

# A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas About the Transformation of Law

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# A NEW HISTORY OF WASTE LAW: HOW A MISUNDERSTOOD DOCTRINE SHAPED IDEAS ABOUT THE TRANSFORMATION OF LAW

JILL M. FRALEY\*

*In the traditional account, American courts transformed the law of waste, radically diverging from British courts around the time of the American Revolution. Some of the most influential theorists of American legal history have used this account as evidence that American law is driven by economics. Due to its adoption by influential scholars, this traditional account of waste law has shaped not only our understanding of property law, but also how we view the process of transforming law.*

*That traditional account, however, came not from a history of the doctrine, but from an elaboration of the benefits of the modern rule in comparison with the drawbacks of the earlier, common law rule. A full history, reaching back to the common law doctrine has not been written until now. This Article provides a legal history of the doctrine of waste, exploring the original common law doctrine prior to the nineteenth century transformation, and demonstrating the multiple flaws of the traditional account.*

*This Article demonstrates that there is little support for the traditional story of a radical and American break motivated by land development. A full account demonstrates that the change was not radical, but rather consistent with centuries of British law. The shift also was not particularly American, but rather roughly contemporaneous with and parallel to a British shift. Most importantly, courts in both countries shifted doctrines to address a change in*

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*the technology of surveying and title recordation, rather than in response to economic forces.*

*This new history of waste law also offers a critique of theories of the transformation of law, along with current methods in legal history that privilege social factors and economic circumstances and largely abandon the traditional legal history methods of tracing the evolution of doctrine. Abandoning doctrine and privileging social factors has detracted from accurately understanding both legal transformation and the role of law – and particularly property law – in American society, suggesting that law is much more flexible and responsive to social change than it necessarily is in everyday politics.*

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## I. INTRODUCTION

Waste law punishes a tenant for changes to the estate that detrimentally impact the inheritance.<sup>1</sup> For decades, waste law has presented a peculiar puzzle to scholars. The common law rule strictly punished changes to property; indeed the common law went so far as to punish with *treble damages* tenants who *increased* the value of the property.<sup>2</sup> Even more oddly, the courts forbade waiving waste liability within a contract.<sup>3</sup> As a result, courts would punish, again with treble damages, tenants who made valuable improvements—despite leases that had permitted the tenant to make precisely those improvements.<sup>4</sup> Eventually, courts replaced the strict common law rule with a modern, more lenient and value-driven rule.<sup>5</sup> The puzzle of the original rule, however, remained.

Morton Horwitz first addressed the puzzle of waste law, explaining socio-economic circumstances that he argued account for the modernization of the rule and, simultaneously, rationalized the old, strict rule.<sup>6</sup> In Horwitz's account American courts broke from the English rule and embraced a uniquely American perspective that supported economic development and natural resource exploitation; a lack of similar pressures for land development in England then explained the old, strict rule.<sup>7</sup> Other persuasive legal thinkers, including John

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1. RICHARD R. POWELL, 8 POWELL ON REAL PROPERTY § 56.01 (Michael Allan Wolf ed., 2000).

2. RALEIGH COLSTON MINOR & JOHN WURTS, THE LAW OF REAL PROPERTY §§ 381, 392 (1910).

3. See *infra* Section II.A.

4. See *infra* Section III.B.4.

5. POWELL, *supra* note 1, § 56.02.

6. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 30 (1977).

7. *Id.*

Sprankling<sup>8</sup> and Jed Purdy,<sup>9</sup> adopted this view.

One might argue that socio-economic pressures are a weak explanation for the puzzle of the strict common law rule. There is, however, a more critical problem: the history, when examined in detail, does not support the traditional account of transformation.

Only a long-range historical perspective provides the necessary context to understand later doctrinal shifts—and to fully explain the puzzle of the strict common law rule. This Article provides the first full history of waste law, examining the common law well before the transformation, along with the history of waste within the British courts. Such a perspective indicates a key problem with traditional accounts of waste law. Incorrectly, the traditional transformation story presumes that historically waste performed only one legal function: maintaining property values.<sup>10</sup>

This Article demonstrates that waste law performed not one but two distinct functions: property value maintenance and boundary maintenance. By developing a history of English waste law and its transformation—chapters that have been missing from the literature—this Article demonstrates that in the common law waste performed both of these distinct functions.<sup>11</sup> Recognizing these two functions explains why the common law rule strictly forbade ameliorative waste, often punishing it with treble damages. In ameliorative waste, the changes to the property increase rather than decrease value.<sup>12</sup> Punishing such changes seems illogical if one looks to waste law solely for maintaining property values. Yet, as this Article will demonstrate, the boundary-maintenance function explains this outcome. Common law courts punished ameliorative waste because such changes jeopardized the evidence of boundaries, which were designated on the land itself by land uses rather than on paper via maps or metes and bounds as we

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8. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 533 (1996).

9. See Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653 (2006).

10. See *infra* Parts II, III.

11. Previous narratives tended to ignore the boundary-making function entirely. Merrill only gives the old rule of preventing injury to the title a footnote. See Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1058 n.19 (2011). Purdy briefly mentions the rule against injury to title, but does not discuss it further. Purdy, *supra* note 9, at 663–64.

12. MINOR & WURTS, *supra* note 2, §§ 381, 395.

expect in modern society.<sup>13</sup>

This Article demonstrates that the modern value-focused rule, which does not punish ameliorative waste, results from modern methods of surveying and recording titles, which displaced the need for the physical description of the landscape to act as a boundary. Waste law changed as a result of the professionalization and modernization of surveying, along with innovations in title recording, which made the boundary maintenance function obsolete. As a result, courts eliminated the boundary function and reemphasized the remaining value function, maintaining a deep fidelity to the English legal tradition. This American doctrinal shift mirrored a contemporaneous English one. Rather than America's doctrine changing to take advantage of land opening to development, both English and American doctrines shifted in response to the professionalization and modernization of surveying. As this Article will establish, law was responsive not to the socio-economic pressures of land development but to the routine advances of technology, particularly in a situation where a doctrine could be adjusted by removing one now-obsolete prong of a test and reinforcing the existing ones.

Establishing this more accurate understanding of waste law matters beyond the bounds of property law. Like Horwitz, other persuasive legal thinkers, including John Sprankling<sup>14</sup> and Jed Purdy,<sup>15</sup> have employed the traditional story of the transformation of waste law to support larger assertions about the transformation of American law to support economic development and, in particular, industrialization. Waste law has regularly figured into American legal theory for the last fifty years.<sup>16</sup>

Ultimately, this Article critiques both a particular theory of the nature of American law and its amenability to transformation and the methodology of modern legal history — a methodology largely adopted

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13. *Id.* § 381.

14. Sprankling, *supra* note 8, at 533.

15. *See* Purdy, *supra* note 9.

16. For their part, property scholars often use waste law to engage theoretical quandaries. *See* Merrill, *supra* note 11, at 1055 (explaining that waste law “has held a peculiar fascination for property theorists”). John Lovett also has argued for the importance of waste. John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1227 (2007). Posner seems to have considered disagreeing, but acknowledged that Lovett “argues forcefully for the continued practical importance of the doctrine of waste.” Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095, 1099 n.9 (2011).

due to Horwitz's vast influence on the field.<sup>17</sup> This Article argues that legal historians have largely abandoned their native methodology of tracing the evolution of doctrine in favor of law and society approaches that seek social and economic explanations for legal change. When historians focus on social factors and economic circumstances that may influence law without giving much attention to law's power to resist social change and maintain fidelity to past precedents, they not only create less accurate historical accounts, but also skew perceptions of the role of law in society. Privileging the social context above tracing the evolution of legal doctrines ultimately distorts the role of law – and particularly property law – in American society, suggesting that it was much more flexible and responsive to socio-economic change than it necessarily was.

The focus on law as a construct effective for achieving social, economic, and spatial goals can distort the nature of law as an independent and stable structure of society – one that much more often than not affirms existing rights and investments, particularly where property is concerned. Too much emphasis on social contexts, and particularly on anachronistic future outcomes such as environmental destruction, neglects the role of law as a conservative force in society – one that makes changes, particularly in property rights, more difficult to achieve. The argument does not aim to displace the practice of examining the impacts of social and economic forces on law, but rather to suggest that we have gone too far on the continuum, favoring social explanations for legal change and ignoring consistencies maintained through the evolution of doctrine. This Article argues for reintegrating the distinctly legal history methodology of tracing the evolution of doctrine and simultaneously demonstrates this corrected methodology.

Following this introduction (Part I), Part II sets forth the original common law rule of waste. Part II then turns to the shift to the modern rule, outlining how various scholars have described the doctrinal shift. Parts III and IV cumulatively develop a new history of waste law. Part III focuses on waste law prior to the doctrinal shift, detailing the previously undescribed boundary maintenance function. Part III elaborates the process of marking boundaries through land uses and the role of waste law in preventing changes that would muddy those

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17. See *infra* Section II.B.1.

land use boundaries. Part IV then provides a new account of the transformation, both in British law and in American law. Part IV draws on the history provided in Part III to explain how changes in technology provided new methods of maintaining boundaries much more effectively than was possible by simply using waste law to maintain existing land uses. In its final section, Part IV summarizes the merits of this new account of the transformation of waste law and details how it provides a more accurate understanding of waste law when compared with the traditional accounts. Part V addresses the timing of the shift—explaining how the new history of waste law answers the chronology question. Finally, Part VI uses the new history to develop a critique of current theory and methods in legal history, focusing on why so many similar accounts of waste law existed, but none of those accounts engaged the doctrine within its historical context prior to the doctrine shift. This Part then develops a prescription for modern legal historians to correct recent tendencies that may skew our understanding of legal transformation and the role of law in society.

## II. THE COMMON LAW RULE AND TRADITIONAL ACCOUNTS OF THE TRANSFORMATION OF WASTE LAW

### A. *The Common Law Rule of Waste*

It is appropriate to begin with the strict common law rule of waste. A cause of action for waste allows a reversioner<sup>18</sup> to recover against a tenant for changes to the estate that detrimentally impact the inheritance.<sup>19</sup> Waste arises in a variety of contexts, including life estates, reversions, leases, and dower property.<sup>20</sup> The common law has long pro-

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18. For the sake of simplicity, I will use the terms “reversioner” and “plaintiff” synonymously for the party who will next take possession of the property and who would be alleging waste. I will use the terms “tenant” or “defendant” synonymously for the party who currently has rights to occupy the property and who may be held liable for waste. Because the technical differences have no bearing on the argument made, I have simplified the terminology.

19. POWELL, *supra* note 1, § 56.01.

20. For further discussions of how both the parties liable for waste and the parties situated to bring an action for waste have changed, see MINOR & WURTS, *supra* note 2, §§ 390–93 (describing, separately, who is “punishable for waste” and who is “entitled to complain of waste”). Initially, formal procedures limited the parties able to receive relief. POWELL, *supra* note 1, § 56.02. Bewes finds that in the oldest formulation, only three parties were liable for waste, because they were liable via the operation of law, rather than “by contract or quasi contract”: “tenants in dower and by the curtesy, and guardians in chivalry.” WYNDHAM ANSTIS BEWES, *THE LAW OF WASTE* 1 (1894). But not all scholars agree on the

tected the reversioner's interests. The Statute of Marlebridge (Marlborough) (1267) provided that "[a]lso fermors,<sup>21</sup> during their terms, shall not make waste, sale nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm."<sup>22</sup>

Waste may be either permissive or voluntary.<sup>23</sup> Permissive waste arises not through malicious actions, but instead through some omission.<sup>24</sup> A tenant might notice a weak support for the porch roof, but rather than reinforcing the support, ignores the problem.<sup>25</sup> The tenant's omission ultimately results in the collapse of the roof, creating li-

precise evolution of liabilities and standing; see George W. Kirchwey, *Liability for Waste*, 8 COLUM. L. REV. 425, 425-26, 437 (1908) (discussing the shifting liabilities of parties over time).

21. Some commentators have translated the term "fermors" as a misspelling of "farmers." See Purdy, *supra* note 9, at 662. This is not historically accurate. Fermors held a specific meaning in the common law, which was not synonymous with the general term for agricultural occupations. "The term 'fermors' comprehends all who hold by lease for life or lives or for years, by deed or without deed." JOSEPH HAWORTH REDMAN, *THE LAW OF LANDLORD AND TENANT* 256 (5th ed. 1901) (citing 2 COKE'S INSTITUTES OF THE LAWS OF ENGLAND 145 (1642)).

22. POWELL, *supra* note 1, § 56.02.

23. Many modern writers divide waste into three categories, voluntary, permissive, and ameliorating. *E.g.*, Merrill, *supra* note 11, at 1057. There is a certain oddity to this alignment, because the only difference between voluntary and ameliorating waste is that the value of the property increases. This means that creating a third category destroys the neat alignment of a division otherwise based on the type of conduct by the tenant (act or omission). Additionally, at first glance it suggests that ameliorating waste would not be voluntary, and yet one struggles to imagine a scenario in which it is not. The three categories are a modern trend, and one that, for the reasons stated, may not best organize our thoughts on the subject. Here, I have preferred following the historic trend of treatise writers who divided waste only into voluntary and permissive, treating amelioration as a subspecies. See ARTHUR W. BLAKEMORE, *LAW OF REAL PROPERTY* 323 (1917) (describing two types of waste, permissive and voluntary); 1 CHARLES T. BOONE, *LAW OF REAL PROPERTY* 300 (1901) (categorizing two types of waste, permissive and voluntary); MINOR & WURTS, *supra* note 2, §§ 380-81 (categorizing waste as either voluntary or permissive, and later discussing amelioration within those structures); GEORGE V. YOOL, *AN ESSAY ON WASTE, NUISANCE, AND TRESPASS* 3 (1863) (describing ameliorating waste, then concluding that all waste is "either voluntary or permissive").

24. MINOR & WURTS, *supra* note 2, §§ 380-81, 386.

25. In its strictest formulation at the common law, this went so far as to include liability for a house burning down by "mischance," which suggests that liability occurs even if the tenant was not negligent. YOOL, *supra* note 23, at 56. Although it seems to require some act, if accidental, of the tenant, who must have so "misadventure[d]." 2 WILLIAM WAIT, *A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW* 113 (1877). This may be contrasted with acts of god or nature, such as lightning or tempests that might also burn down a house. 3 WILLIAM DOUGLAS EDWARDS, *A COMPENDIUM OF THE LAW OF PROPERTY IN LAND* 68 (3d ed. 1896).

ability for permissive waste. When voluntary waste occurs, the tenant acted to harm the property.<sup>26</sup> The tenant might simply tear down the porch, giving the reversioner a cause of action for voluntary waste.

Under the common law rule, whether the allegation was for permissive or voluntary waste, the rule required the reversioner to prove some impairment of the inheritance. To establish an impairment of the inheritance, the common law of waste required damage through at least one of three mechanisms: “(1) [b]y diminishing the value of the estate; (2) [b]y increasing the burthen upon it; (3) [b]y impairing the evidence of title.”<sup>27</sup>

The common law enforced waste strictly, holding landowners responsible for virtually all changes to the landscape.<sup>28</sup> The common law forbade a tenant from “convert[ing] ancient meadow into arable, or arable or pasture into wood.”<sup>29</sup> In general, the tenant “ha[d] no power to change the nature of the thing demised.”<sup>30</sup>

Voluntary waste contained an important subcategory, ameliorative waste, which is key to understanding the shift to modern waste law. With ameliorative waste, there is a fundamental change in the nature of the property—something forbidden under the strict rule—but that change increases the value. Suppose the property contains a home in a somewhat industrialized area of town and the tenant tears down the home to build a storefront. While the land with the home was valued at \$60,000, the land with the storefront is valued at \$120,000. In such circumstances, the tenant committed ameliorative waste. The tenant has violated the technical requirement not to change the nature of the inheritance, but the tenant has economically advantaged rather than damaged the reversioner. The common law rule was known for its strict enforcement of the ancient law, forbidding all changes to the property, even when those changes would economically benefit the reversioner.<sup>31</sup>

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26. MINOR & WURTS, *supra* note 2, §§ 380–81.

27. YOOL, *supra* note 23, at 2.

28. *Id.*; 1 BOONE, *supra* note 23, at 306. Bewes describes the courts as applying the common law standard “with merciless severity.” BEWES, *supra* note 20, at 9.

29. *Greene v. Cole* (1669) 85 Eng. Rep. 1037 (KB) 1047.

