M E M O R A N D U M

TO: Students in my Torts class

FROM: Visiting Professor Keating

DATE: June 30, 2009

SUBJECT: Exam

This is a revised version of the outline that I gave Barak to assist him in grading your exams. I very much enjoyed having the opportunity to teach you, and hope that you learned something from the class. Enjoy your summers!

Question # 1. *Should it make a difference whether the case is a nuisance case or a trespass case? If so, why? What differences among the two rights and two wrongs make different remedies attractive?*

There is a fundamental difference between nuisance and trespass. Trespass is concerned with the right of exclusion, and is usually said to protect the interest in dominion over one's property. It applies to entries of other persons (and objects under their control) onto the property of the party in possession of the land. Nuisance is concerned with the right of use. The relevant law conceives of these as very different kinds of rights. For the most part, our respective rights of exclusion do not conflict with on another: You may be a sovereign on your land and I may be a sovereign on mine. Our respective absolute dominions do not spill across the boundaries of our respective properties and so our rights do not interfere with one another.. Excluding you from my property does not interfere with your dominion over your property, and vice-versa. Uses, by contrast, tend to overflow the boundaries of one's property. Uses often clash; they are often incompatible. Therefore, rights of use tend to conflict with one another mor than rights of exclusive control do. The law reflects this difference when it characterizes the relevant right as a right to the "reasonable" use and enjoyment of land and the relevant wrong as an "unreasonable" interference with someone else's use and enjoyment of land.

Rights of use thus require objective reconciliation from the point of view of an impartial third party (i.e, a court). They must be made compatible with one another through the impartial exercise of objective judgment. Idiosyncratic and subjective uses (hypersensitive plaintiffs) fare poorly in nuisance law, because idiosyncratic uses cannot easily

be made compatible with one another. Normal, or general, or ordinary, or common, uses can be made compatible with one another and the law of nuisance favors such uses in the name of equal right. Rights of exclusive control do not require such objective reconciliation, at least they do not require such objective reconciliation most of the time. They do not tend to conflict with one another and they are not generally subject to a requirement of reasonableness. You are generally free to exclude other people from your property without regard to the reasonableness of your reasons for so doing. The freedom conferred by the right of exclusive control is the freedom to act on idiosyncratic, abnormal, even unfair reasons. This is essential to the autonomy that they confer.

Imposing an objective judicial resolution on cases where the right to exclude goes awry in the sense that it is used to deprive someone else of the reasonable use of their property (Goulding), or to prevent an efficient result from being realized (Silver King) represents a repudiation of the underlying right— the right to pick and choose who and what may enter one's property— in a way that imposing an objective resolution on a conflict of rights of use does not. Rights of use must be objectively reconciled, so the question becomes the more nuanced question of whether a judicially imposed easement is the best objective reconciliation of the conflicting rights of use.

This distinction is embedded deeply in the relevant law, but it is denied by economic analysis. For an economic analysis, legal rights are mere markers for costs. When rights conflict the problem is always the same: how can we reconcile them in a cost-minimizing, wealth-maximizing way? Nuisance and trespass problems are interchangeable on an economic analysis as, indeed, they are in Coase's famous paper.

Question # 2. *From an economic point of view are the problems in Boomer essentially the same as the problems in Goulding are the problems different in significant ways?*

The Boomer and Goulding problems are different in significant ways, though they are the same at a deep enough level of analysis. What they have in common is that in both cases uses of land conflict with one another (impose costs on each other) so that a "problem of social cost" arises. The fundamental question in both cases is how to minimize the costs of the conflicting interactions and how, therefore, to maximize the value (the wealth) extracted from the two interacting activities.

The differences between the cases are nonetheless very important. They have to do with why the interactions fail to reach efficient outcomes (with why the interactions leave wealth, or value, on the table) and these differences affect the choice of an appropriate remedy. The essential difference is this: Boomer involves both transaction cost problems and strategic behavior problems whereas Goulding is almost entirely about strategic behavior problems. Transaction costs have to do with the expense of putting together a deal (i.e., the cost of identifying affected persons, the cost of getting people together, the time spent negotiating, the cost of hiring lawyers and documenting a deal). Transaction costs thwart

deals when they make the expense of doing a deal so great that the deal is not worth doing. (The cost of doing the deal swamps the value gained by doing the deal.)

Strategic behavior is concerned with conduct which is rational in light of the (expected) rational conduct of other people. It is rational to want to be the last neighbor to ink a deal with the cement company because the last neighbor to make a deal has the most leverage. It is rational for the Gouldings to demand a very high price for an easement from the Cooks because the Cooks have no alternative and, without an easement for a septic system, their house is not habitable. It is rational for the Cooks to offer a relatively low price, because the Gouldings have no other buyers for the easement that the are selling. No one is going to offer more money because the easement is useless to anyone else. In economic terms, Goulding is a case of bilateral monopoly.

