KILLING OR WOUNDING TO PROTECT A PROPERTY INTEREST*

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A farmer in Iowa named Briney had a farmhouse in which he stored old furniture and odds and ends, including some antiques of undisclosed value. After several thefts, Briney rigged a spring gun in the farmhouse.[1] At his wife's suggestion, he pointed the gun so that it would hit an intruder in the legs—not, as Briney had initially planned, in the stomach. A man named Katko, who had previously stolen goods from the place, broke in, triggered the spring gun, and was badly wounded in the leg. He was initially charged with burglary but later permitted to plead guilty to petty larceny, fined $50, and given a suspended jail sentence. He brought a civil suit against the Brineys, charging that his wounding was a battery, and won a jury award of $20,000 in compensatory and $10,000 in punitive damages. The verdict occasioned a public outcry, and proposed legislation (modeled on a recent Nebraska law) that would explicitly have authorized the use of deadly force in defense of property[2] was narrowly defeated in the state legislature.[3] At this writing the case is awaiting decision in the Supreme Court of Iowa on defendants' appeal.[4]

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[1] A gun (usually a shotgun) rigged to fire when a string or other triggering device is tripped by an intruder.

[2] Iowa General Assembly, House File 1106 (Jan. 26, 1970), 1302 (Feb. 23, 1970). Senate File 1147 (Jan. 29, 1970). The Nebraska statute is Neb. Sess. Laws, 1969, ch. 233, Self Defense Act.

[3] See Ross, The Thief Who Was Awarded $30,000, Parade Magazine, Dec. 14, 1970, at 7.

[4] The case was decided shortly after this article went to press. The court affirmed the judgment for the plaintiff, one judge dissenting. Katko v. Briney, No. 162-54169 (Sup. Ct. of Iowa, Feb. 1971). The court's opinion illustrates the analytical confusion that, as we shall see, is typical of the area. The opinion contains broad language (drawn from authorities discussed in part I of this article) to the effect that killing or wounding in defense of property is never privileged to prevent "a felony of violence," without, however, explaining what that expression means and, in particular, without mentioning the cases in which killing to prevent a burglary has been held to be privileged (see, for example, note 10 and accompanying text, *infra*). The most satisfactory ground of the

Spring guns were something of a *cause célèbre* in early nineteenth century England,[5] but since that time the reported cases have been few. Cases involving the use of deadly force to defend property in person have been few too, in part because self-defense is so often an issue when the defendant is present. Perhaps the Iowa case, when viewed against a background of mounting public concern over crime, signifies a resurgence of the problem.[6] What makes the deadly-force issue worth discussing, however, is not its topicality but its theoretical interest, which I believe to be considerable. Involving as it does a conflict between the preservation of life and the protection of property interests, the privilege (if there is a privilege) to use deadly force to protect property cannot fail to raise fundamental issues of legal policy. It also presents interesting questions concerning the allocation of law enforcement authority between the public and private sectors. The approach of conventional legal scholarship has been unsatisfactory, and here is another source of interest, since this failure illuminates characteristic deficiencies of such scholarship, especially as it is embodied in the American Law Institute's *Restatements*. I am led to explore an alternative approach, an economic approach, whose utility in helping to answer questions of legal policy and to interpret opaque and apparently conflicting judicial decisions is a major theme of this paper. As we shall see, an economic approach is useful even though it is not usually thought of as an especially apt tool for resolving such basic value questions as life versus property. Finally, although our privilege may seem far from the mainstream of contemporary concern with tort law, we shall see that

decision is that Briney posted no warning that the farmhouse was defended by dangerous means and that from this and other evidence the jury could infer that he intended not to deter further thefts but to inflict serious injury. But of this more later.

[5] The Parliamentary debates preceding enactment of 7 & 8 George IV, c. 18, §§ 1, 4 (1827), which prohibited the setting of spring guns save in a residence between sunset and sunrise, give some glimpse of the early controversy. Spring guns were used primarily by landowners against poachers; this use was defended as being a much cheaper way to defend game than by armed gamekeepers, especially since, before the introduction of spring guns, poachers had apparently taken to traveling in armed bands. Spring guns were also used by what we today call truck farmers in the United States but are termed market gardeners in England. These were located on the outskirts of London, and argued that efficient police protection in central London had driven thieves to the outskirts, where police protection was inadequate. Hostility to the Game Laws and concern with accidents were repeatedly cited as factors warranting strict prohibition. Efforts to carve out an exception for the market gardeners were defeated. See Hansard's Parliamentary Debates, n.s., vol. 12 pp. 641-42, 922-25, 937-42, 1014-20 (1825); vol. 13, pp. 1254-68 (1825); vol. 15, p. 719 (1826); vol. 17, pp. 19-34, 106-07, 235-39, 266-68, 733-43, 895-901 (1827). It is interesting to contrast the legislative solution (broad prohibition) with the rather different judicial solution (see text accompanying note 31, *infra*)—a point to which we return later.

[6] As straws in the wind, see Ex-Green Beret Rigs Burglar Booby Trap, New York Times, Nov. 1, 1970, at 74; Son Shot by Father's Booby Trap, Chicago Tribune, Dec. 24, 1970, sec. 3, at 10.

it is in fact paradigmatic of a wide spectrum of tort questions and illuminates the central policies of that law.

I

There are not many judicial opinions dealing with the privilege to use deadly force and none contains an illuminating discussion of the subject. The one substantial journal piece[7] may be considered merged with the *Restatement of Torts*: the coauthor of the article (Francis Bohlen) was the Reporter for the *Restatement* and the relevant passages in the *Restatement* track the article closely. The level of analysis has otherwise been very low. The Harper and James treatise states:

> It is uniformly held that the possessor of land or goods cannot use force reasonably calculated to cause death or serious bodily harm for the purpose of defending his bare dignitary interests in the property and seldom to prevent the loss or destruction thereof. It is only when the intrusion is of such a character that it threatens the life or limb of the possessor that he may employ force likely to wound or kill the intruder.[8]

If the "seldom" qualification is intended seriously—which cannot be determined, since there is no supporting citation, explanation, or even further mention of the point—then the sentence that follows is wrong. An intrusion may threaten the destruction of property without endangering anyone's life or limb. The authors go on to say that mechanical devices (such as spring guns) are privileged to protect property only "against an invasion which threatens death or serious bodily harm to the occupants of the premises,"[9] but the first case they cite in support of the point holds that the killing of a burglar of an unoccupied warehouse by means of a spring gun is privileged, despite the fact that such a burglary does not endanger anyone.[10]

A number of sections of the *Restatement of Torts* (promulgated in 1934) bear on our subject.[11] Section 77 recognizes a privilege to defend a property interest by means not likely to cause death or serious bodily harm; thus a

[7] Francis H. Bohlen & John J. Burns, The Privilege To Protect Property by Dangerous Barriers and Mechanical Devices, 35 Yale L.J. 525 (1926).

[8] 1 Fowler V. Harper & Fleming James, Jr., The Law of Torts 250 (1956).

[9] *Id.* at 253.

[10] Scheurman v. Scharfenberg, 163 Ala. 337, 50 So. 335 (1909). The other American treatise, William Prosser, The Law of Torts (3d ed. 1964), at 116-18, discusses the privilege in approximately the same terms as the Restatement—and suffers from the same shortcomings (see discussion in text, *infra*).

[11] See Restatement of Torts, §§ 77, 79, 84, 85 (American Law Institute 1934). For a critical and informative discussion of the ALI's restatement project see 2 Henry M. Hart, Jr., & Albert H. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 757-71 (tent. ed., mimeo., 1958).

landowner who shoves a trespasser off his land without hurting him is not liable for a battery. There are certain qualifications—in some cases, for example, notice is required prior to the application of force—but we can ignore them. No reason for the privilege is given, but perhaps none is needed. Section 77 accords with the decisions on the question and raises no special difficulties.

Section 79 states that there is a privilege to use deadly force in defense of property when necessary to protect the occupant of the property from death or serious bodily harm. The draftsmen note that this privilege is largely redundant in view of the privileges of self-defense and of prevention of serious crimes dealt with elsewhere in the *Restatement*.[12] No reasons are suggested why no broader privilege should be recognized.

Section 84 states that there is a privilege to use nondeadly mechanical devices (such as barbed wire) to protect property. One of the comments on the section, after setting forth some sensible qualifications on the use of such devices, states that the privilege is not forfeited merely because "the device is one which is likely to do more harm than the possessor of land would be privileged to inflict if he were present at the time of the particular intrusion"; the risk of injury, in the draftsmen's view, may be offset by the impracticability (cost) of protecting the property other than by an undiscriminating device.[13]

Section 85 recognizes a privilege to inflict death or serious injury by a spring gun or other mechanical device intended or likely to cause such harm when the user, had he been present, would have been privileged to prevent or terminate the intrusion by the intentional infliction of such harm.[14] Why did the draftsmen depart from the formula of section 79, which recognizes a privilege to use deadly force when the occupant's safety is threatened and implicitly not otherwise? Could the privilege be broader when deadly force is employed by means of a mechanical device than when it is employed in person? One might argue by analogy to nondeadly mechanical devices that the privilege could indeed be broader, but this line of argument is cut short by the draftsmen's comment: "A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person"[15]—just what section 84 permits.