30. *Id.*; YOOL, *supra* note 23, at 1 (citing *Darcy v. Askwith* (1618) 80 Eng. Rep. 380 (KB)).

31. MINOR & WURTS, *supra* note 2, § 380. One might argue that the ameliorative applications of waste law also protected the owner’s right to be different or idiosyncratic. While occasionally cases do mention that the reversioner has a right to the thing that was initially in existence, such occasional comments do not really support an idea of individual rights

Remedies for waste included both injunctions and damages awards. Courts rarely bothered with nominal damages,<sup>32</sup> but otherwise enforced waste law stringently, using treble damage awards,<sup>33</sup> as well as injunctions to prevent changes to land that might destroy evidence of the title.<sup>34</sup> If damages had been the sole remedy, tenants might have pursued ameliorative waste and made changes to the property for the purposes of economic development, but both treble damage awards and injunctions prevented such choices.

The strict common law rule initially found root in America, but eventually American courts adopted a new approach to waste. A number of historians and property theorists have examined the adoption of the new rule and used this transformation to support broader assertions about the nature and malleability of law.

### B. *Traditional Accounts of the Transformation of Waste Law*

#### 1. Horwitz on the Shift to the New Rule

Morton J. Horwitz, expanding on James Willard Hurst's approach of incorporating social context into analyses of legal change,<sup>35</sup> produced one of the foundational accounts of legal history using a socio-economic lens. He set out to prove that "[b]y 1820 the legal landscape in America bore only the faintest resemblance to what had existed forty years earlier."<sup>36</sup> Horwitz created a narrative of the transformation of waste law in the United States, using this narrative as evidence of the developing distance between English and American law.<sup>37</sup> Ameri-

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very effectively because so many of the cases of waste involve not a property that will return to the same person, but a property that will be held by one person before being passed on to another. In other words, much of the time we are protecting John's right to receive the falling-down barn that his uncle gifted to him (after a life estate), not John's right to receive back his falling-down barn.

32. BEWES, *supra* note 20, at 130.

33. *See id.* at 9 (discussing the "merciless" application of the rule, including treble damages, in cases of ameliorative waste).

34. 1 WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 67 (1804).

35. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW (1950); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956). Scholars generally credit Hurst with leading American legal historians away from a strict examination of legal reasoning to a more robust account of legal developments, incorporating the social and economic contexts of those changes.

36. HORWITZ, *supra* note 6, at 30.

37. *Id.* at 55, 59.

can courts, he argued, had transformed English law rapidly and drastically.<sup>38</sup>

More importantly, Horwitz identified the particular forces behind that transformation as economic. “[A]n economy dependent on clearing land for economic development,” he argued, “could not enforce a rule of maintaining the existing condition of land. From the moment of independence from England, therefore, American jurists devoted their efforts to modifying or overturning the received common law doctrine.”<sup>39</sup> Horwitz concluded that “the premise that underlay the changing law of waste was that it was preferable to encourage immediate improvement by tenants.”<sup>40</sup>

Horwitz’s argument regarding waste law was not entirely novel. Other, more skeletal accounts of the transformation of waste already had followed Hurst’s example and looked to social forces for sources of legal change. For example, the 1920 edition of Tiffany’s *Real Property’s* described “[t]he general tendency of American courts” as “restrict[ing] the application of the English law of waste, in order to adapt it to the conditions of a new and growing country, and to stimulate the development of the land by the tenant in possession.”<sup>41</sup> In 1930 a *Harvard Law Review* article by an unnamed author briefly stated that the change in doctrines in England was spurred by “the rise of the industrial movement of the early nineteenth century.”<sup>42</sup> The author concluded that American courts followed suit “in an effort to encourage the rapid development of property.”<sup>43</sup>

For Horwitz, the story of waste law simply demonstrated “the transition from an eighteenth century understanding of private law as fixed doctrine to one in which private law adjudication became a creative instrument for promoting social change and economic growth.”<sup>44</sup> More specifically, he saw the changes in waste law as a part of a larger project of commodifying land and “freeing land from both social controls and inconvenient existing claims, held by smallholders, in order

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38. *Id.*

39. *Id.* at 54.

40. *Id.* at 58.

41. 1 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND* 951 (2d ed. 1920).

42. *Liability for Ameliorative Waste*, 43 HARV. L. REV. 1130, 1131 (1930).

43. *Id.*

44. Lovett, *supra* note 16, at 1227.

to make it available as a capital-generating resource for the economic development of the continent."<sup>45</sup> For Horwitz, the story of waste law formed a contributing narrative to the overall story of how Americans reshaped the common law to support burgeoning economic development, both industrialization and the project of claiming and taming the land.

## 2. Sprankling on the Shift to the New Rule

Like Horwitz, Sprankling utilized the transformation of waste law as evidence of a much larger trend in American law.<sup>46</sup> Horwitz's narrative, along with Hurst's influence more generally, shaped Sprankling's environmental approach to understanding the transformation of waste law.<sup>47</sup> Sprankling focused on the role of law in the destruction of wilderness land.<sup>48</sup> Sprankling argued that law developed a substantial bias towards development.<sup>49</sup> This bias, he argued, was not accidental, but rather the product of "judges retool[ing] English property law doctrines to meet the conditions in the new United States."<sup>50</sup> When Sprankling spoke of meeting the new conditions, he did not mean that law simply flexed to meet new scenarios, but rather that judges specifically reworked the common law to "further economic development."<sup>51</sup>

The transformation of waste law formed the very heart of his evidence; it was, by his estimation, "the most obvious example of anti-wilderness retooling."<sup>52</sup> Sprankling cast the strict, common law rule as a force for conservation. English property law, if adopted wholesale, "was a poor tool for encouraging the exploitation of virgin land."<sup>53</sup> When examining English property law, Sprankling found that the "system focused on preserving the condition of land already in productive use in a mature agrarian economy."<sup>54</sup> English waste law, in

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45. Purdy, *supra* note 9, at 661.

46. Sprankling, *supra* note 8, at 533.

47. *Id.* at 521.

48. *Id.* at 519.

49. *Id.* at 521.

50. *Id.*

51. *Id.* at 522.

52. *Id.* at 533.

53. *Id.* at 523.

54. *Id.* at 524-25.

particular, “tended to perpetuate the land-use status quo.”<sup>55</sup> Sprankling concluded that given the landscape conditions in England, the country’s waste law “unsurprisingly favored conservation.”<sup>56</sup> The English doctrine, Sprankling concludes, “would have arrested development.”<sup>57</sup>

Sprankling contrasted the common law with the modern rule, which he saw as American courts refashioning waste to allow land clearing.<sup>58</sup> The American courts were, he concluded, “[d]riven by [an] instrumentalist vision.”<sup>59</sup> As a result, he describes the American courts as “resoundingly jettison[ing]” the English approach to waste.<sup>60</sup>

### 3. Purdy on the Transformation of American Waste Law

Purdy develops his analysis of waste law both in an article focusing on the topic exclusively<sup>61</sup> and, briefly, in his recent book.<sup>62</sup> Purdy examines the transformation of waste law asking “[w]hat causes account for the development of property regimes across time.”<sup>63</sup> He both accepts and challenges the narratives built by Horwitz and Sprankling. First, Purdy accepts Horwitz and Sprankling’s primary argument that economic forces “help[] to explain the change.”<sup>64</sup> To this explanation, however, Purdy adds other forces, finding that “the full story, however, emerges only upon consideration of two other influences on waste doctrine: republican political culture, and the belief that European settlers were under a natural-law obligation to subdue the American wilderness and make it a fruitful, agrarian landscape.”<sup>65</sup> Purdy ultimately concludes that courts adopt the new rule “to promote efficient use of resources that the English rule would have inhibited.”<sup>66</sup>

Like both Horwitz and Sprankling, Purdy uses the transformation

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55. *Id.* at 534.

56. *Id.*

57. *Id.*

58. *Id.* at 534–35.

59. *Id.*

60. *Id.* at 535.

61. Purdy, *supra* note 9, at 654.

62. JEDEDIAH PURDY, THE MEANING OF PROPERTY 45–47 (2010).

63. Purdy, *supra* note 9, at 653.

64. *Id.*

65. *Id.*

66. *Id.* at 661.

of waste law to make a larger argument about American property law. The transformation in waste law, Purdy concludes, “is suggestive of the plurality of values at work in American land regimes generally.”<sup>67</sup>

When it comes to narrating the transformation, Purdy relies primarily on *Jackson v. Brownson*.<sup>68</sup> He cites a dissent, which noted that the old rule was “inapplicable to a new, unsettled country.”<sup>69</sup> Purdy finds that other courts followed the *Jackson* decision, adopting the good husbandry approach because “American courts envisioned this flexibility in contrast to the fixity of the English rule, which they saw as potentially locking the tenant into existing land-use patterns and forbidding the mutually beneficial activity that the American standard embraces.”<sup>70</sup>

#### 4. Merrill on the Moment of Transformation

Following the trend, Merrill used the transformation of waste law as a way of engaging the question of the function of property in society. Merrill viewed the strict, common law rule as “consistent with the view of property as an individual right,” and with promoting “autonomy, security, the ability to make long-term plans, [and] the right to be different.”<sup>71</sup> He reasoned that the new waste rule was less about individual rights and more about “the view of property as a social institution.”<sup>72</sup> The new rule, Merrill found, was a way to manage conflict when there were temporary transfers that are likely to cause such conflict.<sup>73</sup> Merrill, then, saw the transformation of waste law in terms of the continual conflict in property theory – the “fundamental question,” as he puts it – of “whether property is an individual right or social institution.”<sup>74</sup> He extended his interpretation of *Melms v. Pabst Brewing*

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67. Purdy cites both a practical, economic justification behind the new waste rule and multiple cultural reasons (both economic and sociopolitical). Purdy argues that the new rule has a “mixed profile.” On the one hand, it “promot[es] efficiency in contracting.” On the other hand, “its introduction can be convincingly explained as an expression of the then-current commitments in America to republicanism and economic dynamism.” Ultimately, Purdy uses this multiple causation approach to argue that “a default rule can have normative as well as efficiency-enhancing functions.” *Id.* at 661–62.

68. *Id.* at 668–69.

69. *Id.* at 670.

70. *Id.* at 676.

71. Merrill, *supra* note 11, at 1059.

72. *Id.*

73. *Id.*

74. *Id.* at 1060.

Co.<sup>75</sup> as a landmark case in waste law to “a bellwether for assessing our understanding of the basic purposes of property law.”<sup>76</sup>

Merrill dismissed the explanations given by Horwitz, Purdy, and Sprankling, arguing that “[the] transformation was not a manifestation of inexorable social and economic change. Rather, it was a top-down reform introduced by the Legal Realist movement.”<sup>77</sup> Merrill described two conflicting decisions—*Melms*, a Wisconsin case that adopted the new rule,<sup>78</sup> and *Brokaw v. Fairchild*,<sup>79</sup> a New York case that rejected the new rule—as well as subsequent, successful lobbying after *Brokaw* that persuaded the New York legislature to adopt a new statute in line with the *Melms* decision.<sup>80</sup> Merrill concluded that the *Melms* rule prevailed because “[t]he New York reform proved to be highly influential with bodies such as the American Law Institute, which also adopted a test consistent with *Melms* for inclusion in the *Restatement of Property*.”<sup>81</sup> Merrill concluded that the American Law Institute and the New York Law Review Commission favored the new rule because it “embod[ied] the view of property as a social institution.”<sup>82</sup> Whereas the strict, common law rule allowed the reversioner to maintain idiosyncratic views about the ideal use of his property, the new rule allowed the law to “facilitate the efforts of individuals to reach the correct answer, without regard to what particular individuals with possibly idiosyncratic views might think.”<sup>83</sup> For Merrill, the new rule fostered development, because it allowed society to determine “the highest and best use of land” rather than maintaining existing uses.<sup>84</sup> At a more theoretical level, Merrill concluded the new rule embodied an overall shift in American jurisprudence toward a more social concept of property.<sup>85</sup>

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75. 104 Wis. 7, 8, 79 N.W. 738, 738 (1899).

76. Merrill, *supra* note 11, at 1060.

77. *Id.* at 1080.

78. *Melms*, 104 Wis. at 13–15.

79. 237 N.Y.S. 6 (Sup. Ct. 1929), *aff'd mem. per curiam*, 245 N.Y.S. 402 (App. Div. 1930), *aff'd mem. per curiam*, 177 N.E. 186 (N.Y. 1931).

80. Merrill, *supra* note 11, at 1082–83.

81. *Id.* at 1083.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

### III. A NEW HISTORY OF WASTE LAW: THE COMMON LAW RULE AND LAND USE AS BOUNDARIES

Each of these accounts of the change assumed that waste law provided only one legal function. Understanding the true reason for the shift, which happened not only in America but also in the very different land development context of England, requires a full history of the doctrine, and particularly a history that looks back to the doctrine before the shift to determine its multiple purposes. This Part explains the history of the doctrine, detailing how waste law historically protected not only property value but also property boundaries. The first hint of this second function is clear in the traditional formulation of the rule in the common law. The common law required damage through at least one of three mechanisms: “(1) By diminishing the value of the estate; (2) By increasing the burthen upon it; (3) By impairing the evidence of title.”<sup>86</sup> Waste law maintained boundaries because it prevented changes to the land that would impair the evidence of the title.<sup>87</sup> This rule, in and of itself, however, is not particularly clear without an understanding of the processes of surveying land prior to industrialization.

To provide this historical context, this Part describes the process of bounding land in English law, explaining how waste law maintained boundaries in a system that allocated land and recorded land ownership through descriptive rather than visual or physical markers, through land use and butting and bounding rather than through precise surveying technology.<sup>88</sup> This part begins with a brief history of early surveying.

#### A. Early Surveying

The first documents described as “maps” of kingdoms were lists rather than pictorial representations of the territory.<sup>89</sup> Each “map” described the various feudal leaders beneath the king, the territories held, and their duties to the king such as the number of men providing

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86. YOOL, *supra* note 23, at 2.

87. *See infra* Section III.B.

88. *See infra* Section III.B.

89. *See* Josef W. Konvitz, *The Nation-State, Paris and Cartography in Eighteenth- and Nineteenth-Century France*, 16 J. HIST. GEOGRAPHY 3, 7 (1990) (describing the origins of the concept of a map within cartography in France).

knight service in the event of war.<sup>90</sup> This type of survey, which was more a list of attributes of a region than a visual depiction of it, persisted longer than a modern reader might guess.

For example, as late as the end of the seventeenth century, a survey of Scotland resulted in lists rather than maps. In 1682, when King Charles II appointed Sir Robert Sibbald as Geographer Royal, Sibbald set out to make a new survey of Scotland.<sup>91</sup> Shortly thereafter, he printed a large advertisement entreating the many nobles of Scotland to send him lists of “[w]hat Seriffdomes, Bailleries, Stewartires, Regalities, Baronies, and Burrows they have under them?”<sup>92</sup> Sibbald also requested lists of “the Nature of the County,” “the chief products thereof,” along with “[w]hat Plants, Animals, Mettals, Substances, cast up by the Sea are peculiar to the place.”<sup>93</sup> Sibbald warned his readers of the consequences of failing to answer his advertisement.<sup>94</sup> He explained, “The answers to these Queries is earnestly desired that no person may complain, if what concerns them be not insert[ed].”<sup>95</sup> Sibbald’s warning likely sought to ensure that no one later complained that his properties and rights were omitted from the listing of the King’s territories.

Mirroring these maps of kingdoms, through the sixteenth century and the first half of the seventeenth century surveys and maps of estates in land were not visual depictions of streams, forests, fields, and manor houses. Rather, the surveys listed allocated rights in descriptive, but not visual, form. For example, in 1714, Tristram Risdon published a survey of the county of Devon.<sup>96</sup> Risdon describes the climate, landscapes, industries, and resources of the land, along with a history of both property and political control.<sup>97</sup> In his extensive book, he in-

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90. *Id.*

91. Robert Sibbald, Advertisement, in the COLLECTIONS OF THE SCOTTISH NATIONAL LIBRARY (1682).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. TRISTRAM RISDON, THE CHOROGRAPHICAL DESCRIPTION, OR SURVEY OF THE COUNTY OF DEVON (1714).

