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Bubbles (Or, Some Reflections on the Basic Laws of Human Relations)

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BUBBLES
(OR, SOME REFLECTIONS ON THE BASIC LAWS OF HUMAN RELATIONS)

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The protestor's bubble crossed into the officer's bubble,
and then pop, on the double, the protestor was
in a whole hubble of trouble.
But what if she wasn't and instead with the same, the
unwanted intrusion was just part of life's
game?
The law must give some sense of which strife will be
foul; referee each piercing offense from a knife
to a scowl.
Burdened are they who must call how it should be, to
provide some meaning in a word for it all –
externality.© [1]

I. INTRODUCTION

The lessons of this Essay can be visualized through a certain tale reflected in the words of the rhyme above. Principally, these lessons instruct the following: externalities abound in life, their presence in life is critical to the formation of legal rules of human behavior, and an understanding of the externality discussion in law is necessary to have any appreciation for our choice of legal rules in a liberal society.

The facts of our introductory tale, related in more detail below, are relatively simple. A protester comes upon a police officer at a protest

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1. ©Donald J. Kochan, 2014.

while blowing soap bubbles to presumably represent some point of protest. As the bubbles come precariously close to the officer's face, he threatens the protester with arrest for assault if one of those bubbles hits him. The officer, shall we say, has defined his own personal "bubble" or spatial boundary that, once crossed, even if just by a soap bubble, will in his mind constitute an actionable wrong (here, a criminal wrong). The premise is that if the bubbles are being blown but do not cross some threshold then there is no harm, no foul. But, at some point, the use of one's own mouth to blow bubbles through their own device can cross a threshold into causing a harm to another – and a harm of a type that should have legal consequences. This tale of the protester and police officer squared off in a bubble blowing showdown irresistibly occasions a discussion on perhaps the most fundamental principle underlying law's treatment of rights and obligations: You can blow your bubbles in your own bubble but do not let your bubbles cross into mine.

This is an essay with some thoughts on law and the regulation of human relations. We humans must live with each other.[2] That is an inescapable fact. In today's society, only the very most reclusive, off-the-grid hermits have any chance of avoiding interaction with other humans or escaping the reach of the law. Given issues of proximity and frequency of contact and all other types of interaction, we are each also (quite often, in fact) doing things that have negative impacts on other people or experiencing negative impacts from things that others have done. Strangely enough there are conveniences in the complexity offered in this modern society of ours, but they bring with them both the conveniences and inconveniences of interconnectedness.

The term "externality" is critical to the understanding of these laws of human relations and interconnections. It is a term quite often associated with the use of one's property and the external effects that use causes. Moreover, the term usually is seen as one from economics and has economic connotations. For example, *Black's Law Dictionary* defines externality as a "consequence or side effect of one's economic activity, causing another to benefit without paying

2. As Singer puts it when discussing nuisance law: "We don't live alone. It seems obvious, but this simple fact has profound consequences." JOSEPH WILLIAM SINGER, PROPERTY 98 (3d ed. 2010).

or to suffer without compensation."[3] The basic premise regarding law's reaction to the economists' explanation of an externality is to design rules that prevent their occurrence through deterrence or to establish liability regimes and compensation systems to make those adversely affected by another's actions whole.

The externality-regulating regime that develops in the law is grounded in the belief that we typically have a right to exclude others from our property so any harm that invades our property should be prevented or otherwise regulated through the establishment of legal rules.[4] The right to exclude, fundamental to the law of property,[5] has at its base the ideals of the Latin maxim *sic utere tuo ut alienum non laedas*, meaning that "one should use their property in such a way as not to injure the property of another."[6] One may use her property as she wishes so long as she internalizes the costs of her actions, that she respects her neighbors by not imposing negative externalities.[7] And, in property law, we see the emergence of common law doctrines like nuisance and trespass law to enforce the exclusionary ideals in that maxim.[8] Nuisance "provides remedies for . . . uses of one's own property that negatively affect the use or enjoyment of

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3. BLACK'S LAW DICTIONARY 703 (10th ed. 2014).

4. *Id.*; O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 488-89 (2004). Reed explains:

> [T]he positive "bundle" of rights like possession, use, and alienation can all be derived from the negative exclusionary right . . . if an owner can legally exclude others from interfering with the resources of her land, she can possess the land, use it in a myriad of ways that leave an equal right in others to use their resources, or transfer it through sale, lease, or gift to others.
>
> *Id.*

5. EDWARD H. RABIN, ROBERTA ROSENTHAL KWALL & JEFFREY L. KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW 2 (5th ed. 2006) ("All theories of property recognize that the right to exclude others is an important attribute of property.").

6. DUKEMINIER ET AL., PROPERTY 779 (8th ed. 2014). *See also* BLACK'S LAW DICTIONARY 1960 (10th ed. 2014) (translating the maxim as "use your property so as not to damage another's; so use your own as not to injure another's property").

7. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 145 (1876) (defining and explaining the importance of the *sic utere* maxim).

8. DUKEMINIER ET AL., *supra* note 6, at 779.

neighboring property,"[9] and trespass defines the wrongs involving "situations in which one person physically invades the land of another."[10] These and similar real property torts are all prototypical doctrines related to externalities. But they should not be seen as the only ones implicating the externality concept.

This Essay posits that this externality concept has a very special and widespread place in the development of legal rules well beyond the imposition of uncompensated purely economic harm, and that it has a place and meaning in the discussion of legal rules even outside what we typically call the rules of real property law. If we start with the concept that each person has property in and ownership of his or her self, then we can expand the notion of externalities to include harm to both property as typically understood but also to include harms to persons and the property rights in the self.

Many of our laws on interpersonal relations are grounded in evaluating whether we use ourselves in a manner that infringes upon the rights of others to use their selves and/or whether we are violating another's right to exclude us from their space – or, as we might otherwise call it, their bubble. Our determination of what is a harm or what is a wrong is shaped by our understanding of externalities. Our choice to call something a harm or wrong is dependent on a determination that the thing so named is an *unacceptable* externality.

This Essay explains and then asks the reader to accept this broader meaning of the term externality. What then follows, it is hoped, is a greater appreciation for the pervasiveness of externality-based legal rules that will help us better understand the law more generally and aid us in seeing the choices that the law must inevitably make between acceptable and unacceptable intrusions into each other's bubbles (or boundaries).

A person's "bubble" is defined here, in part, as their exclusive domain. Some might equate it to your personal space.[11] It is the

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9. SINGER, *supra* note 2, at 99.

