Australian Journal of Legal History

A RECOGNIZABLE LAW & ECONOMICS JURISPRUDENCE?: HOW MUCH 'WEALTH'- AND 'WELFARE'-MAXIMIZING TOOK PLACE IN THE COURTS, LEGISLATURES, AND CUSTOMS OF EIGHTEENTH AND NINETEENTH-CENTURY COMMON-LAW DOMAINS?

PETER KARSTEN[*]

This essay asks how well Law and Economics theories and claims describe the real behavior of jurists, legislators and ordinary people in the past. It is not intended to serve as a critique of the soundness of Law and Economics *reasoning* in the fields of contract, tort, property, legislation, and custom (or, for that matter, in the fields of civil rights, crime, or civil liberties law), which strikes me, in general, as being quite plausible and powerful. But that is neither here nor there. This paper seeks only to estimate the importance (or relative *unimportance*) of two core law and economics theories – those of 'wealth-maximizing' and 'welfare-maximizing' – among common-law jurists, legislators and ordinary folk in nineteenth century North America and the Antipodes.

I begin the first of these units (on jurists) by referring to the views of Richard Posner and Robert Ellickson, who have been among the more articulate Law & Economics voices. Their claims and findings serve as benchmarks for what we might expect to find in the nineteenth-century judge-made law of contract, tort, and property, if their perspective had salience then. I introduce the unit on legislation with the views of James Willard Hurst as well as those of Posner. Among the leading Law & Economics voices on the subject of customary behavior are Garrett Hardin, Ronald Coase, and Ellickson, and the unit on customs begins with their views. While I do not claim this to be, in any sense an *exhaustive* review of the available evidence and analyses, I do maintain that it is an extensive one, and that its conclusions are viable.

I EVIDENCE FROM THE WORLD OF NINETEENTH CENTURY JURISTS OF A 'JURISPRUDENCE OF THE INVISIBLE HAND'

In his *Economic Analysis of Law* Posner observes that it 'would not be surprising to find' in the late eighteenth and the nineteenth centuries that 'legal doctrines rest on inarticulate gropings towards efficiency' since laissez-faire was 'the dominant ideology'.[1]

He posits a 'good' (wealth-maximizing) jurist and suggests that such a fellow can well be found in the nineteenth century historical record.[2] Robert Ellickson explored the way that neighbors in Shasta County, California, actually resolved trespasses and collisions that had led to economic loss, and found that they did not turn to lawyers or magistrates, to 'law', but resolved the disputes in 'neighborly' fashion, something he called welfare-maximizing'.[3] While Ellickson's book is concerned with popular norms, his Law & Economics model of how people behave with regard to dispute resolution is also useful in understanding judicial reasoning.[4] Treating Posner and Ellickson as polar 'ideal-types' within the Law & Economics theoretical literature,[5] I ask in this section which view may be said to have 'predicted' (described) the past better when it came to judicial behavior.

II CONTRACT

Posner has written that the rules that courts created, or should have created, to deal with disputes over contracts would produce behavioral guidelines that would lower the future costs of contracts for credit, goods, and services, and raise the levels of confidence of the contracting parties that agreements would be honored. Hence courts rule against those who opportunistically breached contracts; it is why liabilities attach to the party better able to prevent unforeseen contingencies from interfering with the contract's performance; it is why restitution, reliance or expectation damages were preferred as being more efficient than requiring a defaulting party's specific performance of the contract's terms; it is why 'futures options' were (or should be) sanctioned to give 'people a stake in forecasting prices correctly, even though they were not involved in producing or consuming the commodity traded in the market', in order to 'increase the amount of price information in the market;' it is why parties who had acquired more information about the object of a sale were protected in their advantage (so long as they did not defraud the other party) because of the likelihood that they had incurred legitimate costs in acquiring this market advantage that ought to be lawfully protected.[6]

What evidence did I find in the courts of the United States, the Canadas, and the Antipodes (hereafter CANZ courts) that *these* sorts of concerns actually motivated nineteenth century courts to decide a given appeal in a particular fashion? When we search the reports for signs of 'economic efficiency' reasoning in contract disputes we *can* find them,[7] but, depending upon the issue, these were either the voices of court dissenters or voices that disagreed sharply over exactly which side's 'rule' *was* the 'efficient' one.

Two examples: Number One: The Virginia and Illinois supreme courts finally sanctioned contingency-fee contracts in the mid-nineteenth century. These jurists argued that such arrangements between attorney and client offered 'a better guaranty' of the 'fidelity, energy, and proper zeal' of the attorney 'than a fee certain'. One who was paid only if successful, and paid a percentage of the judgment rather than an hourly or days-in-court rate, would have the incentive to work efficiently, serving both the client's and the busy court's interests. This was not the particular efficiency rationale offered by Posner in his discussion of contingency fee contracts,[8] but it is a rationale with which he should certainly be comfortable. However, the fact is that one cannot find this or any other economic efficiency rationale offered by any other nineteenth century jurists in leading cases involving the propriety of contingency-fee contracts. Instead, the rationales offered were humanitarian ones — the arrangement ought to be allowed because it was the only way a poor man or woman would be able to be heard by the court.[9] Example number two: When workers quit 'entire' contracts, jurists of different states engaged in sharp disagreements over the propriety of granting such persons 'what their labor was worth' (*quantum meruit*). Those rejecting the 'new' rule of *Britton v Turner* (NH 1834) reflected Posnerian 'efficiency' rationales, while those who, increasingly, came to adopt the *Britton* rule offered the more 'contractarian' or 'welfare-maximizing' rationale that this was the proper way to provide justice in a 'moral economy'. The same can be said of some jurists from the Canadas and Australasia engaged in the same debate on this issue in the same century.[10]

What sorts of jurisprudential questions did jurists appear to have *brought* to questions of contract

disputes? Kim Scheppele analyzed contract appeals in nineteenth century New York wherein the *caveat emptor* doctrine was raised in the seller's defense. She found no evidence at all that jurists were engaged in 'wealth maximizing' or other 'efficiency' analysis. Instead, she found them seeking to do justice to the parties before them in the individual case (consistent with John Rawls' 'contractarian' theory of justice) by applying a general rule that the loss should fall on the party with better access to information about the imperfect object of sale.[11] Jurists in New South Wales and in code-conscious Louisiana and Quebec appear to have applied the same rule as those of New York regarding implied warranties: If the buyer had more information about the product than the seller (typically an agent or wholesaler), the rule was *caveat emptor*, whereas, if the seller had more information than the buyer, then the rule was 'let the seller beware' (*caveat venditor*).[12] As Scheppele has pointed out, this was not the 'wealth-maximizing rule that Posner had posited (that a seller should be obliged to refund the price of defective goods).[13]

A man who claimed the status of a good faith purchaser in Vermont in 1802 was turned away by that state's supreme court with a rationale that was also decidedly 'welfare-maximizing'. The plaintiff had loaned his horse to another who, in a most unneighborly fashion, had sold it. The buyer claimed that he was entitled to *bona fide* status in that the purchase had taken place in a market overt (a lawful, open marketplace). Would there not have been a good, economic, public policy reason to protect *bona fide* purchasers? Would not market traders otherwise have been made unduly leery and uneasy? But Justice Jonathan Robinson found otherwise, and offered a more 'neighborly', more 'christian' public policy reason to turn the *bona fide* purchaser away. He held that to deny the rightful owner his action of replevin or detinue would:

abridge that friendly intercourse among men which ameliorates society, for if the law is, that a man must consider, that every time he loans his horse to a poor neighbor to go to the mill, or to call aid to his wife in the hour of nature's difficulty, that he risks the sale of the property by the borrower, ... this will tend to restrain those acts of neighborly kindness, which, when exercised by the opulent towards the poor, assume a portion of that charity which is the ornament of christian and social life.[14]

Consider as well the judicial application in England and America of the ancient rules against regrating, engrossing, and forestalling (think of them as 'futures', 'options' and 'cornering'). These medieval common-law crimes were given further support by Parliament in the mid-sixteenth century, but that statute was repealed in 1772 as being inefficient, since the prohibitions 'prevent[ed] a free trade in the said commodities and have a tendency to discourage the growth and to enhance the price of same'. None the less, Kenyon CJ, held in 1800 that a man who had bought and resold thirty quarters of oats at the same grain market was guilty of the ancient common-law crime of regrating:

for though in an evil hour all the statutes which had been existing above a century were at one blow repealed, yet thank God, the common laws were not destroyed.[15]

Richard Posner argues that rules sanctioning 'futures' and 'options' are economically efficient, in that they give 'people a stake in forecasting prices correctly', and 'increase the amount of price information in the market'.[16] That sounds right to me, but it didn't sound right to nineteenth century jurists in the United States and Lower Canada/Quebec. 'Futures' or 'options' contracts of the sort where neither party intended to possess or use the commodities being traded (which is to say many of today's sorts of transactions) were declared void in North America since they were 'against good public policy'. Why? Because they tempted men to speculate beyond their means in 'Wall Street gambling',[17] they caused a 'vast amount of misery and suffering', they were 'demoralizing to the community', affecting 'the humblest housekeeper',[18] they might 'agitate the markets', 'derange prices to the detriment of the community', and 'bring down financial ruin upon the heads of the unwary',[19] they brought 'ruin to the family, and financial crises',[20] and they rewarded the 'unscrupulous speculator', 'sharpers and blacklegs'.[21] Justice T Lyle Dickey of the Illinois Supreme Court *defended* an options contract between businessmen in the Chicago Board of Trade in 1876. They were necessary in 'a large city' in the 'competition in the trade in grain' in order to 'secure to the producer an active market for his products'. That was the purpose of the Board of Trade — to facilitate impersonal trading among men 'without

the trouble and time of inquiring as to their pecuniary responsibility'.[22] This was a 'wealth-maximizing' voice, but it was a dissenting voice in a 6 to 1 judgement *against* the legitimacy of the contract. Dickey's colleagues reminded him of the South Sea Bubble, the Panic of 1873, and of 'black Fridays'. A small handful of jurists spoke in the language of economic efficiency, but the rest spoke the ancient, less-than-economical morality of the common law.[23]

Justice Dickey was not utterly without compeers. The Scottish legal theorist, Henry Home (Lord Kames) observed in his *Principles of Equity* (1760) that if 'complaints of inequality' in contracts were to be indulged by courts of equity, 'lawsuits would be multiplied, to the great detriment of commerce'. Home also reasoned that where one made a good faith payment of a debt to the wrong party, equity should favor a bill for recovery by the debtor-payer, since it this were not so, debtors would think twice about paying their debts, 'and how ruinous to credit this would prove, must be obvious without taking a moment for reflection'.[24] This contemporary and countryman of Adam Smith clearly fits the 'wealth-maximizing' bill. But one Home doesn't make a Posnerian House.

And, yes, over a century later, we can find that devotee of *laissez-faire*, Lord Bramwell, offering the same sort of analysis to his peers. There was no evidence, he noted, that a compact of competitors to drive a cost-cutting shipping company out of business was a tortious act that should be judged void as against good public policy:[25]

If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are some people who think that the public is not concerned with this — people who would make a second railway by the side of one existing, saying, 'only the two companies will suffer', as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference [to punish the cost-cutter] did not prevent a waste and was not good for the public.

This is Posnerian reasoning, stem to stern; yet this was not Bramwell's *major* premise regarding contracts and public policy. It had been ideological — 'freedom of contract': Neither the courts nor the Legislature ought to interfere with the rights of individuals to enter into virtually any contract they judged to be in their interests.[26]

English and Commonwealth courts, and, for several decades (until the 1870s and 1880s), courts in the United States as well, sanctioned carriers 'contracting-out' of most of their common-carrier liability by offering to haul the freight of their customers at a lower rate, subject only to evidence of 'gross' negligence on the part of their agents. This seemed reasonable to New York's Justice Parker in 1854, not only because English and American courts had already sanctioned such contracts, but also because 'no one but the parties can be the losers, and it is only deciding by agreement which shall take the risk of the loss'. If a shipper 'chooses' to relieve a carrier of his common-carrier liability in exchange for a lower rate, 'who else has the right to complain'? Parties to such contracts were 'abundantly competent to contract for themselves; they are among the most shrew and intelligent businessmen in the community'. To declare such contracts void at law would be 'an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right'.[27]

But jurists in Queensland were perfectly content on several occasions in the 1860s and 1870s to affirm jury findings that carriers were 'grossly' negligent in spite of arguments by their attorneys that the evidence did not support such findings. As Cockle CJ, put it, while it might be true that 'all would suffer by any injury to the ... interest [of the carriers]', it was also true that 'all would suffer if these contracts were not fairly interpreted by the Courts, and acted upon by juries'.[28] And by 1871 the US Supreme Court was no longer satisfied that such 'contracting-out' arrangements were fair. Inasmuch as they had become the standard contract (often the only one made available) on many American railways, the Court held that they lacked mutuality and were voidable.[29] Several state supreme courts soon followed the lead of the federal one in this regard, a return to what might be thought of as the 'welfare-maximizing', older English rule that had imposed a high degree of liability upon one who accepted payment to transport persons or their

property safely to places distant from their homes and businesses.

Maine's Chief Justice John Appleton was an admirer of 'Bentham, Smith, and the modern School of Political Economists' in the late 1820s, and a critic of usury laws which prevented 'the rich and overgrown capitalist' from lending money to entrepreneurs at rates appropriate to the risks involved. However, Appleton deemed common-law rulemaking to be essentially 'a matter of right and wrong, of punishing culpable conduct rather than allocating economic risks'. This, his Unitarianism, grounded on ethics and 'the principle of individual responsibility', and his abolitionist views, ultimately counted for more than his considerable respect for economic theory. [30] Thus he ordered a soldier-debtor released on a writ of habeas corpus from his creditor's grasp in August, 1861, with the observation that 'the commands of the President are not to be subordinated to the demands of the creditor'.[31] He defended a good faith purchaser of promissory notes fraudulently obtained from a farmer from that farmer's defenses, not with a wealth-maximizing remark about the commercial value of negotiability, but with the moralist's observation that 'the foolish and the deceived must bear the consequences of their folly and their imbecility and not impose on those who relied on their assertions. ...' [32]

Moreover, Appleton ignored the 'efficiency' argument of counsel to stockholders of a bankrupt corporation being sued by its creditors. Their counsel had asked the court to read the relevant statutes in a way that would provide stockholders with limited liability. Any other decision would have a 'disastrous effect ... on our manufacturing interests', inasmuch as Maine's 'lack of private capital compels the formation of corporations and encouragement to foreign capital. ...' But Appleton (for the court) declined to follow this developmentalist lead. It was:

more just that the loss resulting from official mismanagement should fall upon those who entrusted the affairs of the corporation to ... incompetent, negligent or dishonest officials, than upon individuals [the creditors] who had nothing to do with their appointment, and who could not enforce their removal. ...

