Law and Economics: Realism or Democracy?

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LAW AND ECONOMICS: REALISM OR DEMOCRACY?

HENRY E. SMITH

Is law and economics anti-democratic? One hears complaints from many quarters that law and economics is a form of technocracy that cuts off legitimate debate and suppresses other important values that people hold dear.1 On this view, law and economics privileges efficiency and focuses on quantifiable values to the exclusion of other, less measurable values that could have found expression through the political process. These concerns are central to debates in areas ranging from environmental protection to intellectual property. The irony in these complaints is that they are offered by commentators who are heirs of the legal realists, many of whom would in the same breath decry excessive formalism and applaud judicial sensitivity to policy. There may not be an inherent contradiction here, but there is a tension in practice.

Law and economics and democracy are not enemies, but I contend that legal realism—or its lingering aftershocks—causes

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law and economics to be more technocratic and less democratic than necessary. While legal realism as a movement itself may be dead, it rules us from the grave. As the saying goes, “We are all realists now.” 2 There is nothing wrong with law-and-economics-inspired theories as theories—or with legal realism as a theory for that matter. Analyzing law and legal relations in their smallest parts and considering micro incentive effects (to the extent data is available) are worthy exercises, but without some sensitivity to institutional detail and competence, the tendency is to substitute the wisdom of the analyzing expert, especially in courts and agencies, for the collective wisdom emerging either from democracy or tradition. 3

Many movements in legal thought draw on legal realism, 4 and law and economics is no exception. Coase’s articles on the FCC 5 and social cost 6 are hyperrealist in their assumptions about property, especially in their adoption of the most extreme version of the bundle of rights conception of property. 7 In the bundle of rights conception, property has no content on its own but instead emerges from policy-driven decisions about the actions that people might take. 8 Things are merely a

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2. E.g., Laura Kalman, Legal Realism at Yale, 1927–1960, at 229 (1986); Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 267 (1997) ("[A]s the cliché has it,… we are all realists now."); Joseph William Singer, Legal Realism Now, 76 Cal. L. Rev. 467, 467 (1988) (reviewing Kalman ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.").


7. See Merrill & Smith, supra note 3.

8. See, e.g., Thomas C. Grey, The Disintegration of Property, in Property: NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1980); Edward L. Rubin, Due Process and the Administrative State, 72 Cal. L. Rev. 1044, 1086 (1984) (“[P]roperty is simply a label for whatever ‘bundle of sticks’ the individual has been granted.”); Joan Williams, The Rhetoric of Property, 83 Iowa L. Rev. 277, 297 (1998) (“Labeling something as property does not predetermine what rights an owner does or does not have in it.”); see also J.E. Penner, The “Bundle of Rights” Picture of Property, 43
backdrop to this fine-grained analysis of potentially conflicting activities, and rights to exclude from things have no particular status as a starting point.

These assumptions were understandable in light of Coase’s goal of demonstrating that, in a world of positive transaction costs, it matters how entitlements are assigned. But when it comes to using Coase’s insights, his hyperrealist assumptions have been allowed to steal the show. In Coase’s analysis of nuisance, we expect judges to figure out ex post which of the conflicting parties should be awarded each stick in the bundle of rights. And in making these decisions, the questions of “who invaded what” or “who caused what to whom” do no work at all. In contrast to traditional and everyday notions of property as a right to things that is good against the world, Coasean agnosticmsm about causation leads one to see both the trampling animals and the trampled-upon crops as the cause of conflict. And under this conception, one is to ask whether fists or noses cause punches, or, for that matter, which are the cheapest cost avoiders. None of this accords with non-economic intuition. Although causal agnosticmsm is a useful theoretical con-


10. For the article that launched a thousand analyses in this vein, see Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972).

11. For recent analyses from a variety of perspectives that try to bring the more traditional invasion-based test back to the fore, see, for example, Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. LEGAL STUD. 49, 53–65 (1979); J.E. Penner, Nuisance and the Character of the Neighbourhood, 5 J. ENVTL. L. 1, 14–25 (1993); Smith, Exclusion and Property Rules, supra note 9, at 992–96; Eric R. Claeys, Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights (George Mason Law & Economics Research Paper No. 08-20, 2008), available at http://ssrn.com/abstract=1117999.


struct and fine as far as it goes, it does not go very far: for transaction-cost reasons—not to mention basic moral reasons—causation is unidirectional. We have made ex ante decisions about what counts as an invasion, and absent good reasons—and sometimes good reasons exist—we should stick to those decisions.

