F.3d at 173.

unforeseeable the conflict, the smaller P will be, and the stronger the landowner's "coming to the nuisance" defense should be.⁸⁶

Thus, nuisance law, like recording statutes and the rules governing physical encroachments, reflects the reality that potential resource users cannot, without cost, ascertain what rights they need to acquire. Property law responds to those costs by using negligence-like rules to protect users who have taken reasonable care to avoid transgressing the rights of true owners.

The doctrine in these areas raises broader questions: Are there other areas of property law that warrant a similar approach? Are property rights too hard-edged in other areas where the cost of ascertaining rights is high? The next Part explores these issues.

IV. BROADER IMPLICATIONS FOR INTELLECTUAL PROPERTY RIGHTS

The preceding Part suggests that, in a number of areas, liability for encroachment on property rights is less strict than conventional property theory might suggest. The departures become evident when the cost of determining property rights is high. When a potential user of rights can costlessly ascertain ownership of the rights she seeks to use, negligence and strict liability converge because the exercise of reasonable care will always reveal any encroachment. Conversely, when the cost of determining ownership or scope of property rights is high, doctrine moves in two directions. First, as with recording acts, doctrine reduces the cost of ascertaining who owns the necessary rights. In the recording act example, doctrine creates a strong incentive for the owner to record, making it far easier for potential users to determine ownership of the rights they want to acquire. Second, in areas where legal rules alone cannot reduce the cost of determining ownership rights, doctrine excuses encroachers who also took reasonable care to avoid intruding on others' property rights.

One might expect a similar pattern when other property rights are at stake. Intellectual property, in particular, may be a candidate for negligence-based rules. The cost of determining the scope and title of intellectual property rights are, on average, higher than costs expended to determine real property rights in at least two ways. As Clarisa Long

⁸⁶ *Cf. Abdella v. Smith*, 149 N.W.2d 537, 541 (Wis. 1967) (holding that a restaurant owner in a rural area was not entitled to nuisance relief against the operator of riding stables for odors inherent in maintenance of those stables because the restaurant owner should have foreseen that the existing lawful use of the stables would preclude the operation of a restaurant in the immediate vicinity).

observed, a legal actor considering use of a resource has to process two main categories of information about the resource: information about the contours of the legal right involved and information about the attributes of the resource itself.⁸⁷ The boundaries of intellectual property rights tend to be muddier than those surrounding real property rights,⁸⁸ and ascertaining the owner of intellectual property rights is generally more difficult than ascertaining the owner of real property rights, where the use of the property often sends a strong signal regarding ownership.⁸⁹ Moreover, unlike a potential user of real property, who will know immediately that he must purchase the rights to the property, a potential user of intellectual property will have to learn about several attributes of the item before he knows whether there is any property right embedded in the item.⁹⁰ These costs have led Professors Dorfman and Jacob to argue that, even if a strict liability regime governs with respect to real property encroachments, copyright should embrace a negligence standard for infringement.⁹¹

Despite these higher costs, intellectual property doctrine does not consistently incorporate either of the two strategies that real property doctrine has used to address the costs of determining ownership. Consider first the recording strategy: reducing the cost of ascertaining ownership. Copyright law has moved in precisely the opposite direction. To bring the United States copyright system into compliance with the Berne Convention, the copyright statute eliminated long-standing notice and registration requirements that might make it easier for potential users to track down copyright owners.⁹² The Berne Convention's

⁸⁷ Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 471-79 (2004).

⁸⁸ See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 170-71 (2009) (noting that copyright owners enjoy use rights that have "no reference point in the physical world"); Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083, 2127-28 (2009) (explaining that patent boundaries are "harder to delineate" than real property boundaries). For a list of definitional difficulties particular to intellectual property, see Peter S. Menell & Michael Meurer, Notice Externalities (Sept. 10, 2011) (unpublished manuscript) (on file with author).

⁸⁹ See Dorfman & Jacob, *supra* note 25, at 92 (outlining the many difficulties associated with ascertaining ownership of copyrighted work).