10. *Id.*

11. For an interesting discussion of personal space issues and how they are defined in human relations, one might look at the study of "proxemics" – a term and field defined and initiated by Dr. Edward T. Hall. *See generally, e.g.*, EDWARD T. HALL, THE HIDDEN DIMENSION 1 (1969) ("Proxemics is the term I have coined for the interrelated observations and theories of man's use of space as a specialized elaboration of culture."); Edward T. Hall, *A System for the Notation of Proxemic*

outer boundary of their dominion over the property rights in their person and their things. They have the right to exercise that dominion by doing what they wish with this property in the self and in things, while keeping people and things out (the right to exclude) or letting people and things in (the right to include, consent). The complications arise when exercising those rights (like blowing a bubble in your bubble) creates externalities – consequences of one's actions not contained within their bubble.

"Externality" is not a popularly used term in the common human vernacular, but perhaps it should be. It is a concept we face every day. Actions and ideas have consequences, and the cost of these things are not always completely internalized. Thus, the foundation of law is, indeed, a means of forcing responsibility for the internalization of the costs that our actions would otherwise impose upon others.

Part II will provide the details of the tale of the protester and the policeman. While this story is interesting in its own right and might very well spark conversation for those that hear it, the principal purpose of this tale is to use it as an illustration for further discussion on the externalities concept and the pervasiveness of difficult decision-making within the law in relation to that concept. Part III will broaden the understanding of the bubble concept and will include some reflections on self-ownership as a starting point for the understanding of even more comprehensive application of externality norms to legal rules. Part IV will discuss the externality norms in law and is designed first to underscore the importance of understanding the pervasiveness of externality-based decision-making in law. It also seeks to ensure that the reader leaves with a solid grounding in what we mean by the term externalities and with some basics on how the law seeks to control them.

Not all externalities will receive the attention of the law. We must choose which are sufficiently "bad" to warrant legal intervention. The purpose of this Essay will not be to make specific choices of which externalities we should recognize as legally enforceable wrongs. Instead, the main, final goal of this Essay is to highlight the necessity of making that choice and formulating the appropriate,

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Behavior, 65 AM. ANTHROPOLOGIST 1003 (1963); Edward T. Hall, *Proxemics (and Comments and Replies),* 9 CURRENT ANTHROPOLOGY 83, 83-91 (1968).

responsive legal rules to those externalities so categorized as worthy of such regulation.

II. THE PROTESTER AND THE POLICEMAN

In June 2010, a police officer in Toronto threatened to make an arrest for what I will call an "assault by bubble."[12] A protestor at the G20 summit in Toronto was allegedly blowing soap bubbles in the officer's general direction. The police admonished the protestor that a legal wrong would be committed – specifically "assault" – should one of her blown bubbles intersect with the person of any officer. A video posted on YouTube on July 10, 2010 by an outfit called "The Real News" displays the encounter between the G20 protester and one of the police officers on duty at the event.[13] I have transcribed the most relevant portions of the video here:

> *Officer:* "If the bubbles touch me, you're going to be arrested for assault. Do you understand me?"
> *Protester:* "Bubbles?"
> *Officer:* "Yes, that's right. It's a deliberate act on your behalf. I'm going to arrest you [if it happens]. Do you understand me?"
> *Protester:* [inaudible]
> *Officer:* "Right. You're gonna be in handcuffs. Alright? You either knock it off with the bubbles. If you touch me with that bubble, you're going into custody. Right?"
> *Protester:* "I'm putting it away."
> *Officer:* "Right. Thank You."
> *Protester:* "But I would also like to know" [cut off]
> *Officer:* "You want to bait the police? Throw that on me or that other officer and it gets in her eyes, it's a detergent, so you'll be going into custody."
> *Protester:* "I understand that"

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12. I first wrote about this altercation in a short opinion-editorial piece published near in time to the incident. *See* Donald J. Kochan, *Don't Let Your Bubble Cross My Bubble*, L.A. DAILY J., July 27, 2010, at 5.

13. The video, uploaded July 10, 2010 to YouTube, is titled "'Officer Bubbles' – From Bubbles to Bookings," has received more than a million views and is available at: https://www.youtube.com/watch?v=PGMTm3QRwEc (last visited Sept. 1, 2014).

Officer: "Do we understand each other?"
Protester: "I do" [cut off]
Officer: "Then put it away!"
Protester: "I am doing that, I'm just wondering" [cut off]
Officer: "Right. The discussion's over."
Protester: "I'd really appreciate it if you could treat me with a bit of respect."
Officer: "I just did. I just did. You got what you deserved. You got my respect, alright?"
Protester: "I don't feel very respected. I'm just trying" [cut off]
Officer: "That's terrible. My heart bleeds."
Protester: "Mine too."
Officer: "Alright? Put it away, alright? Knock it off."[14]

As one can see, the officer asserted that the protester was committing, or was about to commit, a legal wrong by blowing bubbles in a way that unlawfully interfered with some spatial privilege owned by the officer and his partners, along with a freedom from interference in that spatial zone which we might otherwise call the officers' bubbles.

The video shows that the protester was later arrested and news stories confirm the same.[15] Notably, she was not arrested for the bubbles themselves, but there is no clear account how substantial a factor the bubble showdown might have been in motivating the arrest on other grounds.[16]

Nonetheless, the incident became a bit of general rallying-cry video for related anti-government or anti-development protest movements in Canada and throughout the world. The YouTube video became an internet sensation for all those interested in painting the police and authorities at such protests as unreasonable and

14. *Id.*

15. Wendy Gillis, *Toronto's Officer Bubbles Gains Web Notoriety, Arrest Threat Video Goes Viral, Spawns Queen's Park Protest*, TORONTO STAR, July 17, 2010, at 1 (reporting details of the incident, the protester's version of events, and explaining that the officer is "now known as 'Officer Bubbles'").

16. Oakland Ross, *Arrests Hit 604 As Havoc Carries On*, TORONTO STAR, June 28, 2010, at 1.

abusive.[17] In fact, the officer involved became pejoratively called "Officer Bubbles."[18] And, the protester involved even sued the officer and the City of Toronto for violations of her rights.[19]

Consider for a moment, though, what the officer was threatening as a charge: assault. The *Model Penal Code* states that "A person is guilty of [simple] assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury."[20] It continues that "A person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon."[21] Under both definitions, we have the notion of some act that is causally related to

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17. Adrian Morrow, *G20 Protest Starts With a "Bubble-In,"* GLOBE & MAIL, July 17, 2010, *available at* http://www.theglobeandmail.com/news/toronto/g20-protest-starts-with-a-bubble-in/article1389141/ (last visited Sept. 1, 2014) (discussing the impact of the viral video).

18. Patrick White, *Hamilton's Honest Cops Video Helps Renew Faith in Police*, GLOBE & MAIL, *available at* http://www.theglobeandmail.com/news/national/hamiltons-honest-cops-video-helps-renew-faith-in-police/article16403040/ (last visited Sept, 1, 2014). As this story reports, even the psyche of fellow police officers was disrupted as a result of the incident. Describing Toronto police efforts to reform image, the story quoted one police officer as explaining:

> 'A lot of the officers said the same refrain: Who wants to be the next Officer Bubbles?' Mr. Brown said, referring to Adam Josephs, the Toronto Police constable who has been viewed millions of times on YouTube threatening a G20 protester with an assault charge for blowing bubbles. 'Once it's recorded it's there forever. One misjudgment and it could be the end of your career.'