When the problem is a transaction cost problem, the solution is either (a) to minimize the costs of transacting so as to facilitate the negotiation of a deal by the parties themselves; or (b) to impose the deal that the parties would have reached if transaction costs had not been so great as to preclude the parties themselves from reaching a deal. When the problem is a problem of strategic behavior, the solution is different, and perhaps tougher. The solution is to structure the law so that the parties do not— by miscalculation— bring about a situation that makes both of them (and by extension, society) worse off. If there is no deal between the Gouldings and the Cooks, the Cooks lose the use of their house and the Gouldings face the prospect of being neighbors to a useless and perhaps abandoned piece of property. That state of affairs can only decrease the value of the Gouldings' property. Society is worse off because it is poorer. The value realized by the productive use of the Cooks property (the value realized through its use as a residence) is not realized.

Question # 3. *In Goulding itself, the state's highest court reversed the intermediate appellate court. The intermediate appellate court had ordered that an easement be imposed in favor of the Cooks, permitting them to use the Gouldings' property for a septic system, at a price to be determined by the court. Which court was right? Why? In justifying your choice of either the easement approach or the injunction approach, please be sure to explain why the choice is so difficult – why able courts continue to disagree over which approach is best.*

This is an open-ended question. Equally able students might approach it very differently. To my mind, the most logical way to approach the question is to begin by insisting on the absoluteness of property rights. I think this focuses the issues most sharply. Relatively little turns, however, on the starting point of your analysis of the problem.

The "insisting on the absoluteness of property rights" position supports the decision of the state's highest court in Goulding. It does so on the ground that, to compromise private property rights here by imposing a judicially mandated solution, threatens to upend property rights entirely. The situation in Goulding, one argues, isn't special, it's just extreme. In other words, this is not a necessity type case where a natural force threatens grievous harm

to property and that force is so overwhelming that it suspends the normal operation of legal institutions (see Vincent v. Lake Erie). This is a case where the normal operation of property rights results in a breakdown of cooperation, and hence in a setback to productive, value maximizing activity (as economics conceives of value).

The property right here is the right of dominion, of exclusive control. It confers freedom on the party who possesses it. If that right can be overriden— if the freedom it confers can be cancelled— whenever the exercise of that right prevents property from being put to its highest economic use, then the right of dominion and the form of freedom it institutes cease to exist. Property owners have only the freedom to put their property to its highest use. Because the unfortunate outcome in Goulding results from the normal exercise of property rights and not from an extraordinary external threat which disrupts the normal operation of property rights, there is no principled and limited way to intervene in the case. The ground of intervention is simply that the parties fail to reach an efficient agreement and if that justification is sufficient to override the exercise of the right to exclude and to justify imposing terms on the parties, then the right to the free use of one's property is just the right to put one's property to its highest use.

There are four basic replies to this argument. First, one might argue, with a certain kind of ruthless economic logic, that efficiency justifies property rights and when property rights prove inefficient they ought to be repudiated or reformed. In Goulding, this means the court should impose a solution via an injunction. Second, one can argue that the argument is overdrawn and the situation is special. The argument is overdrawn because the outcome is not just inefficient but monstrously so. The situation is special because Goulding involves a bilateral monopoly and bilateral monopolies are a kind of market failure, justifying judicial intervention. (Question: but isn't a bilateral monopoly just the extreme case of a bargaining situation where strategic behavior may lead to inefficient outcomes? Bargainign situations are, by definition, situations where there is not a market. Don't all bargaining situations therefore contain this same possibility of breakdown, because rational self-interested behavior may lead to a failure to strike a deal that would make both parties better off?) Third, one can argue, from a non-economic perspective, that the basic presupposition underlying our normal approach to enforcing the right to exclude (that approach involves awarding injunctions as a matter of right) does not hold in a case like Goulding. That presupposition is that mutual rights to exclude, enforced by injunctive relief, construct an adequate regime of equal freedom. Put differently, the assumption is that when every property owner has a right to exclude and that right is backed by an injunction everyone will have an effective domain of freedom compatible with everyone else's similar domain. Goulding is one of the rare cases where this assumption fails— where one party's right to exclude interferes with another party's *only* reasonable use— and this failure warrants a remedial intervention normally more at home in nuisance law.

Why are these cases so difficult? For several reasons. First, because they are not as easily cabined as the necessity cases are. Second, because they are something of an embarrassment to economic thinking: private property rights, rationally exercised, lead not to

efficient cooperation but to a disastrously inefficient breakdown of cooperation. Third, because they are also an affront to non-economic thinking about the right to exclude. They undermine the reassuring conclusion that rights to exclude are mutually compatible even though no reasonableness requirement attaches to such rights. And they suggest that a reasonbleness requirement must sometimes be attached. That requirement, however, significantly curbs the freedom that the right of dominion confers.