⁹⁰ See Long, *supra* note 87, at 478-80 (discussing the relative difficulty of measuring a work's "novelty" and "nonobviousness").

⁹¹ Dorfman & Jacob, *supra* note 25, at 82 ("[T]he same considerations that call for the protection of tangible property [through] . . . strict liability . . . require . . . abandoning this regime in the case of copyright.").

⁹² See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857-59 (codified in scattered sections of 17 U.S.C.) (abandoning formal notice and registration requirements, but affording them other legal relevance).

hostility to formalities reflected the burdens an author would face in complying with the different formalities that might be required of authors seeking protection across national borders.⁹³ Technological developments since the United States became a member of the Berne Convention—such as the advent of the Internet and other digital technology—have eliminated many of these difficulties.⁹⁴ Although increased demand for copyrighted works—a phenomenon generated by new technology—coupled with extended copyright duration has increased the need to locate copyright owners, Congress has taken no steps to reintroduce a system that would comply with the Berne Convention while easing the notice burden on potential users.⁹⁵

Eliminating the notice and registration requirements is not the only way in which copyright law has increased burdens on potential users seeking to ascertain what rights they need to acquire. As Anthony Reese has noted, the twentieth century's expansion of copyright scope—particularly increased protection for derivative works—has made it more difficult for potential users to know what rights they need to acquire.⁹⁶

In contrast to copyright law, the registration system remains central to patent law, and patent doctrine creates incentives for some patentees to “mark” patented products with the patent number, thereby putting prospective users on notice.⁹⁷ Sometimes, as with the doctrine of prosecution laches, patent doctrine denies relief to owners who try to mislead potential users about what has been patented.⁹⁸ At the same time, however, legal doctrine has developed in ways that

⁹³ See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 545 (2004).

⁹⁴ See *id.* at 545-67 (arguing that the United States should adopt a new set of formalities that would be consistent with Berne).

⁹⁵ For a proposal to create such a system, see *id.* at 554-64.

⁹⁶ R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 142-44, 176 (2007); see also Fagundes, *supra* note 88, at 174-88 (advocating changes that would better crystallize intellectual property rights).

⁹⁷ See 35 U.S.C. §287(a) (2006) (“In the event of failure . . . to mark, no damages shall be recovered by the patentee in any action for infringement [except under certain circumstances].”). See generally Long, *supra* note 87, at 499-500 (noting that the marking applies only to a certain subset of patented items—those that are easily markable). Moreover, marking does not apply at all if the patentee does not put the goods into the stream of commerce. *Id.* at 507.

⁹⁸ The doctrine of prosecution laches bars infringement claims by a patent holder who refiles an application containing previously allowed claims to delay issuance of the patent, thereby hiding what is patented from potential users. *E.g.*, Symbol Techs., Inc. v. Lemelson Med. Educ. & Research Found., 422 F.3d 1378, 1384-86 (Fed. Cir. 2005). For the doctrine to apply, the user must show the patentee's delay caused him prejudice. *E.g.*, Cancer Research Tech. Ltd. v. Barr Labs., Inc., 625 F.3d 724, 729 (Fed. Cir. 2010).

create incentives to obscure the scope of patent claims, which makes the search process cumbersome for potential users. For instance, patent applications can hide claim language during the patent-prosecution process to surprise innovators who will not learn of the claim's scope until after investing in an infringing design.⁹⁹ Similarly, applicants may include vague or ambiguous language in an attempt to obtain broader protection.¹⁰⁰ Moreover, it is not clear that even a perfect filing system would work as well as the (very imperfect) land recording system for at least two reasons. First, even if it were costless for potential users to find the patent filing, users would still have to determine whether the patent was valid—nearly half of all litigated patents are not.¹⁰¹ Second, unlike lawyers, who carefully review prospective land purchasers, scientists engaged in the research process are unlikely to read patents.¹⁰²

