

## THE NEGLECT OF RIGHTS IN LAW AND ECONOMICS

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### I. INTRODUCTION

The economic approach to law is by any measure the most successful application of the principles of economics to a field outside its traditional focus on markets and their effects on individuals and society. In the half century since the seminal contributions of scholars such as Gary Becker and Richard Posner, economics has influenced the development of law in terms of both statutes and judicial decisions, and has become a thriving field of scholarship in both law schools and economics departments around the world, with numerous volumes and journals (such as this one) published every year.

However, the way that law and economics has developed as a field has troublesome implications for the view of the law it promotes, as well as the policy and legal recommendations it makes. Specifically, law and economics inherited the utilitarian foundations of neoclassical economics and brought them into the study of law itself, to the exclusion of its traditional basis in rights and justice. This influence was hardly resisted: As George Fletcher explains, “the devotee of [law and economics] writes in a long line of theorists who think that all legal institutions should serve the interests of society,” transitioning from a focus on individual rights to a theory of legal intervention that permits the periodic redefinition of property rights for the sake of a collective vision of efficiency.

A theory of individual supremacy ends up as a philosophy of group supremacy. This is a remarkable metamorphosis. Any theory that can successfully obfuscate the difference between individual sovereignty in the market and the dominance of group interests in coercive decision making will surely gain a large number of followers.<sup>43</sup>

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<sup>43</sup> GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 162 (1996).

As Fletcher indicates, the willing adoption of economic principles on the part of legal scholars implied the gradual removal of the concept of rights from the vocabulary, resulting in a picture of the law that no longer grants individuals a sphere of liberty from which they are protected from welfarist dictates, and renders the individual merely a source of utility who contributes to the whole and therefore is subject to policies and laws designed to maximize that sum total.

In this essay, I detail the background of the utilitarian foundations of law and economics and detail the implications of the neglect of rights resulting from it. I explore its ramifications for the way law-and-economics scholars analyze various legal concepts, focusing on the absence of wrongdoing from the field's analysis of harm as well as the failure to consider the existence of rights that can justify it. I conclude with a cautionary note about the continued neglect of rights in the economic analysis of the law, and suggest initial steps to improve it, ensuring that economic principles can usefully contribute to the study of law at the same time that rights of individuals are acknowledged and respected.

## II. UTILITARIANISM AND ECONOMICS

The basic idea of utilitarianism can be traced back to antiquity, but its most well-known and modern exposition is credited to Jeremy Bentham and John Stuart Mill, both reformers who recommended utilitarianism as a tool for social betterment through government policy and law.<sup>44</sup> In their presentation, utilitarianism is a school of ethics focused on maximizing the total happiness, well-being, or *utility* of the members of a group or society. As such, it is a specific form of *consequentialism*, the general term for any ethical system that places moral value on the results or outcomes of actions, rather than the nature of the moral acts themselves (as does *deontology*) or the character of the persons performing them (as does *virtue ethics*).

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<sup>44</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN STUART MILL, UTILITARIANISM (1863). For an overview and contemporary perspectives, see BEN EGGLESTON & DALE MILLER (EDS), THE CAMBRIDGE COMPANION TO UTILITARIANISM (2014).

Bentham started his treatise on utilitarianism with the famous passage: “Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”<sup>45</sup> This statement could very well have been written about economics in both its descriptive (positive) and prescriptive (normative) forms.<sup>46</sup> In descriptive or analytic terms, economic agents are presumed to make choices that maximize their welfare or utility as represented by preferences: Consumers satisfy their preferences for goods and services, workers satisfy their preferences for income and leisure, and so forth. Even agents representing institutions such as firms and government agencies are assumed to have preferences, either their own (for income, prestige, or power) or on behalf of the institutions they represent (firms have a “preference” for profit, government agencies have “preferences” for their own goals, and so on). In general, mainstream economics assumes that all agents make choices to further their preferences and thereby maximize their utility (itself merely a measure of preference-satisfaction), in the spirit of Bentham’s pleasure versus pain determining “what we shall do.”