Id.

19. *See* Josh O'Kane, *Woman Who Encountered Officer Bubbles Sues Police*, GLOBE & MAIL, June 23, 2011, *available at* http://www.theglobeandmail.com/news/toronto/woman-who-encountered-officer-bubbles-sues-police/article584339/ (last visited Sept. 1, 2014).

20. MODEL PENAL CODE § 211.1(1) (1981).

21. *Id.* § 211.1(2) (1981).

an outcome of bodily injury. Both involve an act that causes harm inside the bubble of another by crossing that exclusionary threshold of the body and inflicting damage.

The doctrines of assault and battery are some of the key provisions in the criminal law that (1) emanate from the bubble concept; (2) derive from an understanding that one may not use his or her person to cause bodily injury to another person (i.e. a prohibition of imposing externalities from the use of your person); and (3) provide a protection against injury to someone who is allowed to protect their bubble, using the law, under doctrines based on the theories underlying a right to exclude others. While we traditionally use these terms like exclusion rights and externalities to deal with real property disputes, they are equally applicable in the criminal law and our bubble blowing example. The officer was asserting his right to exclude the harmful agent that emanated from the protestor's use of her property (from her self-ownership-based property of her bubble-blowing mouth and from her personal property in the bubbles themselves).

Similar to our criminal law concepts implicated in this example, most of the traditional personal and property torts usually involve some level of spatial interference with persons or property from the act of another person in the use of his self or his property. This is certainly true of assault,[22] battery,[23] nuisance,[24] trespass,[25] and the like. Most wrongs have some element of crossing the threshold of another. They involve the absence of respect for another's bubble.

Of course a variety of questions arise as to whether the law will decide to fit any particular type of activity into a definition of a wrong such as, here in the protestor/policeman scenario, an "assault." Multiple factors will come into play to determine which externalities are deemed wrongs as such, and even more factors will come into play in the case-specific applications of the standards. Many players and many factors might influence the outcome as to whether one act is or is not deemed a legally enforceable externality and pursued by the legal authorities as such. Sometimes the filter will be definitional, sometimes it will be the basis of jury decision-making,

22. BLACK'S LAW DICTIONARY 137 (10th ed. 2014).
23. *Id.* at 182.
24. *Id.* at 1233-34.
25. *Id.* at 1733.

sometimes it will be within the purview of a judge's decision, sometimes it will be a matter of legislative judgment, and some things will be filtered out through prosecutorial discretion (exercised at any stage of law enforcement, and as appears to be the reason here why charges were not pursued). And, sometimes, our "regulation" of behavior will be left to private ordering, morals-based decision-making, manners, politeness, and kindness or other personal decision-making rather than determined by the dictates of the law.

This relatively simple interaction between the protester and the policeman actually serves as an appropriate visual to consider when trying to get a handle on one of the fundamental concepts in the law of human relations – including property, torts, criminal law, and a slew of other subsets of the law of human relations. How do we decide when and whether a particular intrusion constitutes a wrong? How do we decide a particular negative externality warrants legal intervention?

III. THE UTILITY OF THE "BUBBLE" METAPHOR

As stated above, this Essay presents a brief evaluation of the law of human relations and employs a bubble metaphor for the barriers and boundaries we establish for the protection of property and person. The bubble is that area of our persons or property over which we have control, including the right to exclude people from it.[26] It is the domain over which one claims sovereign authority for herself.

Of course, isolating oneself in a bubble is hardly an ideal state. Many will recall a 1976 made-for-television movie starring John Travolta, *The Boy in the Plastic Bubble*, with the story depicting a young boy who needed to remain in a hermetically sealed environment – inside a bubble – to protect him from all of the harmful effects of the outside world.[27] The boy had such high

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26. *See, e.g.*, Ed Yong, *Brain Damage Pops Woman's Personal Bubble*, DISCOVER MAGAZINE BLOG, Aug. 30, 2009, *available at* http://blogs.discovermagazine.com/notrocketscience/2009/08/30/brain-damage-pops-womans-personal-bubble/#.VAV4VfldWOk (last visited Sept. 1, 2014) ("We all have a personal bubble, an invisible zone of privacy around our bodies. When strangers cross this boundary, it makes us feel uncomfortable.").

27. THE BOY IN THE PLASTIC BUBBLE (American Broadcasting Company, 1976). The movie discusses the plight of a young boy suffering from severe combined immunodeficiency syndrome ("SCIDS"). For information on the 1976

sensitivities and missing such a malfunctioning immune system that he was required to live inside a bubble that created a type of barrier or force field against the imposition of the numerous negative externalities that the air around him had to offer.

The necessity of living in a state separated from all of the normal interactions with the outer world seems to most to be a tragic condition. Very few of us want to live in the absolute isolation of a bubble. Most humans cherish the capacity to interact with their external environment even when we know that, at times, such exposure makes us susceptible to all sorts of negative effects ranging from mere annoyance to the contraction of deadly illnesses. Yet, because there are so many positive elements and benefits from that interaction and exposure, we often are willing to take the bitter with the sweet. We tolerate much external exposure to bad things in order to take advantage of the collisions with the good things that our outer environment offers. Yet, at the same time, to one extent or another, we all live with, and choose to cherish at times, some metaphorical bubble around us, and it is the law that helps to define that bubble's contours and provide its relative strength against those forces that might intrude upon it.

This "bubble" metaphor for some sacred personal space or boundary around one's person – and the related issues of the right to exclude and include – seems to be widely recognized.[28] The bubble visualization has been used as a parenting guide to help children appreciate and understand boundaries and the expectations of good

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television movie from the Internet Movie Database ("IMDB"), see *The Boy In the Plastic Bubble*, IMDB.COM, http://www.imdb.com/title/tt0074236/. A documentary exploration is available from the Public Broadcasting System ("PBS"). *"The American Experience": The Boy in the Bubble*, Apr. 10, 2006, PBS, http://www.pbs.org/wgbh/amex/bubble/index.html. *See also* http://www.imdb.com/title/tt0795058/. For information on the bubble boy's isolation, see, for example, *Germ Free "Home" Shields Baby Boy: Child Without Thymus Has No Defense for Diseases*, N.Y. TIMES, Sept. 23, 1972, at 62.