At the same time, there is little evidence that intellectual property doctrine has adopted the second strategy for dealing with the costs of determining ownership: providing protections for the infringer who acts reasonably. As Reese points out, copyright doctrine provides less protection to the “innocent” infringer than it once did.¹⁰³ In patent law, the suggestion that patent doctrine consider an “independent invention” defense¹⁰⁴ has, so far, fallen on deaf ears.¹⁰⁵

⁹⁹ See Hovenkamp, *supra* note 58, at 228-29 (describing problems with patent continuations, or “late claiming”); Menell & Meurer, *supra* note 88, at 12-13 (same).

¹⁰⁰ See Hovenkamp, *supra* note 58, at 227 (“The extremely technical nature of claim drafting is actually part of the problem because patent drafters have an incentive to make claims as broad as possible.”); see also Menell & Meurer, *supra* note 88, at 12-13.

¹⁰¹ See John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 221-22 tbl.6 (1998) (describing instances of patent invalidity).

¹⁰² See Jeanne Fromer, *Patent Disclosure*, 94 IOWA L. REV. 539, 560-62, 565 n.113 (2009) (citing studies revealing that most inventors do not learn of related patents until after they have completed their inventions and that reluctance to read patents is due, in part, to “legalese” in the documents).

¹⁰³ Reese, *supra* note 96, at 175-79.

¹⁰⁴ Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475, 480 (2006); see also Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defense in Intellectual Property*, 69 ECONOMICA 535, 535-42 (2002) (arguing that the independent invention defense would reduce waste and improve social welfare).

¹⁰⁵ Introducing an independent invention defense would be a radical change to the patent system and might reduce incentives to invent—two significant costs that must be balanced against the advantages of a regime that requires proof of copying. See generally Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1531-32 (2007). In fact, the evidence suggests that most patent infringement cases involve independent development by the alleged infringer. Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1459 (2009).

What accounts for this disparity between the laws of real property and intellectual property? First, unlike real property doctrine, which primarily coordinates the use of existing resources, intellectual property doctrine is designed to offer authors and inventors an incentive to create. One might fear that introducing rules protecting reasonable users at the expense of property owners would undermine that incentive—although, given the loose fit between the incentives and the existing doctrine, the case would be difficult to make.¹⁰⁶ Moreover, the incentive argument for strict liability rules ignores the reduced incentive those rules provide to users of intellectual property, who might choose not to use (or create) because of the high cost of determining what rights they need to acquire.¹⁰⁷

Second, the costs to intellectual property owners of ferreting out infringement may exceed the costs to potential users of avoiding infringement. In copyright, for instance, the owner is unlikely to discover many instances of infringement, because the owner cannot effectively monitor the volume of potentially infringing material. A patent holder would not only have to discover a potentially infringing product, but also would have to examine it in detail to see whether it is infringing.¹⁰⁸ As a result, one might argue for a strict liability rule that places a heavier burden on the resource user—the party who, by hypothesis, is in the best position to determine whether a conflict between rights exists. By contrast, in real property doctrine, the parties face roughly reciprocal costs in determining whether there has been a boundary transgression; either of the two parties could commission a survey at comparable cost.

A negligence regime, however, could be calibrated to account for the difficulties owners face in locating infringers. For instance, rather than holding publishers strictly liable for infringement by authors

This evidence highlights the radical impact an independent invention defense would have on current law.

¹⁰⁶ See Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 217-19 (2006) (noting that in light of the infinite combinations of possible doctrinal rules, whether a particular copyright rule generates efficient incentives is inevitably indeterminate).

¹⁰⁷ Cf. Fagundes, *supra* note 88, at 152-53 (discussing circumstances in which a filmmaker decided to exclude a 4.5-second clip from his film, rather than risk an infringement claim when rights were uncertain); Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 460-61 (2005) (discussing the effect injunctive relief might have on creativity when boundaries are fuzzy).