In prescriptive or policy terms, economics even more directly reflects its utilitarian roots in recommending that policymakers act to maximize total welfare or utility. In theory, the goal of welfare maximization can be conceptualized using *social welfare functions*, which aggregate the preference orderings of society’s constituent individuals and then find the policies or laws that maximize it.<sup>47</sup> On a smaller, incremental scale, economists look at individual policy or legal proposals and assess the relative amounts of “pleasure” and “pain” generated, a process commonly known as *cost-benefit analysis*. A specific form of cost-benefit analysis widely used in economics (and law and economics) is *Kaldor-Hicks efficiency*, in which proposals are assessed to determine whether the total gains from the change exceed the total losses, even if the gains and losses accrue to different parties. In both its descriptive and prescriptive forms, then, mainstream economics—and therefore law and economics—reflects its utilitarian roots, belying the common belief that

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<sup>45</sup> BENTHAM, *supra* note 44, chapter 1.

<sup>46</sup> I prefer the terms *descriptive* and *prescriptive* because they sidestep (to some extent) the debate about the fact/value distinction that complicates discussions of economic methodology. In general, see HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2004).

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economics can be value-free and separate from ethics, as well as revealing ethical problems inherent in economics that it inherits from utilitarianism.<sup>48</sup>

We can use Kaldor-Hicks efficiency to show the limitations of utilitarian logic in economics (and law and economics). Suppose a proposed new bridge over a river would benefit some people by \$10 million (through improved access and travel times) and harm others by \$8 million (through displacement and disruption). This project would be considered Kaldor-Hicks efficient because the “winners” could potentially compensate the “losers” and still be better off (by \$2 million). For this reason, Kaldor-Hicks efficient proposals are often called “potential Pareto improvements,” invoking the more stringent criteria of Pareto efficiency, by which a policy change has to make at least one person better off without making any person worse off. The difference between the two is key, though: The fact that compensation in the Kaldor-Hicks case is purely potential or hypothetical implies that someone *is* hurt and is not compensated for the harm. This is consistent with utilitarian logic, in which the only relevant measure is total utility, which increases as long as gains exceed losses—as they do by definition in Kaldor-Hicks efficient policies.

Herein lies the main problem with Kaldor-Hicks efficiency: As long as total welfare increases, it matters not whether anybody loses in the process. (Distributional effects are not relevant unless they affect utilities themselves.) In general, utilitarianism fails to acknowledge or respect the “distinction between persons” (as John Rawls called it), giving equal treatment to each person’s utility but not guaranteeing that the degree of treatment given to everyone is adequate.<sup>49</sup> Even though each person’s utility is considered just as much as any other person’s, no one’s utility is taken especially seriously, and will quickly be sacrificed if another person’s utility can be increased by more.

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<sup>47</sup> For more on social choice, see AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE: AN EXPANDED EDITION* (2018).

<sup>48</sup> For surveys of these problems, see J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973), and SAMUEL SCHEFLER (ED.), *CONSEQUENTIALISM AND ITS CRITICS* (1988). On the intrinsically ethical nature of economics, see, e.g., HILARY PUTNAM & VIVAN WALSH (EDS), *THE END OF VALUE-FREE ECONOMICS* (2012), and MARK D. WHITE (ED.), *THE OXFORD HANDBOOK OF ETHICS AND ECONOMICS* (2019).

<sup>49</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 27 (1971).

This aspect of Kaldor-Hicks efficiency reflects the absence of any meaningful rights to protect persons from takings in the name of total utility. In terms of Kaldor-Hicks, the harms from a policy proposal are not considered as a possible result of a rights violation, but only as a numerical counterweight to the benefits from it, and if the harms are smaller than benefits, the policy is declared efficient and no more thought is given to the parties on whom the harm is imposed. Of course, compensation may be arranged: For instance, if the government claims eminent domain over private land needed for a public project, the landowner is paid the going market rate for her property.<sup>50</sup> However, not only may the payment given be insufficient to compensate the landowner for the value she places on the property, but also, she was denied the right to refuse consent to the transfer in the first place. As Jeremy Waldron wrote, “when we impose a Kaldor-Hicks improvement, we are not in any way honoring the voluntary consent of the losing party.”<sup>51</sup> Even if compensation were enough to make up for lost value, this would not be enough to satisfy moral concerns; as Ronald Dworkin recognized, “the fact of self-interest in no way constitutes an actual consent.”<sup>52</sup> Consent is necessary to ensure actual well-being is increased, but more importantly, to make sure essential rights are respected.