Now it might be thought that this technocratic tendency in fine-grained analysis is specific to property. Such a view seems unlikely when we consider that Coase and many of the bundle theorists are basically treating property as dissolving into torts. Echoes of this are to be found in current debates over intellectual property, in which skeptics of intellectually property would like to see more of a tort or regulatory regime than a property regime in IP. In any case, the legal realist strand that became law and economics tackled torts relatively early, and torts has featured much more largely in law and economics scholarship than has property proper. Torts seems tailor-made for the type of technical approach that legal realist-style law and economics offers. This Essay, therefore, will concentrate on torts and argue that even here, on the best terrain for legal realist law and economics, the technocratic tendency has led to similar, if less dramatic, results.

A word about technocracy and democracy is in order. I am using “democracy” and “technocracy” in a special sense, one in which they potentially conflict. In arguing against “technocracy” I am not opposing well-informed decision making of all sorts. Instead, I am making the narrower point that modes of legal decision making that ask judges to use a great deal of con-

cizing transaction-cost analysis of questions of entitlement not to be raped and noting the role of reciprocal view of causation); A.W. Brian Simpson, Coase v. Pigou Reexamined, 25 J. LEGAL STUD. 53, 60 (1996) (“Once the reciprocal nature of the problem is conceded, there is just no end to the possibilities . . . . The reciprocal nature of human interaction can raise emotive issues, as when women object to the idea that the way to stop sexual assaults on the streets at night is for them to stay at home. Even if they are the cheapest cost avoiders, ought this to be conclusive?”).

14. See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (refusing to consider actual damage caused or reasonableness of landowner’s refusal of entry); Smith, Exclusion and Property Rules, supra note 9, at 990–1021.


textual information have their inherent limits. The argument is based on the presence of information costs, a limit that could be regarded as "technocratic," but in a different sense. The information cost argument here is at a meta level: In evaluating a system of decision making, one might want to use all available information and techniques, even if these reveal limits, within the system, on our ability to use information.

In other words, I am making a meta-level, realist-style argument for a certain degree of formalism in ordinary legal decision making, where formalism is (relative) invariance to contextual information. By contrast, combating formalism and thereby disregarding these limits to the use of contextual information is quite characteristic of legal realism in practice. Law and economics is only one branch of the tree whose trunk is legal realism proper, and many of the criticisms of thoroughgoing antiformalism apply to these other approaches as well. But today’s topic is law and economics, and more particularly antiformalist postrealist law and economics. Unconstrained contextual decision making tends to put more power in the hands of decision makers within the system—often unelected judges in the case of the common law—and this power tends to conflict with democracy to the extent that such decisions are difficult to reverse in the political process. Moreover, the information cost considerations for which I argue tend to point towards greater reliance on everyday morality, associated with the people, generally. Highly refined all-things-considered utilitarian decision making tends to conflict both with this popular morality and the congruent, more modest decision making that can be economically justified at the higher, systemic level.

There is nothing inherent in analyzing legal relations at the systemic level that would necessarily lead to technocracy, so it is worth considering why law and economics, and the economic analysis of torts in particular, partakes so heavily in those aspects of legal realism that emphasize expert decision making.

Like some strands of legal realism, the economic analysis of torts tends to emphasize, if not elevate, the role of the judge.

This elevation is somewhat ironic in light of the role of juries in tort law, as opposed to administrative decision making. The common law was fertile ground for the first generation of law and economics because bilateral interactions, including litigated disputes, are easier to model than the complex simultaneous interaction of many parties in taxation or regulation. Thus, in the sphere of primary actors, the bilateral impersonal tort-like conflict between the activities of A and B, or the more personal contract between A and B, make torts and contracts easier to understand than property, which is often about impersonal interactions between owners and the “rest of the world.” In property, multiple parties may have some claim on a single resource and multiple systems may overlap. Some interactions, such as the tragedy of the commons, were amenable to economic tools, but the bilateral interactions at the center of torts and contracts made these areas a top priority in law and economics. Further, in a world with zero transaction costs, solving every problem would be costless; it takes some effort to remember that the choice of analytical unit itself has transaction cost implications in the real world. Common-law litigation thus looks more amenable to economic analysis.