97. *Id.* (for example, “[t]he Glebe and Soil of *Devonshire* is diverse; in the Entrance, on the *East Part* of the Shire, the Mould standeth most upon white Chalk, which is passing good for Sheep and Corn; a little farther it consists of a red and blue Marle, which is no rocky, but an earthy Substance; this Soil is most natural for pasturing of Beasts, though it be plentifully furnish’d with Corn”).

cludes one drawing of a building, but no other illustrations or maps of the landscape at all.<sup>98</sup> Risdon focuses more on listing territorial controls, sherrifdoms, and so forth.<sup>99</sup> Similarly, Richard Carew's survey of Cornwall, published in 1769, described the landscape, soil quality, and the natural resources available within the area.<sup>100</sup> Carew also discusses in some detail the process by which a person may claim a particular portion of ground on which to dig for tin and how to maintain the legal claim through bounding on an annual basis.<sup>101</sup> Like others, Carew draws up his survey by listing resources, crops, animals, and the legal jurisdictions, or Hundreds, of the county, but includes no drawings or maps to visually represent the region.<sup>102</sup>

The manor survey performed rather the same function as these larger surveys, cataloging legal rights through lists. The manor survey listed the various tenants, the amount of land each held, and their various rights upon the commons such as fire-bote.<sup>103</sup> The surveyor found "the just Quantity of every Man's Ground, both Arable, Ley-ground and Meadow," and then prepared a field book to maintain a record of the parcels.<sup>104</sup>

The surveyor kept track of this complex system. Notably, rather than teaching geometry, early guides for surveyors taught basic property law.<sup>105</sup> Such books included legal descriptions of different rights on land and different types of estates in land.<sup>106</sup> The early surveyor's guidebook explained the nature of a manor: "A Mannor then consists of Lands, Wood, Meadow, Pasture and Arable, Messuages, Tenements, Services, and Hereditaments, Whereof part are Demesnes, being such as anciently, and ultra memoriam, the Lord has ever used, occupied and manured with the Manor-house. The rest are either Free-holds,

98. *Id.*

99. *Id.*

100. RICHARD CAREW, *THE SURVEY OF CORNWALL* (1769).

101. *Id.* at 12-13.

102. *See id.* Notably, as of 1699, Vincent Wing finds that "very few Authors of Surveying have touched upon" the subject of "Directions for taking the Map of a County." VINCENT WING, *A COMPLEAT BODY OF SURVEYING* 242 (John Wing ed. 1699). Wing himself devotes approximately one and a half pages to the topic. *Id.* at 242-43.

103. 4 WILLIAM LEYBOURN, *THE COMPLEAT SURVEYOR: OR, THE WHOLE ART OF SURVEYING OF LAND* 102-03 (5th ed. 1722).

104. *Id.* at 102.

105. *See id.*

106. *Id.*

Farms, or customary or copyhold Tenements.”<sup>107</sup> The guide would then proceed to explain the many types of rights that citizens might have upon these particular lands.<sup>108</sup> The surveyor’s book would record each of the rights, noting private rights to particular parcels as well as the many rights that the citizen might hold to the common areas of the manor.<sup>109</sup>

Surveyors also acted much as farm managers or advisors. Tracts celebrating the role of the surveyor portray him as educating the farmer or landowner about how grounds can be planted, drained, or improved to greater profit over time.<sup>110</sup> Instruction manuals for surveyors provided extensive advice on the draining of lands through construction of ditches and small-scale canals.<sup>111</sup> For example, Cressey Dymock’s *A Discoverie for Division or Setting out of Land, as to the Best Form*, spends most of its pages discussing how and why fens and marshes of England should be drained as well as how land might be improved through the use of manures and fertilizers.<sup>112</sup> Similarly, William Leybourn’s *The Compleat Surveyor* explains how to slowly drain a bog, even when “your bog be so tender that you cannot go upon it” by locating the springs and creating ditches to channel the water away.<sup>113</sup> Even as the surveying profession became more technical and specialized throughout the eighteenth century, surveyors continued to advise landowners regarding the improvement of lands.<sup>114</sup>

Early surveyors did not use specialized equipment, but instead simply walked the landscape to create descriptive records. Rather, measurements were fluid and approximate,<sup>115</sup> often using agricultural units.<sup>116</sup> Measurements reflected the realities of farming: “a day’s

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107. *Id.* at 75.

108. *Id.* at 76.

109. *Id.*

110. See JOHN NORDEN, *SURVEYOR’S DIALOGUE* (1607); *AN OLDE THRIFT NEWLY REVIVED* (1612).

111. WILLIAM EMERSON, *THE ART OF SURVEYING OR MEASURING LAND* 135 (1770).

112. CRESSEY DYMCK, *A DISCOVERIE FOR DIVISION OR SETTING OUT OF LAND, AS TO THE BEST FORM* (1653) (located in the Collections of the Scottish National Library).

113. 4 LEYBOURN, *supra* note 103, at 132.

114. For example, Emerson describes how a surveyor would determine whether to advise a landowner to consider building a canal for the purpose of draining land. EMERSON, *supra* note 111, at 135.

115. Shaunnagh Dorsett, *Mapping Territories*, in *JURISPRUDENCE OF JURISDICTION* 148 (Shaun McVeigh ed., 2007).

116. By the beginning of the eighteenth century, some surveyors endeavored to edu-

journey or a morning's ploughing."<sup>117</sup> Putting allocations onto paper meant using textual descriptions of the landscape's uses.

Newly acquired lands were laid out by a process of perambulation, or walking the sides of the land to estimate the acreage acquired and to create a written description.<sup>118</sup> To construct boundaries between parcels, surveyors utilized landscape features, a process known as butting and bounding.<sup>119</sup> For the very largest parcels, the surveyor might reference prominent landmarks such as creeks, ravines, bogs, ridges, hills, and valleys.<sup>120</sup> For smaller plots of land, the most efficient reference was one that specifically included a land use.<sup>121</sup> Thus, a parish might be bounded by the "common on the north," or "Alwardby fields" on the west.<sup>122</sup> For example, "[t]he manor [of the Parish of Aspatria] is of a square form, being bounded by Aspatria Common on the north and east sides, by Baggray fields on the south, and by Aspatria Field on the west."<sup>123</sup> To describe a particular plot, the surveyor would record the neighboring landscapes: "from such a place to such a place, and so on till the starting-point was reached again."<sup>124</sup>

cate others about the geometry and mathematics that would provide more accurate measurements of land. *See, e.g.,* WING, *supra* note 102. Notably, Wing seems to assume no knowledge of mathematics whatsoever of his reader—beginning with the very basics of addition, subtraction, multiplication, fractions, decimals, and so forth. *Id.* at 1–26. By the end of the eighteenth century, surveying had become more professionalized and more of a mathematical process. Thus, by 1770, William Emerson was able to describe surveying as "measuring land," or "the art of finding the content of any field, or parcel of land; which is always expressed in acres and decimal parts." EMERSON, *supra* note 111, at 1.

117. Dorsett, *supra* note 115, at 148. Indeed, surveyors were to some degree intentionally inaccurate in reflecting all of the features of a landscape: when surveyors set out to create a new division of land, the grant generally prescribed a particular number of acres. This was presumed to refer to arable acres. Thus the surveyor would stick to a "strict Proportion of Quantity" of arable acres. EDWARD LAURENCE, *THE YOUNG SURVEYOR'S GUIDE* 174 (1716). Thus, "if there . . . be an unuseful Pond, Lake or Puddle, or if there be any Boggy or barren Ground, that must be cast out in the Division." *Id.* The surveyor would "measure that first, and subtract it from the Content of whole Close, and then lay the just Quantity of the remainder on that side that is free from it." *Id.* Thus a total of 200 acres described in the survey would include more than 200 acres when one included the non-arable portions of "that which is useless." *Id.* at 175.

118. Dorsett, *supra* note 115, at 141.

119. LAURENCE, *supra* note 117, at 174.

120. *Id.*

121. 2 WILLIAM HUTCHINSON, *THE HISTORY OF THE COUNTY OF CUMBERLAND* 287 (1794).

122. *Id.* at 286–87.

123. *Id.* at 293.

124. FREDERIC SEEBOHM, *THE ENGLISH VILLAGE COMMUNITY EXAMINED IN ITS*

The early surveys of counties in England provided only the largest divisions of land uses: moors, forests, hills, commons; even smaller scale maps of town areas that showed individual plots still described land uses such as fen, woods, meers, and mown grounds.<sup>125</sup>

Even once surveyors began producing pictorial descriptions of estates, drawing in rivers and fields and houses, they continued to note land uses on the drawings, either by text or by a series of symbols set out in surveyors' guidebooks.<sup>126</sup> Surveyors labeled areas as meadows, common pasture, or planted land.<sup>127</sup> Guidebooks admonished surveyors to illustrate their woods by "draw[ing] diverse little Trees in the most material places," and to use "shadow" to show "mountain[s] and uneven Grounds with Hills and Valleys."<sup>128</sup> Such land uses divided properties in both written and visual depictions until surveyors moved toward modern, geometrical depictions.

### B. Boundary Enforcement with Waste Law

#### 1. Waste, Boundaries & Land Use

In a world without mathematical surveys, land uses efficiently established boundaries. As Chief Justice Tindal explained, "[i]n grants, land frequently passes by the specific description of meadow, pasture, arable, or the like."<sup>129</sup> Altering the land use then could "introduce considerable difficulty in the title."<sup>130</sup> Even in 1831, Tindal found that "[i]t is the daily practice of this court to amend fines and recoveries, on account of the misdescription of the quality of the land; and the ground for making such amendments is that these documents are preserved and handed down, as certifying the title to, and identifying the lands, by reference to the purposes to which they have been applied."<sup>131</sup>

Waste law protected the evidence of title through one of its three

RELATIONS TO THE MANORIAL AND TRIBAL SYSTEMS AND TO THE COMMON OR OPEN FIELD SYSTEM OF HUSBANDRY 375 (4th ed. 1890).

125. See generally MAGNA BRITANNIA ET HIBERNIA (1720) (illustrating English regions by depicting common land uses).

126. CATHERINE DELANO-SMITH & ROGER J.P. KAIN, ENGLISH MAPS: A HISTORY 24 (1999).

127. *Id.*

128. 4 LEYBOURN, *supra* note 103, at 114.

129. *Simmons v. Norton* (1831) All ER (CPD) 345. See also *Simmons v. Norton* (1831) 131 Eng. Rep. 247 (CPD).

130. *Simmons v. Norton* (1831) All ER (CPD) 345.

131. *Id.*

traditional prongs. Traditionally, waste could be proven by (1) “a diminishing of the value of the estate,” (2) “an increasing of the burdens upon it,” or (3) “an impairing of the evidence of title.”<sup>132</sup> The third function of waste was specifically designed to address land use changes. As Lord Coke explained, changing a land use changes “the evidence of the estate.”<sup>133</sup> If the tenant made such a change, he could “caus[e] a difficulty in afterwards proving the identity of the premises.”<sup>134</sup> In a time prior to formalized mathematical surveys and deed registries, “w[aste] was a matter of great importance,” precisely due to its ability to protect land from “injury to title.”<sup>135</sup> Lord Coke explained “if the land be described as arable in the deeds and on view the land is found to be pasture, some special evidence is necessary to prove the identity.”<sup>136</sup>

Following the rule strictly, courts forbade material alterations of buildings, because those buildings were likely a part of the evidence of title.<sup>137</sup> In other words, to change the buildings was to “change the identity of the estate.”<sup>138</sup> For example, in *Cole v. Forth*, the defendant “pulled down a brew-house and built a number of small tenements in lieu thereof.”<sup>139</sup> While the court found that the property rent increased by eighty pounds per year, the Court of King’s Bench determined that it was “waste notwithstanding the improvement, because of the nature of the thing and of the evidence was altered.”<sup>140</sup> Alterations to a building that did not change its function or overall size and location might or might not be waste; it was a question for the jury as to whether or not such a change “affected the evidence of the plaintiff’s title.”<sup>141</sup> In

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132. 1 BOONE, *supra* note 23, at 300.

133. COKE ON LITTLETON § 53 (8th ed. 1822); *Simmons v. Norton* (1831) All ER 343 (CPD). *Simmons* explains using this example: “Ploughing old meadow land and converting it to arable is waste; it alters the evidence of the title.” *Id.*

134. *Young v. Spencer* (1829) 109 Eng. Rep. 405 (KB) 408.

135. BEWES, *supra* note 20, at 130.

136. COKE ON LITTLETON § 53b.

137. *Liability for Ameliorative Waste*, *supra* note 42, at 1130.

138. JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 373 (1875).

139. *Cole v. Forth* (1672) 86 Eng. Rep. 759; 1 Mod. 94 (cited in 2 THE REPORTS OF THE MOST LEARNED SIR EDMUND SAUNDERS 258 (Edward Vaughan Williams ed., 6th ed. 1846)).

140. *Id.* (quoted in 2 THE REPORTS OF THE MOST LEARNED SIR EDMUND SAUNDERS 258 (Edward Vaughan Williams ed., 6th ed. 1846) 259).

141. *Young v. Spencer* (1829) 109 Eng. Rep. 405 (KB), quoted in 2 SAUNDERS *supra* note 139, at 259 (finding that the opening of a new door to a building might or might not be waste, and that it was a question for the jury to decide as to whether the change impact the

general, however, changes to the size of a building or the construction of a new building would be waste because “the consequent alteration in the description of the premises might impair the evidence of the owner’s title.”<sup>142</sup> This included changes to the inside of a building to the degree that they might no longer align with a title description.<sup>143</sup>

It did not matter if the landscape change was “compatible with good husbandry,” only that it had damaged the ability of others to discern the boundaries of the estate. Therefore “cutting down hedges, which serve as fences, or as the monuments of boundaries, is Waste.”<sup>144</sup> For the same reason, waste occurred with “[t]he conversion of one species of land into another, as the changing of meadow into arable.”<sup>145</sup> A defendant committed waste when he plowed up land that had been used as pasture.<sup>146</sup> Thus, courts would restrain tenants from ploughing either meadow or pasture ground.<sup>147</sup>

Because economic value was not the issue and maintenance of boundary lines through preservation of distinct land uses was paramount, injunctions rather than damage awards were the remedy for these types of waste actions. In response to suits, the courts would “award a perpetual injunction to restrain waste by ploughing, burning, breaking, or sowing of down land.”<sup>148</sup>

Cutting down trees potentially offended two of the three waste prongs.<sup>149</sup> Cutting down timber could change the evidence of the estate, by making what was labeled “wood” or “forest” on a land description or map into either meadow or arable land.<sup>150</sup> Because

evidence of title).

142. *MINOR & WURTS*, *supra* note 2, § 381.

143. *BEWES*, *supra* note 20, at 11–13, 167.

144. *JAMES SULLIVAN, THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 335 (1801).

145. *1 CRUISE*, *supra* note 34, at 67.

146. *Gunning v. Gunning* (1678) 89 Eng. Rep. 759 (KB).

147. *Cole v. Peyson* (1637) 21 Eng. Rep. 106; *Atkins v. Temple* (1626) 21 Eng. Rep. 493 (“A tenant will be restrained at the instance of the owner of the inheritance from ploughing up ancient pasture; such ploughing is as much waste as the ploughing of meadow.”).

148. *1 CRUISE*, *supra* note 34, at 67.

149. For nineteenth century discussions of the complexities of English law on waste and timber, see *YOOL*, *supra* note 23, at 22–33; *BEWES*, *supra* note 20, at 98–102; for the traditional common law rules on timber, see *COKE ON LITTLETON* § 53a–b (8th ed. 1822). Additionally, not all trees count as timber. The “custom of particular places” determines which trees are timber. See *CHARLES WATKINS, PRINCIPLES OF CONVEYANCING* 33 (John Merrifield ed., 8th ed. 1833) (finding that the definition of timber varied across England, depending on local custom).

150. *Maleverer v. Spinke* (1537) 73 Eng. Rep. 79, 80 (holding that removing timber

boundary-maintenance was the primary purpose, the rule also worked in reverse—despite the scarcity of timber, it was also waste to change “arable land into wood.”<sup>151</sup> On the other hand, in a country where timber was scarce, cutting down trees could also reduce the value of the property significantly. Given that cutting timber potentially offended both prongs of waste, cutting trees generally constituted waste under the common law.<sup>152</sup>

The strictness of waste law demonstrates the importance of the boundary-maintenance function. This is particularly clear in light of the common law’s normal tendency to prefer arable land to all others.<sup>153</sup> Penalizing the ploughing of ancient meadows, an action which would convert the land into the preferred arable state,<sup>154</sup> speaks directly to the vital importance of the land use as a boundary-setting mechanism.