To get to the heart of the ethical problem with Kaldor-Hicks efficiency, it helps to consider briefly an ethical system often contrasted with utilitarianism: *deontology*, specifically the version developed by Immanuel Kant.<sup>53</sup> In general, deontology judges actions by their intrinsic properties rather than by their consequences in specific cases. For example, most utilitarians regard lying in general to be bad, because the practice usually leads to negative outcomes, but they allow for white lies and “benevolent lies” when they would do more good than harm. Most deontologists, on the other hand, hold lying to be wrong on its face, regardless of effects or intent, because it violates a more

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<sup>50</sup> In the United States, eminent domain is increasingly used, not to claim land for public use, but to transfer it to private developers for use that would increase tax revenues, a clear example of Kaldor-Hicks efficiency that not only violates property rights but also the original intent of eminent domain. For more, see ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2015).

<sup>51</sup> Jeremy Waldron, *Nozick and Locke: Filling the Space of Rights*, 22 *SOCIAL PHILOSOPHY AND POLICY* 81, 101 (2005).

<sup>52</sup> Ronald Dworkin, *Why Efficiency?*, 8 *HOFSTRA LAW REVIEW* 563, 574 (1980).

<sup>53</sup> For Kant’s ethics, see ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT’S ETHICS* (1994) and IMMANUEL KANT’S *MORAL THEORY* (1989). For more on the relevance of Kant to law and economics, see MARK D. WHITE, *KANTIAN ETHICS AND ECONOMICS: AUTONOMY, DIGNITY, AND CHARACTER* 122–162 (2011). For a more general deontological approach to law and economics, specifically using *threshold deontology* (which allows

basic moral precept or principle. Kant in particular found lying to be wrong because it uses the persons lied to merely as means to the liar's end and thereby fails to respect their inherent dignity, as demanded in one of the forms of Kant's famous categorical imperative: "act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."<sup>54</sup> In practice, this means abstaining from deception or coercion, both of which deny the other persons meaningful consent in a situation involving them, reducing them to a mere tool used in someone else's plan.

It is in the Kantian context that the shortcomings of Kaldor-Hicks efficiency and the neglect of rights therein reveal themselves most clearly. When a policy is approved that benefits one group of people at the cost of harming another, the persons harmed are literally used as means to the ends of benefiting others.<sup>55</sup> Therefore, as Anthony Kronman wrote, "For a Kantian, the Kaldor-Hicks test has no significance."<sup>56</sup> This offense stands even if compensation is given, because the persons affected were not given the opportunity to deny consent to the policy to begin with. Even the Pareto improvement test, which requires that no one be harmed by a policy change, runs afoul of this Kantian principle when judgments of "better off" and "no worse off" are made by external observers with no information regarding subjective valuations; this provides another reason to object to Kaldor-Hicks harms even when compensation is provided (as with eminent domain takings).<sup>57</sup>

### III. THE NATURE OF RIGHTS

To put it bluntly, utilitarianism has no room for rights, which Bentham famously called "nonsense upon stilts," a sentiment with which economists, including those specializing

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consequentialist consideration once opportunity costs become sufficiently high), *see* EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

<sup>54</sup>IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (trans. James W. Ellington) 429 (1785/1993).

<sup>55</sup> Technically, if the end is welfare maximization, then *all* persons affected, whether for better or worse, are used merely as mean to that end.

<sup>56</sup> Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 238 (1980).

<sup>57</sup> *See* Mark D. White, *Pareto, Consent, and Respect for Dignity: A Kantian Perspective*, 67 REV. SOC. ECON. 49 (2009).

in the law, would certainly agree.<sup>58</sup> Utilitarians support rights only when they make sense on utilitarian grounds; accordingly, many economists support rights of property and contract only insofar as they contribute to the functioning of the market and the generation of economic welfare (as is seen in antitrust law, on which more later), not out of respect for any principles supporting the rights themselves. As Dworkin wrote critically of economists: “The institution of rights, and particular allocations of rights, are justified only insofar as they promote social wealth more effectively than other institutions or allocations.”<sup>59</sup> Even when economists defend rights, it is in a way so qualified as to be meaningless. For instance, Posner claimed that economists recognize “absolute rights,” but then clarified that “the economist recommends the creation of such rights... when the cost of voluntary transactions is low,” concluding that “when transaction costs are prohibitive, the recognition of absolute rights is inefficient.”<sup>60</sup> Economists are likely to dismiss an “arbitrary initial assignment of rights” (in Posner’s words) that is not grounded in welfare-maximization, but traditionally rights are based on some essential principle grounded in human dignity and liberty, hardly arbitrary outside of utilitarianism.<sup>61</sup>