The loss should not fall 'upon those who would not have benefited by their speculations if prosperous, and should not be injured by them if unprosperous'. The 'influx of foreign capital' was 'desirable, but it is equally desirable that it should look after its own interests'.[33]

Consider as well that the common law right of union members to strike if not granted a union 'closed shop' contract was defended by the New York Court of Appeals on similar 'freedom of contract' grounds. Men and women had a 'moral and legal right to say that they will not work' with 'certain' others, and that their employer 'must accept their dictation or go without their services', so long as their employment contracts were understood to mean that they 'assume all the risk of injury that may come to them through the carelessness of co-employees. ...' [34] 'Freedom of contract' was no evil, late nineteenth century invention of those opposed to labor legislation governing hours or wages; it was celebrated in the Early Republic as a right separating Americans from 'the peasantry of Europe'.[35] Many of those who held parties to the terms of their contracts in these years believed in both republicanism *and* liberalism. 'The terms of a contract', Chief Justice Gibson explained, 'are private laws'. It was:

the boast of a freeman that he is bound only by his own consent; and if there is a power to bind him beyond it, whether exercised by an arbitrator, a judge, a jury, or a populace, it is a despotic one. ...[36]

Some Law and Economics theorists can embrace 'freedom of contract' on wealth-maximizing grounds, but those who defended it in the nineteenth century rarely offered such rationales.

III TORT

How often did nineteenth century jurists engage in cost-benefit analysis to determine whether a tort defendant should be deemed liable? Did tort law reflect economic theory? The answer is that *some* jurists clearly were using econometric reasoning, that *some* would have understood the Cost < Damages

x Probability formula for assessing defendant liability that Judge Learned Hand employed in *US v Carroll Towing*.[37] Virtually all nineteenth century jurists believed that the fundamental purpose of tort law was to get people ' to behave in morally appropriate ways by holding them to community standards of reasonable behavior ' in order to ' minimize injuries and losses, and to promote fairness and honesty in economic relationships '.[38] Clearly at least one of these objectives involved cost-benefit analysis at times. How else was one to know how injuries and losses were to be ' minimized '? But the rest might be said to be closer to Ellickson's ' welfare-maximizing ' norm than to Posner's ' wealth-maximizing ' cost-benefit analysis. And in any event, the ways that jurists determined what the defendant's ' costs ' of accident-avoidance and what the plaintiff population's damage potential and risk were, varied greatly from jurist to jurist, and the frequency of judicial inquiry into the assessment itself was very low.

Some examples: Defenders and critics of the attractive nuisance rule offered very different versions of the defendant's accident-avoidance costs; those favoring the rule spoke of the ' pittance ' required to lock the appealing turntable or box the exposed gears, while those critical of it spoke of the crippling sums required to fence one's property in order to render it ' child-proof '. These were not, however, the central rationales, the *ratio-decidendi*, of these opinions, but secondary ones, designed to buttress decisions reached on other grounds, either those of ' the Jurisprudence of the Head ' or ' the Jurisprudence of the Heart '.[39] Similarly, those concerned with the risks to passengers, freight and crew when the smaller locomotives and cars of the first generation of trains struck stray cattle, felt that the owners of such cattle had no right to reimbursement for their losses, and they noted that the speed of these trains was one of their chief merits.[40] But these were jurists in states and provinces that required cattle to be fenced in,[41] whereas those in states or provinces requiring that they be fenced out characterized the merits of speed quite differently.[42] And courts were more demanding of railroads when the victim was a child rather than a cow (contrary to what Richard Posner has claimed).[43]

Ronald Coase offered an elaborate case for the use of cost-benefit analysis by common-law jurists with regard to fire in railroad rights-of-way.[44] He would have been impressed with such arguments as were advanced by several jurists in our time frame: Williams J, instructed an English jury in 1860 of the London & Northwestern Railway's failure to use the effective ' American spark catcher ': ' If the damage to be avoided were insignificant, or very unlikely to occur, and the remedy suggested were very costly or troublesome ', they were to exonerate the railway of liability for such damages as might have been due to a fire in its right-of-way. US Supreme Court Justice Samuel Miller, riding circuit in 1874, offered similar reasoning: A steamboat's sparks had been the proximate cause of damage to the plaintiff's property. Miller told the jury:

If steamboats must adopt various apparatus thereby increasing their expenses, they must charge them upon the products of the country transported by them. On the other hand, if they can dispense with such things without too great danger, it is in the interest of the people for them to do it.[45]

Several jurists in Upper Canada/Ontario, New South Wales, and Nova Scotia offered similar ' cost-benefit ' instructions and opinions regarding the liability of quasi-public transportation corporations for fires caused by sparks from the stacks of steamboats and locomotives,[46] but the fact is that *most other* courts in the United States and Lower Canada/Quebec weighted the equation heavily to the *advantage* of the victims of fires caused by sparks from trains.[47]

A few early New York Supreme Court opinions that involved children injured in road accidents tended to emphasize the economic utility of the roads and the carelessness of the children and their parents.[48] But thereafter the trend in both the States and elsewhere was strongly in the direction of refusing to consider small children capable of negligence. Less liability fell on the child's parents (especially if they were ' needy ' and unable to afford an attendant for the child) and, thereby, more liability on the negligent driver.[49] When men and women were injured or killed in heroic efforts to save others from life-threatening dangers, they were not treated by jurists as contributorily negligent, as they would have been in England. But the reasoning these jurists employed was not the one that Posner abstracted from the ' leading case '.[50] A man named Eckert was killed rescuing a child from the path of an onrushing train. Posner quotes Justice Martin Grover: ' It was [Eckert's] duty to exercise his judgment as to whether he could probably save the

child without serious injury to himself', and concludes from this that the court saw 'the expected benefit of the rescue to the railroad in reducing an expected liability cost to the child's parents' as being 'greater than the expected cost of the rescue', and thus 'the railroad would have hired Eckert to attempt the rescue', and therefore 'it should be required to compensate him *ex post*'.[51] The problem with this analysis is that Justice Grover's rationale was not as economically-efficient as Posner suggests: His primary ratio decidendi was more humanitarian (or 'welfare-maximizing'): 'The law', Grover explained without citing any precedent or other legal authority for this statement (for there was none), 'has so high a regard for human life that it will not impute negligence to an effort to preserve it'.[52]

Railroad attorneys tried to persuade jurists in the mid nineteenth century to limit corporate liability for careless agents and to cap damage awards, warning of 'licentious and speculative litigation' and of the flight of capital from such works of 'public enterprise'. But jurists tended to react quite negatively to these appeals, alluding instead to the welfare-maximizing role played by pressure on the 'very sensitive pocket nerve' of such corporations.[53]

Courts clearly differed in describing the liability of railroads to use safe equipment. The Iowa Supreme Court turned aside a plaintiff, injured on a car with hand-holds and coupling device less safe than those on other cars, with the observation that it was 'of great importance to the trade and commerce of the country' that a car once loaded should go through to its destination without breaking bulk. Hence it would 'not be reasonable that [modern appliances] should be required as to all ... cars that may be transported in the usual and ordinary course of business'.[54] But other courts in the US and Canada held companies to higher standards, some emphasizing the 'trifling' expense involved in converting (for example) from the unsafe 'short switch' to the 'frog and guard rail' switch. 'Manufacturers should realize', one Canadian jurist wrote, that 'it is in their interest' to install available safety devices since 'in doing so ... they ... will save often troublesome and expensive litigation, sometimes irreparable injury, and, in some cases, valuable lives'.[55] Was he 'wealth-' or 'welfare-maximizing?'

With the invention of the Westinghouse Air Brake, the Miller Platform and Buffer, the Janney Automatic Coupler, as well as superior new switching devices, courts steadily forced railroads to adopt and use these innovations or accept liability for such otherwise avoidable injuries to workers. But they did not engage in sophisticated economic analysis to determine whether these devices, like the more obvious cowcatcher, were less expensive to adopt than were the annual losses of lives and limbs. When such costs exceeded the anticipated liabilities, many companies decided against adopting the safety devices.[56] This led 'reformers' (among them, those companies that *had* gone to the expense) to secure from Congress the federal *Railroad Safety Appliance Act* of 1893.[57] Had jurists applied true cost-benefit analysis to determine whether the company's assumption of risk defense had failed the test of the 'safe equipment' exception to this rule, a great many injured workers would not have qualified (as they *did*) for damage awards.[58]

The fellow-servant rule, as Chief Justice Shaw articulated it in *Farwell*, clearly rested rather heavily on a public policy 'safety' rationale. Posner regards this rationale as possessing an 'essential economic logic' inasmuch as it provided, 'in principle at least', a:

powerful instrument for industrial safety when combined with the rule making the employer liable for injuries inflicted ... by a fellow employee if the employer was on notice of the fellow employee's habitual neglect or incompetence.[59]

Was this 'watchful workmen' rationale 'efficient', or was it only 'efficient' in 'principle'? Were workers reluctant to report careless comrades? Evidence of both railroad employee discharge records and the increase in coal-mine fatalities after the rule was abrogated suggests that it may well have been of some value.[60] But if it reduced accident rates by 20%, and prevented 50% of injured workers from recovering compensation from employers for injuries incurred at the hands of a fellow worker, its 'wealth-maximizing' (as well as its 'welfare-maximizing') efficiency would be in doubt.[61]

Electrical companies offered expert testimony regarding the impossibility, in 1890, of providing that electrical insulating material would protect fully against electrical shocks without engaging in prohibitive expenses, but, despite these claims, courts held these companies strictly liable if they had not incurred the expenses necessary to provide 'perfect protection of its wires' in order to avoid liability![62]

On balance, then, nineteenth century common-law jurists do not appear to have been either particularly interested in using econometric reasoning in negligence cases, or, when they *did* so, to have been particularly competent in deciding how to conduct the analysis. They seemed ultimately to have been more concerned with inspiring what they thought of as good moral and social responsibility, with 'welfare-maximizing' humanitarian efforts at achieving rules that constituted 'good public policy', rather than those that simply constituted strict economic efficiency.

IV PROPERTY

The same may be said of the way that jurists in the nineteenth century generally addressed problems in the law of property. Posner believes that, 'as the relative values of different uses of land change', legal property rules would 'be redefined from time to time'. He also points to what he calls 'the common-law method' of cost-benefit analysis in pollution nuisance cases, and to the judicial sanctioning of compensated 'takings' for railroads, mill dams, and other 'public interest' enterprises. Compensation for mere consequential damages in such 'takings', he says, would be rejected as inefficient.[63] But if nineteenth century jurists *should* have appreciated the economic logic of these points the fact is that they but *rarely* did so.

Let me first offer, though, a clear 'economically-efficient' *exception* to my generalization: English Common-Law rules prohibited 'waste': the damaging or removal of resources from land held by one without full title to that land (a tenant, a holder in fee tail, or a widow with a dower life estate) who often cut down more of the estate's timber than was necessary for his or her fencing or firewood. One who 'wasted' another's estate could be made to pay damages and might also be enjoined from such further behavior.

American courts in the eighteenth and early nineteenth century generally did not apply this rule mindlessly. They distinguished the English rule, often noting that it was inapplicable to the 'conditions of this country' where timber was plentiful and the clearing of land for cultivation was thus an 'improvement' to an estate, not 'waste'.[64] 'Reasonable' use of timber was not 'waste', and courts would decide what was 'reasonable' based on the circumstances of the case and the prevailing economic conditions, for it was only by engaging in such an inquiry that one could decide whether the legal rights of the landlord, remainderman, or reversioner had been violated.

CANZ jurists felt bound by English principles, but they did not feel compelled to follow English precedent *blindly*. Jurists in Victoria (Australia) initially allowed a sheep grazer lessee to cut down all timber not 'used for building purposes'.[65] Later that court similarly construed the word 'timber' in a covenant to mean 'trees' generally, and not just oak, ash, and elm, as in England.[66] The high courts of New Brunswick and Nova Scotia followed the 'common sense' example of their counterparts to the south 'in the United States, a country under similar circumstances with our own in respect to wilderness land'. If timber was felled for cultivation purposes, these courts allowed a relaxation of the Common Law.[67] Upper Canada's Chancellor Blake held that the English rules regarding waste should not be applied inflexibly 'as to growing timber', since 'the beneficial enjoyment of the land is ordinarily attained, and indeed can only be obtained, through the destruction of the growing timber'. Similarly, in 1874 the Court of Common Pleas adopted the innovative (and 'wealth-maximizing') view of its Maritime and south-of-the-border compeers: 'Many acts which would unquestionably be "waste" under one state of circumstances would not be so under another', wrote Galt J. Holding too closely to the English standard would be 'highly inexpedient and unjust', given 'the natural state of lands in this Province. ...' While the precedents of the various courts of the United States, collected in the published 'American Reports', were 'not

binding on us, yet they are entitled to the highest respect ... because the state of landed property in that country is similar to our own'.[68]

Here were jurists clearly employing 'wealth-maximizing' *ratio decidendi*. But, on balance, these instances were not typical of their compeers when it came to deciding other sorts of issues of property law. In his treatment of pollution nuisances, Ronald Coase is critical of English jurists who persistently fail to take into account that both parties fear the loss of property and value. Inasmuch as Coase, English-born and bred, was less familiar with the treatment of pollution nuisance cases in American state courts,[69] he missed the fact that several US jurisdictions had begun to 'balance the equities' by the 1870s and 1880s, allowing a number of major polluters to continue to employ their workers, pay their taxes, and generate their useful manufactured goods, so long as they paid damages to the neighbors whose streams, gardens, or curtains they were injuring. But many others did not, and nearly all US courts refused to apply the English precedent that would deny a plaintiff who had 'moved to the nuisance' the right to seek an injunction or damages from a polluter. Furthermore, many appear to have rejected as well the argument that plaintiffs in 'industrialized areas' had no claim to damages from polluters.[70] Moreover, Canadian courts behaved in the same fashion.[71] Some American jurists (as in Ohio, Pennsylvania and Tennessee) behaved in a 'wealth-maximizing' fashion that Coase and Posner could applaud, but the fact is that, like their English counterparts, most North American jurists did not. Indeed, given the propensity of American courts to deal with those who 'moved to the nuisance' in a decidedly non-wealth-maximizing fashion, it would appear that they 'failed' that test, though the victims of pollution must have thought of them as 'welfare-maximizers'.