Additionally, recognizing the boundary-maintenance function of waste law explains certain results, such as treble damages when the reversioner profited from the property change, that otherwise seem patently unfair.<sup>155</sup> To explain centuries of such rulings by courts otherwise quite interested in a natural concept of fairness or justice, one must focus on the damage that may have been done to the title and boundaries of a property through even a financially positive change to the landscape.

## 2. The Boundary Maintenance Function and the Good Husbandry Standard

Some cases confusingly speak of a change in the “course of husbandry” being forbidden by waste law.<sup>156</sup> This general statement was

damages evidence of title).

151. WILLARD, *supra* note 138, at 373.

152. 1 BOONE, *supra* note 23, at 301.

153. Lord Coke wrote upon this subject in multiple contexts. See BEWES, *supra* note 20, at 30–31 (quoting and discussing Lord Coke and others on the common law preference for arable lands). For a further discussion of the common law preference for arable lands, see Jill Fraley, *The Anti-Wilderness Bias in the Common Law & Modern American Property Law* (forthcoming in MODERN STUDIES IN PROPERTY LAW).

154. See *Simmons v. Norton* (1831) All ER 343 (CPD) 344 (explaining that “ploughing meadow land and converting it into arable is prima facie waste” and “it alters the evidence of title”).

155. See BEWES, *supra* note 20, at 9 (discussing the “merciless” application of the rule, including treble damages, in cases of ameliorative waste).

156. MINOR & WURTS, *supra* note 2, § 383.

a product of more than one of the separate prongs of waste. First, as we have already discussed, changes in the course of husbandry—if they rose to the level of a change in land use—would be prohibited because the land use provided evidence of title.<sup>157</sup> Changing the course of husbandry could also impair either the value of the estate or the burdens upon it. The common law traditionally imposed a good husbandry requirement that prevented changes to the course of husbandry that affected value or increased burdens.<sup>158</sup>

Changing the course of husbandry could violate the good husbandry standard in a variety of ways. First, farmers understood some plants to be incompatible with others that might be planted there in the future. For example, after being planted in woad, land would “not carry corn for seven years after.”<sup>159</sup> Relying on this commonly accepted principle, the plaintiff in *Tresham v. Lamb*<sup>160</sup> alleged waste, in part, through the tenant sowing woad. As one judge explained, woad was “offensive and infectious.”<sup>161</sup> Others cases agreed, finding that woad was “of so poisonous a quality that it destroys the principles of vegetation.”<sup>162</sup> Some crops were, simply put, “pernicious crops,”<sup>163</sup> and waste law prohibited sowing the land with any such plant.<sup>164</sup> As a result, the court would require “an express power in his lease”; otherwise, the tenant would be liable for violating the covenant of good husbandry.<sup>165</sup>

Additionally, some agricultural techniques were likely to run afoul of the good husbandry rule. English courts evaluated changes in the course of husbandry by inquiring into the agricultural custom of the area.<sup>166</sup> This was not a matter for witness testimony as to their personal beliefs on the best husbandry, but rather a sense of community common knowledge.<sup>167</sup> It was what “ha[s] been publicly done

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157. See *supra* Section III.B.

158. While the court imposed the good husbandry requirement, it was possible for the parties to “contract themselves out of it.” *Tucker v. Linger* (1882) 21 Ch D 18 at 24 (Eng.).

159. BEWES, *supra* note 20, at 38.

160. (1610) 123 Eng. Rep. 806, 806.

161. *Id.*

162. *Powis v. Dorall* (1610) 8 Bacon 419.

163. BEWES, *supra* note 20, at 38.

164. REDMAN, *supra* note 21, at 257.

165. *Powis v. Dorall* (1610) 8 Bacon 419.

166. *Tucker v. Linger* (1882) 21 Ch D 18 at 24 (Eng.).

167. *Id.*

throughout the district.”<sup>168</sup> Such a standard, the judges agreed, “must vary exceedingly according to soil, climate, and situation.”<sup>169</sup> Across the country, there was no “uniform course of husbandry,”<sup>170</sup> but the general concept of good husbandry would lay the foundation for the modern value-focused rule.

### 3. The Boundary Maintenance Function & Shifting Land Uses

The boundary-function also explains why some English cases, including some of the oldest, do not find waste even though there was a change in land use.<sup>171</sup> In some instances parcels served multiple purposes over the years, often alternating, as between pasture and meadow.<sup>172</sup> Normally, the strict rule would dictate a finding of waste when the tenant changed uses. However, when the land use had already changed prior to the tenant taking possession, the evidence of the estate was either not given through land use descriptions (but rather through adjoining roads, streams, etc.), or such evidence of title was already impaired by longstanding changes in use. Thus, the change in use was not chargeable to the tenant as waste.

In such cases, the strict *per se* rule<sup>173</sup> for changing land use would not dictate a finding of waste; the rule only prevented changes that “touch[ed] the identity of the estate.”<sup>174</sup> When the reversioner presented no such evidence, the only remaining question was whether such land use changes offended good husbandry or reduced the value of

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168. *Id.*

169. *Legh v. Hewitt* (1803) 102 Eng. Rep. 789, 791.

170. *Id.*

171. MINOR & WURTS, *supra* note 2, § 383.

172. *See Tresham v. Lamb* (1610) 123 Eng. Rep. 806 (finding that, in one parcel at issue, the land had been pasture, but also “had been mowed and used for meadow for diverse years,” and therefore finding no waste with respect to that parcel when the tenant sowed and ploughed it). *But see Fermier v. Maund* (1637) 21 Eng. Rep. 524, 524 (finding that ancient pasture should not be plowed even though it “may have been formerly plowed,” and apparently relying on the designation of “ancient pasture” to refuse plowing).

173. When land use descriptions typically determined boundaries, the courts did not need extensive evidence to conclude that a change in use impaired evidence of the boundaries. Thus, Chief Justice Tindal could write, “All the authorities agree in establishing the position, that ploughing meadow land and converting it into arable is *prima facie* waste. . . . [A]nd one of the reasons given that such an act is waste, is because it alters the evidence of title.” *Simmons v. Norton* (1831) All ER 343 (CPD) 344. For this reason, the court could say that “the ploughing up [of] ancient meadow is, upon the face of it, irreparable waste.” *Johnson v. Goldswaine and Others* (1796) 145 Eng. Rep. 1027.

174. MINOR & WURTS, *supra* note 2, § 383.

the estate.<sup>175</sup>

Chief Justice Tindal, writing in *Simmons v. Norton*, explained the convergence of the two problems to create a rule against changing land use.<sup>176</sup> Justice Tindal cited the fact that such changes could “alter[] the evidence of title,” but also that ploughing a meadow would change the value of the estate because in such cases “a series of years, perhaps ages, must elapse, before it can be restored to its original state and value.”<sup>177</sup> As Justice Tindal’s comments suggest, the boundary-maintenance function is not to be regarded as sharply dichotomous from the value-maintenance function. Maintaining boundaries effectively also directly implicates value. But the additional function of waste, what I am calling the boundary-maintenance function, directed itself specifically to preventing changes to boundaries. Only recognizing this distinct function of waste law in maintaining boundaries explains this line of cases.

#### 4. The Boundary Function & Forbidding Waiver

In general, a deed or grant of an estate may prevent a tenant from being held liable for waste by inserting a clause granting the land “without impeachment of waste.”<sup>178</sup> Both Purdy and Merrill engaged waste law as though it uniformly created a waivable default rule.<sup>179</sup> Purdy described the rule as “to begin with, a default rule, always susceptible to contractual revision.”<sup>180</sup> Yet, this is not accurate. The boundary-making function of the old rule was not waivable, even by a specific provision that prevented impeachment for waste.<sup>181</sup> Notably, English courts would not allow waiver to excuse changes of land use that implicated boundaries.<sup>182</sup> Courts reasoned that, “[t]he Clause of *without Impeachment of Waste*, never was extended to allow the very

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175. *Id.*

176. *Simmons v. Norton* (1831) All ER (CPD) 344–45.

177. *Id.* at 345.

178. WILLARD, *supra* note 138, at 381. This clause did not fully protect a tenant from liability for waste, because courts still often interfered on equity grounds to prevent waste. For a discussion of the reasons why courts would act in equity to prevent waste despite the clause, see THOMAS BRETT, LEADING CASES IN MODERN EQUITY 108–13 (J.D. Rogers & J.M. Dixon eds., 3d ed. 1896).

179. PURDY, *supra* note 62, at 48. See generally Merrill, *supra* note 11.

180. PURDY, *supra* note 62, at 48.

181. *Id.*

182. (1667) 2 Eq. Ca. ABR. 757.

Destruction of the Estate itself.”<sup>183</sup> For example, the converting of “a pasture field into a pit or pond” was restrained by English courts, even if the tenant was to be held “without impeachment of waste” according to the contract.<sup>184</sup>

By using a non-waivable waste rule, common law courts could protect more than the interests of the two parties to a suit. Indeed, some cases introduce wording that suggests directly the stake of the state in waste cases—a move that would be logical given the boundary-maintenance function.<sup>185</sup> In *Atkins v. Temple*, the court described the question of waste as not just the question of whether the actions of the tenant were prejudicial to the reversioner, but also whether they were prejudicial “to the Commonwealth.”<sup>186</sup> *Atkins* involved an injunction request to restrain the tenant “from plowing up ancient Meadow and Pasture Grounds.”<sup>187</sup> Particularly given the brevity of the older English cases, one might consider whether the court meant that the prejudice to the commonwealth was some economic or other burden that plowing these lands would cause. Such an alternative explanation, however, does not fit given the strong preference in the common law for arable over pasture-land.<sup>188</sup> If the commonwealth could be prejudiced by the tenant’s actions, it was through the destruction of the proper evidence of boundaries. The fact that the strict rule was non-waivable in the instance of injury to the evidence of title suggests that the rule was protecting someone besides the reversioner—potentially either the interest of the state in preventing property disputes or the interest of the neighbor in maintaining boundaries.

Finally, making waste non-waivable when it came to the boundary function mirrors the strict holdings in cases of ameliorative waste,

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183. *Id.*

184. *Findlay v. Smith*, 20 Va. 134, 152 (1818) (“In the case of the Bishop of London v. Webb, 1 P. Wms. 527, where a tenant for years, and that too without impeachment of waste, contracted with brick makers to dig and work up the soil, thereby converting the pasture field into a pit or pond, he was [e]njoined by the Chancellor from so doing, because it did a lasting injury to the inheritance; and this, notwithstanding the clause of impeachment of waste.”).

185. *Atkins v. Temple* (1625) 21 Eng. Rep. 493.

186. *Id.*

187. *Id.*

188. See BEWES, *supra* note 20, at 30–31 (discussing Lord Coke’s explanations of the common law preference for arable land over all other types); *Tyrringham’s Case* (1584) 76 Eng. Rep. 973 (including Lord Coke’s footnotes about the common law preference for arable land).

which are discussed in more detail below. In cases of ameliorative waste, where the property changes impaired boundary evidence, courts dispensed treble damages, even while the reversioner profited from the property change.<sup>189</sup> Such strict applications of the common law rule again suggest that courts were protecting a state interest as well as the reversioner's interest.

#### IV. A NEW HISTORY OF WASTE LAW: THE EVOLUTION TO THE MODERN RULE IN BOTH BRITISH AND AMERICAN COURTS

Delineating boundaries through textual descriptions and land use was, of course, a risky business, and one that would inevitably be replaced by more efficient technologies. An accurate map meant that it was possible not to worry about what would later be jokingly called "the scandalous replacement of arable [land] by pasture."<sup>190</sup>

Throughout the seventeenth century, colonists employed the same methods of marking boundaries as had been initially used in England: by referencing natural landmarks or landscape features and land uses.<sup>191</sup> However, given that the land was not inscribed with land uses in the same way that parcels were in England, colonists relied much more heavily on landscape features as opposed to land uses.<sup>192</sup> A 1640 survey of Massachusetts land for William Bradford demonstrates the use of landscape features.<sup>193</sup> Bradford's land extended "from the bounds of Yarmouth three miles to the eastward of Naemskeckett, and from sea to sea, cross the said neck of land . . . and two miles to the western side of the said river to another place called Acqussent River."<sup>194</sup> Similarly, a purchase of Newark in 1667 from native tribes was described as

bounded easterly by a great creek that runs from Hackingsack Bay through the salt meadow called by the Indians Wequahick and now known by the name of Bound Creek, and continuing from the head of the said creek to the head of a cove to a marked tree, from

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189. See BEWES, *supra* note 20, at 9 (discussing treble damages in cases of ameliorative waste).

190. DELANO-SMITH & KAIN, *supra* note 126, at 117.

191. 1 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 258 (W. Keith Kavenagh ed., 1983).

192. *Id.*

193. *Id.*

194. *Id.*

thence it extended westerly upon a straight line, by computation seven miles to the same more or less, to the end or foot of the great mountain and to the ridge thereof called by the Indians Wacchung.<sup>195</sup>

Landscape features replaced land uses as the basis for written metes and bounds.<sup>196</sup> Whether the description of the land was verbal or visual, land uses no longer provided the same social function of maintaining boundary lines between neighboring parcels.<sup>197</sup> Changes in the scale of grants, the types of landscapes being conveyed, and the technology of surveying itself, which increasingly moved toward the visual representation of land and mathematical measurements, meant that waste law no longer needed to protect boundaries.<sup>198</sup> Rather than engaging in more detail the story of the modernization of surveying methods, this Article now turns to the story of the shift in English and American waste law, which will allow the cases themselves to point to the transformations in technology.

#### A. *Transforming Waste Law in England*

Wyndham Bewes places the turning point in English waste law at *Huntley v. Russell*, decided in 1849,<sup>199</sup> which permitted tearing down

195. 2 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 191, at 1494.

196. *See supra* Section III.A.

197. *See supra* Section III.A.

198. *See supra* Section III.A.

199. BEWES, *supra* note 20, at 130. Bewes and his treatise summaries of English law were well regarded by contemporaries. *See* 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (2d ed. 1832) (listing Bewes among the most distinguished of English treatise writers). A contemporaneous review found that Bewes' book "[could not] fail to be of service to the profession," having "dealt exhaustively" with a topic that is both "complex and difficult." *Review: The Law of Waste*, 21 Q.J. JURIS. 95-96 (1895-96).

American cases, including *Melms v. Pabst Brewing Co.*, the case that Merrill believes is the quintessential American case, rely on Bewes for the authoritative interpretation of English waste law. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 10, 79 N.W. 738, 739 (1899).

In the early twentieth century, the other major treatise writers relied on Bewes' work when discussing the law of waste. For example, Herbert Thondike Tiffany repeatedly cites Bewes in his discussion of waste law. 1 A TREATISE ON THE LAW OF LANDLORD AND TENANT 711, 713, 730, 737 (1912). *See also* EDWARD DOUGLAS ARMOUR, A TREATISE ON THE LAW OF REAL PROPERTY 93 (2d ed. 1916); JOSHUA WILLIAMS & THOMAS CYPRIAN WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 115, 497 (20th ed. 1906). Notably, even modern American cases still rely on Bewes when seeking an authoritative position on the traditional English rules of waste. *See* *Dodds v. Sixteenth Section Dev. Corp.*, 99 So. 2d 897 (Miss. 1958); *Vollertsen v. Lamb*, 732 P.2d 486, 494 (Or. 1987) (relying on Bewes to determine which parties may be liable for waste); *State v. Delinquent Taxpayers*, No. M2004-00951-COA-R3-CV, 2006 Tenn.

and rebuilding a barn because “[t]he evidence of title could in no way be affected.”<sup>200</sup> The parties argued *Cole v. Greene*, which had held that “substituting new and different buildings for old ones is waste.”<sup>201</sup> Distinguishing that case, Justice Erle notes that in *Cole*, “the identity of the property was lost, and the evidence of the landlord’s right destroyed.”<sup>202</sup> Delivering the opinion of the court, Justice Patteson explained the ruling by saying that with respect to the three prongs of waste law, “one of these three requisites exists.”<sup>203</sup> Title, the court concluded, “could in no way be affected” by removing an addition to a house, with “that house being still standing.”<sup>204</sup>

By 1875, in *Jones v. Chappell*, an English court reasoned, “[y]ou may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner’s title, and that is a very peculiar head of the law, which has not been extended in modern times.”<sup>205</sup> *Jones* concluded that the building of a new building was not per se waste, because the old per se rule regarding evidence of title no longer applied.<sup>206</sup> Instead, the court held that the question is whether the new building offends either of the two remaining prongs of the waste test; the plaintiff must prove an injury through either a destruction of value or an increase in burdens.<sup>207</sup> Citing *Jones*, treatise writers found that it was “now settled” that English courts had adopted the new rule.<sup>208</sup>

Writing in 1878 for the Court of Appeal, in *Doherty v. Allman*, Lord O’Hagan explained the change.<sup>209</sup> Lord O’Hagan found that “owing to the circumstances in which property is now situated in this country, in Scotland, and in Ireland, evidence of title of this kind is not at all of the same importance as it was in other times and other circumstances. When you have an Ordnance Survey, when you have a Registry of

App. LEXIS 716, \*22 n.11 (Tenn. Ct. App. Nov. 2, 2006) (relying on *Bewes* to determine what conduct constitutes waste).