From there, it was a short step to focus on judicial decision making and, in older law and economics, the kinds of cost-benefit analysis that judges might undertake. When analyzing an interaction, the benefits of fine grain are apparent—they are the point of the exercise—but the costs are less apparent. True, any analysis should take “administrative costs” into account. But as is quite apparent with the bundle of rights, the cheap-

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ness of the baseline in rem right to exclude is easy to overlook. In the case of property, the convenience of the baseline stems in part from the diffuse nature of the processing costs. To the extent that these benefits of the baseline inhere in the system as a whole and are usually left implicit, they are especially easy to ignore in fine-grained analysis that puts a premium on articulated rationality.

It is somewhat ironic that law and economics overlooks the system-wide benefits of simplicity, because economists have long known that global systems show significant local variation. Partial equilibrium and general equilibrium are two very different things. Law and economics rarely rests on a general equilibrium analysis. But partial analyses must be taken with a grain of salt; it is characteristic of complex systems that a sub-part may not share properties with the whole. Similarly, the theory of the second best warns that when distortions are present, fewer distortions are not necessarily better, because one distortion might be offsetting another. Again, in the case of law, to the extent that benefits inhere in a system as a whole, as opposed to its constituent rules, doctrines, or decisions, those benefits are easy to overlook. Although the first-generation arguments about the efficiency of the common law are harder to maintain now,22 the analysis of law in terms of the desirability

22. Compare George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977) (arguing for a tendency of efficient legal rules to become dominant because inefficient rules will be litigated more often), and Paul H. Rubin, Why is the Common Law Efficient?, 6 J. LEGAL STUD. 51 (1977) (arguing that access to courts encourages the development of efficient outcomes), with Vincey Fon & Francesco Parisi, Litigation and the evolution of legal remedies: A dynamic model, 116 PUB. CHOICE 419 (2003) (explaining why developments in law may be plaintiff friendly rather than purely efficient), William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. LEGAL STUD. 235, 284 (1979) (arguing that the common law does not automatically produce efficient rules, but that there are areas in which the tendency to produce efficient rules can be predicted on economic grounds), Richard O. Zerbe, Jr., Justice and the Evolution of the Common Law, 3 J.L. ECON. & POL’Y 81 (2006) (suggesting that the trend towards efficiency is really a result of seeking justice), and Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551 (2003) (arguing that now-abandoned competition between courts once promoted efficiency of the common law but no longer). In part this question turns on a view of the inputs and criteria for judicial decision making. Compare RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 322 (1972) (As in the market, “it is primarily the criterion of efficiency rather
of individual rules stacks the deck against the basic baselines from which they may depart. This is clear in property, but I will argue that this problem arises in torts as well.

The micro focus on individual rules also skews analysis towards the rules and the ex ante perspective. Indeed, legal realism—along with law and economics—is of two minds about the ex ante versus ex post perspective. Law and economics in particular is concerned with incentives for the future and is ex ante in this sense. But like legal realism more generally, law and economics is not ex ante in another very important way. Neither legal realism nor its offshoot in conventional law and economics take seriously the idea of preexisting legal baselines. In areas like property we have made some fairly robust decisions about who has rights against whom, and these decisions are not to be lightly cast aside when someone comes along with a new efficiency analysis. Although it is true that the need for stability in the basic package of rights can be analyzed in economic terms, the tendency in law and economics, as it is practiced in law schools and on the bench, is often to allow economic analysis to drive very low-level decisions about individual rules.

This eagerness to apply economics to individual rules has a vaguely Benthamite or technocratic cast. Actually labeling all

than of distributive justice that guides decision.


25. For an overview with an emphasis on property, see Merrill & Smith, supra note 3, at 375–97.

26. Although Bentham himself was a proponent of property, see, for example, JEREMY BENTHAM, THE THEORY OF LEGISLATION 109–22 (C.K. Ogden ed., Harcourt, Brace & Co. 1931) (1802) (emphasizing property's role in securing “the expectation
this Benthamite is somewhat ironic because Bentham was no fan of judges and the common law. Nonetheless, the progress-oriented faith in articulated rationality and a narrow utilitarianism coupled with disregard for traditions make much of mainstream law and economics and its progeny thoroughly Benthamite. Indeed the legal realists found Bentham mostly congenial for similar reasons.