[12] Restatement of Torts, § 79, comment c.

[13] *Id.* § 84, comment e.

[14] The same test is applied (without explanation) several hundred sections later to dangerous watchdogs. See § 156. I have found no cases involving watchdogs so large and vicious as to be likely to kill, or that did kill, an intruder. Intruders are however bitten frequently, and the general rule is that recovery is barred if the intruder had adequate notice of the presence of the watchdog. See, e.g., Hood v. Waldrum, 434 S.W. 2d 94 (Tenn. App. 1968); Weber v. Bob & Jim, Inc., 298 N.Y.S.2d 854 (Sup. Ct. 1969); Dykes v. Alexander, 411 S.W. 2d 47 (Ky. App. 1967); Mass. Gen. Laws Ann., c. 140, § 155 (1968); Annot., 66 A.L.R. 2d 916, 962-64 (1959).

[15] Restatement of Torts, § 85, comment a.

What, then, is the scope of the privilege? It is not given directly by section 85 and its accompanying comments. Instead we are told that the test is whether the user of the spring gun or other device would, if present, have been privileged to inflict death or serious bodily harm under sections of the *Restatement* dealing with the privilege to use deadly force to prevent certain crimes;[16] no reason is given why this is an appropriate test. The principal section to which we are referred is section 143(2), which provides that the use of deadly force is privileged when necessary to prevent a felony "of a type threatening death or serious bodily harm or involving the breaking and entry of a dwelling place."[17] We are told in the comment that this privilege is limited to felonies as to which the use of deadly force to effect an arrest is privileged under section 131 of the *Restatement*, and we are referred to the comment on that section. In fine print the American Law Institute disclaims any opinion on whether deadly force may be used to prevent breaking and entering a building (not a dwelling place) "in which property of substantial value is stored if such breaking and entering is by statute made a burglary or tantamount thereto."[18]

We go to section 131 and find that deadly force may be used where necessary to effect an arrest in a class of felonies identical to that in section 143(2), and we are told that, while the privilege is limited to felonies of a sort that normally cause death or serious injury or create a serious danger of such consequences, it is immaterial whether in the particular case the felon's conduct created any such danger.

Another section of the *Restatement*, section 87(2), authorizes the use of deadly force to prevent wrongful dispossession from the user's dwelling place, even if the dispossession involves no danger of physical harm. No reason for this privilege is offered, and there is no attempt to reconcile it with the narrower privilege for killing in defense of other property interests.

If we stand back now and consider the pattern created by the various sections and comments, we see that (a) there is no privilege to use deadly force in defense of property as such, but (b) there is a broad privilege to use such force (i) to prevent certain crimes, among them burglary of a dwelling place, whether or not the crime is a dangerous one in the circumstances of the case (the dwelling might be unoccupied), and (ii) to avoid being wrongfully dispossessed from one's home, whether or not there is any danger to the rightful possessor. These rules do not fit together. If (a) is sound, no one should be privileged to set a deadly spring gun in an unoccupied dwelling or a warehouse, or to kill a landlord attempting to evict him. If any part of (b) is sound, it is hard to see why someone should be forbidden to set a deadly spring gun where

[16] *Id.* § 85, comment b.

[17] Apparently it is immaterial whether the person using the force is a police officer or a private individual. See § 143(1) and comment c. on § 131 of the Restatement.

[18] Restatement of Torts, § 143, First Caveat.

it is the only practicable method of protecting valuable property, merely because the property is not located in a dwelling place.[19]

Where two legal rules appear to be in conflict, one is led naturally to inquire into the reasons underlying the rules for possible clues to an accommodation. The *Restatement of Torts*, however, offers no reasoned grounds for the rules of law stated. Why should deadly force be permitted to prevent pure property crimes such as burglary of an unoccupied dwelling place? The only clue is to be found in the comments on section 131 where it is noted that an officer in pursuit of a felon may not know whether a crime endangering life or safety has been committed[20]—an observation quite irrelevant to the propriety, say, of setting a spring gun in one's house before going on vacation. Why is there no privilege to use deadly force in defense of property? Because:

> The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has as is stated in §79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, [unless the intrusion endangers the occupants].[21]

The draftsmen have made the task of balancing life against property easy for themselves by opposing the interest in human life to the interest in keeping out mere trespassers and "meddlers." Suppose an intruder is threatening to remove or destroy property of great value. It is surely not correct to say that society never permits the sacrifice of human lives on behalf of substantial economic values. Automobile driving is an example of the many deadly activities that cannot be justified as saving more lives than they take. Nor can the motoring example be distinguished from the spring-gun case on the ground that one who sets a spring gun intends to kill or wound. In both cases, a risk of death is created that could be avoided by substituting other methods of achieving one's ends (walking instead of driving); in both cases the actor normally hopes the risk will not materialize. One can argue that driving is more valuable and spring guns more dangerous; but intentionality is neither here nor there.

It is not only the Institute's use of the term "intruder," a synonym for trespasser[22] devoid of any connotation of stealing or destroying valuable property, but its avoidance throughout these sections of examples involving

[19] The Institute, it will be recalled, takes no position on whether deadly force may be used to prevent a burglary of a building not a dwelling, in which property of substantial value is kept.

[20] See Restatement of Torts, § 131, comment g.

[21] *Id.* § 85, comment a.

[22] *Id.* § 77, comment b.

serious property losses,[23] that evinces a reluctance to face difficult choices between human lives and other social values. The draftsmen could not have thought that section 143(2) provided adequate protection for economic values and hence that the sections on the privilege to use deadly force in defense of property need deal only with self-help remedies against minor trespasses; dwelling places are not the only site of valuable property. If that *was* the idea, the earlier sections are very clumsily drafted.

Had someone pointed out the problems in their treatment of deadly force, the draftsmen might have replied that their job was to state the law, not to eliminate its inconsistencies. Such a reply, however, would both misrepresent the expressed intentions of the American Law Institute[24] and, worse, misapprehend the character of the common law. The common law is not merely what judges have decided;[25] more importantly it is what they will decide and the difference is crucial when the precedents are few and mostly old and there are manifest inconsistencies in the courts' approach to related questions within the same general area. To predict how courts would react in future spring-gun cases required a principle that either reconciled the apparent inconsistencies or gave a reasoned basis for preferring one set of holdings to another. The *Restatement of Torts* offered no such principle.

The *Restatement* was amended in 1948 and a second *Restatement* was promulgated in 1963 and 1964. The 1948 amendments added a new anomaly to the sections on the privilege to use deadly force in defense of property, while the second *Restatement* removed one of the earlier anomalies.

It will be recalled that section 143(2) of the 1934 *Restatement*, in defining the privilege to use deadly force to prevent certain crimes against property, incorporated the same test as section 131 (privilege to use deadly force to effect an arrest) and even referred the reader to the comments on that section. At the time, there were no American decisions on whether the rule of the English common law permitting the use of deadly force when necessary to apprehend a felon, regardless of the nature of the felony, was law in America; but there were some dicta indicating judicial preference for a narrower rule, which became section 131.[26] After 1934, the question was presented to several courts, which affirmed the common law rule, and bowing to this judicial authority the American Law Institute in 1948 amended section 131 to conform to that rule.[27] Section 143(2) was not reexamined or changed, either in 1948 or at the time of the second *Restatement*, despite its intimate relation to the

[23] See, e.g., *id.* § 85, illustration 1.

[24] See 1 ALI Proceedings 14-15, 21 (1923).

[25] We consider later whether the Restatement restated the judicial holdings accurately.

[26] See ALI Commentaries on Torts, Restatement No. 3, 57-62 (1927).

[27] See ALI Restatement of the Law—1948 Supplement 628, 631-32 (1949); ALI, Keeping the Restatement Up-to-Date—Torts, § 131 (1947).

old section 131. The result—for which no explanation was offered—was that while a burglar could lawfully be killed if necessary to prevent his flight, even where the burglary was of an unoccupied store or warehouse and involved no danger to anyone's safety, the Institute (in the fine print under section 143 (2)) took no position on whether he could be killed if necessary to prevent the burglary from occurring in the first place.

The draftsmen of the second *Restatement* eliminated the provision of section 87 that appeared to permit a tenant to kill a landlord who attempted wrongfully to evict him.[28] One wonders why, if this privilege was considered ripe to be discarded, the draftsmen were not also led to reexamine the privilege to use deadly force to prevent the burglary of an unoccupied dwelling.