200. BEWES, *supra* note 20, at 130 (quoting *Huntley v. Russell* (1849) 116 Eng. Rep. 1381 (KB) 1387).

201. *Huntley v. Russell* (1849) 116 Eng. Rep. 1381 (KB) 1387; *see* *Greene v. Cole* (1669) 85 Eng. Rep. 1037 (KB) 1047.

202. *Huntley*, 116 Eng. Rep. 1387; *see* *Greene* 85 Eng. Rep. 1037.

203. *Huntley*, 116 Eng. Rep. 1388.

204. *Id.*

205. BEWES, *supra* note 20, at 131.

206. *Id.*

207. *Jones v. Chappell* [1875] 20 LR Eq. 539 (Eng.) 541-42.

208. 3 EDWARDS, *supra* note 25, at 68.

209. BEWES, *supra*, note 20, at 131-32.

Deeds, when you have a system of conveyancing, the value of evidence of title, of a place of this sort retaining its particular position, is very sensibly diminished.”<sup>210</sup> Lord Blackburn concurred, reasoning that

when there are Ordnance Surveys, and where, as in Ireland, there is a Court especially dealing with the titles to estates, giving titles, and where the property is marked out on a map, which map can be identified with the Ordnance map—and these maps it may well be supposed will continue to exist and may be referred to the end of the term—any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal.<sup>211</sup>

Purdy has cited *Meux v. Cobley*, a case from 1892, to suggest that England still enforced the traditional common law rule, if in a roundabout way, by utilizing a covenant within a lease “to avoid finding waste in cases of industrial development or improving buildings.”<sup>212</sup> Others have been less pessimistic about the court’s motivations. Bewes, writing only a few years after the court decided *Meux*, interpreted the case as an outlier in English jurisprudence, a special case of “contract by which the tenant of a property, demised by words describing its character, is taken to have impliedly contracted to preserve its nature, as demised.”<sup>213</sup> While Purdy concluded that the English courts “continued . . . to treat changes in the course of husbandry as injuries to the inheritance,”<sup>214</sup> Bewes would have disagreed. Rather than crediting the court with ulterior motives in *Meux*, Bewes looked to the longer line of English cases, dating back to 1849,<sup>215</sup> and concluded that English courts had already adopted the new rule.<sup>216</sup> Bewes summarizes,

It seems fair nowadays, as a matter of arrangement, to treat w[aste] founded on injury to title as a possible variety of trivial w[aste]. Not that there may not be, even

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210. *Id.*

211. *Id.* at 133 (quoting *Doherty v. Allman* [1878] 3 App. Cas. 709 (HL) 735 (Eng.) (appeal taken from N. Ir.).

212. Purdy, *supra* note 9, at 664 n.66.

213. BEWES, *supra* note 20, at 13.

214. Purdy, *supra* note 9, at 664 n.66.

215. BEWES, *supra* note 20, at 130.

216. *Id.*

now, cases in which injunction may be granted or damages awarded on this ground; but that, in by far the largest number of instances, confusion of title is so slight as to be disregarded.<sup>217</sup>

Judge Kekewich, writing in the *Meux* decision, agreed with Bewes, finding that the English law had already changed.<sup>218</sup> He described the transformation as “borne out by many cases,”<sup>219</sup> including *Harrow School v. Alderton* (1800),<sup>220</sup> *Jones v. Chappell* (1875),<sup>221</sup> and *Doherty v. Allman* (1878).<sup>222</sup> This interpretation is supported not only by Bewes’ distinguished treatise on *The Law of Waste in England*,<sup>223</sup> but also by a *Harvard Law Review* article from 1930, which describes the shift in law as occurring first in England, and later, slowly in the United States.<sup>224</sup> To a certain degree, it doesn’t perhaps even make sense to describe the English changes as a transformation—the English rule more properly simply doubled down on the part of the waste rule that had always existed and continued to be useful (the value portion of the rule), while setting aside the other portion of the rule (the boundary portion), which was made obsolete by surveying technology.

### B. *The Transformation of Waste Law in America*

A case called *Pynchon v. Stearns* signaled the shift of waste law in America.<sup>225</sup> In 1846, the Massachusetts Supreme Court explained, “[w]hen our ancestors emigrated to this country, they brought with them, and were afterwards governed by, the common law of England; excepting, however, such parts as were inapplicable to their new condition.”<sup>226</sup> Within America “it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops

217. *Id.* at 129–30.

218. *Meux v. Cobley* [1892] 2 Ch 253 (Eng.) 263.

219. *Id.*

220. 126 Eng. Rep. 1170. *Harrow* involved the tenant “converting three closes of meadow into garden ground.” *Id.* at 1170. In *Harrow*, the court said that “if the jury gave only one farthing damages for each close, the [c]ourt would give [d]efendant leave to enter up judgment for himself.” *Id.* It appears the jury entered nominal damages. Nominal damages are not ordinarily available in waste actions. BEWES, *supra* note 20, at 130.

221. (1875) 20 LR Eq. 539 (Eng.).

222. (1878) 3 App. Cas. 709 (H.L.) (appeal taken from N. Ir.).

223. BEWES, *supra* note 20, at 13.

224. *Liability for Ameliorative Waste*, *supra* note 42, at 1131.

225. *Pynchon v. Stearns*, 52 Mass. 304, 311 (1846).

226. *Id.*

by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required."<sup>227</sup> Such changes were acceptable, because they were not "changes upon the evidence of title to lands."<sup>228</sup> Waste actions, preventing changes to land use, were no longer necessary because "[t]he land conveyed is described by metes and bounds, or by some general and certain description of its limits, without any designation of the kind of land conveyed, whether it be arable land or grass land, wood land or cleared land, pasture or meadow."<sup>229</sup> Such a rule was "unsuited to wilderness conditions"<sup>230</sup> not because industry required the cutting of trees, but because in wilderness conditions land uses could not effectively designate boundaries.

Despite the court's flowery rhetoric on the American innovation, the court cited and directly relied upon a long-standing line of English cases that were in perfect agreement. In cases dating back to the early 1600s the English courts had held that the strict common law rule only prevented those changes that "touch[ed] the identity of the estate."<sup>231</sup> The rule had long allowed that when land historically fluctuated, there was no damage when the current tenant changed the use again.<sup>232</sup> In *Tresham v. Lamb*,<sup>233</sup> for example, the court found that where the land had been pasture, but also "had been mowed and used for meadow for diverse years," there was no waste with respect to that parcel when the tenant sowed and ploughed it. In *Pynchon*, the Massachusetts Supreme Court specifically followed this line of cases, a line that had long been cited in two traditional English treatises that detailed the rule allowing for changes in land that had been previously changed: John Comyn's *A Digest of the Laws of England*, along with Matthew Bacon and Henry Gwillim's *A New Abridgement of the Law*.<sup>234</sup> The rule, according to Bacon and Gwillim, was that "if a meadow be sometimes arable, and sometimes meadow, and sometimes pasture, there, the

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227. *Id.*

228. *Id.*

229. *Id.*

230. Sprankling, *supra* note 8, at 534.

231. *MINOR & WURTS*, *supra* note 2, § 383.

232. *Id.*

233. (1610) 123 Eng. Rep. 806, 806.

234. *Pynchon*, 52 Mass. at 311; MATTHEW BACON & HENRY GWILLIM, *A NEW ABRIDGEMENT OF THE LAW* 252 (6th ed. 1807); JOHN COMYNS, *A DIGEST OF THE LAWS OF ENGLAND* 667 (5th ed. 1826).

ploughing of it is not waste.”<sup>235</sup> Comyn’s treatise similarly finds that where the use of land has changed “where it was sometimes pasture, and sometimes arable,” there is no waste.<sup>236</sup> The argument that Justice Wilde makes in his *Pynchon* opinion, relies directly on this longstanding rule: changes only counted as waste if they “touch[ed] the identity of the estate.”<sup>237</sup> Where the land use fluctuated, it could not be the source of the identity of the estate; there was no reason to punch another change in land use as waste. In *Pynchon*, this is precisely Justice Wilde’s reasoning: the strict rule against land use changes didn’t apply to the American wilderness because metes and bounds instead of land uses delineated boundaries.<sup>238</sup> Rather than elaborating a new rule, *Pynchon* endorsed one dating back centuries in English jurisprudence.

A second influential case closely followed *Pynchon*. In 1850, the Supreme Court of Rhode Island followed the Massachusetts example.<sup>239</sup> In *Clemence v. Steere*, the court found:

The defendant is charged with having converted meadow into pasture land. In England this would be waste. But we are not to apply the English law too strictly. Our lands are in many respects cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste.<sup>240</sup>

Additionally, the court failed to award any damages for waste when the defendant tore down a house that was alleged “not to be repairable, or so dilapidated that the expense of repairing would be beyond the value of the house.”<sup>241</sup> The court did find that “[w]hatever may have been its value, the reversioner had a right to it,”<sup>242</sup> but no damages were awarded for razing the house.<sup>243</sup>

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235. MATTHEW BACON & HENRY GWILLIM, A NEW ABRIDGEMENT OF THE LAW 252 (6th ed. 1807).

236. JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 667 (5th ed. 1826).

237. MINOR & WURTS, *supra* note 2, § 383.

238. *Pynchon*, 52 Mass. at 311.

239. *Clemence v. Steere*, 1 R.I. 272 (1850)

240. *Id.* at 274.

241. *Id.* at 276.

242. *Id.*

243. *See id.* at 277.

The Missouri Supreme Court re-evaluated the traditional waste rule in 1860: the court held that it was not “waste in this country to convert arable land into meadow.”<sup>244</sup> This conclusion came from the court reasoning that “cutting timber and clearing land may, so far from being waste, often enhance the value of the inheritance.”<sup>245</sup> This did not mean, however, that changing the course of husbandry would never be waste. The court continued the traditional good husbandry standard, finding that, “there is a due and reasonable medium to be observed according to the custom of farmers. To cut down all the timber on a tract of land and sell it would be waste because it would be detrimental to the inheritance.”<sup>246</sup>

*Cannon v. Barry*, a Mississippi Supreme Court case from 1881, concluded that the English law was “inapplicable” to the new American context.<sup>247</sup> While the court does not explain exactly what makes the rule inexplicable, the attorney’s arguments from the case demonstrate how the boundary function of English waste law was not needed in America.<sup>248</sup> The attorney explains that, “[t]he common law doctrine that anything is waste which impairs the evidence of title, as drawing in fences, has no application in this country, where the lands are described by land-office numbers.”<sup>249</sup> In *Cannon*, the defendant had cleared thirty to forty acres, and in doing so he “freely cut and used the growing timber on the place, of which there is a superabundance for this and all other purposes.”<sup>250</sup> The court concluded that the defendant “has unquestionably been guilty of that which would be deemed waste under the English authorities, but which we cannot pronounce to be such under the state of things existing with us, and under the circumstances of this case.”<sup>251</sup> The court reasoned that “[t]he condition of this country and that of England are wholly dissimilar, and that which would be a safe test there is altogether inapplicable here.”<sup>252</sup> In England, the very changing of the use of land from woodland to arable would have been, unquestionably, waste. It would have

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244. *Proffitt v. Henderson*, 29 Mo. 325, 327-28 (1860).

245. *Id.*

246. *Id.*

247. *Cannon v. Barry*, 59 Miss. 289, 303 (1881).

248. *Id.* at 297, 303.

249. *Id.* at 298.

250. *Id.* at 303.

251. *Id.*

252. *Id.*

been perhaps the safest of tests for waste. As the attorney argued though, the rule was no longer necessary where land boundaries were precisely recorded.<sup>253</sup>

In 1888, in *Hubble v. Cole*,<sup>254</sup> the Virginia Supreme Court considered a case involving the erection of a new building and a potential change in the course of husbandry. While the court was unsure based on the evidence if there truly was a change in the course of husbandry, the court did not even consider applying the traditional rule forbidding changes outright, which would have been non-waivable.<sup>255</sup>

In 1903, Tiffany's treatise *Real Property* finds that "[i]n former times, some acts were regarded as waste merely because they changed the appearance of the land, and so impaired the evidence of title thereto, but, with the adoption of improved methods of identifying land, this can no longer be regarded as waste."<sup>256</sup> Tiffany cites both *Melms* and *Pynchon*, among other cases.<sup>257</sup> By 1920, Tiffany's treatise speaks all the more firmly of this change.<sup>258</sup> Tiffany described the old rule, saying that the reason for the rule was that a change in husbandry "render[ed] the proof of title more difficult."<sup>259</sup> Tiffany describes this reason as "inapplicable in this country" because "land is almost invariably, at the present day, described by metes and bounds or courses and distances, or by reference to a plat or survey, and not by its particular character."<sup>260</sup>

### C. *The Transformation of Waste Law in America: Treatise Formalization*

As these cases demonstrate, while later courts at times simply parroted the precedents, earlier American decisions explained their logic in terms of the demise of one prong of the waste rule: the boundary-maintenance function. Treatise authors recognized the same reasoning for the change.

Writing in 1894, Wyndham Anstis Bewes composed a thorough

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253. *Id.* at 297.

254. 7 S.E. 242 (1888).

255. *Id.*

256. HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND* § 247 (1903).

257. *Id.* § 247 n.175.

258. 1 TIFFANY, *supra* note 41, at 954.

259. *Id.*

260. *Id.*

treatise on the law of waste.<sup>261</sup> Bewes explained old and new rules of waste and their history of adoption in England as well as the United States.<sup>262</sup> Notably, Bewes dates both English and American adoptions of the new rule to roughly the same time period.<sup>263</sup> Bewes cites the “turn of the tide” in England as 1849, with *Huntley v. Russell*.<sup>264</sup> *Huntley* involved the tearing down of a barn and building of another in a different location (“a mile away”).<sup>265</sup> The court concluded that this was not waste, because “[t]he evidence of title could in no way be affected.”<sup>266</sup>

When Bewes considered American case law, he determined that American courts were also adopting the new rule. Bewes cited *Pynchon v. Stearns* and *Clemence v. Steere* as the leading American cases that break with the English common law tradition,<sup>267</sup> thus placing the shift in the United States at the mid-1800s.

Most other treatise writers were less thorough in their discussions, and therefore less specific in placing the date of transformation. They were, however, clear that the new rule was well ensconced by the turn of the twentieth century. Charles Theodore Boone, writing in 1901, found that waste law in the United States depended on determining the change in the property’s value through the good husbandry standard.<sup>268</sup> Writing in 1910, Minor detailed the American adoption of the new rule.<sup>269</sup> Minor explained that as for changes in land use “touching the identity of the estate,” this “reason would be generally of little weight in the United States.”<sup>270</sup> Blakemore, writing in 1917, explained that the original waste rule prevented changes in land use because such usages gave “evidences of title.”<sup>271</sup> Blakemore concluded that American courts had largely abandoned this rule.<sup>272</sup> Blakemore noted that the old rule was unnecessary “on account of our system of deeds

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261. BEWES, *supra* note 20.

262. *Id.* at 18–30, 130–38.

263. *Id.* at 29–30, 130.

264. *Id.* at 130 (citing *Huntley v. Russell* (1849) 116 Eng. Rep. 1381 (KB)).

265. *Id.*

266. *Id.*

267. *Id.* at 29–30.

268. 1 BOONE, *supra* note 23, at 307.

269. MINOR & WURTS, *supra* note 2, § 383.

270. *Id.*

271. BLAKEMORE, *supra* note 23, at 327.

272. *Id.*

and registries of deeds.”<sup>273</sup>

*D. The Transformation of Waste Law in America: Understanding the Shift*

This new history of waste law departs from previous accounts in two key ways. First, while traditional accounts have maintained that the shift was a radical American break with British tradition, the new history describes a shift that is parallel in both countries. The new history concludes that there is little reason to think of the new rule as distinctively American. Second, the new history disputes the traditional account of transformation as fueled by the pressures of land development. Rather, this new history explains how both British and American courts shifted to adopt the new rule when the old one’s strict boundary maintenance function was made obsolete by technological developments. This Section discusses each of these two key points in further detail.