28. *See, e.g.*, *Personal Space Bubble*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=personal%20space%20bubble (last visited Sept. 1, 2014) (defining one's "personal space bubble" based on exclusionary principles as "the area around a person, aprox. *[sic]* 1 - 2 feet (depending on culture), that you should not enter without their (verbal or non-verbal) permission to do so.").

interpersonal behavior,[29] for example, so why not apply it to help us understand the law too? One psychologist, Dr. Maria Salvanto, advises the following regarding children's bubbles, their understanding of the exclusion and inclusion aspects of their relations, and the need to use the bubble visualization as a way to help identify good and bad behavior:

> [C]hildren can imagine a bubble around themselves. Reinforce this by having your child draw a picture of his personal space bubble. Ask him who can enter his bubble, which people have to stay out and if there is anyone he wishes would stay in their own bubble but does not. This opens the door for many quality lessons, like good and bad touching. In addition, it can be used to address problem behaviors, such as pushing, shoving, bumping and hitting. Teachers might find this exercise exceptionally useful for encouraging better behavior when lining up students and during transitional times, showing children they should not push their way to the front of the line and that they should be mindful to not accidentally bump into one another while rushing. Reminding children to respect their classmates' space bubbles is often all it takes to keep kids, well, in line.[30]

Could it be that the basics of what you need to know about the formation of legal rules you learned in kindergarten?[31] Or, perhaps it was learned later in poetry class where Robert Frost admonishes that "[g]ood fences make good neighbors."[32]

The lessons learned from either place tell us about some basic truths of human behavior and the need for boundaries and rules regarding the same. In the end it is about drawing lines between

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29. Maria Salvanto, Ph.D, *You're in My Space Bubble: Teaching Children Boundaries*, PARENT GUIDE NEWS, available at http://www.parentguidenews.com/Articles/YoureInMySpaceBubble (last visited Sept. 1, 2014).

30. *Id.*

31. *See, e.g.*, ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (2004).

32. Robert Frost, *Mending Wall, in* COLLECTED POEMS, PROSE, & PLAYS 39-40 (Literary Classics of the U.S., 1995) (1914).

individuals and between their property and other rights so that each of us can regulate our behavior by developing an understanding of what is mine and what is not mine. It is about identifying the limits of activity inside each of our bubbles so as not to interfere with others' uses of their own bubbles. And it is about developing norms of respect for, and reciprocal recognition of, the bubbles of the people around us.

A. KEEP OUT! What is a "Bubble"? Boundaries, Barriers, Fences, Thresholds, and the Overall Concept of Protected Space or Private Property

One science website stated the bubble idea in terms of a social commandment mirroring the law's *sic utere* maxim, stating: "Thou shall not transgress thy neighbor's personal space. It's among the most sacrosanct rules of social behavior."[33] The author also asked an important question that often perplexes law as well: "But how do these invisible bubbles of space surrounding each of us come to exist in the first place, and why does it feel so icky when they overlap?"[34] The law struggles to decide where one's bubble ends and another's begins. It understands that the "overlap" often involves the icky'ness of an unwelcome and uninvited negative effect.

The law regularly starts with identifying boundaries, commanding respect for legitimate barriers and fences between persons and properties, and setting thresholds that cannot be crossed without permission. Quite often, the law is placing or recognizing a "keep out" sign[35] that each of us inherently holds as a consequence of our own individual sovereignty and dominion over those things we own, including ourselves.

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33. Natalie Wolchover, *Why Do We Have Personal Space?*, LIVESCIENCE (June 6, 2012, 7:09 PM), http://www.livescience.com/20801-personal-space.html (last visited Sept. 1, 2014).

34. *Id.*

35. Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) ("That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state.").

B. Self-Ownership and Protection of the Self at the Foundation of Legal Rules and at the Heart of the Bubble Concept

At the heart of many of the legal rules governing human behavior is the idea of self-protection. After all, many posit that the state exists to take individuals out of the state of nature where their only recourse for a wrong is self-help[36] and substitute the protection of the liberal state for the less than ideal concept of self-defense in that state of nature.[37] From the concept of self-ownership, we are able to identify spheres of the self – or bubbles – that should be free from intrusion or other interference from other members of society and from the state itself.

The law acts as an intermediary in disputes and helps individuals avoid the chaos of an order-less society where individuals would otherwise be required to rely on their might to overcome oppressors and plunderers.[38] As Hume posits, "It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules."[39] If one thinks about laws against murder, theft, assault, rape, or other harms against the self, one can easily see how these laws act as substitutes for self-help measures for preventing or punishing intrusions on the person. Property offenses like nuisance and trespass similarly seek to repel those who would transgress against the ownership of property. I contend that the former category

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36. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 66 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690). John Locke argued, "The great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting." *Id.* at 66.

37. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-10 (1985) (discussing the creation of the Lockean liberal state and its property and contract rights and enforcement regimes as a means of overcoming the debilitating aspects of the state of nature, including competitive self-interest).

38. James Madison observed that "Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, *Property*, NATIONAL GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

39. DAVID HUME, A TREATISE OF HUMAN NATURE II.2 314-315 (L.A. Shelby Bigge ed., Oxford University Press 2000) (1740). *See also* Madison, *Property*, *supra* note 38, at 266 (explaining the concept of "equal advantage").

can be reframed to equate intrusions against the person and his or her ownership in their self with the real property protection doctrines.[40] By recasting both harms against persons and traditional property into the same category of intrusions on a type of ownership, it is quite easy to see how all of these laws are enforcing a type of right to exclude others. These laws involve the right to protect what one calls her own, or, alternatively stated, what one defines as her bubble.

Richard Epstein has written on the fundamental importance of self-ownership to an understanding of our rights and other laws, stating:

> [W]ithout some bedrock conception of self-ownership, no individual could claim to be the owner of himself or herself; no one would be in a position to bargain with anyone else to secure his own bodily protection. Nor would any individual have the right to acquire ownership of external things by "occupation," takin[g] *unilaterally* the first possession of otherwise unowned objects, to the exclusion of other possible owners.[41]

The idea of self-ownership gives legitimacy to one's claim to self-protection and self-defense, and it justifies one's demand that the state provide the laws that substitute for the right to self-defense when the option of self-help is surrendered to the power of the state.

This idea of self-ownership tracks the broad meaning of "property" espoused by Founder James Madison in his essay *On Property*.[42] Madison explained that individuals' property interests include not just real property but also our own rights as well: "[A]s a man is said

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40. The U.S. Supreme Court has explained:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

41. RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 73–74 (2011).

42. Madison, *Property*, *supra* note 38, at 266.

to have a right to his property, he may be equally said to have a property in his rights." [43] Madison continued to stress that each of these types of ownership is fragile and must be protected from the excesses of others that might act against them. He explains that: "Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions."[44] That excess of power could come from the state or from the unconstrained private individuals that are free to impose externalities upon others without any manner of legal intervention.[45] Where one's bubble has no reinforcement in legal rules, no man or woman is safe.

Madison, therefore, adopts a broad definition of property and an expansive scope for those things one can claim dominion over and demand others respect and not intrude upon. One might frame it in terms of an expansive definition of the protectable bubble that each man or woman is entitled to assert:

> This term ["property"] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.* In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to

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43. *Id.*

44. *Id.*

45. Justice Joseph Story has stated:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property, should be held sacred.