By contrast, traditional notions of property rest on a base of everyday morality. In property, core rights to exclude, backed up by norms and laws against trespass and theft, command widespread support. Only at the edges, where nuisance and regulations like zoning concern high-stakes specialized problems not amenable to the exclusion approach do we find another kind of morality of balancing that is more consistent with the type of analysis common in realist-inspired law and economics.

On certain dramatic occasions, as in the recent decision in Kelo v. City of New London, there is a conflict between scientific policy making and the core moral sense of property, a sense that has tradition, and more recently democratic action, behind it. Thus it is the low-level utilitarianism, which characterizes much of law and economics, that lends it a vaguely technocratic cast. By breaking law down into individual rules and holding these up to the light of articulated rationality, law and economics deemphasizes everyday notions of morality that find their expression in tradition and democratic decision making.

of deriving certain advantages from a thing . . . in consequence of the relation in which we stand towards it”); Jeremy Bentham, Principles of the Civil Code, in 1 THE WORKS OF JEREMY BENTHAM (John Bowring ed., London, Simpkin Marshall & Co. 1843) (warning the attacks on property would result in the destruction of incentives to work), his disdain for tradition and penchant for scientific policymaking commended him to the realists. See infra note 28 and accompanying text.


30. See id. at 1890–94.


32. See Merrill & Smith, The Morality of Property, supra note 13, at 1879–84.
One might think that torts is the common law area ideally suited to the type of law and economics this Essay criticizes and that some form of legal realism is really the only coherent way to think about torts. There is, however, some suggestive evidence to the contrary. Although this is not the time or place to compare utilitarian and corrective justice theories of torts, law and economics in a non-realist—or not exclusively realist—spirit is not only possible but desirable.

Economic analysis has tended to ignore baselines in those parts of torts that are the closest to property. Take, for example, nuisance law. According to authorities like the Restatement (First) of Torts and much of law and economics, nuisance is an exercise in balancing and looks like regulation writ small. This approach misses important aspects of nuisance. First, much—though not all—of nuisance is indeed about invasions: who caused what waves or particles to cross a boundary to the

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33. See Restatement (First) of Torts §§ 822, 826 (1939); see also Richard A. Posner, Economic Analysis of Law 62 (6th ed. 2003) (“The alternative to absolute rights is balancing, and is the approach taken by the most important common law remedy for pollution, which is nuisance, the tort of interference with the use or enjoyment of land. The standard most commonly used for determining nuisance is unreasonable interference, which permits a comparison between (1) the cost to the polluter of abating the pollution and (2) the lower of the cost to the victim of either tolerating the pollution or eliminating it himself. This is an efficient standard . . . .”); William L. Prosser, Handbook of the Law of Torts § 89 at 596 (4th ed. 1971) (citing cases). Under the Restatement (Second), a nuisance is a significant nonrespiratory invasion of use and enjoyment of land that is caused by either intentional and unreasonable activities or by negligent, reckless, or abnormally dangerous activities. Restatement (Second) of Torts §§ 821F, 822 (1979). Intentional nuisances largely turn on reasonableness:

An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweights the utility of the actor’s conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Id. § 826; see also id., § 827 (setting out factors relating to gravity of the harm, including the social value of the plaintiff’s use); id. § 828 (setting out factors relating to utility of actor’s conduct, including its social value); see also 6-A American Law of Property § 28.22, at 66, § 28.26, at 75–77 (A. James Casner ed., 1954) (emphasizing the vagaries associated with, and importance of, a determination as to whether a defendant’s conduct is unreasonable); 1 Fowler V. Harper & Fleming James, Jr., The Law of Torts § 1.24, at 70–74 (1956) (discussing the importance of reasonableness consideration in nuisance cases).

34. See Smith, Exclusion and Property Rules, supra note 9.
disturbance of the owner.\textsuperscript{35} Further, some nuisances are nuisances per se;\textsuperscript{36} when a noise is loud enough, for example, one simply does not need to know about context.