'Takings' for public purposes were sanctioned by courts throughout the Common-Law world where the legislature's rules had been followed. But consequential as well as direct damages were ordered to be paid in most of the United States, however inefficient the economic consequences. And where the state-sanctioned 'taking' (or 'taxing') for a mill site, factory, or road (arguably a dynamic and valuable new use of the property) was too 'private' or 'entrepreneurial' in character, it was prohibited.[72] Jurists in Western Australia, South Australia, and Victoria often appeared to have displayed similar, economic-inefficiency in 'takings' cases.[73]

The mid-nineteenth century petroleum bonanza generated another common-law 'efficiency' conundrum. In 1889 the Pennsylvania Supreme Court applied the common-law of capture to oil mining, assigning property to the oil only after it had been brought to the surface. This position, adopted in many other jurisdictions (including the particularly oil-rich states of Texas and Oklahoma), resulted in adjacent landowners rushing to drain the oil or gas resources from the underground pool that lay commonly beneath their properties. As such, it was not a conservation-generating, 'wealth-maximizing' rule of law, but an inefficient, wasteful one. (Wyoming and a few other states solved this 'commons tragedy' by defining the property in the oil before extraction, a legal regimen known as 'unitization'.)[74]

A few final examples: Both the (new American) prudent investor rule and the (old English) ancient lights doctrine were economically efficient and developmentalist, but most courts in the United States rejected them (in the latter case because they led to 'unneighborly' results).[75] Many older ferry and turnpike franchises were 'inefficient' by comparison to the allocations of the routes and crossings sought by the newer, more dynamic railroad technologies, but courts do not appear to have responded to such 'expediency' arguments.[76] Stockholders seeking to bar corporate leadership from going beyond the language of the original charter often succeeded in halting such actions even when they had the sanction of the legislature and the majority of stockholders and were likely to produce both economic growth and profits.[77]

In summary, social harmony, private rights, the 'rule of law', and 'the public good' were clearly the objects of judicial solicitude more often than was economic efficiency.[78] Jurists offering such rationales were but rarely engaging in 'wealth-maximizing', but some of their common-law innovations, such as the abrogation of the ancient lights doctrine, were of a 'welfare-maximizing' character.

Whether one searches for evidence of 'wealth-maximizing' jurisprudence in the law of contract,

tort, or property, one comes away with the distinct impression that few nineteenth century American jurists appreciated the argument that courts should help create economic efficiency. Their benchmark was 'the public good', and sometimes their inspiration was their understanding of Christian benevolence. Inspired by such sentiments, they tended to produce 'welfare-maximizing' results.

V LEGISLATION

James Willard Hurst saw state legislators in nineteenth century America as generally effective lawmakers, allocating scarce resources and released economic energies by creating wealth-generating quasi-public corporations, generally for the greater public good.[79] Richard Posner faults legislators for responding to interest-group pressures and ill-considered impulses, unlike his ideal-type jurists who felt few such pressures or impulses that might distract them from creating wealth-maximizing rules. '[J]udge-made rules', he writes, 'tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing'.[80]

Evidence of the propensity that Posner identifies is clearly plentiful in the eighteenth and nineteenth centuries, but there is also some evidence of 'efficiency-promoting' legislation.

A clear example of Posner's dichotomy between inefficient legislators and wealth-maximizing jurists may be seen in *The King v Broad*, a decision of the New Zealand Court of Appeals. Government-owned railway corporations sometimes sought to protect themselves from liability for accidents by creating by-laws requiring drivers to make complete stops at crossings before proceeding. In 1912 a motorcyclist was killed in Wellington, New Zealand, 'between the Queen's Wharf and a spot beyond Cuba Street extension', when he failed to come to a complete stop for a train of the government-owned Te Aro Railway that was within a half mile of the crossing, as the by-law required. His heirs sued the Crown, and won appeals both before the New Zealand Supreme Court and Court of Appeals. New Zealand's Justice Worley Edwards and his colleagues viewed the by-law as one made by the railway commissioners ultra vires.[81] He set aside a by-law that required all drivers to come to a full stop, and offered an economic-efficiency rationale for this judgment:[82]

If every person who drives a vehicle across any one of these [full-stop] crossings ... were to obey this by-law, the traffic of the city would in some parts, notably at the end of Queen's Wharf, be brought to a standstill without any necessity or corresponding advantage.

This judgment thus came at the expense of both real railway resources and purported railway authority. The New Zealand Railway Ministry consequently appealed to Privy Council, but the Law Lords allowed that 'a plenitude of local knowledge assisted their lordships' on the New Zealand Court of Appeals. They joined this respect for 'local conditions', with a cost-benefit analysis of their own: The New Zealand jurists 'seem to have recognized the grave public inconvenience' of the by-law. 'To what purpose', asked Lord Sumner, was 'this waste of energy' in forcing all vehicles to come to complete stops?[83] In this instance, as Posner has posited (offering the same example: legislative-mandated stops at railway crossings), jurists proved to be more 'efficient' than government by-lawmakers. But jurists were rarely as willing (or able) to trump 'inefficient' by-laws, let alone statutes.

Consider the homestead exemption statutes that spread from Texas in the 1840s to Mississippi, Alabama, Georgia, Florida, Vermont, California, Iowa and others: a total of forty states and territories by 1870. Under the terms of these statutes, a farmer or rancher who found himself unable to meet his debts was assured that his homestead (variously defined as his home, basic tools and equipment, and a small plot surrounding the home) would be free from the fieri facias and sheriff's sale. Defended by legislators, legal commentators and state courts for decades, it has recently been praised as a means of making 'capital more venturesome by lessening the risk [to the farmer/rancher]'.[84] While this may describe the situation from the perspective of the 'risk-taking' homesteader, it surely made those asked to lend monies to such homesteader/ranchers less willing to risk capital, inasmuch as such creditors knew their only collateral was the improved and unimproved land and water resources, often worth little without the un-attachable dwelling and equipment of their debtor. Less capital, not more, was available to the individual farmer/rancher

entrepreneur in homestead exemption states. Hence those legislators who sought credit to develop the 'New South's' economy in the late nineteenth century appropriately 'began to scale the value of the exemption back. ...' [85]

To be sure, some 'inefficient' debtor-relief statutes passed by American state legislatures after the Panic of 1817 and that of 1837 were voided by the US Supreme Court, because they came up against ex post facto and 'contract clause' language in the US Constitution. But other, more carefully crafted statutes of this sort, still lacking economic efficiency, passed constitutional muster, and were sanctioned by both state and federal courts.[86] So did the measures taken in the second half of the nineteenth century by a number of state legislatures (especially in the South) to repudiate state bonds. How could they do so? Because they were free from interference by the US Supreme Court because of its 'strict' interpretation in these years of the 11th Amendment (baring suits by individuals against states). The result, as John Orth has pointed out, was that the credit-worthiness of these states plunged on Wall Street and abroad.[87]

Generally speaking, Posner's view of legislators as relatively inefficient appears to be close to the reality of nineteenth century legislatures, closer, I believe, than that of Hurst. Yes, certain economic 'energies' were 'released' by legislators,[88] land transfers were made easier, faster, and more secure,[89] but by men who displayed little concern for public cost-benefit analysis. Interest groups struggled for possession of scarce resources (land, timber, minerals, range, water, franchises), and the lust for personal lucre mattered more than 'the public good'.[90] Moreover, it was (generally speaking) legislators, not jurists, who created laws stripping aboriginal people of their property rights; legislators, not jurists, who created slave law.

None the less, Posner may not give legislators quite enough credit for the occasional 'efficient' statute: After all, it was legislatures (Parliament and Congress) that abolished the same slavery other legislators had created; it was a legislature (Congress) that created the statutes requiring states and private citizens to observe the civil rights of the recently-freed slaves.[91] It was legislatures (especially in Australia and New Zealand, but also in some parts of the United States) that mandated the reallocation of land and water rights, ordering pastoralists to surrender tracts of underutilized leased land to homesteaders who appeared to them to be more efficient users of those resources.[92] It was the British Parliament that resolved the long-standing tension between Newfoundland cod fishers, their local suppliers, and British capital providers with a statute (the Fisheries and Judicature Act of 1824) that created a lien arrangement that was arguably more efficient than the customary rule.[93] And it was Parliament and legislatures elsewhere in the lands of the British Diaspora that abolished the old common-law rules against forestalling, engrossing, and regrating — rules which had prevented the 'efficient' futures transactions in the commodities exchanges. When 'Rational Actor' railway managers failed to mandate cost-effective (but not free) safety devices to reduce fires, reduce the killing of livestock on rights-of-way, and to produce safer conditions for passengers, brakemen, strangers crossing tracks, and the like, it was legislators and municipal councils throughout the lands of the British Diaspora who called for investigations into accidents and to take measures to reduce them.[94] In short, legislators did sometimes act in ways that 'maximized wealth'.

VI CUSTOMS

Three important Law and Economics voices have addressed customary behavior directly: Robert Ellickson, Ronald Coase and Garrett Hardin.[95] This section assesses the evidence in the historical record that either supports or refutes one or the other of their models of reality.

A *Coase, Ellickson, and Customary Dispute Resolution*

Ronald Coase has argued that those who suffer a loss of property due, for example, to a breach in a fence shared with a neighbor will bargain with that neighbor to terms reflecting the relative value each place on the property at stake in the dispute so long as they do not perceive significant costs that will have to be expended associated with the transaction.[96] The Coase theorem assumes that pastoralists will negotiate with farmers, polluters with those who suffer from the pollution, as

rational profit-maximizers, factoring the relevant legal rule extant on their lands into the bargaining like any other cost of doing business, and that the one will buy out the other's legal entitlement at a figure that allows both to benefit financially. 'If it is inevitable that some cattle will stray', Coase writes, 'an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops.' The rancher 'will pay the market price for any crop damaged'.[97] Robert Ellickson has, in a sense, put the Coase theorem 'to the test' by observing how ranchers and ranchette owners in Shasta County, California, actually did deal with one another when a steer encroached on a ranchette owner's garden. As I have pointed out, he found them engaging in 'wealfare-maximizing'. How do the Coase and Ellickson models describe the ways that ordinary folk resolved their disputes and bargained in the eighteenth and nineteenth century lands of the Common Law? [98]

B *Labor Contracts*

The Coase theorem appears to describe with some accuracy the way that highly-skilled or particularly scarce workers managed to get employers to agree to a 'contracting-out' of certain particularly one-sided master-servant rules, especially in the earliest stages of Diaspora settlements, but the empowering of workers in this regard in times of labor scarcity was not commonplace: As often as not, employers managed to recruit employees with 'standard' contracts that were employer-friendly. [99] As the scope and size of businesses grew throughout the nineteenth century, the bargaining power of workers tended further to decline, and personal bargaining failed, giving rise to the Union movement. There were also problems with the bargaining process in labor contracting when one party belonged to a strikingly different culture than the other, as when British Diaspora newcomer-employers misunderstood the work cultures of aboriginal employees. I have provided evidence of this in *Between Law and Custom*,[100] but want to add a further example that I recently noted in the work of Beverley Blaskett,[101] who offered this passage from an autobiographical memoir in the Zwar papers:

One day my Father ... came across the blacks stripping a tree alongside the road. Billy, who was lying in the shade of a tree nearby, hailed him and told him all about the contract. He said he was getting sixpence a sheet for stripping [and paying his workers ninepence a sheet]. Father asked him how he could pay ninepence ... when he was only getting sixpence. Billy said it was worth threepence just to be boss.

Zwar, Sr's, comment on this transaction was a speculation that 'as his people did not know the value of money Billy intended to swindle them'. That might have been the case. But it is just as likely that, like 'his people', Billy simply had a different notion than Zwar of 'the value of money', and that Billy's explanation was, for him, a perfectly sensible one – not a traditional 'wealth-maximizing' arrangement, but one that was status-gratifying, which maximized the sort of 'wealth' that Billy appeared to have sought.

C *Sales Contracts*

It is well-known, due to the research of Stewart Macaulay, that parties today with long-standing sales and trade relations rarely resort to Law when one feels he or she must back out of a contract ('must cancel my order'). Instead, the parties accommodate one another in order to preserve fruitful business relationships.[102] There is plenty of evidence as well of such forbearance in the Lands of the British Diaspora prior to the twentieth century. In the early stages of frontier life and of mining communities, a kind of 'agreements' ethic was widely held – that:

debts would be paid as means were available, and that legal action circumvented the normal process of negotiation and accommodation that should occur between creditor and debtor.[103]

Miners in the American West 'felt and said that it was disgraceful to dun a man for money'. They believed that 'honor between men, and the strength of society and business relations', were 'far better protection to the lender than bond of Shylock and execution of sheriff', as Charles Shinn put it in 1880. Hence no court of miners 'ever collected debts. ...' [104]

This accommodating frontier ethic often had a half-life of no more than a generation or two. It had largely vanished from the country stores of Connecticut by the 1720, from the dealings of Plymouth County merchants by the early nineteenth century, replaced by the promissory note. Such notes made debts transferable as credit by the early eighteen century in England and were soon in widespread use throughout the Diaspora lands, for they also precluded some of the legal problems that the action of debt could pose in court.[105] Promissory notes made a lot of economic sense, both in places where debtors could no longer be trusted to respect a storekeeper's mere 'book account' of a debt, and in cash-scarce places like early New South Wales where everyone's notes circulated and served as a primitive currency medium. Throughout the first several decades of settlement, the governors of New South Wales sought to prohibit the use of notes drafted by convicts and those written for any value but sterling, since they were contrary to English Law and, in any event, the negotiable value of such notes were often difficult to assess. But the colony's chief jurist, Ellis Bent, found their customary use to be so pervasive as to warrant ignoring the gubernatorial proclamations.[106]