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

> him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.[46]

Property is at the base of all we hold dear and to which we claim rights, including our lives and safety.[47] Accepting this view, one can see ownership and the right to exclude others from all that one owns – which is certainly a good way to characterize the base of most legal rules regulating human relations and interactions with other persons and real property – as extending from these principles of property and ownership in the self and all that extends from the self.

Furthermore, it is important to stress the lesson Madison offers in the passage above regarding the necessity of reciprocal rights and reciprocal obligations that must be present and enforced between persons in society vis-à-vis each other's property, broadly construed (including both property in land, the self, rights, and all other things).[48] This lies at the heart of the *sic utere* maxim and its command to control against negative externalities.

In this light, it is the responsibility of all legal systems to determine what ownership in the self means. All governments must establish a

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46. Madison, *Property*, *supra* note 38, at 266. Consider another appreciation for this broad concept of property to include facultative resources:

> The Framers of the United States Constitution, with James Madison at the helm, assumed the existence of property as a constitutional institution and, further, had a very broad view of the resources that the term "property" protected. It certainly protected those resources such as land and goods that traded in the marketplace, but it also protected facultative resources, that is, the personal resources comprising one's talents, efforts, expressions, and practices.

O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 487-88 (2004).

47. As the Supreme Court posited in one case, "Individual freedom finds tangible expression in property rights." U.S. v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993).

48. Madison, *Property*, *supra* note 38, at 266 (discussing "like advantage"); *see also* EPSTEIN, DESIGN FOR LIBERTY, *supra* note 41, at 79–80 ("The first constraint in setting system-wide rules is one of equal entitlements for all landowners . . . So the first working assumption is that a sound system of land use regulation should protect the *like* liberty of all owners to use their property as they please.").

legal infrastructure that identifies the level of protection and recognition of property in the self as an antecedent to thereafter defining more specific rules of conduct. And, as such, every system must make determinations regarding the scope of individual's bubbles and must make decisions regarding which intrusions into those bubbles that we, as a society, determine are necessary to protect the self.[49] This will, as discussed below, involve decisions regarding which externalities we wish to define as legal wrongs susceptible to legal rules and their concomitant remedies or deterrent effects and which we must simply accept as necessary incidents of living in a complex and interconnected world.

C. Exclusion at the Heart of Self-Ownership and Its Translation to Other Legal Rules

The right to exclude is well-recognized as a fundamental feature of legal systems developed in the liberal tradition.[50] As such, the protection of the right to exclude – or, what might be described as the right to protect one's bubble from intrusion from outsiders – lies at the foundation of our formulation of legal rules. As one scholar has appropriately put it, the right to exclude is property's "singular conceptual core" and "[a]t the very heart of property."[51] If we think of property as broadly construed such as discussed in the previous subsection, this level of importance for the right to exclude extends to

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49. EPSTEIN, DESIGN FOR LIBERTY, *supra* note 41, at 87 (2011) ("These examples show how the common law develops corrections to the initial no-invasion rule that bring it closer to maximizing some notion of social welfare.").

50. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) ("Property depends upon exclusion by law from interference. ..."); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others"); Int'l News Serv., 248 U.S. at 250 (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

51. Reed, *supra* note 46, at 487-88 (2004) ("If having 'property' means anything, historically and legally, it is that the owner can exclude others from the resource owned and that others have a duty not to infringe this right.").

all forms of ownership and self-protection from intrusion against persons, real property, and rights alike.[52]

The exclusive domain – recast here for illustrative purposes as one's bubble and equated to our sense of personal space – forms the outer boundary for which the individual expects legal protection against invasion or other harm. It is a matter of dominion, where an individual has the legal capacity to do as they wish with themselves and their property, while keeping other persons and substances out (the right to exclude) or permitting other persons or substances to enter their bubble (the right to include). Any understanding of the right to exclude, of course, requires an appreciation for this necessary corollary and corresponding right to include – to let another into one's bubble.[53] The right to exclude operates within this concept of dominion with reciprocal rights and obligations of ownership – each individual has a right to expect others to respect her bubble, but others have an expectation that she will not invade or otherwise impose negative externalities on their bubble too.[54]

There is near universal agreement that the right to exclude is a "unifying or necessary characteristic" of the "concept of property."[55]

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52. *An Enquiry into the Nature and Extent of Liberty; with Its Loveliness and Advantages, and the Vile Effects of Slavery*, *in* JOHN. TRENCHARD AND THOMAS GORDON, 2 CATO'S LETTERS; OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 244, 244-45 (W. Wilkins ed., 3d ed. 1733) ("By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruits of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys.").

53. DUKEMINIER ET AL., *supra* note 6, at 104 (explaining Felix Cohen's conception of property as "a relationship among people that entitles so-called owners to include (that is, permit) or exclude (that is, deny) use or possession of the owned property by other people; . . . The two rights are the necessary and sufficient conditions of transferability.").

54. HUME, *supra* note 39, at 314-315 ("leave another in the possession of his goods, *provided* he will act in the same manner with regard to me.").

55. H. WILSON FREYERMUTH, JEROME M. ORGAN, ALICE M. NOBLE-ALLGIRE, & JAMES L. WINOKUR, PROPERTY & LAWYERING 7 (2d ed. 2006). *See also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES xxxix (5th ed. 2010) ("most scholars agree that the right to exclude is either the most important, or one of the most important, rights associated with ownership."); J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKAR, & PAUL A. FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 3 (3d ed. 2007) ("Since Blackstone's time, the Anglo-American legal tradition has

Merrill echoes this when concluding that the right to exclude "is the *sin qua non*" for property,[56] without which one can hardly make an ownership and dominion claim. The right to exclude is susceptible to limits chosen by the governing bodies in our society, but that does not diminish its overall substantiality.[57]

As we each exist in our own bubble, we have set the boundaries against which exclusion and inclusion rights are measured. Consider Blackstone's discussion of our real and invisible boundaries when it comes to trespass as an example. When describing trespass, Blackstone talked about "every man's land is in the eye of the law enclosed and set apart from his neighbor's" [58] and proceeded to describe this boundary as one that could be created "either by a visible and material fence, as one field is divided from another by a hedge; *or, by an ideal invisible boundary*, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."[59] The law has always found a way to identify those lines that isolate our separate spaces.

The bubble sets the outer limits. Once we know the bubble's boundaries, we can start to test whether the costs of our actions are contained within our bubbles and, at the same time, judge whether other parties' actions are seeping past our bubble's barrier into that protected space, leaving us a need for a legal remedy to the intrusion. All of these contemplations regard externalities and our determination of which of these are wrongs, and these are the subjects of this Essay's next and final Part.

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honored this view, but the boundaries of the right of property have not always been easy to define.").

56. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

57. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 2-3 (2006) (noting that "there have always been limits" on the right to exclude and those limits are evolving).

58. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 209-10 (1768) (explaining that under law "[e]very unwarrantable entry on another's soil the law entitles a trespass by *breaking his close*").

59. *Id.* (emphasis added).

IV. THE MEANING, AND PERVASIVENESS, OF EXTERNALITIES IN THE FORMATION OF LAW

Despite the fact that individuals should sagaciously understand the concept of externalities, as it affects almost every aspect of their use of property and interactions in the world, they most likely do not give them sufficiently serious attention. This Part is designed to sound the alarm, explaining the need for a constant awareness of the externalities in our lives and regular attention to what the law can do about them.

"Externalities" is undoubtedly not the first word people think of in the morning or discuss at the breakfast table, but they should. Will I internalize the costs of my actions today? What negative externalities might my actions today impose? Will my choices lead to the commission of a wrong by imposing a negative externality today? What negative externalities might be inflicted upon me today? The fact is that we could hardly live a day without technically inflicting negative externalities on others. Some human relations demand acceptance of certain unauthorized, even offensive, interactions that we must accept as inconvenient incidents of living in a human society. It is only by distilling unacceptable negative externalities that can we properly define legal rules and impose liabilities.

Both negative and positive externalities emerge in the use of one's person or other property. When costs are imposed on another, there are negative externalities;[60] one uses himself or his other property, reaps all the reward by internalizing the benefits or profit of the behavior yet he has no responsibility to internalize all negative consequences of the acts.[61]

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60. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS 175 (2d ed. 2006) ("Pollution and similar problems occur when people do not bear all of the costs of their actions."). *See also id.* at 20, 121-22, 175-218, 336-40.

61. *See, e.g.,* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("'Internalizing' such effects refers to a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons."); *see also* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights,* 31 J. LEGAL STUD. 453, 462-63 (2002) ("Demsetz proposed that property rights are devices to internalize externalities and will develop when the gains of internalization outweigh its costs.").

When benefits of one's activity are captured by a stranger to the act, positive externalities are conveyed.[62] One uses his property and internalizes most benefits but the use actually brings profits or added value to another as well, independent of the system of exchange. A good example of a positive externality is one that results from the refurbishing of a rundown or vacant house. When someone invests in improving the value of that property, the neighbors' values increase as well. The property restorer gets the benefit of his improvements related to the value of the improved property, but the neighbors also see increased values in their own homes (through no effort of their own) which the improver is unable to share. If the improver asks the neighbor to share some of that new value with him, the law usually will not compel the neighbor to do so. The neighbor is entitled to keep the happy benefit bestowed upon his property as a result of the improver's acts without need to compensate the improver.

The externality issue, therefore, involves the analysis of property uses and whether both costs and benefits are internalized and how doctrines or regulations should develop as a result.[63] For the most part, however, the law is concerned almost exclusively with negative externalities and allows beneficiaries of positive externalities to keep those benefits without legal intervention or coerced adjustments.

The concept of externalities has long been a foundational issue in the analysis and development of property law and regulatory responses. Amidst an interconnected world, there is an increased possibility that when one acts they might step on another's toes. We have become so concentrated and interconnected – in time, space, and relations – that the definition of legally actionable externalities

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62. *See* BUTLER & DRAHOZAL, *supra* note 60, at 184-86.

63. As Dukeminier et al. explain:

> Externalities exist whenever some person, say *X*, makes a decision about how to use resources without taking full account of the effects of the decision. *X* ignores some of the effects – some of the costs or benefits that would result from a particular activity, for example – because they fall on others. They are "external" to *X*, hence the label *externalities*. As a consequence of externalities, resources ten to be misused or "misallocated" which is to say used in one way when another would make society as a whole better off.

DUKEMINIER ET AL., *supra* note 6, at 46 (emphasis in original).

has become increasingly difficult. Only through an understanding of the foundational concept of unacceptable negative externalities can we justify legal rules that reflect the compelling *sic utere* maxim, where one may use their property as they wish so long as they internalize the costs of their actions, and respect their neighbors by not imposing negative externalities.

As noted in this Essay's introduction, the right to exclude and the concept of externalities generate primarily from one important controlling axiom that describes their basis and purpose. The U.S. Supreme Court in *Munn v. Illinois* explained that the maxim that "each one must so use his own as not to injure his neighbor – *sic utere tuo ut alienum non laedas* – is the rule by which every member of society must possess and enjoy his property."[64] Stated differently, each individual is required to internalize the costs of his actions. If he does, there is no inherent limitation on what he may do (although society may choose to regulate beyond this starting point). It is a matter of respect for others, where one refrains from imposing costs on another when using his property.[65] As Demsetz explains, "[a] primary function of property rights is that of guiding incentives to gain a greater internalization of externalities."[66] Each of us can make a claim to protection from the imposition of unacceptable externalities.[67] Each can assert that their bubble has been broken if others fail to respect this norm. Of course, defining the acceptable

64. Munn v. People of Illinois, 94 U.S. 113, 145 (1887).

65. As Demsetz explains:

> It is important to note that property rights convey the right to benefit or harm oneself or others. . . . [P]roperty rights specify how persons may be benefited or harmed, and, therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities.

Demsetz, *supra* note 61, at 347.

66. *Id.* at 348.

67. *Id.*; *See also* Smith, *supra* note 61, at 486 ("A number of patterns in property rights can be explained as variation along the methods of delineation, reflecting their respective costs and benefits.").

and unacceptable externalities becomes the challenge,[68] as we will discuss in more detail in a moment.

In *Munn*, the U.S. Supreme Court described the social compact's authorization for "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another" as "the very essence of government."[69] A rule of anti-interference with other's liberty and forbearance from causing harm to another's property is at the heart of the system of property and becomes a necessary predicate for the rule of law in a liberal system.[70]

Given that this Essay's example incident occurred in Toronto, it is also instructive to note that the Supreme Court of Canada has recognized the maxim on a number of occasions. In the 1923 case of *Reid v. Linnell*, for example, Justice Mignault stated that it is "an undoubted rule of law."[71] Mignault explained that *sic utere* means "It is, *prima facie*, competent to any man to enjoy and deal with his own property as he chooses," but he must "so enjoy and use it as not to affect injuriously the rights of others."[72]

Conceptualizing the *sic utere* maxim in its broadest sense, one can see that the maxim need not necessarily be limited to guiding the norms and rules for the regulation of real property. Although the maxim involves the basic exclusion rights understood as grounded in real property, it is equally appropriate to apply the concept to help

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68. DUKEMINIER ET AL., *supra* note 6, at 46 ("'Externality,' Demsetz says, 'is an ambiguous concept.' It is also an important one that you will be confronting more than occasionally [in the study of property law].").

69. *Munn*, 94 U.S. at 124.