Moreover, the notion of invasion piggybacks on basic entitlements. The whole notion in the scheme of property rules and liability rules that “we” need to “decide” whether A or B, resident or polluter, “gets” the “entitlement” does great violence to the basic package of rights in land.\textsuperscript{37} That package includes a right to exclude,\textsuperscript{38} a right to which for some purposes we might make exceptions or of which we might weaken the protection (from injunction to damages).\textsuperscript{39} But it does not include a “right to pollute.”\textsuperscript{40} One might get away with pollution, but the put-upon neighbor is allowed to blow the smoke back. Or one might have an easement which would be a right to pollute but which is definitely not part of the default package of rights. In its enthusiasm for breaking legal relations down into interesting analytical bits and discovering intriguing symmetries, the economic approach to nuisance, and by extension other torts, often disregards the asymmetry built into ex ante baselines of property rights.\textsuperscript{41} This is true of rights to bodily integrity and rights to land or chattels. Again, we do not think in terms of reciprocity of causation for assaults.

More generally, the enthusiasm for liability rules over property rules flows from the technocratic impulse in law and economics. Sophisticated arguments for ever more complex liability rules overlook the virtues of simple baselines that also

\textsuperscript{35} See id. at 990–1007.

\textsuperscript{36} See, e.g., Morgan v. High Penn Oil Co., 77 S.E.2d 682, 687 (N.C. 1953); Smith, Exclusion and Property Rules, supra note 9, at 998 & n.100.


\textsuperscript{38} See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (characterizing the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

\textsuperscript{39} See, e.g., Smith, Exclusion and Property Rules, supra note 9, at 973.

\textsuperscript{40} Id. at 1011–16.

\textsuperscript{41} See, e.g., Lee Anne Fennell, Property and Half-Torts, 116 Yale L.J. 1400, 1404 n.10 (2007); Frank I. Michelman, There Have To Be Four, 64 Md. L. Rev. 136, 147–52 (2005) (discussing asymmetries in “remedial entailments” in the C&M framework); Jeanne L. Schroeder, Three’s a Crowd: A Feminist Critique of Calabresi and Melamed’s One View of the Cathedral, 84 Cornell L. Rev. 394, 433–35 (1999); Smith, Exclusion and Property Rules, supra note 9, at 1019–21; Smith, supra note 37, at 72–76.
accord with everyday morality. To be sure, in situations of high transaction costs, it is worth considering liability rules, but even where the conventional wisdom would strongly favor liability rules, as in large-scale pollution by a factory employing many people, the tendency in fine-grained utilitarian law and economics is to grasp much too quickly for liability-rule solutions. By contrast, recently some have argued that even the classic Boomer opinion was too quick to shift from injunctions to damages. Even in high transaction cost situations, property and property rules should have some presumptive force, and especially in cases of deliberate, high-stakes violations, we should require the prospectively invading party to justify its selection of site in a hearing beforehand (and perhaps post a bond), as is typical of Mill Acts and limited private eminent domain statutes, rather than causing a fait accompli. In other


words, if we are to have private eminent domain, it should come with due process safeguards at least as stringent, if not more so, than those to which we subject exercises of public eminent domain.

The “Boomer problem” has also been taken as support for a version of behavioral law and economics in which ordinary actors’ decision making is interpreted as distorted by biases and heuristics.46 Might property rule protection lead to a greater endowment effect than liability rules? In a recent paper, Rachlinski and Jourden find that experimental subjects show a greater gap between willingness to accept and willingness to pay for entitlements protected by property rules than those protected by liability rules, and the authors interpret this as an example of the endowment effect preventing efficient negotiation.47 To address


ecological validity they examine Boomer through the lens of behavioral decision theory; they interpret the behavior of the plaintiffs in Boomer as also reflecting the endowment effect rather than subjective value, on the grounds that the plaintiffs did not appeal the size of the damage award or ask for higher-than-market damages. But the likely reason for the plaintiffs’ failure to do so is not the endowment effect, but rather that under the law of nuisance, injunctions are available but supracompensatory damages are not.