None the less, when the promisor refused to honor his note, the costs of court-proceedings, of the legal counsel accompanying them, and of the prospect of appeals from an initial decision, prompted most New York merchants, as well as their smaller-scale counterparts on the Wisconsin frontier, to insist on commercial arbitration of their disputes.[107] Moreover, by the 1820s and 1830s merchants, contractors, and their farmer counterparts had available to them in the United States insolvency statutes that made accommodation and out-of-court settlement an even more attractive avenue for debtors to follow than the Common-Law remedies.[108] Joseph Ellicott, the Holland Land Company's first agent in western New York, reported in 1818 that 'the whole of this community is Debtor and Creditor, Creditor and Debtor', and Ellicott persistently advised against the Company not to threaten its many indebted lot-holders with legal action, since the fruits of such suits were notoriously bitter.[109]

Similarly, a supplier of farm equipment in Ontario, and thus a creditor of many farmers, wrote a colleague during financial 'hard times' in June, 1838, that 'very few feel under any obligation to pay', and 'to sue is worse than useless'. Rural Ontario's manufacturers and storekeepers knew that they had to provide credit, especially during 'hard times', if they were to survive. Were they to press their debtors for payment, both their credit-assets and their local reputation might well be lost. The result of taking a debtor to court was that he was forced into bankruptcy, as land-, supply- and seed-creditors all jumped in, accompanied by attorneys and court costs. 'Sue a beggar, catch a louse' was the maxim; the merchant was better off pressing his own credit limits than pressing those of her debtors. The price that merchant-creditors were prepared to pay in this business in the early nineteenth century in Upper Canada was an average of 20% of one's debtors defaulting in a given year.[110] Merchants lending to farmers have always had to factor into their lending costs the constant risk of defaulters and absconders. But merchants who buy from and sell to one another in established markets and mercantile exchanges have for centuries enjoyed a dispute-resolution system that works, the customary law of merchants (the law merchant), with its informal hearings of disputes and speedy judgments rendered by fellow merchants. This customary law of contracts was celebrated in Chicago in 1885, for example, at the dedication of the new Chicago Board of Trade building when attorney Emery Storrs praised these customs, 'stronger' as they were 'than any mere legal technicalities'. Before them 'the [Common] Law must bend', Storrs remarked, 'and if it does not it will break'.[111]

When creditors did turn to legal proceedings, those called upon to attach the debtor's property could face stiff resistance. The constable in Newfoundland who sought to attach the property of fishermen and 'planter'-middlemen for their debts in the eighteenth and nineteenth centuries could well face a threat to 'blow his brains out'. Later, in 1848, men with blackened faces overpowered a bailiff guarding the attached property of an insolvent Newfoundland 'planter' to prevent its being sold to pay overseas 'merchants'. In any event, as Sean Cadigan puts it, 'there was much room for popular negotiation and adaptation before disputes might end up in court'.[112]

Coase's theorem might be said to have described many such debtor-creditor relations, but the theorem does not predict past reality nearly as well when it came to trade between Diaspora settlers

and Aborigines. The first sales agreements that the Diaspora newcomers entered into in the colonies were those involving the fur trade with North American natives. These Diaspora traders quickly discovered that gift-giving, a measure to the natives of mutual respect, was an essential preliminary to any transaction. Some traders also came to appreciate that, for many natives, the acquisition of European goods was inspired by more than a simple desire to achieve 'economic' benefit. Such acquisitions could improve one's local reputation, and provide evidence that one had influence with the British traders. Indeed, for many native tribes the trade relationship was as important as the trade itself, inasmuch as the process constituted a kind of alliance with a source of foreign power.[113]

Moreover, 'trade-for-profit' simply had a different meaning to aboriginal hunter-traders than it did to their Diaspora counterparts. The ordinary 'laws' of supply and demand did not seem to apply to many native hunters. Gabriel Archer, one of the first Virginia colonists, felt that the natives in the vicinity of Jamestown had:

no respect of profitt, neither is there scare that we call meum et tuum [a sense of private property] among them save only the ... people [know] their severall gardens.[114]

The economic objective of many native traders was not so much the acquisition of wealth, but that of comfortable subsistence. Their strategy was to exchange enough beaver to acquire a relatively fixed passel of trade goods, and to acquire these goods with the least expenditure of effort. Hence 'Giving Indians [a] larger Price' for their pelts when they were scarce 'would occasion the Decrease of Trade', not its increase, or so several Hudson's Bay Company officials put it in 1749. Their chief factor at York made the same point in 1768.

If the trading standard were enlarged in favor of the natives, [that] would ruin it all; for I am certain that if the natives were to get any more for their furs, they would catch fewer ...[115]

Another aspect of the fur trade, in both the United States and Canada, was that of the construction of what might be called a debt chain. The English legal rules of debt collection, particularly those pertaining to the seizure and sale of the debtor's property, were foreign and troubling to the Cherokee and could lead to grief. Indians had notions of indebtedness that were similar to those of the Diaspora newcomer-traders, but they were not identical ones. English capitalist-merchants extended credit to Charleston merchants in the late seventeenth and early eighteenth centuries, 'who in turn credited the Carolina trader'. That trader, 'needing skins to meet his debts, could not resist the temptation of obtaining a lien on the next winter's kill by extending credit to the Cherokee hunter', which often led to 'ill Consequences', such as those 'fatally experienced' in bloodshed with a neighbor of the Cherokee, the Yamasees, in 1715, or so Indian Trade Commissioner George Chicken put it in 1727.[116] But, for their part, Indians soon discovered that they could manipulate traders who refused to provide them with additional credit, either by attacking and beating that trader (in which case the relationship usually came to an abrupt end), or by threatening to shift their business to others. This latter course often resulted in their being extended more credit, until that trader found himself inexorably bound to those native suppliers.[117] Peter Skene Ogden was in charge of the Hudson's Bay Company's trapping parties on the Snake River in the 1820s when his Indian and Meti hunter-trappers began to ignore and disobey his orders. He reported that, with American competitors in the vicinity, 'I did not think it good policy to use any threats towards them' (though he longed to 'make an example' of 'some of them' once they returned to the trading post in the fall). He had been correct; some of his Iroquois trappers soon left him for the American competition with these words: 'Now we go and all you can say or do will not prevent us from going'. Throughout the early nineteenth century Company officials sought informal, non-judicial means of resolving disputes, and displayed respect for the laws, customs and norms of the native peoples in what they often referred to as 'Indian Country'.[118] Later, in the 1840s, the Company (an organization perfectly capable of using violence to obtain its ends) limited its response to the murder of two of their traders to non-lethal measures. Ogden, now serving the Company in a more elevated position, explained this with a kind of cost-benefit rationale: 'We have nothing to gain. On the contrary, everything to lose.' Similarly, when the Company prosecuted a Meti in its General Quarterly Court of Assiniboia for trading with its American competition, a mob of Metis surrounded the courthouse. The man was found guilty, but the judge took the advice of the

jury that their be no penalty imposed and immediately set the man free, prompting one of the Meti jurors to shout to the jubilant crowd, 'Le commerce est libre!' Dale Gibson notes that the Company made no further attempts to prosecute 'free-traders'.[119]

D *Animal Trespasses*

Animal trespasses on farmland in the Lands of the British Diaspora were sometimes dealt with in the 'rational', 'efficient' bargaining fashion described by Coase.[120] Those who behaved in such fashion clearly fared better than those who went to private law or private war. But that social fact did not prevent some members of the British Diaspora from taking costly or violent measures when trespassing or being trespassed upon. In the first stages of frontier life, when neighbors were not well known to one another, where those on the two sides of a boundary fence were not yet likely to be the offspring of established members of the community or church, the sort of social isolation that Lois Carr and Miles Fairburn detected in the first generation of Maryland's and New Zealand's settlers could get in the way of accommodation and cooperation.[121] Eventually social bonds developed, and the relatively equal resources and claims of the parties in the inevitable disputes over animal trespasses lent themselves to informal, 'neighborly' adjustments.

But there was less willingness to bargain when the trespass involved members of such strikingly different peoples as aboriginals and British Diaspora immigrants. Settlers could not easily assume the legally-mandated costs of fencing both their own animals out of Maori crops and their own crops in from Maori animals, and, in any event, they refused to do so. These different cultures were often unable to accommodate one another's claims their differing perceptions of the proper rules regarding the fencing in or out of crops and animals, and the low opinion of natives held by most British settlers in both North America and the Antipodes (and of settlers by aboriginals in those regions led to widespread ignoring of 'the law' and to the imposition by both of an often bloody 'informal' law.[122]

I have concluded from a comparative analysis of animal trespasses that the economically-efficient bargaining process described by Ronald Coase[123] often did not take place. Chicago economist James Heckman recently observed that the 'separation of efficiency and equity' by neoclassical economists:

creates a void that often leads to the neglect of the distribution/redistribution question entirely. This analytical separation may amount to a ... blind spot in neoclassical theory because it encourages concentration on the piece of the analysis that one can be clear about as an economist, rather than the piece that one cannot.[124]

Heckman's words seem to apply well here.

E *'The Tragedy of the Commons' Reconsidered*

Biologist Garrett Hardin delivered a presidential address with this title to the Pacific Division of the American Association for the Advancement of Science in 1968. He took issue with the Smith-Benthamite view of individuals seeking their own best interest and thereby simultaneously producing what was best for 'the public interest'. Hardin critiqued this 'greatest good' reasoning when the issue at stake was commonly held (be it land, air, forests, or water). His most prominent illustration, as was the case with Coase, concerned the grazing of animals on a commons. 'As a rational being', Hardin writes:

each [cottager] herdsman seeks to maximize his gain. Explicitly or implicitly ... he asks 'What is the utility to me of adding one more animal to my herd [on the commons]? ... Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1. ... Since ... the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1 ... [Hence] the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd [on the commons]. But this is the conclusion reached by each and every rational herdsman sharing a

commons. Therein is the tragedy.[125]

Hardin went on to offer comparable examples regarding the pollution of streams and air, and then addressed his primary concern, overpopulation. His general point was that individual wealth-maximizing on the commons has adverse, wealth-minimizing effects on other commons users. Over-fished and polluted oceans and rivers, over-hunted wildlife, over-grazed public land, air pollution, eroded soil, and deforestation plague us all today. My reading of the evidence from the past in the lands of the British Diaspora is that Hardin failed to appreciate that for centuries, both European and non-European communities that shared land for grazing or other food-gathering purposes took formal or quasi-formal legal steps to police that sharing. But that aside, with regards to pollution, over-fishing, over-hunting, and over-grazing (in frontier societies), he was essentially 'on the mark'.

F *The Enclosing of Grazing Land, Open-fields, and Mines*

European peasants had for centuries appointed local officers (or shared the duty) to monitor the grazing rights of those entitled to access to the Common pastureland ('stinted' according to the rights associated with their cottage or the amount of their arable fields and wealth), and fined those abusing their rights (a process known as vecera in Spain's Asturias and Leon and regulated in like fashion in the Swiss alps at least as early as 1500).[126] Throughout the Continent and the British Isles arable fields were made available to grazing animals as soon as the harvest was in (known as derrota in Spain and vaine pature in France and Quebec), in order to provide better nutrients to the animals and to have them manure the fields.

The British peasantry relied on the commonly-held land for such purposes (nutrients, fuel, pasture, grazing, and a host of other household needs). Called 'crofters' in Scotland, 'commoners' or 'cottagers' in England, they had for centuries shared the seasonal efforts of maintaining and utilizing the Commons with their more affluent, propertied farmer-neighbors. They had exchanged produce and finished-goods with them, had participated in the manorial and Borough-English courts that administered the by-laws and customary rules of the Commons. There were from time to time a number of disputes over how many cattle or sheep cottager A or farmer B was allowed to graze on the common land (issues of 'levancy' and 'couchancy') how much wood could be taken from the waste (an issue involving the rights of 'turbary', 'botes', and 'estover') how many rights attended a cottage at sale, how much of a fine might ensue from the hayward's report of a downed fence. But these and other such issues were generally susceptible to resolution at arbitration, in the local court (with the sanction of the Court of Chancery), or in the court of self-help. Hence many were adversely affected by the Enclosure Movement, however much the generation living at the time of the enclosure might have been compensated.

Peasants in several regions of Britain and the Continent chose a farming methodology known as 'open fields' agriculture by the late Middle Ages. Yeomen held strips of land in separate places in order to spread and thereby minimize their risks of disaster were one or another of their fields or crops failed in any given year.[127] This arrangement made good economic sense until the eighteenth century, when rising prices and other circumstances led to the enclosure of arable fields and grazing land, either by common agreement or Parliamentary fiat. This forced those owning small tracts of land to sell out to their more well-endowed neighbors due to the costs associated with the installation of fences, and it led to a decline in rural population. But the wealth of England increased.[128]

Deep mining entrepreneurs, equipped with capital, steam engines, laborers and railway access lines, invaded the customary turf of the free miners in coal-rich regions like the Forest of Dean in the early nineteenth century. Were they more 'efficient' or simply more powerful? Chris Fisher answers that the latter was the case, while not explicitly addressing the former question. He is certainly correct about the power relationship, and he offers solid evidence that most of the free miners and, for about two decades at the turn of the century, the surveyors-general officials charged with administering the Crown's interests within the Forest as well, effectively resisted encroachment on the free miners' domain by 'foreigner' capitalists, determined as both groups were to protect 'the lower class of colliers' 'poor honest men', from loss of their livelihoods.[129] But while

the eventually success of the politically effective deep-mine entrepreneurs did, indeed, reduce most of the free miners to the status of laborers,[130] the fact remains that coal was mined that had been inaccessible, and that it was more efficiently transported. And in that sense the passing of the Mine Law Court, while lamentable to the free miners, could be said to have been beneficial to the national interest.

G *Hunting and Other Food-Gathering on 'the Commons'/'Waste'/'Woods'/'Bush'*

'Poaching' wild animals on land belonging to others was an ancient custom in the British Isles. But those who had established title to land increasingly sought to ban such practices. In the early nineteenth century 'poachers' were confronted with a set of restrictive English Game laws. But those in Parliament who sought to limit the right to hunt and fish to the actual owners of the land and stream were aware of the resistance that would greet their efforts, for they were asked rhetorically by one of their members during the debate on the Bill:[131]

> Would [the poacher] trouble his head to read the book of parliament? He read the book of nature. In that book he saw that the hand of nature made game wild, and 'unclaimed of any' and he would act accordingly.