First, to examine the new rule and illuminate its consistencies with both the original common law rule and the modern British rule, it is appropriate to begin with the concept of ameliorative waste. Ameliorative waste lies at the heart of the change. Under the old rule, ameliorative waste was forbidden; under the new rule it is permissible.<sup>274</sup> The strict rule against ameliorative waste emerged directly from a fear of a tenant destroying evidence of title.<sup>275</sup> As *Young v. Spencer* explained, “A tenant has no right to make any alteration to the demised premises; not even that which may improve their value, if such an alteration will affect the evidence of the landlord’s title,” thus potentially causing a difficulty in afterwards proving the identity of the premises.<sup>276</sup> It was this one prong—evidence of title—of the three-prong waste test that made adding positive value punishable when the tenant’s actions otherwise passed the remaining prongs.<sup>277</sup> If, on the other

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273. *Id.*

274. See *supra* Sections IV.B, IV.C.

275. See *Young v. Spencer* (1829) 109 Eng. Rep. 405 (KB).

276. *Id.*

277. “To pull down a house and rebuild it less than before is certainly waste; and it seems at common law to be no less waste to rebuild it greater than before, because, it is said, it is to the prejudice of the owner of the inheritance, for it is more charge to repair! A better reason is that the consequent alteration in the description of the premises might impair the evidence of the owner’s title. Indeed, Lord Coke holds it to be waste even to build a new house where there was none before. But in England, at least, this seems to be no longer the rule if the value of the land has been increased by the rebuilding—a doctrine much more conformable to modern ideas of justice and reason.” MINOR & WURTS, *supra* note 2,

hand, the alteration increased the value of the property, under the old rule the next question was for the jury to determine: whether the change damaged the reversioner's ability to prove the boundaries.<sup>278</sup> This is because it may be an act which would increase the value of the estate, yet be injurious to the inheritance, as it may impair the evidence of title.<sup>279</sup> When there was no problem with impairing the evidence of title, ameliorative waste need not be punished under the remaining two prongs.<sup>280</sup> If the tenant "pulled down a barn," it was not waste, if the jury find that the premises are not damaged.<sup>281</sup>

Indeed, the two functions of waste law—boundary-maintenance and value-maintenance—explain some otherwise anomalous results. Not all common law cases held that it was waste to erect new buildings;<sup>282</sup> logically, such acts did not have to constitute waste. If they added value to the property and did not overburden it, and the property was not designated in title by the location or function of the buildings, then new buildings might have no impact on the evidence of title.<sup>283</sup> In such cases, ameliorating waste would not have offended the three-pronged common law test.<sup>284</sup> Such reasoning of the English courts allowed tenants to construct temporary buildings that were placed on stilts or rocks, so long as they were "removable at will" and "not fixed into the ground."<sup>285</sup>

English courts specifically connected their omission of the boundary-maintenance prong of waste to their acceptance of ameliorating waste. Having no need for waste law to maintain boundaries, English courts determined "nowadays, as a matter of arrangement, to treat w[aste] founded on injury to title as a possible variety of trivial w[aste]."<sup>286</sup> Then, "[i]t follows by an *a fortiori* argument that if a tenant be not punishable for trivial w[aste], neither is he for meliorating, and this is established by abundance of authority."<sup>287</sup> Others have fol-

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§ 381 (internal citations omitted).

278. *Young v. Spencer* (1829) 109 Eng. Rep. 405 (KB).

279. *Doe v. Burlington* (1833) 110 ER 878 (KB).

280. *Id.*

281. *Id.*

282. BEWES, *supra* note 20, at 138–39.

283. *Huntley v. Russell* 116 Eng. Rep. 1381 (KB) 1381.

284. *Id.* at 1388.

285. *Id.* at 1382.

286. BEWES, *supra* note 20, at 129–30.

287. *Id.* at 134.

lowed this approach, connecting the strict common law rule with the rule against “even ameliorative changes.”<sup>288</sup> In *Barret v. Barret*, the court found that the only way for waste to exist is for it to be prejudicial to the inheritance.<sup>289</sup> Expounding on this premise, the Court of King’s Bench in *Cole v. Greene* found that for an act to be injurious to the inheritance, it must do so by one of three ways: “by diminishing the value of the estate, or, secondly by increasing the burthen upon it, or, thirdly, by impairing the evidence of title.”<sup>290</sup> The court then determined that in the case of pulling down old buildings and replacing them with new ones, if “the value of the reversion might be increased by the alteration; it was, therefore, a question for the jury” as to whether waste occurred.<sup>291</sup> If the court omitted the issue of evidence of the title, the common law rule simply became the two remaining factors: increase of burden on the property or diminishment the value of the estate.

American courts followed the same approach, omitting the boundary-maintenance prong and keeping the other two.<sup>292</sup> American courts omitted the boundary-maintenance prong for precisely the same reason as the English courts: it was increasingly superfluous given the technical and professional developments in surveying and the registration of deeds.<sup>293</sup>

A second point on which the new account would disagree with traditional narratives is the idea that the change was fueled by the need to develop land. Horwitz, Sprankling, and Purdy’s accounts share a common approach: each cites development pressures to explain the origins of that rule.<sup>294</sup> As an initial point, each explanation assumes—incorrectly—that American courts were doing something distinct that was a great contrast to the approach of British courts. Sprankling, for example, argued that American judges were

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288. *Liability for Ameliorative Waste*, *supra* note 42, at 1130.

289. *Greene v. Cole* 85 Eng. Rep. 1037 (KB).

290. *Id.* at 1047.

291. *Id.*

292. See generally HORTWITZ, *supra* note 6, at 54–55; Sprankling, *supra* note 8, at 533–35; Purdy, *supra* note 9.

293. See generally HORTWITZ, *supra* note 6, at 54–55; Sprankling, *supra* note 8, at 533–35; Purdy, *supra* note 9.

294. HORTWITZ, *supra* note 6, at 54–55; Sprankling, *supra* note 8, at 533; Purdy, *supra* note 9.

“creat[ing] a uniquely American jurisprudence.”<sup>295</sup> As we have seen, little evidence supports this idea. Setting this aside, however, there are other reasons to doubt the development-fueled narrative.

Recall that Horwitz used waste law as a primary example of a larger trend in American law, the transformation of law to foster economic development.<sup>296</sup> Sprankling found that American courts “merely eroded the traditional rule; melding rationales based on economic necessity and presumed owner intent.”<sup>297</sup> As for the American change, Purdy

contend[s] that U.S. courts refashioned the English law of waste for several reasons: to promote efficient use of resources that the English law would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and because of a belief that the cultivation of wild land underlay the Anglo-American claim to North America.<sup>298</sup>

The traditional narrative of jettisoning the English law at the American Revolution in favor of a more development-friendly rule that allowed timber cutting has often relied on rhetoric from cases that described the English rule as “inapplicable” or no longer fitted to the “new country.” Sprankling cited courts that described the English rule as “wholly inapplicable”<sup>299</sup> and instead found that the English rule had to be “varied and accommodated to our new and comparatively unsettled country.”<sup>300</sup> While indeed some American cases cite the economic need to cultivate land as a reason for adjusting the English rule, many of the cases describing the English rule as “inapplicable” rely on *Pynchon v. Stearns*, which, as previously discussed, specifically rejected the English rule because it no longer served the boundary-maintenance function.<sup>301</sup> *Drown v. Smith*, for example, adopted the new American rule in Maine, finding the English rule “inapplicable to this country” and relying on *Pynchon*.<sup>302</sup>

Waste actions, preventing changes to land use, were no longer nec-

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295. Sprankling, *supra* note 8, at 522.

296. HORTWITZ, *supra* note 6, at 54.

297. Sprankling, *supra* note 8, at 536.

298. PURDY, *supra* note 62, at 46–47.

299. Sprankling, *supra* note 8, at 535.

300. *Id.* at 536.

301. *Pynchon v. Stearns*, 52 Mass. 304, 311 (1846).

302. *Drown v. Smith*, 52 Me. 141, 144 (1862).

essary because “[t]he land conveyed is described by metes and bounds, or by some general and certain description of its limits, without any designation of the kind of land conveyed, whether it be arable land or grass land, wood land or cleared land, pasture or meadow.”<sup>303</sup> Or, as the attorney in *Cannon v. Barry* noted, “The common law doctrine that anything is waste which impairs the evidence of title, as drawing in fences, has no application in this country, where the lands are described by land-office numbers.”<sup>304</sup> Tiffany’s treatise, *The Law of Real Property and Other Interests in Land* summarized the adoption of the new rule, explaining that “[i]n former times, some acts were regarded as waste merely because they changed the appearance of the land, and so impaired the evidence of title thereto, but, with the adoption of improved methods of identifying land, this can no longer be regarded as waste.”<sup>305</sup> Where “land is almost invariably, at the present day, described by metes and bounds or courses and distances, or by reference to a plat or survey, and not by its particular character,”<sup>306</sup> there is no need for a strict rule prohibiting changes in land use because they impaired evidence of title. Minor explained in his treatise on property law that, as for changes in land use “touching the identity of the estate,” this “reason [for punishing a change of land use] would be generally of little weight in the United States.”<sup>307</sup> With respect to the changes in technology, Minor noted, “lands are commonly described by metes and bounds, and seldom by the character which they happen to have at the time, as arable, pasture, etc.”<sup>308</sup>

In *Melms*, when the Wisconsin Supreme Court adopted the modern rule, the court specifically noted that the old rule served a purpose in law that was no longer administratively or scientifically necessary.<sup>309</sup> When it came to impairing the evidence of title, it had been “a cogent and persuasive [rule] in former times,” but with modernization, it “ha[d] lost most, if not all, of its force . . . .”<sup>310</sup> The rule was no longer needed in a world with “accurate surveys and the establishment of the

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303. *Pynchon*, 52 Mass. at 311.

304. *Cannon v. Barry*, 59 Miss. 289, 297 (1881).

305. TIFFANY, *supra* note 256, at 560.

306. 1 TIFFANY, *supra* note 41, at 954.

307. MINOR & WURTS, *supra* note 2, § 383.

308. *Id.*

309. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 12, 79 N.W. 738, 739 (1899).

310. *Id.*

system of recording conveyances.”<sup>311</sup> In such a context, when it came to changes on the physical landscape, the court concluded that “there can be few acts which will impair any evidence of title.”<sup>312</sup> Like the English courts, American courts no longer needed waste law to perform the boundary-maintenance function. New technologies and professional surveyors, along with deed registration systems, performed this function and did so with greater accuracy. The American courts, like the English courts, had determined to dispense with the prong of the waste test that maintained boundaries.

Sprankling has argued that the good husbandry standard was chosen by the American courts, making a break with English courts, primarily to advance land development.<sup>313</sup> But the evidence here shows that by relying on the two remaining prongs of the old rule, American courts maintained significant continuities with older British cases, beginning with their use of the good husbandry standard. Indeed, “good husbandry” became the operative phrase for the new rule. As previously discussed, British cases applied a standard of “*due and husband-like management*” to determine whether waste occurred.<sup>314</sup> Because good husbandry provided evidence of damage to the property’s value—one of the two central prongs of waste—courts invoked this implied standard even in negotiated contracts such as agricultural leases<sup>315</sup> and even without specific covenants.<sup>316</sup> Courts implied a rule that a tenant was “bound to manage his agricultural land in a husband-like way according to the custom of the country.”<sup>317</sup> The good husbandry standard was not a new invention for the English courts, but rather one that dated to the oldest cases on waste.<sup>318</sup> *Maleverer v. Spinke* (1538) found that while the tenant could not “convert land into wood, or wood into arable land,” he could “root up bushes, furze, and thorns

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311. *Id.*

312. *Id.*

313. Purdy summarizes Sprankling’s approach as “contend[ing] that an ‘instrumentalist’ view of the natural world, coupled with a perceived imperative to bring the new continent under the ax and plow, led to the good husbandry standard, which allowed tenants to clear and develop land in the interests of advancing cultivation.” PURDY, *supra* note 62, at 46.

314. YOOL, *supra* note 23, at 8; BEWES, *supra* note 20, at 12–13.

315. BEWES, *supra* note 20, at 13.

316. *Id.* at 32.

317. *Id.*

318. *Id.* at 131–34.

growing upon the land, for melioration, for that is good husbandry.”<sup>319</sup>

Like the American courts, the English courts continued after the rule change to use the good husbandry standard to evaluate value changes. For example, in *Hubble v. Cole*, the plaintiff alleged that the defendant was “plowing up 80 or 90 acres of river bottom,” and that it “would require the same to be mowed or grazed, and not cultivated for gain crops,” and additionally that “this land lies immediately in the middle fork of Holston river, and, in times of high water, is subject to overflow, and, if plowed three years in succession, in all probability would be injured by floods and water beyond estimate and beyond reparation.”<sup>320</sup> In such circumstances, good husbandry indicated that the value of the land had been damaged by the acts of the tenant.<sup>321</sup> Good husbandry went hand in hand with value change, which had always been one of the quintessential means of proving waste under English common law.<sup>322</sup> It continued to be so under the new rule both in England and in America.

Given that land use conditions varied greatly between the two countries, the development-driven narrative endorsed by Horwitz, Sprankling, and Purdy fails to account very effectively for the strong consistency between the English and American shifts. On the other hand, both jurisdictions similarly experienced the changes that occurred through the professionalization and modernization of surveying, along with the creation of accurate legal mechanisms for recording boundary and title details.

## V. THE NEW HISTORY AND THE TIMING OF THE DOCTRINAL SHIFT

Horwitz found that American waste law by 1820 “bore only the faintest resemblance” to the law before the Revolution.<sup>323</sup> Temporally, he specifically locates the catalyst as “the moment of independence from England.”<sup>324</sup> Sprankling, similarly, contrasts an English rule with an American law whose emergence he places around the time of the

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319. Quoted in BEWES, *supra* note 20, at 134.

320. *Hubble v. Cole*, 7 S.E. 242, 242 (1888). In this case, the court applied not the English common law regarding good husbandry generally, but rather interpreted a provision in the lease which provided that “the lands shall be farmed in a way to prevent injury to the same.” *Id.* at 243.

321. *Id.* at 244–45.

322. YOOL, *supra* note 23, at 2.

323. HORWITZ, *supra* note 6, at 30.

324. *Id.* at 54.

Revolution.<sup>325</sup> Purdy separates the English and American adoption of the new rule, saying that the English change “came for quite distinct reasons, and long after American law had completed its break from English doctrine.”<sup>326</sup> Additionally, Purdy’s contrast of the American and English rules and construction of the civic republic narrative suggests that the American doctrine did, in fact, shift with or near the American Revolution.<sup>327</sup>

Only a couple of early cases, such as *Jackson v. Brownson*, on which Purdy substantially relies,<sup>328</sup> consider deviating from the English rule.<sup>329</sup> Those cases are not only limited to a couple of jurisdictions, but also, as the New Hampshire Supreme Court observes, to circumstances where the court is interpreting a contract, in particular a short term lease of undeveloped land.<sup>330</sup> Rather than concluding that other jurisdictions had wholly “jettisoned” the English law, as Sprankling would have us believe, the New Hampshire court saw a much more mediated response from the American courts.<sup>331</sup> Short term leases provided a very specific context—one where it was illogical for the lessee to anticipate making a financial gain from the land unless he could either cut timber or clear land for cultivation. Logically, “[i]f lands are leased to a lessor in an uncultivated state, he must of necessity have the power to clear; otherwise, the lease would be of no profit or advantage to him.”<sup>332</sup> Moreover, such circumstances were analogous to the English rule that allowed for a tenant to work open mines even if they were not mentioned within a lease—the need for economic gain from the lease was inferred.<sup>333</sup> If a tenant intended to live on the un-

325. Sprankling, *supra* note 8, at 534–35.

326. Purdy, *supra* note 9, at 664–65.

327. *See id.* at 668.

328. *Id.* at 661. Purdy describes *Jackson v. Brownson* as the “watershed” case in American waste law.

329. *Jackson v. Brownson*, 7 Johns. 227, 336 (N.Y. 1810).

330. *Chase v. Hazelton*, 7 N.H. 171, 177–78 (1834).

331. *Id.*

332. *Ward v. Sheppard*, 3 N.C. 283 (1803).