II

The failure of generations of distinguished scholars to give an adequate account of the law on what is after all both an old and a narrow question reflects, I believe, limitations inherent in a certain type of legal scholarship and in the attempt to restate the common law in code form. Limitations of the first kind include a propensity to compartmentalize questions and then consider each compartment in isolation from the others; a tendency to dissolve hard questions in rhetoric (for example, about the transcendent value of human life); and, related to the last, a reluctance to look closely at the practical objects that a body of law is intended to achieve. Codification, as in the *Restatements*, would hardly counteract these tendencies. Indeed, the preoccupation with completeness, conciseness, and exact verbal expression natural to a codifier would inevitably displace consideration of fundamental issues and obscure the flexibility and practicality that characterize the common law method.

Perhaps these failures of scholarship stem ultimately from a tendency to confuse what should be distinct levels of discourse. I expect that most judges, before deciding a case, conceive it in highly practical terms. I do not mean by this that they consider which party's plight is more desperate, which more engages their sympathies. I mean that they consider the probable impact of alternative rulings on the practical concerns underlying the applicable legal principles. Holmes must have had this thought in mind when he wrote:

> The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned.[29]

[28] See Restatement (Second) of Torts, § 87 (American Law Institute 1965); Restatement (Second) of Torts—Tentative Draft No. 1, § 87, Note to Institute (1947); 34 ALI Proceedings 334-35 (1957).

[29] O. W. Holmes, Common Carriers and the Common Law, 13 Am. L. Rev. 608, 630 (1879), quoted in Felix Frankfurter, The Early Writings of O. W. Holmes, Jr., 44 Harv. L. Rev. 717 (1931). An interesting elaboration of this conception of the judicial process is Karl N. Llewellyn, The Common Law Tradition—Deciding Appeals (1960).

Why judges, having made a practical decision, so often embody it in the pompous, stilted, conclusionary prose that the layman derides as legalistic is something of a mystery. But what seems clear is that the task of legal scholarship is to get behind the prose and back to the practical considerations that motivated the decision. Yet scholars often seem mesmerized by the style, terminology, and concepts of the judicial opinion; they confuse their function with the judicial.

A possible way of avoiding this danger is to take an economic approach to questions of legal interpretation.[30] One who tries to explain cases in economic terms may expose himself to many pitfalls, but they will not include the pitfall of attempting to analyze cases in the conceptual modes employed in the opinions themselves. An economic approach is especially plausible with regard to tort law, since the subject of economics is how society meets the conflicting wants of its members and tort cases, as we shall see, are plainly concerned with arbitrating such conflicting wants.

The nature of an economic approach to our problem can be illustrated by reference to an old English case, *Bird v. Holbrook*.[31] The defendant owned a valuable tulip garden located about a mile from his house. It was surrounded by a wall 7-8 feet high on one side and somewhat lower (how much lower is not indicated) on the other sides. After some of his tulips were stolen, the defendant rigged a spring gun. One day a neighbor's peahen escaped and strayed into the garden. A young man (the plaintiff in the case) tried to retrieve the bird for its owner, tripped the spring gun, and was badly injured. The incident occurred during the daytime, and there was no sign warning that a spring gun had been set.

The case involved two legitimate activities, raising tulips and keeping peahens, that happened to conflict. Different rules of liability would affect differently the amount of each activity carried on. A rule that the spring-gun owner was not liable for the injuries inflicted on the plaintiff would promote tulip raising but impose costs on (and thereby tend to contract) peahen keeping, for knowing that efforts to retrieve straying fowl from neighbors' yards might

[30] This approach was taken by R. H. Coase in discussing English nuisance cases in his landmark article, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960), which has greatly influenced my own thinking. The economic significance of tort principles has also been discussed in the context of automobile accidents. See Guido Calabresi, The Costs of Accidents—A Legal and Economic Analysis (1970); Harold Demsetz, Issues in Automobile Accidents and Reparations from the Viewpoint of Economics (June 1968), in Charles O. Gregory & Harry Kalven, Jr., Cases and Materials on Torts 870-75 (2d ed., 1969); Richard A. Posner, Book Review, 37 U. Chi. L. Rev. 636 (1970).

[31] 4 Bing. 628, 130 Eng. Rep. 911 (Com. Pl. 1828).

invite serious (and uncompensable) injuries, keepers of peahens would keep fewer fowl, or invest in additional measures to keep the birds from straying, or do both. The opposite rule, one that recognized no privilege ever to use spring guns in defense of property, would benefit peahen keeping but burden tulip growing. The wall surrounding the garden had not been effective in preventing theft. The garden was too far from the defendant's home for him to watch over it himself. Raising the wall or hiring a watchman may have been prohibitively costly.

One would have to know a good deal about tulip growing and peahen keeping, and about the likelihood and character of other trespasses to the garden, in order to design a rule of liability that maximized the (joint) value of both activities, net of any protective or other costs (including personal injuries). And if one wanted a rule that applied to still other crops and straying creatures one would have to know a lot more. But what seems reasonably clear without extended inquiry is that the economically sound rule will be found somewhere in between the extreme possibilities of making the spring-gun owner never liable or always liable. At the minimum, someone in the defendant's position should be required to post notices that anyone entering his garden might be shot: the cost of doing so would be less than the cost (in medical expenses, loss of earnings, and suffering) likely to be incurred by someone who strayed into the garden on an innocent mission. (Of course, a daring and ingenious thief, alerted by the notices, might be able to avoid or disarm the spring gun.) It is possible to go further and suggest a plausible rule that avoids the extremes of blanket prohibition and blanket permission. Given that the expenses of protecting the defendant's valuable tulips other than by a spring gun would probably have been high, that a theft was most likely to be attempted at night, that domestic animals are usually confined then, and that people (other than burglars) do not customarily climb walls at night, the defendant should have been permitted to set a spring gun only at night and after posting appropriate notification. The actual decision in the case is consistent with such a rule. The Court of Common Pleas held for the plaintiff, stressing the absence of notices and the fact that the incident occurred in the daytime.

The reader may object that an analysis which focuses exclusively on the value of the interfering activities is too narrow and in one respect he will be clearly right: it improperly ignores the costs of administering different rules of law. A complex rule, one carefully tailored to relevant differences among the situations to which it might be applied, may do better in terms of maximizing the joint value of the interfering activities than a simple and crude rule yet be inferior because the additional costs of administering the complex rule exceed the additional value of the activities. The complex rule may require lengthier (and hence more costly) litigation or settlement negotiations;

or it may be more uncertain and the uncertainty may have a dampening effect on productive activity. Because the costs of different types of legal rule have never (to my knowledge) been seriously studied, it is very difficult to introduce the element of administrative expense into the economic calculus but I assume that judges attempt to do so in a rough way. Our law is replete with instances where judges explicitly rejected a more complex in favor of a simpler rule because the costs of administering the former were thought to outweigh its benefits. That is what the debate over *per se* rules in antitrust law—to take one of many examples—is all about.

Even so broadened, our calculus is open to the objection that it is insufficiently rich to provide an unambiguous guide to the maximization of social welfare, notably because it omits any reference to the effects of different rules of liability on the distribution of income and wealth. This objection would be more telling were my purpose here normative analysis. It is not. I argue only that the kind of simple economic analysis employed in our discussion of the *Bird* case, supplemented by consideration of the costs of administering different legal rules, will explain, better than alternative approaches, the actual pattern of decisions dealing with our subject. Whether the approach in fact maximizes welfare is neither here nor there.

But I would not like to leave the impression that I believe the income effects of rules of liability do not play a role in the design of such rules by courts. I believe they do. An example will make clear why this is so—and why we can ignore the point in our discussion of deadly force. Suppose a railroad buys some land adjacent to a farm and builds a track across it. On the first day that the new line is in operation sparks from the locomotive consume the farmer's crop and it is clear that unless something is done, the crop can never be grown there again because of the fire hazard. As Professor Coase has shown, the rule that maximizes the social product of the interfering activities (railroading and cultivation) may be that the railroad is not liable for the damage caused[32] by the sparks.[33] This result will strike many readers as "unfair" to the farmer because his income—depending on alternative uses of the land—may have been drastically reduced. The objection based on unfairness has force and is at bottom an economic objection. The protection of property rights is necessary to induce adequate investment.[34] The farmer who has no assurance of being able to reap where he has sown will sow less than is socially desirable. The scope of the rights to be protected, the correct balance between protecting existing property interests and facilitating more productive activi-

[32] "Caused" is used here in an everyday sense that is imprecise; in an economic sense the damage is caused by both the sparks and the wheat.

[33] See R. H. Coase, *supra* note 30, at 32-33.

[34] See Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. Papers and Proceedings 347 (1967).

ties that interfere with those interests, of course present difficult questions. The cost of insurance as a means of reducing uncertainty in the enjoyment of property rights is among the many factors that must be weighed. But it is at all events clear that the farmer's "equities," as a lawyer would say, cannot be completely ignored in designing sensible rules of liability.