The story appears to have been much the same in the Australian colonies — that is, settlers of all social status hunted game with weapons of their choice essentially without interference from the Law. From a cattle station on the Goulburn in the mid-nineteenth century John Cotton wrote an old 'billiard-playing' friend of his in London that it was 'not necessary to take out a licence to carry a gun; one shoulders it at pleasure and hunts without fear of trespassing'. Of necessity, Cotton armed his station-hands as well, and he knew they hunted too. In fact, the 'master' and the 'servant' often hunted side by side.[132]

Colonial American assemblies concerned about the depletion of game began to pass seasonal limits on the hunting of deer and wildfowl and to restrict the netting of salmon in the early eighteenth century. But these and a host of later statutes were out of sync with the 'customary law' of the hunter-majority. Thus New Hampshire's statute limiting the hunting of deer (passed in 1740) was simply un-enforced until the creation of the office of State Game Commissioner in 1878. When Maine's legislature, inspired by the growing 'gentleman-sportsman' tourist trade, passed statutes in the late nineteenth century designed to limit one's seasonal quota of moose and elk, local 'Down Easterners' reacted with anger and defiance. One man, George Magoon, acquired lasting fame by killing a game warden who had sought to arrest him.[133]

In short, the same culture that had produced 'poachers' in Britain resisted game laws in Australia and the United States. Wildlife was ferae naturae, given to Man in the Bible. Hence throughout the lands of the British Diaspora 'efficient' conservation and the privatizing of game proceeded with difficulty.[134]

The aboriginal peoples of North America and the Antipodes may have been better at 'efficient' managing of 'the Commons' than their 'newcomer' competitors. Most native people had a clear sense of which woods/bush/hills 'belonged' to whom, and recognized that they had rights only to their own 'hunting grounds'.[135] But the fact remains that the stocks of species like the moose, caribou, and especially the beaver were at times drastically depleted in much of North America in the 17th, 18th and 19th centuries, despite the efforts of firms like the Hudson's Bay Company to get the native trappers to engage in conservation measures.[136]

Explanations differ as to why the beaver, in particular, was over-hunted. Some attribute this to the appeal of trade goods held out to aboriginal hunters by European fur trading companies. Others argue that some aborigines blamed the beaver and other animal 'nations' for the diseases that were cutting them down in the first generations of Contact with the European traders, and that they consequently 'waged war' upon the suspect animal 'nations'. Still others point out that some native Americans believed until the mid-19th century that it was not possible to kill too many beaver, elk or deer; that each species was capable of replenishing itself with ease, and that:

if they do not [kill all they find], the beasts would go and tell the others how they had been hunted and that then, in times of want, they would not find any more.

Robert Brightman describes these convictions among the boreal forest Algonquians (Cree hunters and trappers) as 'magico-spiritual' beliefs that were resistant to Hudson's Bay Company efforts to get them to practice conservation in the first third of the nineteenth century, and there is evidence that these sorts of beliefs were held by other native Americans as well.[137] Law & Economics theorists might call the last two of these reasons 'irrational'. And, by Western standards of 'rationality' they were. But that is only to say that for millennia the 'First Nations' managed the Commons fairly well without utilizing, or appreciating, the cost-benefit analysis of Economic Man.

In any event, once Diaspora settlers arrived, there would be pressure of a more serious sort on the 'common' wildlife. Settlers hunted deer, turkey, buffalo and other game with abandon, without asking permission of the Original People. 'When you white men buy a farm', Ohio Valley warriors told David McClure in 1769:

you buy only the land; you don't buy the horses and cows and sheep. The Elks are our horses, the Buffaloes are our cows, the deer are our sheep, and the whites shan't have them.

(Hence on one occasion in the early 1770s Shawnee warriors 'relieved' some Virginia hunters of 1,100 deerskins.)[138] On the Manitoba grasslands competition between natives, Metis, and whites for buffalo, fish, and especially for scarce stands of timber grew steadily in the 1850s and 1860s. Lake Winnipeg was over-fished by a Detroit firm using seine nets. Gristmills and steamboats on the Red and Assiniboine rivers killed off the sturgeon. Meti Joseph Royal complained to the province's governor in 1871 of the harvesting of timber on the Assiniboine and Sale rivers: 'Until now this timber was a commonly held resource where each limited the taking to what was necessary for his proper use'.[139]

The invasion of the Diaspora resource-snatchers clearly led to the crisis, but, at least on the Canadian plains, both cultural groups ultimately can be said to have shared responsibility for it. Unable to cooperate, they took what they could with increasing rapidity. One Indian band advised government negotiators in the 1870s 'when timber becomes scarcer on the reserves we select for ourselves; we want to be free to take it anywhere on the common'. Ozawekwun, a Cree hunter, laughed when told by Indian Agent Ogletree in 1885 that he was not allowed to hunt deer in the Tiger Hills. He said, 'if he was starving and saw a Deer he would certainly shoot it. ...' The result was another ecological 'tragedy of the commons' by the mid-1870s, and was one of the grounds leading Meti Louis Riel and his followers to declare Meti sovereignty in the 1880s.[140]

H *Fishing*

For centuries British common folk had 'poached' salmon as readily as they did deer and other game, and readers of the novels of Sir Walter Scott in the early nineteenth century would have read one character claim that Scottish crofters 'have as much right to the fish as the lairds have'.[141] The Diaspora settlers living along the rivers of British North America where salmon spawned exercised customary riparian rights to fish with weirs, racks and scoop nets, and ignored or politically savaged legislators who sought to undermine those rights for milldams.[142] By the nineteenth century lobstermen in Maine had reached community-based 'efficient' agreements on the taking of that crustacean from the sea.[143] But it cannot similarly be said that eighteenth and nineteenth whalers engaged in 'efficient' conservation. Whales reproduce at a much slower rate than virtually all other creatures of the seas. Hence, before the problem was as clearly perceived as it would be by the late twentieth century, whalers were both less willing and less able to estimate the proper rate of harvesting. Nor would anyone's proposal to 'privatize' that hunt have made sense, given the migratory nature of the hunted and the international character of the industry.[144] And what of the capital-intensive 'pound-net' (fixed-fishtrap) operations strung along the coasts of Newfoundland, New England, and the mid-Atlantic states by the 1880s? They were certainly better at catching fish than their trolling and trawling competition (who have been

dismissed as 'Luddites' by two scholars for their opposition to this more 'efficient' plundering of the watery Commons). But how 'efficient' was this if it led at times to over-fishing?[145]

The same sort of confrontation took place simultaneously in one of the more lucrative of the shellfish industries — oystering. In the United States the common-law rules regarding the ownership of the off-shore oyster beds differed from state to state. The New Jersey supreme court decided in 1821 that, by virtue of the War of Independence, the natural resources of the tidewaters and bays were vested inalienably in common 'in the People',[146] and thereafter New Jerseymen bitterly contested all efforts to 'enclose' the common flats and bays.[147] Were private owners and 'seed-planter' capitalists more 'efficient'? Clearly a combination of holding beds privately and seeding and tending them regularly was more likely to preserve the stock than the public harvesting of commonly-held beds alone. As one oysterman from Sayville, Long Island, put it:

A man will care for his property. If he has his own lot, he will scrape it ... free of parasites, and he won't take up oysters too soon that would be better left till they are older. [148]

Nonetheless, such a private property regimen has not proven to be politically acceptable for the other species in a number of coastal states. California's modest efforts in the late nineteenth century to protect spawning salmon met resistance from those who sought this fish for something other than their own personal dietary sustenance or sport: One defendant admitted in court to having netted salmon illegally. The judge thereupon instructed the jury that the evidence warranted a guilty verdict, but the jury found him not guilty after little more than 'a ten-minute deliberation', or so the California State Board of Fish Commissioners reported in 1892. They added that their officials were then 'followed' from 'the court-room to the hotel, and from the hotel to the [railroad] station', by 'a howling mob of thirty to forty men and boys', all in all 'a most insulting demonstration'.[149]

This is not to say that the resistance of salmon fishers was an inefficient 'tragedy'. In the waters of the Sacramento River and the San Francisco Bay, Greek and Italian salmon fishermen formally divided the gill-net harvest among some one hundred-odd boats from 1872 on, allocating each no more than forty fish per day in order to maintain both the supply and the fresh-market price. Chinese shrimpers and abalone hunters in California waters similarly 'arbitrated their own conflicts' and divided their fishing grounds. US Fish Commission researcher David Starr Jordan reported to Congress in 1887 that 'everything is governed by laws which the fishermen have made for themselves'. The monopolistic character of this division of the spoils-of-the-sea offended Progressive politicians in the fin-de-siecle, who used Law to destroy it. 'In the process', Arthur McEvoy observes, they exposed the fish 'to the full force of market pressures and ultimately encouraged depletion'.[150]

It appears that a number of North American coastal native communities also practiced 'efficient' conservation of the sea's natural resources. Arthur McEvoy has documented the practices of pre-contact California native tribes in conserving the salmon, sharing the resource with tribes upstream, treating the salmon as a major spiritual player, and limiting their take. Native people on Vancouver Island and Puget Sound deliberately checked the take of salmon for periods of time during the spawning season, apparently aware of the need to do so in order to conserve the species. In the early 1850s Captain Walter Grant, RN, observed the Nootka and other tribes on Vancouver Island and wrote of them that 'all of the tribes are singularly jealous of their fishing privileges, and guard their rights with the strictness of a manorial preserve'. Many were protected in those rights by the efforts of the Hudson's Bay Company's governor of the island, Sir James Douglas, but on the mainland of British Columbia commercial fisheries over-fished the salmon on the Fraser River in the mid-1860s at the expense of the Salish Indians.[151]

Aboriginal fishers elsewhere in the Pacific provide evidence of both 'efficiency' and 'inefficiency'. By the early nineteenth century the Hawaiian Islanders appear to have developed an elaborate set of regulating norms (Aikapu), among them, rules regarding fishing rights and land tenure. Thus it was forbidden to fish during the spawning season, and certain species of seafood were reserved for chiefs, others reserved for males. But Ponam Islanders (off North Papua/New Guinea) appear to have lacked an 'efficient' or 'rational' grasp of conservation, over-fishing

at times because they saw declines in their take as being due merely to the fish having become 'wary'.[152] They were granting the same sort of intelligence to their prey as Algonquins had to the animal 'nations' in North America.

Just as the arrival of Diaspora settlers gave rise to a 'tragedy of the Commons' in North America for beaver and elk, so the arrival of Diaspora fishermen did for many aquatic species. Intense tensions developed between Indian communities exercising such customary fishing rights and the efforts of Diaspora governments and fishermen to infringe on those rights in Nova Scotia, the Great Lakes, the Oregon Territory, California, Australia and New Zealand.[153] Ngai Tahu on the South Island of New Zealand, for example, had been selling the Diaspora newcomers in Dunedin seafood for several decades when, in the 1870s, several newcomer-run companies began to trawl outside of the Heads of Otago Harbor. Ann Parsonson tells us of the ensuing 'tragedy of the commons': Within a few years fish in those waters were 'described as "less than scarce". The new fishing-men had not taken any steps to conserve the resource that [both Pakeha and Maori] depended on.' [154]

VII CONCLUSION

Ronald Coase and Robert Ellickson provide us with many viable insights regarding customary dispute-resolution that are borne out in the historical record. Nonetheless, they fail to attend to the theories and findings of abnormal psychology and cultural anthropology. 'Irrational' behavior sometimes prevented rational bargaining and neighborly sharing of costs among the British Diaspora. Law & Economics theory does not work well when neighbors are simply 'irrational' (or 'abnormal' as the psychologist would have it). I found very little bargaining when it came to native-settler interactions, and very many failed bargains when it came to settler-settler interactions during the first generation or two of settlement. The percentage of 'irrational' folk in the lands of the British Diaspora of the past was not insignificant. That ought to signal to us that rational-actor models of dispute resolution should be supplemented with those of anthropology, psychology and sociology.

Moreover, Law & Economics theory employs an amorphous catch-all term, 'transaction costs', to capture any and all intervening variables interfering with the smooth flow of 'rational' economic exchanges. To Law & Economics folk the term 'transaction costs' includes the costs of obtaining information in the bargaining process and those associated with the actual negotiation or litigation. But where cultural barriers are high, the term also has to be used to refer to the costs needed to surmount those barriers of language, symbols, meaning, and values. Using such a term to 'capture' these, amounts to a rather clumsy way of establishing that cooperation is difficult to arrange when the parties come to the issues wearing different cultural glasses. Law & Economics theorists can claim that they can 'account for' those differences and all they entail in calculating the bargaining process or the transaction costs, but the accounting may not be as useful as they would like to believe.

Such theory also does not work very well to explain behavior when the parties to a dispute were from strikingly different cultures, since such theory does not give sufficient weight to ordinary perceptions of 'fairness', a crucial motivating force that can get in the way of 'logical' solutions to disputes. It must make room for both the psychologist's concept of abnormal behavior and the anthropologist's concept of culture and for what they represent — the 'irrational' and less-than-pecuniary domains of personality traits, norms, symbols, and values.[155]

When it comes to the evidence of customary behavior and 'the Commons', Garrett Hardin's 'Tragedy of the Commons' all too often appears to be a sound model of what transpired. While the Commons in England was better policed than Hardin must have assumed before Enclosure, there is evidence that the legal privatizing of land was, indeed, a more 'efficient' use of it, and the evidence of the 'tragedy' is even clearer when it comes to 'poaching' on 'the Common' hunting grounds and fisheries.

Based upon our sortie into the evidence of behavior in the Lands of the British Diaspora in the eighteenth and nineteenth centuries, it seems fair to say that Law & Economics theorist Richard

Posner appears to be correct in assuming that jurists would be more likely to craft economically-efficient legal rules than legislators, though there is *some* evidence of 'efficient' legislation. But Posner has clearly overestimated the propensity of jurists to behave in that fashion.[156]

Let me repeat that I am not asking whether the 'Jurisprudence of the Invisible Hand' would then have been (or is today) either wise or wrong-headed. Much of the economic analysis of law as Richard Posner would have it makes sense to me. But that is neither here not there. I see my task as being that of helping us better to comprehend the past. And in that regard I must report that a 'wealth-maximizing' version of law did not appear to inspire many jurists in the nineteenth century. In any event, it was not as important as their occasional applications of a 'humane' jurisprudence or their more predominant dedication to 'precedent for its own sake'. But there *is* evidence of 'welfare-maximizing' common-law jurisprudence — that is, we find considerably more of Ellickson's 'welfare-maximizing' on the Bench than has previously been imagined.