333. *Findlay v. Smith*, 20 Va. 134, 143 (1818). While one judge, Judge Cabell, spoke of the need to accommodate waste law “to the situation of our new and unsettled country,” he made this statement specifically in the context of acknowledging that the English rule already “varies and accommodates itself to the varying wants and situations of the different counties in that country” rather than announcing a great break with the common law. *Id.* at 142. Even at that, Judge Cabell’s comments appears to be primarily dicta; he makes his decision not so much based on the law of waste, but rather by focusing on the intent of the testator. *Id.* at 146.

developed land during the lease, then the tenant had a reasonable expectation to be able to clear enough land “for the necessary support of his family.”<sup>334</sup> Still, only a handful of such cases exist; the majority of jurisdictions applied the strict English rule well beyond the turn of the century.

As for *Jackson v. Brownson*, rather than seeing a watershed case, as Purdy argues, the New Hampshire Supreme Court saw the holding in *Jackson* as limited to the circumstances of a lease of undeveloped land.<sup>335</sup> As a potential watershed case for American law, *Jackson* has a more problematic flaw: In *Jackson v. Brownson* the parties agreed that the lease contemplated clearing land, leaving the only question as whether the tenant “committed waste thereon by clearing and draining off the land more than a reasonable and due proportion of the wood.”<sup>336</sup> As a result, the question of whether or not the law of New York would find the clearing of undeveloped land to be waste would not properly be before the court in *Jackson*.<sup>337</sup> This, perhaps, explains why so few decisions later cite or rely on *Jackson*; this also explains the lack of the trail of subsequent citations that one would expect from a watershed case.

Most importantly, there is significant evidence that the strict common law rule thrived long after these two cases. As of 1935, Alabama courts affirmed the English rule, and described their holding as in conformity with the majority of jurisdictions: “many authorities, both English and American, declare that such changes will be deemed waste, even though the value of the property would be enhanced by the alteration.”<sup>338</sup> Similarly, as of 1836, Massachusetts followed the old rule.<sup>339</sup> The tenant had “no right to cut growing trees, that such cutting would be waste, and that wild and uncultivated land cannot be deemed estate yielding annual rents or profits.”<sup>340</sup>

Closer to the middle of the century, Alabama still retained the English rule, applying it to prevent a change in building uses. Alabama recognized that

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334. *Parkins v. Coxe*, 3 N.C. 517 (1805).

335. *Chase*, 7 N.H. at 178.

336. *Jackson v. Brownson*, 7 Johns. 227 (N.Y. Sup. Ct. 1810).

337. *Id.* at 237.

338. *Senteney v. United Embroidery Co.*, 159 So. 252, 255 (Ala. 1935).

339. *White v. Cutler*, 17 Pick. 248, 250 (Mass. 1836).

340. *Id.*

[i]t is an old principle of the common law, that a tenant is guilty of waste, if he materially changes the nature and character of the building leased. Thus, it is held, that he cannot convert a corn-mill into a fulling-mill, or a water-mill into a wind-mill, or a log-wood-mill into a cotton-mill, or a dwelling-house into a warehouse, or a brewhouse into an office.<sup>341</sup>

Indiana applied the traditional English rule through 1876, limiting the right of a tenant to take timber to only what was necessary for repairs.<sup>342</sup>

To see how long the old rule persisted beyond the American Revolution, it is important to look past the few published cases on waste to the more robust litigation on dower rules. This line of cases demonstrates fidelity to the old rule, continuing well after the American Revolution and through the nineteenth century.<sup>343</sup>

Dower cases often incorporated the traditional waste rules to determine the rights of widows to wilderness lands. For example, in 1818 the Massachusetts Supreme Judicial Court decided *Conner v. Shepherd*, determining whether or not a widow was entitled to a dower right within wild or uncultivated land owned by her husband.<sup>344</sup> The court concluded that she did not, relying primarily on the fact that waste law, as it traditionally existed in the English common law, would apply to the case.<sup>345</sup> The court concluded that it was a needless limit on the estate to give the widow a dower right in wild lands because she would be able to do nothing with the land and to draw no income from it because of the application of waste laws.<sup>346</sup> The court reasoned that “her estate, would be forfeited if she were to cut down any of the trees valuable as timber.”<sup>347</sup> Similarly, “[i]t would seem too that the mere change of the property from wilderness to arable or pasture land, by cutting down the wood and clearing up the land, might be considered as waste.”<sup>348</sup> The court specifically cited the traditional

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341. *Parkman’s Adm’r v. Aicardi & Tool*, 34 Ala. 393, 396 (1859).

342. *Miller v. Shields*, 55 Ind. 71, 75 (1876).

343. See generally, e.g., *Conner v. Shepherd*, 15 Mass. 164, 167 (1818); *Webb v. Townsend*, 18 Mass. 21, 22 (1822); *Ford v. Erskine*, 50 Me. 227, 230 (1862).

344. *Conner*, 15 Mass. at 167.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

rule of not changing land uses, but did not apply it for the purpose of maintaining boundaries.<sup>349</sup> Instead, the court reasoned that the land use rule existed to prevent changes in the property because “even if it became thereby more valuable, [it] would subject the estate in dower to forfeiture: the heir having a right to the inheritance, in the same character as it was left by the ancestor.”<sup>350</sup>

In 1836 the Massachusetts Supreme Judicial Court again considered the issue and affirmed *Conner v. Shepherd*, although noting that for the purposes of dower land it applied only to wild or uncultivated lands.<sup>351</sup> The court explained that there was no “dower in wild and uncultivated lands” because such lands “yield no annual profit, and secondly, because the widow could not make the only beneficial use of them, of which they are capable, without committing waste and forfeiting the estate.”<sup>352</sup> Following Horwitz, Sprankling, and Purdy, one might expect that the rule would shift soon after the revolutionary period, but in fact it did not. Nearly a century later, Massachusetts followed the same rule.<sup>353</sup>

Massachusetts was not alone in relying on traditional English waste law to determine the extent of dower rights. As the Maine Supreme Court explained in 1862, the old waste rule was retained by statute, and thus “a widow shall not be endowed of wild lands of which her husband died seized.”<sup>354</sup> The court noted that “[t]his has long been the settled law of this State and of Massachusetts.”<sup>355</sup> In maintaining this dower standard, Maine followed Massachusetts’ reasoning based on the English law of waste. According to the Maine Su-

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349. *Id.* at 164–67.

350. *Id.* at 167.

351. *White v. Cutler*, 34 Mass. 248, 250–51 (Mass. 1836). The court limited its ruling explaining that, “These reasons apply as well to the case of a woodlot situated in the midst of a cultivated country, as to forest lands in their original state. But the chief justice, in delivering the opinion of the Court in this case, takes care in terms to limit its operation to the case of woodlands not used or connected with a cultivated farm, or other improved estate.” *Id.*

352. *Id.* at 250; *Webb v. Townsend*, 18 Mass. 21, 22 (1822).

353. The question, then, when determining dower rights was whether or not the piece of land was accurately described as wild and uncultivated. *Goodspeed v. Lawrence*, 208 Mass. 258, 260 (1911) (“The finding of the single justice that the widow can occupy the lands here in question without committing waste does not mean, as the appellant contends, that the widow can occupy but cannot improve these lots without committing waste. It is plain that they can be improved without committing waste, and that the single justice so found. It follows that they are not wild land within R.L. c. 132, § 3.”).

354. *Ford v. Erskine*, 50 Me. 227, 230 (1862).

355. *Id.*

preme Court, “[t]he reason for this rule is, that dower being an estate for life only, woodland can be of no practicable value to the tenant in dower, as it cannot be improved nor the wood cut off by her without liability for waste.”<sup>356</sup>

New Hampshire courts similarly concluded, “[t]he right of dower is limited to lands ‘in a state of cultivation;’ because a life estate in lands in a state of nature would generally be worthless, the tenant for life being subject to trespass and waste, if she cut down wood and timber for the purposes of sale or cultivation.”<sup>357</sup>

As of 1867, the Supreme Court of Georgia still applied the traditional rule. Indeed, the court relied on Lord Coke, affirming that a “tenant-for-life may cut timber trees, (that is, trees twenty years of age,) at seasonable times, for the repairing of the houses or fences on the land.”<sup>358</sup> Additionally, the life tenant may use dead wood for fuel.<sup>359</sup> To go beyond these two uses, however, was waste, because “[a]ll timber belongs to the remainder man.”<sup>360</sup> The Georgia court noted that such restrictions had been removed in some of the American states, such as New York, but found that within Georgia, “these common law doctrines have not been altered by any legislative enactment, and are therefore obligatory on the [c]ourts.”<sup>361</sup> In 1884, the Wisconsin Supreme Court considered the dower rules from multiple states, reviewing those that did and did not apply the English rule of waste to determine which lands were subject to dower rights.<sup>362</sup> Wisconsin, ultimately, did not prefer the English rule, but also did not dismiss it outright without considering the weight of the states maintaining that rule.<sup>363</sup> Multiple jurisdictions, long after the American Revolution and into the twentieth century, relied on the English rule of waste in establishing dower rights.<sup>364</sup>

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356. *Id.*

357. *Johnson v. Perley*, 2 N.H. 56, 59 (1819).

358. *Dickinson v. Jones*, 36 Ga. 97, 104 (1867).

359. *Id.* at 105.

360. *Id.*

361. *Id.*

362. *Wilkinson v. Wilkinson*, 59 Wis. 557, 561, 18 N.W. 527, 529 (1884).

363. *Id.* at 560. Wisconsin adopts the modern American standard of considering the overall value of the property and the rule of good husbandry: “[i]t is not waste for the life tenant to cut down wood or timber, so as to fit the land for cultivation or pasture, provided this does not damage or diminish the value of the inheritance, and is conformable to the rules of good husbandry.” *Id.* at 561.

364. One might interpret Pennsylvania as a jurisdiction that in earlier years rejected

Cases interpreting wills and deeds provide another source of information on American courts applying the old rule, at least through the first few decades after the Revolution. One of the traditional quandaries of interpreting estate language is determining when the author intended to create a life estate versus a fee simple. The general rule has been to require words of inheritance to create a fee simple; the overall rule of interpretation, however, has been the author's intent to benefit the devisee.<sup>365</sup>

Courts in multiple jurisdictions, relying on the incorporation of the English rule of waste into their state common law, used waste law to illuminate the intent. Courts reasoned that "a devise of wild and uncultivated land carried a *fee* without any words of inheritance;—because a *life estate* would be of no use to the devisee."<sup>366</sup> Because of the rules of waste, courts reasoned that a life estate in wild, uncultivated lands was "worthless."<sup>367</sup> Given that "[a] devise is always intended for the benefit of the party,"<sup>368</sup> the author must intend something more than a life estate. The court concluded, "[t]he inference then is clear, that a devise of such land, without words of inheritance, carries a fee."<sup>369</sup> Like the dower cases, these will cases demonstrate the continuing importance of the traditional English rule.

When it comes to dating the shift from this rule, Merrill opposed Horwitz, Sprankling, and Purdy, dating the rule change to nearer the twentieth century, to the *Melms* case, which he describes as "the catalytic decision that began the process of remaking the doctrine in this fashion."<sup>370</sup> Merrill argues that "[t]he real transformation in the American law of waste occurred not in the nineteenth century, but in the

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the British rule in dower cases. In *Hastings v. Crunckleton*, the court allowed the widow to clear lands. However, it appears from the circumstances that the widow received only uncultivated lands in her common law division and therefore to have any support from the lands, which she could not sell, she would have had to clear some area for cultivation. 3 Yeates 261 (1801). Such reasoning by the courts seems more an exception to the general rule rather than the adoption of a new one.

365. In general, a devise "without words of inheritance" is one for life only. *Sargent v. Towne*, 10 Mass. 303, 307 (1813). However, "[a] devise is always intended for the benefit of the party." *Id.*

366. *Babb v. Perley*, 1 Me. 6, 8–9 (1820).

367. *Sargent*, 10 Mass. at 307.

368. *Id.*

369. *Id.*

370. Merrill, *supra* note 11, at 1084.

twentieth.”<sup>371</sup> And Merrill has not been the only person to regard *Melms* as the landmark case.<sup>372</sup> Merrill argues “Before *Melms*, all courts would have regarded the deliberate destruction of a house to be waste. Indeed, any *material alteration* of property by someone temporarily in possession was regarded as waste.”<sup>373</sup>

As we have seen, a number of American cases through the nineteenth century adopted the new rule, omitting the boundary-maintenance prong and leaving the waste rule with only the two value-maintenance prongs.<sup>374</sup> So why does Merrill not see a shift until after *Melms*? Merrill argued that the cases cited by Horwitz, Purdy, and Sprankling all involved agricultural cultivation.<sup>375</sup> Merrill does not see these cases as evidence of the new rule being applied because he maintains that courts would have reached the same outcome under the old rule, and argues that it was “not clear that there was any real difference between English and American law on [agricultural cultivation

371. *Id.* at 1080.

372. Thomas Merrill describes *Melms* as potentially “the most important decision ever rendered by an American court concerning the law of waste.” *Id.* at 1055; *see also* Deepa Varadarajan, *Improvement Doctrines*, 21 GEO. MASON L. REV. 657, 672 (2014) (describing *Melms* as the “landmark case” of when “American courts began to relax this absolute rule of waste in the late-nineteenth and early-twentieth centuries”); Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157, 2183 n.157 (2012) (describing *Melms* as “[a] leading American case that breaks with the English common law rule”).

373. Merrill, *supra* note 11, at 1058. In its earliest iterations, the common law held that the “[p]ulling down of a mansion-house” was not only waste, but actually an “aggravated act[] of waste,” which might be restrained in equity despite a covenant providing the property “without impeachment of waste.” YOOL, *supra* note 23, at 15–16. The tenant was required to keep a house in good order even “though no timber grow on the ground.” COKE ON LITTLETON § 53a (8th ed. 1822). However, other cases point to a different result by the mid-nineteenth century. Writing in 1863, George Yool found that English courts would uphold the action of the defendant in removing a building provided that the value of the property remained stable or increased. YOOL, *supra* note 23, at 60–61. Henry Roscoe, in his treatise, finds that “[i]f the house be ruinous at the time of the tenant’s coming in, yet, if he pull it down, it will be waste; unless he re-build it.” 1 HENRY ROSCOE, A TREATISE ON THE LAW OF ACTIONS RELATING TO REAL PROPERTY 81–82 (1840). Roscoe goes on to say that pulling down a house and rebuilding will be acceptable, provided that the new house is neither smaller nor larger than the old one. *Id.* On the other hand, Roscoe does find that converting a house to another purpose will be waste, even if the conversion increases the property value. *Id.* at 82. *See also* *Greene v. Cole* 85 Eng. Rep. 1037 (KB) 1047 (discussing how the building of a new house might or might not be waste, and requiring a new building to precisely match the size of the old one).

374. *See supra* Section IV.B.

375. Merrill, *supra* note 11, at 1079.

and value change].”<sup>376</sup> In support of this Merrill cites to *Melms*, which briefly discussed two English cases, and reasoned that “‘even in England’ a change in agricultural uses by a tenant ‘will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance than injures it.’”<sup>377</sup> In support of this proposition, *Melms* cited *Doherty v. Allman* (1878)<sup>378</sup> and *In re McIntosh* (1891)<sup>379</sup> and Merrill provides no additional support.<sup>380</sup> As we have seen, however, the cases that Merrill cites are not English cases following the old rule, but the new one.<sup>381</sup> Merrill neglected to recognize that the English courts had already shifted from the original law of waste to embrace the new rule.

Notably, it does not seem that the court in *Melms* would have supported Merrill’s suggestion that the English courts still maintained the old rule and that *Doherty* and *In re McIntosh* indicated that the old rule would have allowed for value-enhancing shifts in land use. Although Merrill does not discuss *Bewes*, *Melms* relies on *Bewes* when deciding to adopt the new rule, specifically citing the pages where *Bewes* discusses how England had already adopted the new rule.<sup>382</sup> *Bewes*, of course, not only finds that the English adoption of the new rule dates to the mid-nineteenth century, but also points to a case that addressed not agricultural changes, but the tearing down of a barn and building of another in a different location a significant distance away.<sup>383</sup>

The better understanding is that *Melms* contributed to the solidifying a trend that had already begun in the United States, with cases such as *Pynchon v. Stearns*,<sup>384</sup> and followed the new rule as it had al-

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376. *Id.* at 1079–80.

377. *Id.* at 1080 n.114.

378. [1878] 3 App. Cas. 709 (HL) (appeal taken from N. Ir.).