There is a technique that is available in the legal system for obtaining both equity and a more narrowly conceived efficiency, in cases where these interests appear to conflict. Suppose that the joint value of railroading and cultivation in our example would be maximized by (a) permitting the railroad to operate over the new line without restriction and (b) requiring the farmer to plant a different crop, one more resistant to fire albeit less lucrative. If this is so and if the costs of bargaining between the railroad and the farmer are high a rule that makes the railroad liable for all crop damage caused by the sparks will not maximize the social product. Whether the railroad discontinues the line or installs spark arresters or pays periodically for the damage it causes the farmer's crop the farmer will have no incentive to plant a fire-resistant crop. But now suppose the rule is that the railroad must pay the farmer only (a) the value of the crop initially destroyed plus (b) the diminution in the value of the land due to inability to plant any but the fire-resistant crop there henceforth. Then, should the farmer persist in growing inflammable crops, the railroad would not be liable for their destruction. The rule would both protect the farmer's sunk costs and give him an incentive to grow the fire-resistant crop.

The principle illustrated by this example is applied in many areas of the law and under many different names (among them "incomplete privilege," about which more later), but I am reluctant to explore it further in this paper because the equity problem has been unimportant in the deadly-force context. The problem is a serious one only where substantial sunk costs (such as a farmer's investment in land that would be much less productive in any use other than that for which he bought it) would be jeopardized by a particular rule of liability, and this has not been a common situation in cases involving the use of deadly force to defend property.

We need to consider a rule of liability that will have a more general application than the rule suggested for *Bird v. Holbrook* and will be more firmly grounded in a discussion of the relevant considerations—including the value of a human life.

Some people express shock at the idea of weighing personal injury and death in the same balance with purely economic costs and benefits, but it is done all the time. Individuals who work at hazardous jobs for premium pay are exchanging safety for other economic goods. And where life is taken or injury inflicted in an involuntary transaction, such as an automobile accident, society often attempts to approximate the loss in monetary terms. It goes

without saying that the task of approximation is an extremely difficult one. Some dimensions of the loss—such as the anguish to family and friends—cannot even be approximated by the methods available to the courts and are therefore usually ignored. But it is out of the question to ban all hazardous activities on these grounds.

A difficult problem of analysis is created where, as will often be the case when deadly force is used to defend property, the person killed or injured is a criminal. One could argue that burglary and other thefts involving trespass to land are risky activities and that someone who engages in them is no different from a man who agrees to drive a dynamite truck for extra pay: he assumes the risk of being killed. Or one could argue that society should place only a small value on the lives of people who engage in antisocial conduct. These arguments could be debated endlessly; it is sufficient to note that they ignore important practical considerations. If a burglar is injured, his injuries will be tended, if need be at the expense of the state; and if he is disabled, he will not be left to starve. The costs of treating and maintaining him are no less real costs to society than the costs of treating and maintaining the innocently injured and disabled. The interest in minimizing such costs cannot be ignored in the design of a proper rule of liability. Furthermore, a rule that greatly increased the hazards of certain property crimes might disrupt a more or less carefully calibrated scheme of criminal penalties. One reason for not punishing all crimes with equal severity is to preserve an incentive for criminals to commit less serious in preference to more serious crimes.[35] If robbery were punished as severely as murder, there would be fewer robberies but more occasions on which the robber killed everyone who might be a witness. If the burglar of an unoccupied building ran the same risk of being killed or maimed as a burglar of an occupied dwelling, there might be more burglaries of occupied dwellings and hence a greater danger to personal safety than under legal arrangements that made burglaries of unoccupied buildings safer for burglars.

It does not follow that an appropriate rule of liability would be one under which a burglar injured by a spring gun set in an unoccupied building could always recover damages. It is one thing to attempt to graduate punishment in accordance with the gravity of different crimes and another to adopt policies that make the punishment, when discounted by the probability of escaping apprehension, a negligible deterrent. One can imagine situations, for example the storage of valuable property in a remote location, where the likelihood of preventing theft or apprehending the thief afterward without using armed watchmen or spring guns would be so small that even nominally quite severe criminal penalties would not deter. In cases such as these deadly force may be an appropriate, because it is the only practical, deterrent.

[35] See George J. Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526 (1970).

These observations reinforce the point made earlier in connection with *Bird v. Holbrook* that neither blanket permission nor blanket prohibition of spring guns and other methods of using deadly force to protect property interests is likely to be the rule of liability that minimizes the relevant costs. What is needed is a standard of reasonableness that permits the courts to weigh such considerations as the value of the property at stake, its location (which bears not only on the difficulty of protecting it by other means but also on the likelihood of innocent trespass), what kind of warning was given, the deadliness of the device (there is no reason to recognize a privilege to kill when adequate protection can be assured by a device that only wounds), the character of the conflicting activities, the trespasser's care or negligence, and the cost of avoiding interference by other means (including storing the property elsewhere). The enumeration of the relevant criteria is simple enough. The real challenge is to fashion them, on the basis of scanty information, into a rule of liability that will maximize the value of the affected activities, subject to the constraint that any rule chosen be simple enough to be understood by those subject to the rules and to be applied by courts (our administrative-cost point). I offer the following as a plausible such rule:

1. Deadly force should not be privileged in situations where the owner of property has an adequate legal remedy (as in the typical boundary dispute), or where the threatened property loss is small. In these cases the costs of protection in human life or limb exceed the value being protected. However, in the computation of value, the economic status of the owner should be considered, since property that would be of no moment to a person of average means might be extremely valuable to a poor person.

2. There should be no privilege to set deadly contrivances such as spring guns in heavily built-up residential and business areas. The protection of property by means of alarms, watchmen, or the police should normally be feasible in such areas and is much to be preferred in view of the undiscriminating character of the mechanical devices. To be sure, one can imagine cases where a spring gun might seem an appropriate measure in such areas: an old lady living alone in a high-crime-rate area; a house full of priceless paintings. But even in such cases (and note the self-defense element in the first) the dangers inherent in the use of the device seem inordinate. The old lady might die in her sleep; her house would be a death trap. A fire might break out in the house containing the paintings; the firemen would trigger the spring gun. The likelihood of beneficent, or at least innocent, intrusions—by public officers, concerned neighbors, mischievous boys, meter readers, and the like—seems greatest in a built-up area, the very situation where alternative protective measures are most likely to be relatively effective at reasonable cost. In contrast, in remote areas the alternative protective measures are less feasible and at the same time noncriminal intrusions are less frequent. (To be sure, in a remote area the victim is also less likely to receive prompt aid.)

Because the stationing of armed watchmen involves fewer dangers, it need not be confined to remote locations. The watchman can discriminate between the harmful and harmless intruder and can usually prevent a theft or apprehend the thief without actually harming him.

Although the undiscriminating character of the spring gun, as I have indicated, is a matter of legitimate concern, it has at least one redeeming grace. One danger of recognizing any privilege to kill is that it may be used as a shield for unjustified killing. *A* hates *B*, shoots him, and then claims it was self-defense. *B* cannot dispute the point because he is dead. Spring guns are at least devoid of any personal animus—though so are most watchmen. The privilege to kill in self-defense is more prone to abuse than a properly limited privilege to kill in defense of property. The latter privilege is ordinarily asserted against strangers; it is harder to use against a personal enemy. (Periods or places where racial or other tensions create a danger that armed watchmen will kill total strangers merely because they belong to a disliked group require special rules.)

3. The privilege to use deadly force in defense of property should be forfeited if the user fails to take reasonable precautions to minimize the danger of accidental injury both to innocent and to criminal intruders. If theft is likely only at night the spring gun should not be set during the day. Signs should be posted with explicit and credible warnings. The defendant should be liable if he left his door open or his land unfenced—thereby virtually inviting intrusion—or if he declared that he had not set a spring gun when he had. Lethal calibers, or, in the case of a shotgun, lethal shot, should be avoided in spring guns or other devices since ordinarily the wounding of an intruder is adequate to prevent intrusion. A watchman should not be subjected to this requirement, because his personal safety might be endangered. But he should be required to warn a thief before shooting at him, at least where the thief is clearly not armed; and, consideration of his own safety permitting, he should be required to shoot to wound rather than to kill.

4. In property not sufficiently enclosed to keep out straying animals, children, and youths, the privilege to set spring guns should be limited to the nighttime.

5. Where the use of deadly force is permissible under the foregoing precepts:

a. An adult intruder killed or injured in an attempt to steal or destroy property should not be permitted to recover damages. This result is appropriate in order to prevent serious property losses due to theft in circumstances where, as discussed earlier, other means of deterrence may be impracticable.

b. An innocent intruder should be denied recovery if carelessness on his part contributed materially to the accident. This part of the rule is designed

to minimize the joint cost (which is another way of saying, maximize the value) of legitimate but interfering activities by placing responsibility on the participant who could have avoided the interference at least cost. Suppose that a watchman has been stationed, or a spring gun set, and all reasonable precautions observed. A bird watcher comes along, climbs a high fence—ignoring a clear warning notice in plain view—and triggers the spring gun against which the notice warned; or he ignores the repeated warnings of an armed watchman who reasonably believes that the theft or destruction of valuable property is being attempted. One could prevent the accident by forbidding spring guns and armed watchmen in all circumstances, but this may be a very costly means of prevention. The method of averting accidents likely to minimize the relevant costs is one that encourages the intruder to take a few precautions himself by barring recovery of damages otherwise.