Nonetheless, I find Robert Ellickson's description of what he found less than entirely satisfying. He subsumes neighborliness into economic efficiency when he writes that norms that maximize welfare are economically efficient because they 'minimize the sum of deadweight losses and transaction costs. ...' [157] There are certainly instances of this sort of conscious or less-than-fully conscious reasoning by ordinary people and jurists, but the way he characterizes welfare-maximization still troubles me. Why? Because it presumes that neighborly behavior, and, by inference, the judiciary's effort to support it with the sorts of 'welfare-maximizing' common-law rule-making that I have reported, is solely calculated to produce social benefits for those doing the accommodating. This does not allow for acts of humanity inspired by disinterested benevolence — acts, and judicial rules, where the doing of 'good' was 'its own reward'. Evangelist Charles Grandison Finney observed of 'the utility of human benevolence' during the Second Great Awakening in the United States (the 1830s) that 'the mind is so constituted that benevolent affections are a source of happiness'.[158] Finney's remark comes close to Ellickson's, but the difference is still profound. Finney's concern was with benevolence, not the happiness that could be derived from it. Ellickson's attention was drawn to what he felt was the self-serving nature of cooperation. Certainly some eighteenth and nineteenth century welfare-maximzers were inspired by these selfish motives, but others (especially jurists) were inspired by unselfish, explicitly Christian motives. We could give 'utilitarianism' a Christian-benevolent spin, but that would not do justice to either concept.[159]

---

[*] Professor of History, University of Pittsburgh.

[1] Posner, 'A Theory of Negligence' (1972) 1(1) *Journal of Legal Studies* 29; Cf: Guido Calabrese, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499. Neither Richard Posner, Robert Ellickson, nor any of their Law and Economics colleagues have advanced anything like a full-fledged 'transformation' thesis regarding nineteenth century jurists (My reference to a 'transformation' thesis here is, of course, an allusion to Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977)), but Posner allows elsewhere that 'wealth maximizing is not ... the only conception of the good or the just that has influenced law. ...' Posner, *Economic Analysis of Law* (3rd ed, 1985) 21; Posner, *The Economics of Justice* (1983) 115.

[2] He does allow that *some* nineteenth-century common-law rules were not efficient; he refers to the rule against granting damages in wrongful death actions, to the practice that penalty clauses not be enforced strictly, and to the twentieth-century shift from contributory negligence to comparative negligence. Posner, *Economic Analysis* above n 1, 4th ed, 233.

[3] Ellickson compares this to, but also distinguishes from Posner's and Ronald Coase's emphases on 'wealth-maximizing'. Robert Ellickson, *Order without Law: How Neighbors Settle Disputes* (1991); Ellickson, 'Brining Culture and Human Frailty to Rational Actors' (1989) 65 *Chicago-Kent Law Review* 23; Coase, 'The Problem of Social Costs' (1960) 3 *Journal of Law & Economics* 1.

[4] Indeed, Ellickson's essay, 'Law & Economics Discovers Social Norms' (1998) 27 *Journal of Legal Studies* 537 constitutes such an argument.

[5] I appreciate that there are economic historians, identified as 'New Institutional Economics' practitioners, who integrate economic theory and historical research in sophisticated ways. But these scholars address specific issues and have not, as yet, provided the overarching theory of a Posner, Coase, Hardin or Ellickson. For a good review of New Institutional Economics see: Ron Harris, 'Encounters of Economic History and Legal History' (Summer 2003) 21(2) *Law and History Review* 297.

[6] Ibid 230, 81, 85, 97, 106, 114.

[7] See a few Massachusetts cases of marine insurance, prize cases, and promissory notes noted in William Nelson, *The Americanization of the Common Law: the impact of legal change on Masacusetts Society 1760-1830* (1975) 154-55.

[8] Ibid 535.

[9] See: Peter Karsten, 'Enabling the Poor to Have Their Day in Court' (1998) 47 *Depaul Law Review* 231.

[10] I have offered evidence of this propensity of CANZ jurists in Karsten, *Between Law and Custom: high and low legal cultures in the lands of British diaspora – the United States, Canada, Australia, and New Zealand, 1600-1990* (2002) 274, 299-325. Moreover, in claims of 'standing' by third party beneficiaries to contracts, a similar disagreement prevailed among a *few* high courts that offered utilitarian rationales either for or against the claims of such beneficiaries. But the jurists disagreeing with one another over which position was the 'efficient' one were themselves in a distinct minority; the vast majority of high courts gave no thought to 'efficiency' at all in doctrinally deciding this sort of contracts issue. See: Karsten, 'The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case' (1991) 9 *Law and History Review* 327.

[11] Kim Scheppele, *Legal Secrets: equality and efficency in the common law* (1988) chapter 10.

[12] See: *Fallon v Smith* 18 Quebec 113 (1865); and *Benson v Mulholland* 18 Quebec 372 (1866). In *Fallon*, the Chief Justice of Quebec's Queen's Bench observed that 'our rule of law' was 'more favorable to the purchaser', and spoke of Quebec's '*garantie-de-droit*' in addition to 'a *garantie-conventionnelle*'. This may be compared with the rule in Louisiana, another jurisdiction with a Civil Law past (and lingering presence). See: *Melancon v Robichaux* 17 La (OS) 97 (1841).

[13] Scheppele, above n 11.

[14] *Heacock v Walker* 1 Tyler (Vt) 338, 342 (1802).

[15] Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 130; *Rex v Rugby* Peake Add Cas 189, 170 ER 241 (N P 1800). Such common-law actions were finally and decisively abolished by Parliament in 1824. See especially: Walter Pratt, 'American Contract Law at the Turn of the Century' (1988) 39 *South Carolina Law Review* 415.

[16] Posner, above n 2, 97, 106.

[17] *Ex parte Young* 30 Fed Cas 828 (ND Ill 1874); *Beveridge v Hewitt* 8 Ill App 467 (1881) (speculator was a 25-year old clerk); *Heard v Russell and Potter* 59 Ga 25, 39 (1877).

[18] *Brua's Appeal* (1867) 55 *Pa St* 299; *Waterman v Buckland* 1 Mo App 45, 48 (1876) (options on the price of 'mess pork' leading to 'the demoralization of society'; English cases sanctioning these contracts of 'wager' had 'never been regarded as good precedents in Missouri'); *Nave v Wilson* 12

Ind App 38, 45, 38 NE 876, 878 (1894); *Webster v Sturges* 7 Ill App 560, 564 (1880); *Justh v Holliday* 13 DC (2 Mackey) 346 (1883) (a case involving the reckless speculations of Colonel George Custer on the eve of his further recklessness at Little Big Horn).

[19] *Sawyer, Wallace & Co v Taggart* 77 Ky (14 Bush) 727 (1879); *Melchert v American Union Teleg Co* 11 Fed R 193, 195 (CCD Iowa 1882); *Heard v Russell & Potter* 59 Ga 25, 38 (1877).

[20] *Forget v Ostigny* 4 QQB 118 (1895) 156-59, 161, 163. Cf: *Shaw v Carter* 26 LCJ 151 (1876); *Allison v Macdougall* 27 LCJ 355 (1883); *Macdougall v Demers* 30 LCJ 168 (1886); *Brand v Metrop Stock Exchange* 11 QC Sup 303 (1897). Quebec's jurists relied, not on English precedent, which tolerated such transactions, but Pothier on French Code law and other French authority.

[21] *Heard v Russell and Potter* 59 Ga 25, 39 (1877); *Melchert v American Union Teleg Co* 11 Fed R 193, 195 (CCD Iowa 1882).

[22] *J B Lyon & Co v Culbertson, Blair & Co* 83 Ill. 33, 53 (1876).

[23] Compare Lord Kenyon's *dicta* in *Rex v Rusby* Peake Ad Cas 189, 170 ER 241 (1800), affirming a judgment against one who bought and sold oats in the same market: 'The Legislature is never so well employed as when they look to the interests of those who are at a distance from them in the ranks of society. It is their duty to do so; religion calls for it; humanity calls for it. ...' And see: William Novak's, 'Public Economy and the Well-ordered Market: Law and Economic Regulation in 19th-Century America' (1993) 18 *Law and Social Inquiry* 1-32 for additional examples from antebellum high courts of judicial antipathy to 'free trade' arguments, noting however, that Georgia's Judge Lumpkin proved to be responsive to them. Another Posnerian 'minority voice' was that of New York's Chief Justice John Savage in *People v Fisher* (1835) who sustained the state attorney's call for a criminal conspiracy indictment for an attempt by journeyman bootmakers in Geneva to raise the price paid them for boots to one dollar. The price of labor should be 'left to regulate itself'. (*People v Fisher* 14 Wend 10, 18 (1835)). Here was a reading of the law that would have satisfied Adam Smith. (Adam Smith, *The Wealth of Nations* (1776) Book 1, ch 9). But, as we know, *Commonwealth v Hunt,* not *People v Fisher,* was the 'leading case' in union 'conspiracy' cases by 1843, and Lemuel Shaw's opinion in that case did *not* adjudge the combining of journeymen to raise the price of their labor to be a criminal conspiracy *per se.* Non-coercive collective bargaining was lawful, even if its consequence was to raise artificially the price of commodities. *Comm v Hunt* 45 Mass 111 (1842).

[24] Home (Kames) *Principles-of-Equity* (2nd ed, 1767) 368, 259; cited in David Lieberman, *The Province of Legislation Determined: Legal Theory in 18th Century Britain* (1989) 169.

[25] In *Mogul Steamship Co v McGregor, Gow & Co* AC 25, 45-6 (HL 1892).

[26] See: Atiyah, above n 15, 374-80; C Fairfield, *A Memoir of Lord Bramwell* (1898) 139-47; *Manchester, Sheffield & Lincolnshire Ry v Brown* LR 8 AC 703, 716-7 (1883); cited in Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (1967) 112-113.

[27] *Dorr v New Jersey Steam Nav Co*, NY 475 (1854).

[28] *Pettigrew v Australasian Steam Nav Co* 1 Queens SCR 113 (1864); *Wing Wah v Austr Steam Nav Co* 2 Queens SCR 36 (1869); *Tough v Austr Steam Nav Co* 2 Queens SCR 75 (1870).

[29] *RR v Lockwood* 84 US 357 (1871).

[30] David M Gold, *The Shaping of Nineteenth Century Law: John Appleton and Responsible Individualism* (1990) 9, 95, 110; Appleton, 'Usury Laws' (1831) *American Jurist & Law Magazine* 282, 296-97, cited in Gold, 58; Parrington, *The Romantic Revolution in America, 1800-1860* (Vol 2 of *Main Currents in American Thought*) 380 cited in Gold, 172.

[31] *In re Gilmore, Bangor Daily Whig & Courier* 31 Aug. 1861, cited in Gold, above n 30, 115-16.

[32] *Nichols v Baker* 75 Me 334, 341 (1883), cited in Gold, above n 30, 78-79.

[33] *Lovegrove v Hunt* 58 Me 9 at 21 (1870), cited in Gold, above n 30, 81-82.

[34] Chief Justice Parker in *Na. Prot Assoc of Steamfitters v Cuming* 170 NY 315, 322, 63 NE 369 (1902). See: B W Poulson, 'Criminal Conspiracy, Injunctions, and Damage Suits in Labor Law' (1986) 7 *Journal of Legal History* 212, 222.

[35] Orville Dewey, *Moral Views of Commerce* (1838) quoted in 'The Moral Law of Contracts' (1839) *Hunt's Merchant's Magazine* I, 304.

[36] *Harris v Ligget* 1 W & S (Pa) 301, 305 (1841). Cf: *Johnston Harvester Co v Meinhardt*, 60 How Pr 168, 175-76 (NY Sup Ct 1880); *Bayard v McLane* 3 Harr R (Del) 139, 220-21 (1840).

[37] *US v Carroll Towing* 159 Fed 2nd 169 (1947).

[38] Kaczorowski, 'The Common Law Background of Nineteenth Century Tort Law' (1990) 51 *Ohio State Law Journal* 1127, 1128.

[39] Karsten, '*Explaining the Fight over the Attractive Nuisance Rule ...*' (1992) 10 *Law and History Review* 45; Karsten, above n 10, 422. Robert Rabin makes a similar point in 'The Historical Development of the Fault Principle: A Reinterpretation' (1981) 15 *Georgia Law Review* 925, 955-56.

[40] Coase, above n 3, 32-34.

[41] See, eg,: *N Y & Erie RR v Skinner* 19 Pa St 298 (1852); *Rocheleau v St L & A Ry* 2 Low Can R 337, 339 (1852); *Same* 3 Quebec 217, 218 (1852).

[42] See, eg,: *Vicks & Jacks RR v Patton* 31 Miss 156 (1856); *Clayton v Can Northern Ry* 7 Western LR 721, 730 (1908); *Parks v Can Northern Ry* 21 Manitoba 103, 18 Western LR 118, 120 (1911).

[43] Posner, *A Theory of Negligence* above n 1, 58. Illinois Chief Justice Charles Lawrence was adamant about this: 'We cannot regard the saving of a few minutes of time, in making the journey between Chicago and Alton, a matter of such importance as to justify a railroad in permitting its fastest trains to dash with unabated speed through villages, where men, women, and children are liable at all times to be on the open and unguarded track. ... Accidents may be less common than one would suppose; but that [this] must be dangerous, is self-evident, and the law requires of these companies the greatest precautions for the safety of human life'. *Chicago & Alton RR v Gregory* 58 Ill 226, 228 (1871). Cf: Karsten, above n 10, 418-19.

[44] Coase, above n 3.

[45] Williams J, in *Freemantle v London & NW Ry* 2 F & F 337, 175 ER 1086 (NP 1860); Justice Miller in *Kellogg v Milwaukee & St Paul RR* 1 *Central Law Journal* 278 (1874).

[46] Posner had posited that courts might have held 'that [a certain] level of spark emission is reasonable because it would be more costly for the railroad than for the farmer to prevent the crop loss'. Posner, above n 1, 47. This was, indeed, the view taken by Justice John Wellington Gwynne. See: *Hill v Ontario* S & H Ry 13 Up Can QB 503 (1855); *Jaffrey v Toronto, Grey & Bruce Ry* 23 Up Can CP 553 (1874); *Same v Same* 24 Up Can CP 271, 290 (1874).

[47] As in *Fent v Toledo, P & W RR* 59 Ill 349 (1871); *Grand Trunk Ry V Meegar* 29 Low Can J 214 (1885); and see cases cited in Karsten, above n 10, 397-99.