379. (1891) 61 LJR 164 (Eng.).

380. Merrill, *supra* note 11, at 1080 n.114.

381. See *supra* Section IV.A.

382. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 12, 79 N.W. 738, 739 (1899).

383. *BEWES*, *supra* note 20, at 130. *Jones v. Chappell*, decided in 1875, also indicates that the English courts had already considered and adopted the new rule in the context of buildings. In *Jones*, the court concluded that the old rule of “[i]f the tenant build a new house it is w[aste]” was “not the law at the present time.” *BEWES*, *supra* note 20, at 138 (quoting *Jones v. Chappell* [1875] 20 LR Eq. 539 (Eng.) 540).

384. Merrill describes *Melms* as “a milestone in a transformation in the law of waste that took place in the twentieth century.” Merrill states that “[b]efore *Melms*, all courts would have regarded the deliberate destruction of a house to be waste. Indeed, any *material alteration* of property by someone temporarily in possession was regarded as waste.” Mer-

ready been established in England.<sup>385</sup> Merrill has argued against the development narrative, finding “that transformation was not a manifestation of inexorable social and economic change. Rather, it was a top-down reform introduced by the Legal Realist movement.”<sup>386</sup> Merrill describes two conflicting decisions—*Melms*, a Wisconsin case that adopted the new rule, and *Brokaw v. Fairchild*,<sup>387</sup> a New York case that rejected the new rule—as well as subsequent, successful lobbying in favor of the *Melms* decision.<sup>388</sup> Merrill concludes that the *Melms* rule prevailed because “[t]he New York reform proved to be highly influential with bodies such as the American Law Institute, which also adopted a test consistent with *Melms* for inclusion in the *Restatement of Property*.”<sup>389</sup>

With that said, there remain reasons to be cautious of Merrill’s emphasis on *Melms*. In particular, treatise writers at the turn of the century appear to have found the changes in waste law fully under way rather than just nascent with *Melms*.<sup>390</sup> Merrill’s distinguishing of earlier cases fails to convince; contrary evidence suggests *Melms* was not a landmark case. For that reason, it is hard to see *Melms* as the turning point in American law. Merrill’s more persuasive argument involves the influence of *Melms* on the American Law Institute. Merrill may indeed be correct that the backlash against a New York case, *Brokaw*,<sup>391</sup> may have spurred American jurisdictions to more rapidly adopt the new waste rule.<sup>392</sup> Merrill suggests that the *Melms* decision became so significant because the New York Law Review Commission, which recommended that *Brokaw* be overturned, adopted the reasoning in *Melms*, and the Review Commission, in turn, influenced the American Law Institute.<sup>393</sup>

The timing of the shift matters for determining what factors influ-

rill, *supra* note 11, at 1058. See *Pynchon v. Stearns*, 52 Mass. 304 (1846).

385. *Supra* Part V.

386. Merrill, *supra* note 11, at 1080.

387. 237 N.Y.S. 6 (Sup. Ct. 1929), *aff’d mem. per curiam*, 245 N.Y.S. 402 (App. Div. 1930), *aff’d mem. per curiam*, 177 N.E. 186 (N.Y. 1931).

388. Merrill, *supra* note 11, at 1082–83.

389. *Id.* at 1083.

390. *Supra* Part V.

391. *Brokaw v. Fairchild*, 237 N.Y.S. 6 (Sup. Ct. 1929), *aff’d mem. per curiam*, 245 N.Y.S. 402 (App. Div. 1930), *aff’d mem. per curiam*, 177 N.E. 186 (N.Y. 1931).

392. Merrill, *supra* note 11, at 1082–83.

393. *Id.*

enced the change. A shift that did not occur at the time of the American Revolution, but roughly half a century later, casts doubt on the idea that courts transformed waste due to pressures from land development. A shift in doctrine would have been enormously more useful during earlier eras. In general, the earlier the shift the more useful it would have been for citizens to take advantage of the rule in developing land. As it happens, the shift was quite late. Given how much more useful the shift would have been earlier on, it is harder to see the social and economic pressures of land development as the primary force behind the changes in waste law.

#### VI. THE NEW HISTORY OF WASTE LAW AND A CRITIQUE OF MODERN LEGAL HISTORY THEORY AND METHODS

This new history of waste law differs from the traditional accounts in two ways that matter deeply for those who study legal history. First, the new history demonstrates that the change in waste law was not a radical throwing out of old laws in response to economic pressures.<sup>394</sup> Instead, the change maintained fidelity to existing legal doctrine.<sup>395</sup> Second, while previous accounts source change in the social and economic pressures of development or the persuasiveness of certain lobbyists and reformers, this Article demonstrates that law shifted in response to modernizations in technology and did so logically and to maintain coherence within the existing doctrines.<sup>396</sup> The changes in waste law do not support a story that casts law as entirely malleable.<sup>397</sup> Instead, the changes show that property law shifted slowly, even if in response to social contexts, and maintained fidelity to past doctrine.<sup>398</sup>

These differences matter not just because of the role waste law has played in understanding American law more generally. Correcting the story of waste law in America also provides an impetus to correct the methodology of modern legal history. Accurately understanding waste law requires knowledge of both the social contexts (here, science and technology more directly than economic development) and the doctrinal history. Without maintaining doctrinal investigation as a key methodological component, law and society approaches risk anachro-

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394. *Supra* Part IV.

395. *Supra* Part IV.

396. *Supra* Part III.

397. *Supra* Part IV.

398. *Supra* Part IV.

nistic pulls such as the sense of the inevitability of development that will, as they did in the case of waste law, distort our understanding of the history.

A. *A Critique of Modern Theories and Methods of Legal History*

Prior to the movement to emphasize socio-economic contexts in legal history, scholars tended to focus on the slow evolution of doctrine. In general, “[h]istorians did a good deal of ‘line-tracing’ – connecting the doctrines to be found in judicial decisions . . . – in a kind of ‘follow the dots’ intellectual exercise.”<sup>399</sup> Valid criticisms of this method soon emerged. It “tend[ed] to rarify and isolate the law as a factor in historical change.”<sup>400</sup> Moreover, isolating law implicitly suggested that law was entirely immune to the complex forces of socio-economics, as well as other social pressures and circumstances that fell short of revolution.

Hurst and Horwitz drove a reactionary force against this trend and for decades now, historians instead have focused on the complexities of law and social change, incorporating disciplines from psychology and sociology to anthropology and economics. Horwitz, in particular, influenced legal scholarship enormously,<sup>401</sup> and did so particularly with his *Transformation of American Law*, the book that included his previously discussed reflections on waste law.<sup>402</sup> Theoretically, Horwitz developed his approach more fully in *Transformations II*, which explicitly tackled the subject of the relationship between law and poli-

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399. Harry N. Scheiber, *Law and American Agricultural Development*, 52 AGRIC. HIST. 439, 439 (1978).

400. *Id.*

401. Daniel Hamilton and Al Brophy have honored Horwitz with their edited book, *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ* (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

On the other hand, Tomlins argues that Hurst, rather than Horwitz, provided the primary metanarrative that “endures as a default setting” for legal history – the idea of the nation the law built. See Christopher Tomlins, *American Legal History in Retrospect and Prospect: Reflections on the Twenty-fifth Anniversary of Morton Horwitz’s Transformation of American Law*, 28 LAW & SOC. INQUIRY 1135, 1141 (2003). Tomlins sees Horwitz as continuing the tradition of Hurst rather than providing any new metanarrative. *Id.* at 1142.

402. Tomlins describes the book as having “a major influence on the field of American legal history” and being “a focus for legal historical scholarship.” See Tomlins, *supra* note 401, at 1136. Laura Kalman finds that “routinely do legal historians today make *The Transformation of American Law* their starting point.” Laura Kalman, *Transformations*, 28 LAW & SOC. INQUIRY 1149, 1149 (2003).

tics.<sup>403</sup> As Sunstein summarized it, the “overriding theme” of the book was “the rise and fall of ‘Classical Legal Thought.’”<sup>404</sup> Tomlins described “Horwitz’s key claim to innovation” within legal history as proving “that the history of law was in crucial respects indistinguishable from past politics.”<sup>405</sup> Horwitz, according to Tomlins, “discover[ed] that law was . . . thoroughly embedded in social conflict and covered with the finger-prints of the powerful.”<sup>406</sup> Law, for Horwitz, was “what society’s ‘powerful groups’ used to confound and confine the rest.”<sup>407</sup> Following Horwitz, legal history has embraced a realist, “law and society” approach, looking for explanations for legal change in social forces.

Yet, focusing on the social context, particularly with a modern lens and without a solid doctrinal investigation, leads to conclusions like Sprankling’s on waste: “Driven by the instrumentalist vision, nineteenth-century American courts resoundingly jettisoned the waste doctrine’s ban on clearing forest land for cultivation.”<sup>408</sup> As this Article demonstrates, privileging the social context above tracing the evolution of legal doctrines ultimately distorts the role of law in early American society, suggesting that it was much more flexible and responsive to socio-economic change than it necessarily was.<sup>409</sup> The focus on law as a construct effective for achieving social, economic, and spatial goals can distort the nature of law as an independent, stable, and internally consistent structure of society—one that promotes social stability and affirms existing rights and investments, particularly where property is concerned. Too much emphasis on social contexts, and particularly on anachronistic future outcomes such as environmental destruction, neglects the role of law as a conservative force in society—making changes, particularly in property rights, more difficult to achieve.

Few voices have spoken against the strength of the law and society

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403. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 272 (1992).

404. Cass R. Sunstein, *Where Politics Ends*, *THE NEW REPUBLIC*, Aug. 3, 1992, at 38, 38.

405. See Tomlins, *supra* note 401, at 1136. Tomlins suggests that legal historians have moved toward politics to fill the “vacuum left” after historians outside law abandoned politics for social and cultural history.

406. *Id.* at 1137.

407. *Id.* at 1140.

408. Sprankling, *supra* note 8, at 534–36.

409. *Supra* Parts II, III.

movement in legal history. Yet, quiet rumblings periodically question how much we have abandoned our native methodologies. Upon publication of Horwitz's *Transformations II*, Cass Sunstein responded by criticizing the book for focusing too much on scholarship of law and too little on the actual "concrete developments in American law."<sup>410</sup> Part of the problem is that the law and society approach to legal history suggests where to look for sources of change, but in the end is far more a vision of what law is than it is a demonstrable methodology. The result is, a great deal of the time, that legal history lacks a methodology.

Legal historians are, admittedly, not really alone in suffering from this malady. Historical method may be floundering as much outside law as in it. David Henige recently argued, "[h]istorical method was once a centerpiece of the historiographical enterprise, but this day seems long gone."<sup>411</sup> As historians outside law seek to reestablish their methods, legal historians should embrace a similar impulse.

#### B. *A Prescription for Modern Legal Historians*

What modern legal historians seem to have lost over the years is their native methodology: the simple and sometimes tedious exercise of tracing the evolution of doctrine. Beginning at the beginning and ending at the end. It is only through tracing the evolution of doctrine that historians capture the permanence of law—law's consistency or fidelity to itself.

Consider the importance of law's fidelity to itself in the story of waste law. This Article demonstrates that through the transformation of the common law of waste to the modern rule both English and American courts maintained substantial fidelity to existing law. That fidelity is all the more significant if one accepts Merrill's argument: Merrill suggested that the new rule, as a default, is not so efficient or useful when compared to a standard prohibiting all change and allowing the parties to contract around the rule.<sup>412</sup> Merrill finds that a strict rule prohibiting changes is one that is both a bargain-inducing default rule, as well as a rule consistent with "broader understandings about the value and function of property as an institution in our society."<sup>413</sup>

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410. Sunstein, *supra* note 404, at 40.

411. DAVID HENIGE, HISTORICAL EVIDENCE AND ARGUMENT 8 (2005).

412. Merrill, *supra* note 11, at 1092-93.

413. *Id.*

If Merrill is correct, then courts in both countries adhered faithfully to the value-maintenance standard, dropping the strict approach, even when the strict approach was more efficient.

That's strong evidence of the power of fidelity. Such evidence suggests that law maintains significant and structural or systemic preferences for consistency and fidelity that sometimes, or maybe even often, trump other key values such as efficiency. This Article argues that legal historians should reintegrate the methodology of doctrine-tracing, because without it, we have a poorer and less accurate theory of the role of law in society and the process of transformations of law.

Methodologically, doctrine tracing provides a way to locate the evidence of law's continuities and fidelities. There are, of course, many examples of law's fidelity, for better or worse. At times law maintains doctrines based on incorrect information (such as antiquated principles of science), perhaps persisting long beyond what we might reasonably expect in light of the time necessary for procedural mechanisms to force their reconsideration in legislatures and courts.<sup>414</sup> While there is nothing to celebrate about our uncorrected errors, there is something worth noticing in the pattern in terms of the strength of law's consistency over time. Moreover, historians need methods for locating the evidence of continuities. The reigning methods of modern legal history, with their focus on social pressures and transformation, capture moments of change; they do not focus on the many pressures that keep laws in place for centuries, even when the laws aren't ideal.

Yet, historians, it is fair to say, have abandoned tracing the evolution of doctrine as an approach to legal history. Most historians focus on social factors and economic circumstances that may influence law without giving much attention to the power of law to resist social change and maintain fidelity to past precedents.<sup>415</sup> In the context of property law, that power may be all the more important due to vested rights and the risk of takings claims resulting from significant shifts in doctrine. In the context of waste law transformation, Horwitz, Sprankling, and Purdy all emphasized the social circumstances and disregarded the continuities of law;<sup>416</sup> the result was a skewed history of how waste law changed in America. Doctrine tracing, as exemplified in this Article, provides a way to ease back along the continuum from

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414. Sprankling, *supra* note 8, at 536.

415. *Supra* Part I.

416. *Supra* Part IV.

the law and society approach.

The point here is not that we have gone entirely astray in looking to legal and societal approaches in legal history. This is not an argument against law as a social creation, but instead a push toward recognizing that law, at least within common law systems, maintains numerous mechanisms such as *stare decisis* and vested rights that give law a unique role in society, making it a force for perseverance and stability. To account for legal change fully, legal history needs methodologies that gather precisely this kind of evidence: evidence of law's fidelity and resistance to change due to specific legal mechanisms. To accurately understand transformations in law, historians cannot allow investigations of social context to absolve them of the duty to conduct a parallel investigation of the doctrinal history.

This argument does not aim to topple law and society approaches, but rather to suggest that historians have gone too far along the spectrum, favoring social explanations for legal change and ignoring consistencies maintained through the evolution of doctrine. This Article suggests not that we depart from the law and society approach entirely, but rather that historians reintegrate the distinctly legal history methodology of tracing the evolution of doctrine. When the law and society approach could have enriched our own distinct methodology, it instead, unfortunately, largely replaced it.

## VII. CONCLUSION

Waste law has been transformational well beyond its bounds within legal scholarship. It has supported arguments for new approaches to legal history and provided a concrete world in which to explore complex issues of property theory. Following that trend, this Article contributes to the overall literature on waste law, offering a number of important correctives to existing accounts, but also employs the story of waste law's transformation to a greater purpose, offering a critique of current methods in legal history.

This Article offers a new history of waste law—the first to engage the development of the doctrine within the common law prior to the adoption of the modern rule. This new history demonstrates the flaws in the traditional account, which described a transformation that was uniquely American and driven by the economics of land development. This Article demonstrates that rather than creating a unique and distinctively American rule, our courts transformed waste law both contemporaneously with British courts and with a great deal of doctrinal

consistency. In detailing this history, this Article illuminates the two distinct functions of waste in the common law, recovering the previously undescribed boundary-maintenance function. By analyzing the two distinct functions of waste law and delving into the history of the boundary-making function in particular, this Article created a new and more accurate account of the transformation of waste law.

Finally, this Article employs the new account of the waste law transformation to critique the methodology of modern legal history. The Article argues that legal histories have abandoned their traditional methodology of tracing the evolution of doctrine in favor of law and society approaches that seek social and economic explanations for legal change. When historians focus on social factors and economic circumstances that may influence law without giving much attention to the power of law to resist social change and maintain fidelity to past precedents, they not only create less accurate historical accounts, but also skew perceptions of the role of law in society. The focus on law as a construct effective for achieving social, economic and spatial goals can distort the nature of law as an independent, stable, and internally consistent structure of society—one that promotes social stability and affirms existing rights and investments, particularly where property is concerned. In light of these concerns, this Article argues for reintegrating the distinctly legal history methodology of tracing the evolution of doctrine.

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