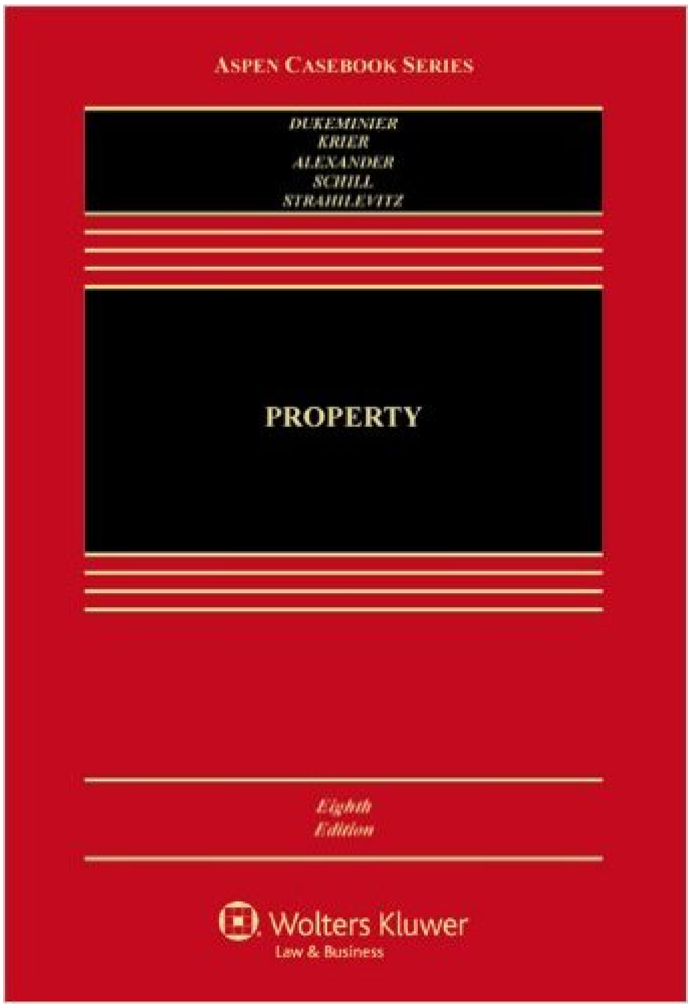

The idea of an externality is fundamental to environmental law and policy — and indeed, to just about any aspect of the common law (at least outside criminal law, and maybe even there). When I teach first-year Property law, I have to introduce the concept pretty early on in the course, as I imagine most teachers do.

Which is why I and the students get so perplexed in this description from the 8th edition of Dukeminier et al's *Property,* by far the best-selling text in the legal academy:

> An externality is not simply an effect of one person's activity on another person; rather, it is an effect that the first person is not forced to take into account. X's activity benefits X $100 and costs A $50. A offers X $50 to change his activity, and X refuses. The harmful or costly effect on A will thus continue. But it is not an 'externality' because X has taken account of it in deciding to forgo the payment offered by A. This hardly means that you should rest easy (especially if you are A!); notice that X is benefitting at A's expense. It simply means that you

> should not call the effect on A an externality.

It seems to me that that has to be wrong: merely because someone knows that their activity affects others hardly means that it is no longer an externality. Consider the famous case of *Boomer v. Atlantic Cement,* involving a cement factory dumping emissions on the people nearby. Simply offering the company money doesn't change the externality. Perhaps the text is trying to say that 1) it is an externality; but 2) on efficiency grounds we are still okay with it because the factory's use is more valuable than the neighbor's use of living without the emissions. Competing uses injure each other all the time, and part of the law's function is to make the choice about which one to favor and to what degree. But that is far from saying it is no longer an externality.

Perhaps the notion is that since the factory is foregoing the payment to stop its activity, it is no longer an externality, but that can't be right, either. It is still imposing costs on others and does not have to pay those costs. Yes, it has to "pay" in that it foregoes the payoff from the neighbors, but I don't see why or how that changes its status as an externality. It will produce more than it would it had to pay for the damage it causes: whether it has an absolute entitlement doesn't enter into it.

I can't help but think that I am missing something here, but am not sure what it is. Could it be that in fact the text is missing something?