[48] *Hartfield v Roper* 21 Wend 615, 618, 620 (1839); *Honegsberger v 2nd Ave Ry* 33 How Pr 193, 201

(1864).

[49] See: Karsten, *Heart versus Head: Judge made law in Nineteenth-Century America* (1997) chapter 8; Karsten, above n 10, 413-420.

[50] *Eckert Adm v Long Island Ry* 43 NY 502 (1871).

[51] *Eckert Adm v Long Island Ry* 43 NY 502, 50 (1871); Posner, above n 1, (5th ed) 272-73.

[52] *Eckert Adm v Long Island Ry* 43 NY 506.

[53] See: *Heart versus Head*, above n 49, 275-280, Karsten, above n 10, 488-495.

[54] *Baldwin v CRI & P RR*, 50 Iowa 680, 685-86 (1879). And see the views of Justice Robert Hall in *Montreal Steam Laundry v Demers*, 5 Quebec QB 191, 195 (1896): 'The 15 year-old girl injured at work had assumed the risk, because, were the rule otherwise, an element of risk and uncertainty would be introduced into business transactions, which, in the end, would operate seriously against the interests both of capital and of labour'.

[55] *Smith v N Y & Harlem RR*, 19 N Y 127, 133 (1859); *Louisville & Nashville RR v Collins*, 2 Duvall (Ky) 114, 117-20 (1865); and cases cited in Karsten, above no 10, 429.

[56] In England, William Galt's report in 1877 as a member of the Royal Commission on Railway accidents indicated that companies there had estimated the expenses of installing certain new safety devices to exceed the cost of continuing to pay damages, as a consequence of which they did not install them. See also: Charles Francis Adams, Jr, *Notes on Railroad Accidents* (1879) 268n; and Hugh Sells (a railway expert) to Ontario's Select Committee on Ry Accidents, Feb 2, 1880, MSS Rpt On Sel Comm, Ont Legis, 1880, MU RG 49-95, No 1, Archives of Ontario.

[57] Charles Clark, 'The Development of the Semiautomatic Freight-Car Coupler, 1863-1893' (1972) 13 *Technology and Culture* 170; Roger Natte, 'Lorenzo S Coffin' in Robert Frey (ed), *Encyclopedia of American Business History and Biography ... Railroads in the Nineteenth Century* (1988) 53-57; L Friedman, *A History of American Law* (1985 ed,) 479-80.

[58] See: Karsten, above n 10, 421-23, 444-48.

[59] Posner, 'A Theory of Negligence' above n 1, 29, 44.

[60] See: *Heart versus Head*, above n 49, 116-7.

[61] Some of those injured workers might recover *some* compensation in a separate action from the negligent co-worker, if that person was a superintendent, engineer, or other member of labor's 'aristocracy'. But that still threw a substantial fraction of injured workers (and their families) 'to the tender mercies of the poor laws' or, if they were lucky, onto a primitive insurance system. And, as progressive economists like Richard Ely pointed out, that was not *socio*-economically efficient. For a good analysis of the question see: David Moss, *The Political Economy of Insecurity: The American Association and the Crusade for Social Welfare Reform in the Progressive Era* (PhD thesis, Yale University, 1992).

[62] See: *McLaughlin v Louisville Electric Light Co*, 100 Ky 173, 37 SW 851 (1896).

[63] Posner, *Economic Analysis* above n 1, 47, 49-50, 56, 53, 484. He notes as well that charitable trusts are/were generally managed by courts in an inefficient fashion, and my modest sortie into the nineteenth century caselaw on this subject bears him out. See: *Heart versus Head*, above n 49, 131-34.

[64] See: *Denwood v Winder* (Md 1770); Morton Horwitz, above n 1, 54-58. After nearly two hundred

years of settlement, the Massachusetts Supreme Judicial Court concluded in 1818 that the remaining stands of timber were, indeed, now quite valuable, and moved the standard for determining what was and wasn't 'waste' back towards the English one, but it employed the same pragmatic reasoning in the process. See: *Conner v Shepard*, 15 Mass 164 (1818).

[65] *Bruce v Atkins*, 1 W & W (Eq) 141 (1861). Stringybarks were widely used for roofing (peeled bark) and walls (sawn planks of the trunk). Peter Taylor, *Station Life in Australia: Pioneers and Pastoralists* (1988) 23, 25.

[66] *Campbell v Kerr,* 12 VLR (L) 384 (1886).

[67] *Rector of Hampton v Titus*, 6 New Br 278, 324 (1849); *Titus v Sulis*, 9 Nova Sc 497, 500 (citing the rule in New York state) (1875); *Titus v Haines*, 11 Nova Sc 542, 546 (1877).

[68] C Blake, in *O'Keefe v Taylor*, 2 Grant's Ch 95, 96, 100, 110 (1850); and in *Chisholm v Sheldon*, 1 Grant's Ch 318, 320 (1850) (but he enjoined a mortgagee from further cutting of timber despite these *dicta*); Galt J, in *Drake v Wigle*, 24 UCCP 405, 409, 410 (1874). See also: the references to American cases by Hagarty CJ, in his concurring opinion (418); and see the view of C Boyd, in *Hixon v Reaveley*, 9 Ont LR 6 (1904).

[69] All but a handful of the cases he addresses in 'The Problem of Social Costs' are English cases.

[70] See: Coase, above n 3, 19-23. Coase *did* notice one that the American treatise-writer William Prosser had drawn attention to cost-benefit analysis with regard to pollution nuisance cases (p 19). See also: Karsten, *Heart versus Head,* above n 49, 134-143.

[71] Jennifer Nedelsky, 'Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880-1930' in David Flaherty (ed), *Essays in the History of Canadian Law* (1981) 281-322; Karsten, above n 10, 214-217.

[72] See: Peter Karsten, 'Supervising the Spoiled Children of Legislation: Judicial Judgements involving Quasi-Public Corporations in the Nineteenth Century United States' (1997) 41 *American Journal of Legal History* 315, 322-344.

[73] See: Karsten, above n 10, 198-203.

[74] David Feeny, *et al*, 'The Tragedy of the Commons: 22 Years Later' in *Managing the Commons* (1998) 80-81.

[75] See: Karsten, *Heart versus Head*, above n 49, 132-33, 147-56.

[76] See: Karsten, above n 72, 315, 345-353.

[77] See: Ibid 315, 353-367.

[78] I found some exceptions to this generalization, in property cases, to be sure. But they were just that — exceptions. Examples: Chief Justice John Appleton in *Allen v Inhabitants of Jay* (1872) and *Brewer Brick v Brewer* (1873); Senator Putnam in *Beckman v Saratoga & S RR*, 3 Paige (NY) 45, 74 (1831); Justice Jeremiah Black in *Packer v Sunbury & Erie RR*, 19 Pa St 211, 217 (1852); and Justice Peter Daniels (dissenting) in *Pa v Wheeling Bridge*, 13 How (US) 518 (1852).

[79] Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956) 15-17, chapters 2 & 3, esp. 43, 53; Hurst, *The Growth of American Law: The Lawmakers* (1950) 37-40, 62, 70-74. Hurst is not uncritical of legislators, to be sure, but his is a more positive account than that of Posner.

[80] Posner, *Economic Analysis of Law,* above n 1 (5th ed, 1998) sec 19.2, 569.

[81] Robin Cooke, *Portrait of a Profession* (1969) 71-72.

[82] *King v Broad*, 33 NZLR (CA) 1275, 1286 (1914) (Denniston J, dissenting).

[83] *King v Broad*, NZ Pr Council Cas 658, 666 (1915).

[84] Timothy Huebner, *The Southern Judicial Tradition* (1999) 111-113. Cf: Joseph McKnight, 'Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle' (1983) 86 *Southwestern Hist Q* 392-99.

[85] Ibid 213.

[86] Priest, 'Law and Economic Distress, Sangamon City, Illinois, 1837-1844, (1973) 2 *Journal of Legal Studies* 469.

[87] John Orth, *The Judicial Power of the United States: the 11th Amendment in American History* (1987) 116-118. Similarly, British Utilitarians, serving as administrators and lawmakers of the British East India Company in the first half of the nineteenth century, applied the 'rent' theory of David Ricardo and James Mill *disastrously* to landlord-tenant relations and taxation on the sub-continent. Misunderstanding these relationships in their effort to tax Ricardan 'rent', their measures led inexorably to widespread resistance and, ultimately served as a cause for some to support the 'Bengal Mutiny' Rebellion in 1857. Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (1978) 131, passim.

[88] But recall Robert Fogel's telling 'Cliometric' critique of the railroad-chartering mania of the mid-nineteenth century. Fogel, *Railroads and American Economic Growth* (1964). And see Richard White, 'Information, Markets, and Corruption: Transcontinental Railroads in the Gilded Age' (June 2003) 90(1) *Journal of American History* 19.

[89] See: John Weaver, *The Great Land Rush and the Making of the Modern World* (2003) 118-25.

[90] Indeed, had Morton Horwitz chosen to focus on legislators in his *Transformation of American Law, 1780-1860,* his contribution would have been more telling.

[91] The lawmakers who drafted the Civil Rights Act of 1866 (the enabling legislation ending 'involuntary servitude' under the terms of the 13th Amendment), focused on the two rights they deemed essential to freedom: the right to own and alienate property and the right freely to contract with persons of one's choosing US Stats, XIV, 39th Cong, 1st Sess, Ch 31, 9 April 1866.

[92] For example, see: Karsten, above n 10, 203, on the NZ Land for Settlements Act of 1894, comparable to similar acts passed by Australian provincial legislatures in the 1860s and 1870s; and S D Clark and I A Renard, 'The Riparian Doctrine and Australian Legislation', 7 (1970) *Melbourne Univ Law Rev* 450, 479. To be sure, the cost-effectiveness of legislative 'takings' of grazer's rights for homesteaders is debatable. John Weaver has made a good case for a contrary perspective in chapter 8 of his superb work, *The Great Land Rush and the Making of the Modern World* (2003).

[93] See my argument to this effect Karsten, above n 10, 303-08.

[94] Ibid 445, 521-22.

[95] Coase, above n 3; Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243. Posner makes some mention of customary norms in *Economic Analysis of Law* (5th ed, 1998) 281-3, but only in a cursory way.

[96] Coase had in mind the costs associated with the process of bargaining, drawing up an agreement,

and monitoring the observance of the agreement. He has less to say in the examples given in the essay of the external costs (so-called 'externalities') to the bargaining and the agreement — that is, the costs non-bargainers — but Coase is fully aware of these and expects the reader to be sensitive to them as well. His focus throughout this famous essay is on wealth-maximizing, defined narrowly in terms of 'comparisons of the value of production, as measured by the market'. Hence his concluding observation that 'it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account' has been lost on some readers. It was not lost on Robert Ellickson.

[97] Coase, above n 3, 4; Ellickson, above n 3. Cf: William Landes and Richard Posner, *The Economic Structure of Tort Law* (1987) 110-111 (econ analysis of fencing law).

[98] Karsten, 'Cows in the Corn, Pigs in the Garden and the Problem of Social Costs' (1997) 32 *Law & Society Review* 63-92; Karsten, above n 10, 218-262.

[99] See the examples of this provided in Karsten, *Heart versus Head*, above n 49, 166-67; and Karsten, above n 10, 330-360.

[100] Karsten, above n 10, 326-32.

[101] Blaskett, *The Aboriginal Response to White Settlement at Port Phillip [Victoria]* (Master's Essay, Univ of Melbourne, 1979) 264.

[102] Macaulay, 'Non-Contractual Relations in Business' (1963) 28 *American Sociological Review* 55.

[103] Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1800-1860* (1990) 33-38, 47.

[104] Charles Shinn, *Mining Camps: A Study of American Frontier Government* (1948) 126. This is to say nothing of the earlier debtor relief statutes of the 1780s in North Carolina (the *Pine Barrens Act* 1785) and Rhode Island (the *Force Act* 1785) that compelled creditors to accept something other than the specie bargained for (Rhode Island) or forced upon them barren pine lands in exchange for the more valuable property the creditors were prevented from forcing to a sheriff's sale.

[105] C W Brooks, 'Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640-1830' in A L Beier, D Carnadine and J Rosenheim (eds), *The First Modern Society* (1989) 87-89; Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (1987); William E Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (1981).

[106] Bruce Kercher, *An Unruly Child: a history of law in Australia* (1995) 53-54.

[107] William Jones, 'Three Centuries of Commercial Arbitration in New York' (1956) *Washington University Law Quarterly* 193, 206-07, 215-219; Donald Kommers, 'The Emergence of Law & Justice in Pre-Territorial Wisconsin' (1964) 8 *American Journal of Legal History* 20, 28.

[108] Hence when one such merchant in Baltimore, James Partridge, was deemed in 1819 to be 'in quite an embarrassed situation', his primary creditor, a member of the DuPont family, was advised by an agent that he 'had best make a settlement with him by getting what he can from him' since Partridge would find 'little difficulty in getting discharged by our insolvency law. ...' Tony Freyer, *Producers versus Capitalists* (1994) 65.

[109] Charles E Brooks, *Frontier Settlement and Market Revolution: The Holland Land Company* (1996) 112; Aron, *How the West was Lost: the transformation of Kentucky from Daniel Boone to Henry Clay* (1996) 167. Aron does add that they did eventually impose 'the rules of the market on all manner of exchanges'.

[110] D McCalla, 'Rural Credit and Rural Development in Upper Canada, 1790-1850' in Roger Hall *et al* (ed), *Patterns of the Past: Interpreting Ontario's History* (1988) 40, 43, 49. Furthermore, despite the English Common-Law rule, enforced in Canada's courts, that third party beneficiaries of contracts had no standing to sue to enforce the terms of those contracts made for their benefit, the fact is that in the cash-scarce economy of early rural Canada, farmers with a momentary credit balance at a local merchant's store often contracted with that merchant to have some or all of that credit transferred to one of their creditors who also had a line of credit with the merchant.

[111] Noted in Jonathan Lurie, *The Chicago Board of Trade* (1979) 17.

[112] Madigan, *Hope and Deception at Conception Bay: Merchant-Settler Relations in Newfoundland, 1785-1855* (1995) 72-73, 100, 118-19.

[113] Gregory Dowd, '"Insidious Friends": Gift-Giving and the Cherokee-British Alliance in the Seven Years' War' in Andrew Cayton and Frederika Teute (eds), *Contact Points* (1998) 132-140. This is not to say that native hunters and traders were indifferent to the relative value of the objects of trade; many impressed their Diaspora trade partners with being especially shrewd or hard-driving. See the evidence summarized in Karsten, above n 10, 277-79.