70. *See* EPSTEIN, DESIGN FOR LIBERTY, *supra* note 41, at 74. Epstein explains:

> [I]t is here that the indissoluble empirical connections between property rights and the rule of law are forged. The central proposition is this: the *only* set of substantive rules that achieves that goal is one that requires all persons to *forbear* from interfering with the property rights of any other person, where "interfering" is narrowly defined to involve taking, using, handling, or breaking the property of another.

Id.

71. Reid v. Linnell, [1923] S.C.R. 594 (S.Ct. Canada 1923), *available at* http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7777/index.do (last visited Sept. 1, 2014).

72. *Id.*

understand the rationale for identifying most of the wrongs and offenses we identify in most of civil and many parts of criminal law.

Consider first an important corollary to the *sic utere* maxim is the "harm principle," a concept focused more on the legitimate role of government than the limitations on individuals but instructive here all the same. The harm principle is attributed to John Stuart Mill's seminal work *On Liberty*, where he propounds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[73] A goal of government is to protect citizen's bubbles.

A critical permutation of the *sic utere* doctrine is the oft-cited adage in legal discourse that "your right to swing your arm ends at the tip of my nose."[74] One could clearly translate this into this Essay's visual example – your right to blow bubbles from your bubble ends at the edge of my bubble. The use of the property in your person – whether it be your lips blowing bubbles or your arm swinging forward – is constrained by the limits of the other persons' bubbles that may be interfered with as you employ your faculties.

And yet another alternative adage captures even more closely this concept of exclusion applying to property in the person. It states that, "My property rights in my knife allow me to leave it where I will, but not in your chest" [75] – hence the need, as mentioned in our opening rhyme, to distinguish between those piercings by knife and others by mere scowl. While I may be offended by your scowl and it may pierce my bubble as I am forced to view it with my eyes, there may be a question whether it is the type of intrusion we wish to preclude with law. More likely to be deemed an actionable externality are those piercings of the bubble with a knife, inflicting physical harm to the person.

One obvious way to understand externalities is to consider pollution, the quintessential externality.[76] Whether it be soap bubbles in the air, oil gushing into the ocean, or the smoke coming from the man sitting next to you on the park bench exhaling his cigarette, each are pollutants even though with differing degrees of harm. With

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73. JOHN STUART MILL, ON LIBERTY 10-11 (David Spitz ed., W.W. Norton & Co., Inc. 1975) (1859).

74. Boisseneault v. Mason, 221 N.W.2d 393, 393 (Mich. 1974).

75. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171 (1974).

76. BUTLER & DRAHOZAL, *supra* note 60, at 122 ("Pollution is the most obvious example of an externality.")

each, we have an issue of negative externalities. If I emit pollution from my space, or bubble, and you are required to consume the negative effects of that pollution in your space, or bubble, then I have caused a negative externality that will be borne by you, the receptor of my pollution. Cutting and Cahoon describe pollution as involving this relationship between generators and receptors – persons who generate pollutants and persons who receive negative externalities from such generation.[77] In fact, they even use the concept of the invasion of one's "space" in their explanation:

> [W]e suggest that the field of vision [for addressing pollution] ought to be broadened to include: 1) the rights of all receptors (landowners and lawful occupiers, public or private) to be free of the effects of pollution ("externalities"), and 2) the responsibility of all generators of environmental alteration to safeguard those rights. To paraphrase George Carlin: *"You should keep your stuff in your space."* Any alteration of nature must (in addition to any other onsite regulations) be contained within the three-dimensional construct of the property boundaries.[78]

The regulation of pollutants – whether it be through common law doctrines or statutory law is responding to this generator/receptor issue and the need to provide receptors with means to protect their bubbles.

Stray smells, stray soot, stray animals, the steam or sparks from a passing train, or other things (including stray soap bubbles) that cross and transcend boundaries create risks that negative effects will be imposed on another.[79] Demsetz offers the following example to generally explain this externality problem:

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77. Robert H. Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 PACE ENVT'L L. REV. 55 (2005) (emphasis added).

78. *Id.* at 58-59.

79. Consider, for example, Coase's discussion of the "straying cattle which destroy crops growing on neighboring land." Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). *See also* HALSBURY'S LAWS OF ENGLAND (4th ed. 1973) (under the heading "Sparks from engines").

> The short-hand description for [the externality issue] is that private costs (or benefits), which do influence a resource owner, are not equivalent to the total of social costs (or benefits) associated with the way an owner uses his resources. An example . . . concerns the use of soft coal by a steelmaker. The soft coal produces soot. The soot descends upon a neighboring laundry, making it more difficult for the laundry to clean its customers' clothes, but this cost is not faced by the owner of the steel mill when he decides to use soft coal to fuel the steelmaking process.[80]

The control over the shifting of costs from one actor to an innocent other is often stated as a justification for legal intervention.[81]

The task for the law is to identify whether and when the generators have obligations to the unwilling receptors (individuals or society as a whole) for any harms imposed.[82] Huffman describes the internalization difficulty as often being one where there is a market failure that may require regulatory correction where the market has failed to ensure that the full costs of one's activities are internally accounted for and where instead those costs are imposed on outsiders to the act.[83] The formulation of legal rules, responsibilities, and

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80. Harold Demsetz, *Ownership and the Externality Problem, in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW (Terry Anderson & Fred McChesney eds. 2003).

81. As Butler and Drahozal describe:

> Externalities exist when the actions of one party affect the utility or production possibilities of another party outside the exchange relationship. Externalities can prevent a free market from being efficient. If a firm emits pollution into the air, it can adversely affect the welfare of the firm's surrounding neighbors. If the firm does not bear these costs, it is likely to select an inefficient level of pollution (that is, to overpollute). In choosing how much to invest in pollution control equipment, the firm will consider only its private costs and benefits. A socially-efficient investment would also consider the costs and benefits imposed on the neighbors.

BUTLER & DRAHOZAL, *supra* note 60, at 25.

82. *Id.*

83. James L. Huffman, *Environmental Protection and the Politics of Property Rights: The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 380 n.11, 383-84 (1997).

liabilities is informed by the desire to channel behaviors and to encourage or require internalization of harms.[84] It is a matter of allocating efficiently the controls on, and liabilities for, unacceptable behaviors.

Not all externalities will be worthy of legal intervention. Coase recognized this when explaining the consideration of remedies after identifying possible wrongs:

> What has to be decided is whether the gain from preventing harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm. In a world in which there are costs in rearranging the rights established by the legal system, the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed.[85]

Governmental control should not be the presumptive solution whenever a cost is not fully internalized. Coase notes that there may be a role for the state and "corrective government action . . . is not necessarily unwise. But there is a real danger that extensive government intervention in the economic system may lead to the protection of those responsible for harmful effects being carried too far."[86] We should heed this caution whenever determining the appropriate legal response to an externality.

Although Coase recognizes the potential for market failures that require government intervention in controlling externalities, he also provides a valuable caution about government efficiency: "direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm."[87] A secondary question, after identifying that legal intervention is necessary and appropriate, involves choosing the means of

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84. LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 655 (3d rev. ed. 1963) (discussing the need to hold owners liable for externalities so as to incentivize good behavior and the prevention of harms).