The reader may question whether it is realistic to suppose that the denial of damages will deter an intruder not already deterred by fear of being killed or maimed. Perhaps people do not, in general, take greater precautions (other things being equal) against those hazards that are not compensable, such as being struck by lightning, than against those that are. It is hard to believe they do not. When a person takes out accident insurance, he is reducing the likelihood not of an accident but only of an uncompensated accident; that there is a market for such insurance indicates that people are influenced by considerations of compensability as well as by fear of injury itself. Rules of liability could also influence conduct more subtly. A rule that owners of property were strictly liable for any injuries accruing to intruders might be taken by the latter to imply that they need not be careful. They might assume that the completeness of the landowner's liability would impel him to eliminate any hazard. Or they might think the rule was based on a finding that all accidents were caused by the carelessness of landowners rather than of intruders.

6. An accident may occur even though neither the landowner nor the intruder was demonstrably careless. The warning sign may have been sturdily fixed to the fence but then stolen before the innocent intruder chanced on the scene. In such a case there is no clear basis on economic grounds for preferring one rule of liability to another. But I incline to making the landowner liable (though, for reasons explained earlier, only to the innocent trespasser). He is in control of the premises and so in a better position, in the usual case, to anticipate and avoid contingencies that increase the hazards created by the employment of deadly force. Stated otherwise, there may be reason to suspect that in most cases where an accident occurs and the intruder was not careless, the landowner was—though we cannot prove it.

The rule I have proposed is intended to exhaust the situations in which deadly force may be used to prevent an invasion of property interests. I recognize no separate privilege to kill or wound to prevent the commission of burglary or other felonies where there is no issue of self-defense. Whether a separate privilege in cases of arrest should be recognized is discussed briefly at a later point. It would appear that the permissible scope for using deadly force is probably narrower in my formulation than it is in the *Restatement*, despite the draftsmen's pretense of attaching transcendent value to human life.

I express no view on whether it would be best for legislators to enact a rule such as just proposed in a statute, or for trial judges to embody it in their jury instructions or for appellate courts to declare it as a rule of the common law and thereby reduce the jury's function in these cases to a simple factfinding and rule-applying one. It may be best to leave matters very largely in the jurors' hands with a minimum of guidance, the elements of the rule being simple and commonsensical. But the form of the rule is not my concern here. Nor, to repeat an earlier point, am I concerned with defending the rule as socially optimum. Advocates of strict firearms control have urged that death and maiming from criminal acts would be substantially reduced if police forces were given an effective monopoly of firearms,[36] and to them any rule that permits private individuals to use deadly force is bound to strike a discordant note. My own view is that the privilege under discussion is too circumscribed to be a major source of concern. It relates only to weapons kept for the purpose of protecting valuable property and most weapons are kept either for criminal purposes or self-defense. Law-abiding people do not, as a rule, have guns in their homes to repel theft; they have them for self-defense in case they are at home when a burglar or other criminal intrudes. If society rejected this justification for keeping arms and enforced its decision, the particular problem with which the advocates of strict gun controls are concerned would disappear, even if armed watchmen and spring guns were still permitted in limited circumstances. Moreover, the appealing slogan "a public monopoly of force" conceals practical difficulties. Much of the policing function in this country is performed by the private sector—by companies like Pinkerton and Brinks and by countless armed watchmen. The creation of a governmental monopoly of policing would disrupt an existing mixed public-private pattern that, conceivably, is more efficient than a public monopoly would be.

But, as I have said, I am not concerned with establishing the ultimate (and unreckonable) merits of the proposed rule. What I am concerned with is whether such a rule, plausibly grounded in economic considerations, explains the course of judicial decisions in the area—to which I next turn.

[36] See, e.g., George D. Newton & Franklin E. Zimring, Firearms and Violence in American Life—A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence (1970).

III

The decisions in which courts have been asked to recognize a privilege to kill or wound to protect property compose a pattern that seems broadly consistent with an economic approach, and with the specific rule of liability that I have suggested. Thus, the courts have refused to sanction the use of deadly force to repel merely technical trespasses that cause no loss or damage, as when a property owner shoots a hole in a boat that has strayed into the owner's part of the lake;[37] and they have rejected any privilege to use deadly force in support of a legal claim asserted in a boundary or other property dispute.[38] A dispute differs from theft or vandalism in that there are well developed judicial remedies—temporary restraining orders, preliminary injunctions, bonds, and the like—by which a person can avert loss or destruction of substantial property values without having to resort to force. This, incidentally, would seem to be the explanation of why the courts have held the poisoning of trespassing animals to be wrongful even when the owner of the animals was forewarned.[39] The victim of the trespass has adequate remedies (including the right to impound the animals) that do not entail the destruction of valuable property. If he had time to warn the animals' owner he also had time to obtain temporary injunctive relief and the cost of so proceeding would in the usual case be smaller than the value of the animals killed.

The courts have likewise refused to recognize a privilege to use deadly force to avert the loss of property having little value, as by killing a thief with a spring gun in order to protect goods worth no more than $6 or shooting a drunken man because he refused to return a bottle of whiskey belonging to his assailant.[40] At the same time, it has been implied that the amount of force permissible is, up to a point, proportional to the value of the property at stake.[41]

In a number of cases where a claim of privilege has been rejected, the defendant exhibited carelessness in his use of deadly force, as by failing to

[37] See Collins v. Lefort, 210 So. 2d 895 (La. App. 1968).

[38] See, e.g., M'Ilvoy v. Cockran, 2 A.K. Marsh 271 (Ky. 1820); State v. Shilling, 212 S.W. 2d 96 (Mo. App. 1948); Godwin v. Stanley, 331 S.W. 2d 341 (Tex. Civ. App. 1959). As noted earlier wrongful dispossession by a landlord is no longer treated differently.

[39] Johnson v. Patterson, 14 Conn. 1 (1840); Bruister v. Haney, 233 Miss. 527, 102 So. 2d 806 (1958).

[40] State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924); Grigsby v. Commonwealth, 151 Ky. 496, 152 S.W. 580 (1913); cf. State v. Plumlee, 177 La. 687, 149 So. 425 (1933); State v. Barr, 11 Wash. 481, 39 Pac. 1080 (1895).

[41] See Higgenbotham v. State, 237 Miss. 841, 116 So. 2d 407 (1959); Grant v. Hass, 75 S.W. 342, 346 (Tex. Civ. App. 1903).

give adequate warning or by using an excessively lethal weapon.[42] In one case the defendant saw a 15-year old boy stealing watermelons from his watermelon patch, shot to frighten him—and hit him.[43] One defendant set a spring gun and neglected to notify an employee, who was killed by it.[44] In one case the court pointed out that the defendant, before setting a spring gun, should have erected a higher fence around his property to prevent cattle (and their keepers) from straying on to the property.[45] Another defendant who had set a spring gun placed a vague warning on two pieces of paper—"Dangerous, don't go in this patch. Go back out"—and the plaintiff, a 14-year-old boy who testified that he had not seen the notices and thought his family owned the watermelon patch, was seriously wounded when he triggered the gun.[46] In another case a policeman was killed when he tried the door of the defendant's store on his nightly rounds to see whether it was locked and the door swung open, triggering a spring gun. The defendant, who knew that the police tried the door on their rounds, had not told them about the spring gun and had neglected to fasten the door securely.[47]

The language of the opinions is not always consistent with an economically sensible rule of liability. In particular, the courts are prone to say that the infliction of injury by a spring gun is privileged when the defendant would have been privileged to inflict the same injury in person, and not otherwise.[48] The reader will recall that this is how the privilege to use deadly mechanical devices was stated in section 85 of the *Restatement of Torts*. Such a formulation is inconsistent with our rule of liability in two respects. In part 2 of our rule, we explained why the privilege to use deadly force by means of an armed watchman should in some circumstances be greater than the privilege to kill or wound using a spring gun. And it was implicit in part 5b that it should be narrower in other circumstances. We said that a careless victim should be denied recovery if the use of a spring gun was otherwise privileged, but of course an armed watchman would not be privileged to shoot an intruder merely because the intruder was careless; the watchman must actually

[42] Wildner v. Gardner, 39 Ga. App. 608, 147 S.E. 911 (1929); State v. Barr, *supra* note 40; Hooker v. Miller, 37 Iowa 613 (1873); cf. Starkey v. Dameron, 92 Colo. 420, 21 P. 2d 1112 (1933).

[43] Brown v. Martinez, 68 N.M. 271, 361 P. 2d 152 (1961).