[114] Karen Kupperman, *Settling with the Indians: The Meeting of English and Indian Cultures in America, 1580-1640* (1980) 57.

[115] See the evidence summarized in Karsten, above n 10, 278-79. The Company's chief factor at Fort Nez Perces in 1830 offered a similar judgement. But note that this phenomenon was a characteristic of Diaspora hunters as well: James Finley recalled of hunters he had known as a boy in late eighteenth-century Appalachia that they had 'no artificial wants which wealth' could 'gratify', that they had not been 'animated' by economic 'stimulus. Theodore Stern, *Chiefs and Chief Traders: Indian Relations at Fort Nez Perces, 1818-1855* (1993) 136; *Autobiography of Rev James Finley, or Pioneer Life in the West* (1853) 36, cited in Stephen Aron, *How the West was Lost* (1996).

[116] John Phillip Reid, *A Better Kind of Hatchet* (1976) 172. On the unfamiliarity of New England Algonquins with the principles of English contract law and debt see: Colin Calloway, *The Western Abenakis of Vermont, 1600-1800: War,Migration,and the survival of an Indian People* (1990) 139; and Y Kawashima, *Puritan justice and the Indian: white man's law in Massachusetts,1630-1763* (1986).

[117] Daniel Francis and Toby Morantz, *Partners in Furs: A History of the Fur Trade in Eastern James Bay, 1600-1870* (1983) 44-45; Royce Kurtz, 'Looking at the Ledgers: Sauk & Mesquakie Trade Debts, 1820-1840' in Jennifer Brown *et al* (ed), *The Fur Trade Revisited* (1994) 143; Paul C Thistle, *Indian-European Trade Relations in the Lower Saskatchewan River Region to 1840* (1986) 12, 67.

[118] Cole Harris, *The Resettlement of British Columbia* (1997) 47-48; Hamar Foster, 'Conflict Resolution during the Fur Trade in the Canadian Northwest, 1803-1859' (1994) 25 *Cambrian Law Review* 127. And see Arthur McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980* (1986) 57, on the settling of debts between Yurok and Karok natives and Diaspora miners and salmon packers in northern California in the 1850s and 1860s.

[119] McConnell, *A Country Between: the Upper Ohio Valley and its Peoples, 1724-1774* (1992) 41; Fisher, *Contact and Conflict: Indian-European relations in British Columbia, 1774-1890* (1977) 38; Dale Gibson, 'Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba' (1996) 23 *Manitoba Law Journal* 247, 250.

[120] See, eg,: the views of members of the Laramie County Stock Association, in Weaver, above n 89, 303, 451-52.

[121] Miles Fairburn, *The Ideal Society and its Enemies*: *The Foundations of Modern New Zealand Society, 1850-1900* (1989); Lois Carr, 'The Development of the Maryland Orphan's Court, 1654-1715' in Carr & Aubrey Land (eds), *Law, Society & Politics in Early Maryland* (1977) 41ff.

[122] I have made the case for this summary of animal-trespass customary dispute resolution in Karsten, 'Cows in the Corn, Pigs in the Garden and the Problem of Social Costs ...' (1998) 32 *Law & Society Review* 63.

[123] To be fair, Coase does allow (but only in a catch-all phrase of his final page) that 'all spheres of life should be taken into account' in Law and Economics analysis, not simply those 'comparisons of the value of production as measured in the market' (43). The problem with this qualification is that it is just that: A hedge offered, as if in passing, *not* the major premise repeated throughout the essay.

[124] Heckman, 'The Intellectual Roots of the Law & Economics Movement' (1997) 15 *Law & History Review* 327, 332.

[125] Garrett Hardin, 'The Tragedy of the Commons' (December 1968) 162 *Science* 1244. Cf: Bonnie M McCay and James M Acheson (eds), *The Question of the Commons: The Culture and Ecology of Communal Resources* (1987).

[126] Jane M Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1750-1820* (1993) 6-7, passim; J M Fernandez, 'Call to the Commons: Decline and Recommitment in Asturias, Spain' in Bonnie McCay and James Acheson (eds), *The Question of the Commons* (1987) 266-289; and R Nelling, 'Of Men and Meadows: Strategies of Alpine Land Use' (1972) 45 *Anthropological Quarterly* 132. And see a similar 'custom' in Kansas in the 1880s, in Weaver, above n 89, 288. (But see as well the testimony of a frontier cattleman in 1885 before the US Public Lands Commission: 'Very few herds can occupy any range for ... long ... because as soon as it is known that good grass is found there, herds from other ranges which may have been eaten out are driven upon it, crowding it beyond capacity.' Weaver, above n 89, 123-24.)

[127] See: Donald McCloskey, 'The Persistence of English Common Fields' in W Parker and E Jones (eds), *European Peasants and Their Markets: essays in agrarian economic history* (1975).

[128] See the essays by Hoffman, 'Medieval Origins of the Common Fields' above n 125; McCloskey, above n 125; McCloskey, 'The Economics of Enclosure: A Market Analysis' and Cohen and Weitzman, 'Enclosures and Depopulation: A Marxian analysis' all above n 125. (or Ibid). Such communal property efforts were attempted by the Mormons in nineteenth century America without success, and by Hutterite communities in the American and Canadian West, with greater success. John Baden, 'Communitarianism and the Logic of the Commons' in Douglas Noons and John Baden (eds), *Managing the Commons* (1998) 137-44.

[129] Chris Fisher, *Custom, Work and Market Capitalism: The Forest of Dean Colliers, 1788-1888* (1981) x, 22-29.

[130] On their resistance to the enclosure of their domain see Ralph Antis, *Warren James and the Dean Forest Riots* (1986).

[131] Howkins, 'Poaching and the Game Laws, 1840-1880' in Sandra Burman and B Harrell-Bond (eds), *The Imposition of Law* (1979) 278, 285.

[132] Maie Casey, *An Australian Story, 1837-1907* (1960) 81.

[133] See: Edward Ives, *George Magoon and the Down East Game War: History, Folklore, and the Law* (1993).

[134] Karsten, above n 10, 30-31, 35-38.

[135] Aboriginal families in Australia knew the borders of their own and their clan's domains, and also knew which bushes and trees were theirs, to harvest berries, nuts, leaves, burrowing grubs and tree-dwelling animals.

[136] A J Ray, 'Some Conservation Schemes of the Hudson's Bay Company, 1821-1850' (1975) 1(1) *Journal of Historical Geography* 49-68. Several large mammals and other species were hunted to extinction. See the summary of this evidence in Calvin Martin, *Keepers of the Game* (1978) 168-73 and Jared Diamond, *Guns, Germs, and Steel* (1997) 42-44.

[137] Martin, above n 134; C Bishop, 'Northeastern Indian Concepts of Conservation and the Fur Trade: A Critique of Calvin Martin's Thesis' and Shepard Kretch, '"Throwing Bad Medicine": Sorcery, Disease, and the Fur Trade ...', in S Kretch (ed), *Indians, Animals, and the Fur Trade* (1984) 39-58, 73-108; Brightman, 'Conservation and Resource Depletion: The Case of the Boreal Forest Algonquians' in B McCay and J Acheson (eds), *The Question of the Commons*: *The Culture and Ecology of Communal resources* (1987) 122-23, 125, 130-31, 137.

[138] Franklin Dexter (ed), *Diary of David McClure*r (1899) 83-5. Michael McConnell observes of this action that the Shawnee would have called this justice 'for poachers who had ... .robbed native hunters of their livelihood'. McConnell, above n 118, 259, 262. See also: Elizabeth Perkins, *Border Life* (1998) 14-15, 77 (Ohio Valley natives complaining that 'the whites were killing off their turkies [sic], deer and etc').

[139] Jean Friesen, 'Grant me Wherewith to Make my Living' in Kelly Abel and Jean Friesen (eds), *Aboriginal Resource Use in Canada* (1991) 146.

[140] Irene Spry, 'The Tragedy of the Loss of the Commons in Western Canada' 210-213 and Thomas Flanagan, 'Louis Riel and Aboriginal Rights' 247-262 both in Ian Getty and Antoine Lussier (eds), *As Long as the Sun Shines and Water Flows* (1983) (translation of Royal's remarks mine).

[141] Indeed, as recently as the 1970s villagers in the west of Ireland resisted all efforts to curb their poaching on the waters owned by others or held for all under the protection of the Irish government. Lawrence Taylor, 'The River would run Red with Blood: Community and Common Property in an Irish Fishing Settlement' in McCay and Acheson (eds), above n 135, 290-309.

[142] See: Gary Kulick, 'Dams, Fish and Farmers: [18th century Rhode Island]' in Jonathan Prude (ed), *The Countryside in the Age of Capitalist Transformation* (1985); Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America, 1625-1742* (1964) 382-83 (on rioting against Pennsylvania statute in 1738 banning fish weirs and racks in the Schuylkill); Theodore Steinberg, *Nature Incorporated: Industrialization and the Waters of New England* (1991).

[143] J M Acheson, *The Lobster Gangs of Maine* (1988).

[144] C W Clark, 'The Economics of Overexploitation' (1973) 181 *Science* 630. There is less 'harvesting' that takes place on the world's tropical reefs, but these serve as breeding grounds for many species vital to the food chain of those that *are* harvested, and the environmental degradation of these fragile life-forms is largely due to 'externalities' – the 'free' character of the oceanic 'commons' to those who transport oil or who dump sewage in the vicinity of these reefs.

[145] See: Bonnie McCay, 'The Culture of the Commoners: Historical Observations on Old and New World Fisheries' in *The Question of the Commons*, above n 12, 202-204, 216; C Gersuny and J Poggie, 'Luddites and Fishermen: A Note of Response to Technological Change' (1974) 2 *Maritime Studies and Management* 38-47. And see: Bonnie McCay, 'The Pirates of Piscary: Ethnohistory of Illegal Fishing in New Jersey' (1984) 31(1) *Ethnohistory* 17-37.

[146] *Arnold v Mundy* (1821) 6 NJL 1.

[147] In other seaboard states owners of the foreshore owned the tidal beds, while those located further out or adjacent publicly-held land were available for all to harvest (and no one to 'seed', unless the state did this itself, as in Maryland).

[148] Lawrence Taylor, *Dutchmen on the Bay* (1983) 110.

[149] Biennial Report of the State Board of Fish Commissioners, 1891-92, 18, delightfully reported in James Tober, *Who Owns the Wildlife?: The poltical economy of conservation in nineteenth-century America* (1981) 138n; and see: McCay, above n 143.

[150] McEvoy, above n 117, 95-99.

[151] See: Sweezey & Heizer, 'Ritual Management of Salmonid Fish Resources in California' (1977) 4 (1) *Journal of California Anthropology* 6; McEvoy, above n 117, ch 2; Evelyn Pinkerton, 'Dramatic Processes in the Assertion of Local Commanagment Rights' McCay and Acheson (eds), above n 135, 344-69.

[152] Norman Miller and Robert Horwitz, 'Land Tenure in Hawaii' in Ron Crocombe (ed), *Land Tenure in the Pacific* (1971) 21-39; James Carrier, 'Marine Tenure and Conservation in Papua/New Guinea' in McCay and Acheson (eds), above n 135, 142ff.

[153] Responsive to instructions from the Crown, Governor James Douglas crafted some 14 treaties with tribes on Vancouver Island in the early 1850s, offering guarantees regarding their fisheries, but his successors were not as scrupulous. See: Hamar Foster, 'The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title' (1989) 23 *Univ of British Columbia Law Review* 629. See also: Desmond Sweeney, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16 *Univ of New South Wales Law Journal* 97; P G McHugh, 'Maori Fishing Rights and the North American Indian' (1985) 6 *Otago Law Review* 65; D E Sanders, 'Indian Hunting and Fishing Rights' (1973-74) 38 *Saskatchewan Law Review* 45; Leslie Upton, *Micmacs and Colonists: Indian-White relations in the Maritimes, 1713-1867* (1979); Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (1993); and McEvoy, above n 117, chapter 1.

[154] Ann Parsonson, 'The Challenge to Mana Maori' in Geoffrey Rice (ed), *The Oxford History of New Zealand* (2nd ed, 1992) 195-97. Settlers polluted the streams that fed Te Waihore (Lake Ellesmere), killing eels, flounder and other Maori staples. The process was much the same for Ngati Te Rangi, Ngati Paoa, and Ngati Whatua of the North Island, but North Island Maori did win a number of political fights in the 1890s, securing continued use of their eel weirs, access to their oyster beds, and freedom from licence fees for trout fishing. Williams, *Politics of the New Zealand Maori: Protest and Cooperation 1891–1909* (1969) 74-75.

[155] A few candidates: For one whose views on dispute resolution do not presume the rational-actor superiority of Economic Man, see Donald Black, 'The Elementary Forms of Conflict Management' in Altheide, David, Gray*, et al*, *New Directions in the Study of Justice, Law and Social Control* (1990) 40-56, and Marvin Harris, *Cultural Materialism: The Struggle for a Science of Culture* (NY 1979), for a defense of functionalist anthropology, a powerful way of comprehending the origins, purposes and force of customs and norms.

[156] We find *some* of Posner's 'wealth-maximizing' (considerably more than I found in support of the so-called 'transformation' thesis), but still not enough to say that Posner's perspective explains more than a slice of judicial behavior in the eighteenth and nineteenth centuries.

[157] Ellickson*, Order without Law*, above n 3, 173; Posner also observes that there is utility and practical value to gestures and measures of kindness, love, and honesty. Posner, above n 1 (4th ed, 1992) 238-39.

[158] C G Finney, *Sermons on Important Subjects* (3rd ed, 1836) 55.

[159] Adam Smith was been concerned with 'moral sentiments', but these were not of the 'ideal' or Christian sort. Jeremy Bentham's 'benevolence' always coincided with utility and self-love. The American 'Jurisprudence of the Heart' was not Reasonable Man as Adam, Smith's 'Impartial

Spectator'. See: Stephen Hicks, 'The Revolution in Social Theory in the Early Nineteenth Century' and 'From Sympathy to Disinterestedness with an Afterward on the Origin of the Tort of Negligence', both in Tom O Campbell (ed), *Law and Enlightenment in Britain* (1990); and N MacCormick, 'Adam Smith on Law' (1981) 15 *Valpariso University Law Review* 243.