All this is familiar territory and vaguely property related. Another suggestive example of how the conventional rule-by-rule approach misses something that is captured in a more holistic appreciation of traditional baselines is the “economic loss” rule in torts. As its name suggests, it should be amenable to economic analysis. And sure enough, there has been no dearth of speculative analysis about why courts apparently deny recovery in negligence for harm where there is only pure economic loss—no injury to person or property. Rationales boil down to a pragmatic sense that applying negligence to all economic loss would lead to indeterminate and open-ended liability. In keeping with current trends, the economic loss rule in the courts is now being studied empirically as well, revealing how many exceptions there are and, at

48. See id. at 1543–44.
49. See Henry E. Smith, Property and Property Rules, supra note 44, at 1771–72; see also Boomer v. Atl. Cement Co., 257 N.E.2d 870, 874–75 (N.Y. 1970) (discussing damages available and referring to diminution in objective value); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 89, at 637–40 (5th ed. 1984) (discussing types of damages available to nuisance plaintiffs, including diminution in market value and, under some circumstances, special damages, but not damages for subjective value).
the same time, how no one can really say what the efficient rule is.\textsuperscript{53}

By contrast, in a recent, more doctrinally oriented analysis of the rule, Peter Benson shows that it is really quite simple: One can only recover from the tortfeasor if one has an \textit{in rem} property right that has been violated.\textsuperscript{54} Other lesser rights, such as a contract, are irrelevant to the tortfeasor. A good example comes from the classic \textit{Robins} case:\textsuperscript{55} If a ship is destroyed through the defendant’s negligence, the ship owner can sue for the loss of the ship. The measure will be the market value of the ship. Someone who rented the ship cannot sue for the loss of his contract rights; he must sue the owner, who in turn can sue the tortfeasor.\textsuperscript{56} But the allocation of the risks under the contract and the possible adoption of even greater risk by the owner— for example, if the owner warranted the ship for a particular purpose—are normally of no relevance to the outside world. Tort law deals with \textit{in rem} dutyholders, and they are responsible for the standardized information that property law offers to the rest of the world. The opposite approach would allow contracting parties to impose a variety of hard-to-process duties on people at large. In this sense liability would be “excessive” or “unforeseeable,” but this is a much more specific sense than the way those terms are currently used by courts and commentators.

Thus, under the economic loss rule, recovery is only allowed to one who holds an \textit{in rem} property right. Contractual and other relations between an owner and others are walled off and treated separately.\textsuperscript{57} This makes sense on information cost grounds. Unfortunately, the kind of common-law reasoning that would get one there is an endangered species in


\textsuperscript{54} See Peter Benson, Economic Loss and the Prerequisites of Negligence (Feb. 2008) (unpublished manuscript, on file with the University of Toronto).

\textsuperscript{55} \textit{Robins}, 275 U.S. 303; see also Benson, supra note 54, at 15–39.

\textsuperscript{56} See \textit{Robins}, 275 U.S. at 309.

American law schools—and evidently in America’s court-
rooms as well.58 This traditional approach was, despite the
bad rap from the legal realists, neither incoherent nor neces-
sarily less desirable than academics’ and judges’ familiar un-
structured—and inconclusive—economic theorizing. Al-
though it really is not possible without empirical evidence to
say with any certainty whether the rule is efficient, one can
point to a factor in its favor that typical academic law and
economics analysis—and the more informal reasoning in judi-
cial opinions—conspicuously leaves out: in rem property
rights are designed to be broadcast to the world and have a
simplicity and standardization that contract rights do not
have. In other words, property rights are meant for an audi-
ence of impersonally interacting parties like potential tortfe-
asors.59 How rights are internally carved up are idiosyncrasies
that are internal to a deal and are not allowed to impose in-
formation costs on third parties.60

Is the traditional approach efficient? It is hard to say. But the
structure that emerges, in which the property, tort, and con-
tract systems have defined spheres and interact in simple ways,
has the indirect effect of making simple the incentives facing
potential tortfeasors and making clear the baseline from which
people contract. The traditional approach gives roughly correct
incentives in an overall structure that is easy to use—for judges
and for people in ordinary life. That is a big plus.