[44] Weis v. Allen, 147 Ore. 670, 35 P. 2d 478 (1934); cf. Phelps v. Hamlett, 207 S.W. 425 (Tex. Civ. App. 1918); Hill v. Tualatin Academy, 61 Ore. 190, 121 Pac. 901 (1912).

[45] Bethea v. Taylor, 3 Stew. 482 (Ala. 1831). But the plaintiff was held barred from recovering damages by his contributory negligence. See text at note 50, *infra*.

[46] State v. Childers, 133 Ohio St. 508, 14 N.E. 2d 767 (1938).

[47] Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923).

[48] E.g., State v. Childers, 133 Ohio St. 508, 515, 14 N.E. 2d 767, 770 (1938). Another source of confusion in this formulation is that if the defendant were [illegible] able to claim self-defense, unlike the

and reasonably believe that the intruder was an adult about to steal or destroy valuable property and that he could not be stopped in any gentler way.

To repeat an earlier point, the task of legal scholarship is to get behind the prose of the opinions and when we do this we find much less support for the "indirectly" principle than the *Restatement* would lead us to believe exists. The courts have appeared to recognize a broader privilege for the armed watchman in circumstances where our rule of liability would dictate a broader privilege.[49] The relevance of the victim's conduct is less clear in the cases. An early case barred recovery on the ground that, although the defendant was negligent in having set the spring gun, the victim was careless too.[50] In two more recent cases the victim's apparent carelessness was not given any weight. In one the plaintiff climbed a fence and broke two locks to get into the house where the spring gun was set (his motives in doing so were found to have been innocent); in the other the plaintiff (again with innocent motives) climbed over a fence at night into a watermelon patch where the defendant had set a spring gun.[51] But perhaps both cases should be explained as resting on the absence of any notice that a spring gun had been set.

A fairly recent case appears to illustrate part 6 of our rule (although again the absence of notice may have been a factor in the court's decision). The defendant fastened two locks on an unoccupied building in which he had set a spring gun. Someone broke the locks and when the plaintiff, whose motives were completely innocent, came along the door was unlocked. The court held the defendant liable.[52]

In the cases thus far discussed a claim of privilege was rejected but it has been accepted in other cases. An early case refused to declare premises protected by a spring gun a public nuisance.[53] The court emphasized the difficulty of protecting valuable property against theft and the absence of evidence that the owner had deployed the device in a manner likely to injure innocent passersby. And in several cases involving warehouses, courts have held that the owner was privileged to kill or wound a burglar by means of a spring gun,[54] or in person.[55]

The courts in these cases have seemed to attach great significance to

[49] Cf. Savoie v. Lirette, 230 So. 2d 392 (La. App. 1969); State v. Beckham, *supra* note 40; Grant v. Hass, *supra* note 41.

[50] Bethea v. Taylor, *supra* note 45.

[51] State v. Green, 118 S.C. 279, 110 S.E. 145 (1921); Grant v. Hass, *supra* note 41.

[52] Marquis v. Benfer, 298 S.W. 2d 601 (Tex. Civ. App. 1956).

[53] State v. Moore, 31 Conn. 479 (1863). But see Simpson v. State, 59 Ala. 1 (1877).

[54] Gray v. Combs, 30 Ky. 478 (1832); United States v. Gilliam, 25 Fed. Cas. 15205a (D.C. Crim. Ct. 1882); Scheurman v. Scharfenberg, 163 Ala. 337, 50 So. 335 (1909).

[55] People v. Silver, 16 Cal. 2d 714, 108 P. 2d 4 (1940).

whether the theft involved a felony, such as burglary, or a misdemeanor, which is presumably why the American Law Institute was led to recognize a separate privilege to use deadly force to prevent certain felonies, and otherwise to deny that there is a privilege to use such force in defense of purely property interests. Such an approach is thoroughly unsound. The legislative classification of offenses is not irrelevant to the practical interests with which a privilege to use force in defense of property should be concerned; it is some indication of the gravity of the intruder's conduct and hence of the measures appropriate to deter that conduct. But it should not be controlling. A legislature might classify breaking into a building with intent to steal as burglary, regardless of the value of the property involved in the theft, simply in order to shorten the criminal trial by eliminating value of the property stolen as an issue. It would not follow that the legislature wanted to permit the use of deadly force to protect property having a negligible value.

The notion of a separate privilege to kill or maim to prevent certain felonies is an expression of a peculiarly mechanical jurisprudence. The inquiry is turned from whether the use of deadly force against an intruder is appropriate to protect concrete property interests in concrete circumstances—a functional inquiry—to whether the intruder's conduct has been classified a certain way for other purposes—a purely conceptual or legalistic one.

As it happens, the latter approach seems more firmly rooted in the *Restatement* than in the cases, where one can find a good deal of support for the view that legislative classification of the intrusion as a burglary is relevant but not controlling.[56] Such a reading of the cases derives additional support from the frequency with which courts state that the propriety of employing spring guns or other methods involving deadly force in defense of property presents an issue of fact rather than of law, that the controlling standard is one of reasonableness.[57] Such an approach precludes mechanical reliance on a particular circumstance, such as whether the intrusion constituted a felony, as dispositive. More broadly it implies rejection of either blanket permission or blanket prohibition of the use of deadly force to defend property—the alternatives that we said earlier could not be squared with a practical economic approach to the problem. Here, as with the nuisance

[56] Allison v. Fiscus, 156 Ohio St. 120, 100 N.E. 2d 237 (1951); State v. Beckham, *supra* note 40; cf. Gray v. Combs, *supra* note 54.

[57] Marquis v. Benfer, *supra* note 52; Allison v. Fiscus, *supra* note 54; State v. Beckham, *supra* note 40; Pierce v. Commonwealth, 135 Va. 635, 652, 115 S.E. 686, 691 (1923); State v. Barr, *supra* note 40; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939 (1907); Aldrich v. Wright, 53 N.H. 398 (1873). The test of reasonableness is applied routinely in cases involving nondeadly devices (such as barbed wire) used to protect property. See Francis H. Bohlen & John J. Burns, *supra* note 7, at 528-36, and cases cited. It was also the tack taken by the dissenting judge in the *Katko* case, *supra*, note 4.

cases examined by Professor Coase,[58] the adoption of a standard of reasonableness has apparently implied a judicial commitment to rules of liability designed to work an efficient adjustment between interfering activities.

If we reject the notion of a privilege to kill or maim to prevent burglary or other felonies as such, where does that leave the privilege to kill or maim to effect an arrest? It will be recalled that the original *Restatement of Torts* tied these privileges closely together and that the second *Restatement* sundered the tie without explanation. The attempt to link the privileges was, I believe, specious; the relevant considerations are different. In the prevention case, the controlling consideration is (or ought to be) whether the use of deadly force is proper to protect the interests threatened by the criminal. In the arrest case, this concern is superseded by another: the danger to personal safety posed by a criminal in flight. When an officer sees a man fleeing from the scene of a crime, he will often not know the gravity of the crime, whether the man is armed, how desperate he is, whether he is likely to attack anyone who impedes his flight. These uncertainties argue for a broader privilege to effect arrest by deadly force than to defend property by such force. It is one thing for someone to set a spring gun to protect $6 worth of soft drinks, and another for an officer to gun down a petty thief who refuses to stop when ordered in circumstances where the officer has reason to believe (and does believe) that the man is armed and is dangerous, though perhaps not to the officer. This is not to say that the killing or wounding of any fleeing felon should be privileged. Although that is the traditional rule of the English common law, the ground on which it was originally supported—that all felonies were capital offenses[59]—is obsolete. A number of jurisdictions have limited the common law rule, as does the American Law Institute's own Model Penal Code.[60]

IV

By now it should be apparent that the *Restatement of Torts* has another shortcoming besides those discussed earlier: it eliminates the nuances of the relevant case law and thereby misstates it. This flaw seems attributable primarily to the form of the *Restatement*; the Reporter's earlier article on deadly force[61] contained a more discriminating account of the cases. Evidently the common law does not lend itself to being restated in code form, and on reflection this is not surprising. Much of the common law has been pre-

[58] See R. H. Coase, *supra* note 30, at 22.

[59] See 4 William Blackstone, Commentaries *181, *182.

[60] See, e.g., Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); ALI Model Penal Code (Proposed Official Draft 1962), §§ 3.07(2)(b)(ii), (4), (5).

[61] See *supra* note 7.

empted by statute, and those areas not preempted may be precisely ones where the flexible and particularistic approach of common law is more suitable than the simpler categorical approach of legislation.

To be sure, there has been a certain amount of statutory activity in our area. About half of the states have statutes that bear on the use of deadly force to defend property; their provisions are summarized in Table 1 at the end of this article. The statutes fall into two categories: statutes that make the setting of a spring gun—regardless of circumstances (although there is sometimes an exception for nondeadly gopher guns)—a misdemeanor; and statutes that specify whether it is a defense to a criminal prosecution for homicide that the defendant was attempting to protect property or prevent a felony against property. Some statutes of the second type broaden the common law privilege, as we have described it; some narrow it; and some have been interpreted as incorporating rather than overriding the common law limitations on the use of deadly force.[62] The extent to which these statutes would permit a tort suit by a criminal intruder presents an interesting, and so far as I know unresolved, question; but in any event, to the extent the criminal penalties are enforced, the utility of any tort privilege may be slight.