85. Coase, *supra* note 79, at 27.

86. *Id.* at 28.

87. *Id.* at 18; *see also* BUTLER & DRAHOZAL, *supra* note 60, at 186 ("existence of externalities is not, by itself, justification for government intervention to correct the externality.").

intervention. We must determine whether the control of externalities society defines as harmful should be addressed through the market, common law concepts of nuisance or trespass, governmental regulation, or some other means. Coase continues by hedging that regulation may at times contribute to economic efficiency:

> But equally there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when, as is normally the case with the smoke nuisance, a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high.[88]

Admittedly governmental intervention is necessary at times to solve externality problems, but the delicacy of the determinations requires that it not be the presumptive choice.

Serious reflection must be given to any decision where the law chooses to intervene into people's bubbles even in the name of controlling externalities. After all, when we are trying to control externalities to protect one person's bubble, we are necessarily also limiting the rights of the other person and thereby shrinking the size of that actor's bubble and limiting the sphere of acceptable activity allowed within that bubble.

There is a reciprocal relationship between members of society. Each person may use their own but only in a manner so as not to harm another. When one does not fully bear the costs of his actions but instead imposes costs on others, he has created a negative externality. At its foundation, law corrects this misallocation of costs and forces people to internalize costs through regulation, restraint, liability, or other means.

Each of us has a bubble surrounding our own domain and each of us crosses into another's bubble from time to time, even regularly as our time, space, and relations become increasingly concentrated and interconnected. There is the rub – society must sometimes make difficult choices by defining which bubbles to protect and which bubbles to burst; which consequences are actionable harms and which are those we must tolerate as necessary incidents of life.

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88. Coase, *supra* note 79, at 18.

It seems clear that the mere existence of externalities from a particular action alone is seldom if ever enough to justify regulation of the activity. There must be some reasoned legal decision to choose to regulate a particular externality – a determination that the act and its externalities are of the type, kind, and frequency that warrants the intervention of the law. "It would be unwise for a society simply to ban all activities with (costly) external effects or to make all those engaging in them pay for the effects."[89]

The choice over which externalities to control and which to let pass (requiring affected individuals to accept and absorb) is not easy. The point of this Essay is not to determine which externalities we should recognize as legally enforceable wrongs. Instead, the point of this Essay is to underscore the importance of appreciating the necessity of making such a choice. As Epstein aptly notes, some externalities for possible tagging as legally actionable harms, like potential acts we might decide to call nuisances, "vary by frequency, intensity, and extension. Accordingly this branch of the law requires a more flexible approach, in part because an infinite variety of low-level invasive harms are a common feature of everyday life and are dangerous to stamp out."[90] Thus, as Epstein continues, sometimes we simply must decide to accept that we will have some costs imposed upon us: "To avoid this risk of persistent turmoil between neighbors, all legal systems intuitively gravitate toward a principle of live-and-let-live for reciprocal, low-level harms."[91] Consider, for example, the noises that we must hear as we walk down the street or the people we bump into in the hallways on the way to class or in the mall. Each of those acts are intrusions into our bubble – one invaded our ears and the other our general body bubble – but these are incidents of everyday life, the harms from which we must absorb especially as we are likely imposing similar relatively trivial harms on others throughout the day as well. Epstein calls this a "live-and-

89. DUKEMINIER ET AL., *supra* note 6, at 49, n.31 ("The term [externality] can quite understandably, but also quite misleadingly, be taken to suggest that the best response to external costs is always to ban or otherwise control the activities seen to give rise to them.").

90. EPSTEIN, DESIGN FOR LIBERTY, *supra* note 41, at 84.

91. *Id.*

let-live principle,"[92] as do the authors of the Restatement (Second) of Torts.[93]

In commenting on what is "unreasonable" conduct for purposes of nuisance law, for example, the drafters of the Restatement (Second) of Torts explained the realities of life and the necessity of living with, tolerating, and accepting some things that we wish we could avoid but from which the law will not and should not protect us. It is worth quoting this Restatement comment at length because it substantially underscores an important lesson about the limits of the law in protecting what we might think is, or want to be, our bubble. First off, society is too complex and interconnected to escape intrusions:

> Not every intentional and significant invasion of a person's interest in the use and enjoyment of land is actionable, even when he is the owner of the land in fee simple absolute and the conduct of the defendant is the sole and direct cause of the invasion. Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms.[94]

As a result, we need a thick, tolerant, accepting, and resilient skin inside our bubbles if we are to get along in this world:

> It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore

92. "Under that live-and-let-live principle, everyone is free to engage in activities where the nuisance levels fall below some socially defined reciprocal risk, which will in general (under the so-called "locality rule") tolerate higher levels of interference in crowded industrial areas than in the quiet country-side." EPSTEIN, DESIGN FOR LIBERTY, *supra* note 41, at 85.

93. Restatement (Second) of Torts §822 cmt. g (1977).

94. *Id.*

> the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.[95]

This necessity of acceptance is present for both real property as well as personal intrusions. The law has limits on its capacity to protect us from life's ordinary interferences, inconveniences, and encroachments.

Of course, the problem becomes how law decides to define harm and what aggravating factors we might require, even when a negative externality occurs, so as to hold the perpetrator of the externality legally liable or responsible to the receptor. The law must determine whether to distinguish the acts of a seemingly innocent, frolicking child blowing soap bubbles in the wind destined to land on another's person or other property from the protester blowing bubbles with a far different intent or effect. Each has violated a primary tenet regarding one's rights and their corresponding limitations, but the law will likely not treat them the same.

V. CONCLUSION

The law recognizes fundamental reciprocal relationships between members of society. Each person may use their own but only in a manner so as not to harm another. Negative externalities emerge when one imposes costs on others through her actions rather than bearing the costs alone. Law exists to correct such misallocations. Forcing internalization of costs often becomes its focus, limiting the class of acceptable, legal behaviors. At other times, the law will choose to "let it go" and ask that citizens accept some imposition of harm and absorb certain costs for the greater good and smooth functioning of our complex society.

Applying these principles to the Toronto incident, the protestor has the right to blow bubbles in her bubble so long as the effects were contained there. But when blowing the bubble crosses out of her bubble and into the police officer's bubble or society's bubble, she is

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95. *Id.*

no longer internalizing the costs of her actions. Someone is the receptor of a negative externality. Whether we want to recognize the resulting externality as a crime or a claim for liability against the perpetrator becomes the task for the discerning lawmaker – using common sense, degree, impact, frequency, intent and whatever other metrics are appropriate. Such choices have implications for a wide range of areas from environmental pollution to product safety to financial markets among others; and yes, it extends to whether you should allow your child to blow bubbles in the air in the backyard this afternoon, for the full impact of those bubbles will often not remain contained in your backyard's bubble.