¹⁰⁸ See Jonathan S. Masur, *Patent Liability Rules as Search Rules*, 78 U. CHI. L. REV. 187, 195 (2011) (“[A]s a comparative matter, it is likely easier for a producer to find relevant patents than for a patent holder to locate potentially infringing products.”).

whose works they publish, a negligence regime could require the publisher to investigate whether its publications include infringing material, and excuse publishers whose reasonable investigation did not uncover any infringement. Such a negligence regime, however, would generate a third reason for preferring strict liability: the administrative cost of making “reasonableness” determinations.¹⁰⁹ This cost, however, comes with an offset. In cases where the alleged infringer acted reasonably, courts will not have to decide whether infringement occurred. Moreover, a regime that develops rules to cabin the “reasonableness” determination might minimize administrative costs.

Regulatory capture may also explain the disparity in treatment between real and intellectual property. Unlike real property doctrine, much of which has been developed by state courts through the common law, intellectual property doctrine is the province of federal courts bound by federal statutes. Congress, in turn, is subject to capture by intellectual property owners, who are generally unsympathetic to protecting reasonable users. Moreover, intellectual property defendants—the parties with the greatest incentive to educate federal courts about limits on strict liability in real property cases—likely will not invoke the property metaphor at all.¹¹⁰

Federal courts have not been entirely unsympathetic to the plight of the reasonable user in intellectual property. However, they have largely accounted for the difficulty in ascertaining ownership and scope of legal rights by adjusting the remedies available to owners, rather than by providing users with defenses.¹¹¹ Limiting owners to money damages rather than injunctive relief can, in some circumstances, protect a reasonable user against loss of the investment he made in the mistaken, but reasonable, belief that it was unnecessary to acquire any

¹⁰⁹ See Roger D. Blair & Thomas F. Cotter, *Strict Liability and its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 825 (“[U]nder a negligence standard, courts must determine the optimal amount of search . . . presenting an administrative nightmare.”).

¹¹⁰ Intellectual property defendants tend to shy away from the property metaphor because, as Peter Menell has stated, exclusive rights of the sort generally associated with real property “would stand in the way of technological and expressive progress in many areas of creativity.” Peter S. Menell, *The Property Rights Movement’s Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 ECOLOGY L.Q. 713, 744 (2007).

¹¹¹ See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (overturning the Federal Circuit’s determination that injunctions should be automatic upon a finding of patent infringement and holding instead that traditional equitable principles should govern the remedy available); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (finding copyright infringement, but concluding that “it hardly follows from today’s decision that an injunction . . . must issue”).

rights from the owner.¹¹² However, this remedy limitation does not protect a reasonable user who bought his rights from the “wrong” owner.¹¹³

CONCLUSION

Blackstone’s conception of property rights, in which an owner enjoys “sole and despotic dominion” over “external things of the world, in total exclusion of the right of any other individual,”¹¹⁴ places property squarely in the realm of strict liability. A person who seeks to use a property right must go to the market or suffer the consequences. As modern scholarship has demonstrated, that concept generates enormous advantages if potential users can costlessly determine who owns the property rights they want. But even in the world of real property, where boundaries are often treated as though they were clear, neither questions of title nor questions of scope can be determined without cost. As a result, doctrine has developed to reduce those costs and to protect users who exercised reasonable care in investigating ownership issues. In effect, negligence principles play an unappreciated role in real property doctrine. Although intellectual property doctrine has borrowed much from real property doctrine, it has not yet recognized the important role of negligence principles in cases where the title and scope of rights are less than crystal clear.

¹¹² Henry Smith astutely observes that doctrine should not (and does not) limit the owner to damages when the encroacher acts in bad faith. Smith, *supra* note 88, at 2129. A negligence-based approach would focus not only on good faith, but also on the reasonableness of the encroacher’s investigation.

¹¹³ Nor does it protect the user who would have worked around the owner’s rights if the user had known of the existence or scope of those rights.

¹¹⁴ 2 BLACKSTONE, *supra* note 1, at *2.