What is interesting in a comparison of the legislative and the judicial responses to the problem of deadly force is the tendency of the former toward grosser, and of the latter toward finer, classifications of the regulated conduct. The economic calculus seems much less clearly at work in the legislative product; and one recalls the refusal of Parliament in the first spring-gun statute to carve out an exception for truck farmers, who had a rather forceful argument for being permitted to set spring guns.[63] A comparison of the political and other incentives operating on legislators with those operating on judges would show, I believe, that legislators are less likely to be guided by concern with maximizing economic efficiency in the sense in which I have used that term than judges, and that the difference in the legislative and the judicial approaches to the problem of deadly force is, therefore, an instance of a more general phenomenon. But such an analysis is beyond the scope of this paper.

V

The reader will not have failed to notice that my approach and particular conclusions assume that the dominant purpose of rules of liability is to channel people's conduct, and in such a way that the value of interfering activities is maximized. Even those who find the analysis plausible may

[62] E.g., Iowa Code Ann. § 691.2; State v. Metcalfe, 203 Ia. 155, 212 N.W. 382 (1927).

[63] See *supra* note 5.

wish to quarrel with the premise. They may argue that judges do not think in economic terms. No doubt very few judges would articulate their grounds of decision in the precise terms used in this paper. But they could easily hit on the approach intuitively. The adversary process forces them to consider the impact of a ruling on both parties, and therefore on both interfering activities. The fact that the incomes of parties and other such factors bearing on their relative deservedness are excluded from the consideration of judge and jury (except as bearing on a claim for punitive damages) also helps to keep the focus on the *activities* affected by the rule of liability. Such factors are not excluded from legislative judgments, which is one reason for expecting the legislative product to be different. What is truly unlikely is that the process of judicial reasoning is exhausted in the conceptual categories exhibited in judicial opinions.

One might also question the assumption that the rules of liability prescribed by the tort law actually affect conduct. As Professor Coase has shown, where transactions between interfering parties can be effected without cost, the market will bring about an optimum adjustment between the interfering activities regardless of the rule of liability initially prescribed by the law.[64] Although the cost of transacting is never zero, Coase's point has force whenever it is low. But in the cases that we have been considering the cost of transacting is normally prohibitive. It is not feasible for the landowner to contract with the potential trespasser or the potential trespasser with the landowner. There are exceptions—the reader will recall the case where an employee was killed by his employer's spring gun—but they seem rare. As I have mentioned elsewhere,[65] Coase's insight, were it taken seriously, might lead to a redefinition of the boundaries of tort law that excluded all sorts of accidents and injuries incidental to a contractual relationship. Most of the deadly-force cases, however, would remain inside the tort boundary.

Our basic premise will also be challenged by anyone who believes that the dominant purpose of the law of torts is to compensate people for wrongs suffered rather than to shape people's conduct; the latter is the proper sphere, it is sometimes argued, for criminal and other regulatory laws. In support of this argument one might cite the criminal penalties for excessive use of deadly force. Many of the cases discussed in the preceding part were in fact criminal cases. (Their inclusion in a discussion of tort law is justified by the fact that the criminal and tort standards governing the propriety of using deadly force to protect property are basically identical.[66])

Although the issue is too large for adequate discussion here, I will venture

[64] R. H. Coase, *supra* note 30.

[65] Richard A. Posner, The Federal Trade Commission, 37 U. Chi. L. Rev. 47, 64, n.76 (1969).

[66] E.g., Redmon v. Caple, 159 S.W. 2d 210 (Tex. Civ. App. 1942).

the suggestion that a compensation theory of the law of torts has little content. The need for compensation is typically independent of the nature of the accident giving rise to the need. A man killed by lightning suffers the same loss as if he had been killed by a careless driver. The law of torts decrees compensation only where there is "wrongful" conduct, and the criteria of wrongfulness are not self-evident. One plausible meaning that can be assigned the term is conduct that society wishes to deter in order to increase the joint value of two (or more) interfering activities, consistently with protecting certain sunk costs in order to encourage adequate investment (our "fairness" point).

Because tort law is concerned, as I would argue, with shaping conduct, it does not follow that we need no other machinery of deterrence. There are good reasons for supplementing tort with criminal sanctions in certain areas. Tort law will not deter a judgment-proof individual while the threat of imprisonment may, and it is not a fully effective deterrent where, for one reason or another, many victims will not sue at all (burglars and other thieves may be reluctant to institute tort suits) and others, who do sue, may be barred from recovering damages by their own carelessness. Furthermore, where tortious conduct involves killing or maiming, a tort judgment, for reasons touched on earlier, may well undervalue the true social cost of the conduct and hence fail to deter it sufficiently for the future, in which case an additional, penal sanction may be appropriate. It does not follow that we should place exclusive reliance on criminal sanctions. Considering how overburdened the institutions of criminal law enforcement seem at present, we should be seeking ways of increasing rather than of diminishing the scope and effectiveness of tort law in deterring socially harmful behavior.

All things considered, the approach to tort questions sketched here seems decidedly superior to the "method of maxims"—the pseudo-logical deduction of rules from essentially empty formulas such as "no man should be permitted to do indirectly what he would be forbidden to do directly" or "the interest in property can never outweigh the value of a human life"—that plays so large a role in certain kinds of legal scholarship. And the present study provides a good point of departure for investigation of other areas of tort law. Distant as our subject may seem from the dominant concerns of modern tort law, on closer examination it is seen to be curiously central. We mentioned in passing one group of cases where the reasoning underlying the privilege to defend property by deadly force was invoked, and properly so, to solve a different problem: the destruction of trespassing domestic animals. Another doctrine with a strong affinity to the deadly-force cases is that of "private necessity." In *Ploof v. Putnam*,[67] the plaintiff and his family were sailing their boat on

[67] 51 Vt. 471, 71 A. 188 (1908).

a lake when a storm came up. They moored at a dock owned by the defendant. The defendant's employee unmoored their boat, it ran aground, and several of the occupants were injured—a sequence the employee should have anticipated. The court held that the plaintiff's trespass had been justified by necessity and that the defendant's employee had acted wrongfully in casting him off. It could as well have viewed the case as one where deadly force—which is what the employee used, in effect, in repelling the trespass—was manifestly unjustified in defense of a property right. Had the plaintiff's act in mooring his boat to the dock damaged the dock, the defendant could have obtained damages from the plaintiff.[68] The plaintiff was not a criminal against whom legal remedies would probably have been unavailing, so there was no occasion to endanger human safety.

Just as the *Ploof* case might have been decided by reference to the limitations on the privilege to use deadly force in defense of property, so *Bell v. Holbrook* might conceivably have been decided under the doctrine of necessity. A valuable fowl had strayed into the defendant's garden and the defendant had no privilege (in the circumstances) to use deadly force to prevent the plaintiff from recovering it. In *Ploof*, to be sure, the trespass was necessary to avert danger to human safety, but the doctrine of necessity has also been invoked to excuse trespasses committed solely in order to avert property losses,[69] often in the context of deviations from highways—where the doctrine (naturally) is called by a different name.[70]

As noted, the privilege to commit a trespass to avert serious injury to life or property does not relieve the trespasser from the obligation to pay for the harm that his trespass inflicts. This principle comports with the economic objectives that I have argued best explain the course of decisions in these areas. It not only protects sunk costs but forces the individual contemplating a trespass to weigh the injury he will cause by committing the trespass against the injury that would result from refraining and to choose the course that maximizes the joint value of the interfering activities; we do not want people trampling on tulips to save peahens if the damage to the tulips would exceed the value of the peahen. In addition, as Clarence Morris has suggested,[71] the right to recover damages may incline the landowner to cooperate with the trespasser in situations where cooperation is likely to minimize the social costs of the intrusion. When a boat unexpectedly moors at a stranger's dock

[68] Cf. Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).

[69] E.g., Whalley v. Lancashire & Yorkshire R. Co., 13 Q.B.D. 131 (C.A. 1884); Currie v. Silvernale, 142 Minn. 254, 171 N.W. 782 (1919) (dictum).

[70] See 1 Fowler V. Harper & Fleming James, Jr., *supra* note 8, at 43-45.

[71] Morris on Torts 44-46 (1953).

in a storm, the owner of the dock will have a greater incentive to assist with fresh rope[72] if he knows that any injury to the dock is fully compensable.