The possibility of often unelected judges being encouraged to
cut huge swaths through the common law based on economic
 speculation of the most selective—and therefore discretion-
ary—sort should give one pause. A certain amount of judicial
modification of rules is necessary, but I have argued that exist-
ing baselines, especially core rights to exclude, deserve a pre-
sumptive force that they do not receive from legal realism or its

58. See Niblett et al., supra note 53.
59. See, e.g., Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the
Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1 (2000); Smith, supra
note 17, at 1114, 1146–47, 1151.
60. In a more generalized setting, trusts and other entity property often allow in
p ersonum “internal” parties to allocate rights in resources among themselves in a
way that the law keeps from being relevant in rem to outsiders. See THOMAS W.
MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 684–829 (2007);
Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 COLUM. L.
offshoot in conventional law and economics. We do overcome these presumptions when making exceptions to exclusion rights (for example, for airplane overflights or necessity), \(^{61}\) and they are surrounded by fuzzier governance regimes like much of the law of nuisance. \(^{62}\) Nor is it easy to say how strong the presumption for these baselines should be; that is perhaps the central normative conflict in these areas of law. But a few tentative guidelines are possible.

In the light of these information cost considerations, when we can identify a situation in which legal innovation has occurred in a way that overthrows a traditional rule with overlooked information cost advantages, we need to take a second look. Simplicity for third parties—as furnished by, for example, the economic loss rule—should strengthen the presumption for the rule. In general, where tort law implicates baselines furnished by property law, the reason for those baselines does not suddenly disappear. They need at least to be weighed against the considerations pointing to departure from them.

Second, the study of complex systems and cognitive psychology is beginning to make some of the traditional approach to custom and the common law more attractive than it did to the realists. \(^{63}\) With some exceptions the realists were positivist and centralist. \(^{64}\) Robert Ellickson and others have used economics to frame and test hypotheses about the importance of social norms and how they tend to be efficient within close-knit groups but may present wider externalities. \(^{65}\) Information cost economics and cognitive science suggest some wisdom in

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\(^{61}\) See, e.g., United States v. Causby, 328 U.S. 256 (1946); Hinman v. Pac. Air Transp., 84 F.2d 755 (9th Cir. 1936); MERRILL & SMITH, supra note 60, at 9–15.

\(^{62}\) See Smith, Exclusion and Property Rules, supra note 9, at 973–75. For examples of scholarly comment on the “fuzzy” nature of nuisance law, see, for example, Daniel A. Farber, The Story of Boomer: Pollution and the Common Law, 32 ECOLOGY L.Q. 113, 117 (2005), and Carol M. Rose, Property in All the Wrong Places?, 114 YALE L.J. 991, 1006 (2005).


the common law’s approach to the relation of custom and law. Judges had an intuitive sense—which can be explained and refined by economics—that custom is a danger if it binds those outside the community that originated the custom in question. Besides consent—a democracy issue—community custom can impose high information costs on outsiders. Should the custom of hunters bind nonhunters? This is the question in Pierson v. Post. Partly the desirability of applying such a custom more widely depends on whether nonhunters can or should be required to know the custom. In general, customs have been selected and formalized in the process of adoption in the common law. This judicial filtering is a necessary part of the process and can benefit from economic analysis. Nonetheless, the virtue of custom in the first place is that it is a partial substitute for a technocratic judicial analysis.

Finally, and more speculatively, the information cost virtues of traditional common law principles may point to a partial reconciliation of corrective justice and utilitarian approaches to tort law. Although this much-debated topic must be left for another day, note that corrective justice tends to reflect everyday morality that in the property context sensibly accommodates information cost. Getting dutyholders to focus on intuitive and concrete harms to a well-defined class of other parties has information cost advantages. If the information cost theory carries over from property to torts it may well be that the kind of everyday morality that has potential democratic support and the weight of tradition behind it can be rationalized on economic grounds. Such an economic approach to torts would be more democratic and more stable than the hyper-fine-grained utilitarianism and scientific policymaking in our post-legal realist law and economics as currently practiced.

In sum, as a branch of legal realism, law and economics has often cut out certain baselines that, subject to exceptions, have

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66. See Smith, supra note 63.
67. 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805).
the force of general consent and tradition behind them. A broader-gauged economic analysis that takes information costs into account suggests the wisdom in affording these baselines more presumptive force, even in an area as seemingly regulatory and activity-based as torts. In this way, rather than being a vehicle for overweening technocracy and therefore an enemy of democracy, law and economics can increase our appreciation for the information cost benefits of common-law starting points.