An old case where compensation was not allowed, *Mouse's Case*,[73] is the exception that proves the rule. The parties were passengers on a ferry that began to sink in a storm. The defendant cast a valuable chest belonging to the plaintiff overboard in order to lighten the craft. The plaintiff sued the defendant for the value of the chest and lost. The court found that, but for the defendant's action, the boat would have sunk. Therefore the defendant wasn't really responsible for the loss of the chest—it would have been lost anyway. Moreover, the defendant should be entitled to offset the value of the plaintiff's life, which his action was instrumental in saving, against the value of the plaintiff's goods. These are good grounds but the ground I would stress is that the denial of compensation served the same purpose as the grant of compensation does in the usual necessity case: to encourage the value-maximizing course of conduct. We do not want each of the passengers of a sinking ship to hesitate in casting off excess baggage in the hope that another one will act first and save him from tort liability.

As these examples and I hope the whole paper suggest, there are far more conceptual pigeonholes in the law of torts—the privilege to use deadly force to protect property, the privilege to use such force to prevent certain crimes, the privilege in cases of arrest, rules about animals,[74] the doctrine of necessity, rules governing deviations from highways onto private land, liability for engaging in ultrahazardous activities[75]—than there are useful distinctions. By utilizing the approach to tort questions sketched here, legal scholarship has an opportunity to effect a drastic and necessary simplification of doctrine and to place the analysis of tort law on a more functional basis.

[72] Cf. Vincent v. Lake Erie Transp. Co., *supra* note 68.

[73] 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1609).

[74] See, e.g., *supra* note 14.

[75] See Restatement of Torts, § 519 (American Law Institute 1934).

TABLE 1
STATUTES RELATING TO USE OF DEADLY FORCE IN DEFENSE OF PROPERTY

State	Spring Guns Specifically: Statute	Spring Guns Specifically: Offense and Punishment	Privilege To Use Deadly Force to Defend Property: Statute	Privilege To Use Deadly Force to Defend Property: What Permitted
Alabama				
Alaska				
Arizona			Ariz. Rev. Stat. Ann., Art. 22, § 13-462 (1956)	To protect habitation or property, in preventing a felony, but bare fear insufficient.
Arkansas			Ark. Rev. Stat., Ch. 22, § 41-2215; 41-2231-2235 (1947)	To protect habitation or property, in preventing a felony such as robbery or burglary, but bare fear insufficient.
California			Cal. Penal Code, §§ 197, 198 (Deering 1872, amended 1963)	To protect habitation or property in preventing a felony, but bare fear insufficient.
Colorado			Colo. Rev. Stat., Ch. 40, Art. 2, §§ 40-2-13, 40-2-14 (1963)	To protect habitation or property, in preventing a felony such as robbery or burglary, but bare fear insufficient.
Connecticut				
Delaware				
District of Columbia				
Florida			Fla. Stat. Ann., Tit. 64, Ch. 782, § 782.02 (1927, revised in 1967)	When in a dwelling house, in resisting a felony.
Georgia			Ga. Code Ann., Tit. 26, § 26-1013 (1933)	To protect habitation or property, from serious injury, but only after gentle measures are used.

TABLE 1 (*Continued*)

State	Spring Guns Specifically: Statute	Spring Guns Specifically: Offense and Punishment	Privilege To Use Deadly Force to Defend Property: Statute	Privilege To Use Deadly Force to Defend Property: What Permitted
Hawaii				
Idaho			Idaho Code, §§ 18-4009-4010 (1947)	To protect habitation or property, in preventing a felony, but bare fear insufficient.
Illinois	Ill. Stat. Ann., Ch. 38, Art. 24, § 24-1 (Smith-Hurd, 1961)	for setting—a misdemeanor	Ill. Stat. Ann., Ch. 38, §§ 2-8, 7-2, 7-3 (Smith Hurd, 1961)	To protect dwelling or property, but only if reasonably necessary to prevent a forcible felony.
Indiana				
Iowa			Iowa Code Ann., Tit. 35, § 691.2 (1946)	To protect property in lawful possession, but only resistance sufficient to prevent offense may be used.
Kansas	Kansas Stat. Ann., Art. 42, Ch. 180, § 21-4201 (1969)	for setting—a misdemeanor	Kansas Stat. Ann., Art. 4, Ch. 21, § 21-404 (1963)	Repealed, L. 1969.
Kentucky				
Louisiana			La. Rev. Stat., Tit. 14, Ch. 1, §§ 18-20 (1950)	To protect property, but force must be reasonable and apparently necessary, and no defense if homicide results. Also, in preventing a forcible felony; if actor reasonably believes it necessary to preserve own life, deadly force is justified even though homicide results.
Maine				
Maryland				
Massachusetts				

TABLE 1 (*Continued*)

State	Spring Guns Specifically		Privilege To Use Deadly Force to Defend Property	
	Statute	Offense and Punishment	Statute	What Permitted
Michigan	Mich. Stat. Ann., Tit. 28, Ch. 37, § 28.433 (1962)	for setting—a misdemeanor; for killing—manslaughter		
Minnesota	Minn. Stat. Ann., §§ 609.665, 609.205 (1963)	for setting—a misdemeanor; for killing—2nd degree manslaughter		
Mississippi			Miss. Code Ann., Tit. 11, Ch. 1, § 2218 (1942)	When in a dwelling house, in resisting a felony.
Missouri			Mo. Stat. Ann., Tit. 38, § 559.040 (1949)	When in a dwelling house, in resisting a felony.
Montana			Mont. Rev. Code, Tit. 94, Ch. 25, § 94-2513, 92-2514 (1947)	To protect habitation or property, but bare fear insufficient.
Nebraska			Neb. Sess. Laws, 1969 ch. 233	No person shall be placed in legal jeopardy of any kind for protecting, by any means necessary, himself, his family, or his real or personal property.
Nevada	Nev. Rev. Stat., Ch. 22, § 202.250 (1967)	No injury—misdemeanor; injury—1-6 yrs. or fine; death—murder penalty		
New Hampshire				

TABLE 1 (*Continued*)

State	Spring Guns Specifically		Privilege To Use Deadly Force to Defend Property	
	Statute	Offense and Punishment	Statute	What Permitted
New Jersey			N.J. Stat. Ann., § 2A:113-6 (1937)	To prevent arson or burglary.
New Mexico			N. Mex. Stats., § 40A-2-8 (1953)	To protect property, if necessary.
New York			N.Y. Penal Law, Pt. I, Tit. C, §§ 35.10, 35.20, 35.25 (McKinney's, 1968, amending law of 1965)	To protect property against arson or burglary, but in preventing other criminal trespass only nondeadly force may be used.
North Carolina				
North Dakota	N.D. Code, Ann., Tit. 12, Pt. 5, Ch. 12-27, §§ 12-27-26, 12-27.26.1 (1960)	for setting—misdemeanor, for killing—1st degree manslaughter		
Ohio				
Oklahoma			Okla. Stat. Ann., Tit. 21, Ch. 24, § 733 (1951)	When in a dwelling house, in resisting a felony.
Oregon	Ore. Rev. Stat., Tit. 16, § 166.30 (1953)	for setting—misdemeanor	Ore. Rev. Stat., Tit. 16, § 163.100 (1953)	When in a dwelling house, in resisting a felony or to prevent felony to property.
Pennsylvania				
Rhode Island				
South Carolina	S.C. Code of Laws, Tit. 16, Ch. 4, Art. 5, § 16-143 (1962)	for setting—misdemeanor		
South Dakota				
Tennessee			Tenn. Code Ann., Tit. 38 § 38-102 (1932)	To protect property in actor's lawful possession.

TABLE 1 (Continued)

State	Spring Guns Specifically		Privilege To Use Deadly Force to Defend Property	
	Statute	Offense and Punishment	Statute	What Permitted
Texas			Tex. Penal Code, Tit. 15, Ch. 12, Art. 1221-1228 (1961)	In preventing burglary and theft at night, and to protect property, but not unless actor fears bodily injury.
Utah			Utah Penal Code, §§ 76-30-8, 76-30-10, 76-30-11, 76-30-12 (1953)	To protect habitation or property, in resisting a felony, but bare fear insufficient.
Vermont				
Virginia				
Washington	Wash. Rev. Code Ann., Tit. 9, §§ 9.41.180, 9.41.185 (1961)	No injury—misdemeanor injury—up to 20 years; death—up to 20 years	Wash. Rev. Code Ann., Tit. 9, § 9.48.170 (1961)	When in a dwelling house, in resisting a felony.
West Virginia				
Wisconsin	Wisc. Stat. Ann., Tit. 45, § 941.20 (1958)	for setting—misdemeanor	Wisc. Stat. Ann., Tit. 45, §§ 939.49, 940.05 (1958)	May not use deadly force in defending property. When the use of deadly force to prevent a felony results in death, it is manslaughter.
Wyoming				
A.L.I. Model Penal Code	§ 5.06 (5)	Use of device for protecting property justifiable if: (a) device not known to cause injury, *and* (b) its use is reasonable *and* (c) its use is customary and notice is given to probable intruders	§ 3.06(3)(d)	Against dispossession from dwelling where no claim of right; and to prevent forcible felony when felon is using or threatening deadly force in actor's presence, or when use of nondeadly force by actor would place him in danger.