However, the justification of rights solely on utilitarian grounds defeats the very purpose of rights, which are meant to protect individuals from the demands of utilitarian logic. As Ronald Dworkin wrote in the introduction to his landmark volume *Taking Rights Seriously*:

Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.<sup>62</sup>

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<sup>58</sup> Jeremy Bentham, *Nonsense Upon Stilts*, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION (Philip Schofield, Catherine Pease-Watkin, & Cyprian Blamires, eds, 2002), at 317. On this concept, see Schofield, *Jeremy Bentham’s ‘Nonsense Upon Stilts’*, 15 UTILITAS 1 (2003).

<sup>59</sup> Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 198 (1980).

<sup>60</sup> RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (2<sup>nd</sup> ed) 70 (1983).

<sup>61</sup> *Id.* at 98.

<sup>62</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977).

In this sense, rights absolve persons who possess them from being forced to comply with the dictates of utilitarian policy. For the most part, citizens in liberal democracies are free to consume the goods and services they like, pursue the careers they find most personally fulfilling or lucrative, and live where and with whom they want, without being required to make their choices conform with the maximization of total welfare or utility. By the same token, many of the rights granted to the people in the Bill of Rights to the U.S. Constitution protect certain ranges of behavior, such as speech, association, and religious practice, from suppression in the interests of overall well-being (which may be sincerely and significantly affected by them, such as when a racist demagogue on a street corner offends the sensibilities of passersby). All of these choices and behaviors are shielded by rights in the interest of protecting individual liberty from the state's otherwise reasonable and legitimate interest in maximizing well-being.

The conception of rights for which I am advocating is very general and, I hope, one that most readers will find reasonable and familiar. I do not hold to any precise or specific definitions of rights, but rather the sense that Dworkin referred to when he wrote of rights as “trumps,” protecting individuals from the demands of utilitarianism, carving out a zone of liberty in which they are free to do as they choose, regardless of the effects of total welfare, provided they respect the same rights of others. The idea of rights I am using is also very broad: It does not specify which rights belong to individuals in a given society or legal system, but merely holds that they have some rights which take precedence over welfare in nontrivial cases. In more liberal societies people generally have more and stronger rights, or wider zones of freedom, although the precise delineation of these rights differs (especially with regard to freedom of speech). It also does not specify how strong rights must be. It certainly does not posit any rights to be absolute; any right, in general, can be overridden by another right, principle, or interest that is judged to be more important in a particular situation. Nonetheless, in order to have any meaning whatsoever, a right must overwhelm the dictates of welfare in some nontrivial cases.



My intention is to propose a very common and widely held view of rights—not absolute, but with significant ability to stand up to welfarist concerns. This is how most civil rights are considered, including rights to free speech, association, and worship, as well as protections given to members of specific minority groups. Speech can often cause true harm, ranging from “mere” offense to significant emotional distress, which can be quantitatively significant if it affects a large group. The paradigmatic example is the racist spewing filth on a street corner, but it can also apply to a person telling “uncomfortable truths” to an audience who would rather not hear them. Traditionally, the right of free speech, at least in the United States, has been held to be all but absolute, admitting exceptions only in cases of “clear and present danger” and deliberate provocation of violence, and definitely not in cases of more ephemeral harm, this being one of the considerations against which such a right is enforced. Nonetheless, the right of free speech has been increasingly challenged on grounds of harm; for instance, the rise in far-right hate speech in the early 21<sup>st</sup> century has led to calls for bans or “deplatforming,” citing the harm on targeted communities, whose very personhood and right to existence is questioned by such speech.<sup>63</sup>

Nor is the interpretation or enforcement of rights implied to be simple or straightforward, as we can see even with the traditional defense of free speech, which nonetheless admits of exceptions in extraordinary circumstances. In the United States, the Supreme Court and federal appeals courts spend a great deal of time defining, refining, and sometimes overturning rights which, in their original language, every schoolchild and applicant for citizenship learns as simple statements of principle. Typically, however, these rights are not subject to democratic vote; as Dworkin, again, wrote, rights are based on moral and legal principles at the heart of a political and legal system, and should not be subject to the preferences of a shifting electorate.<sup>64</sup> Otherwise, there is the danger of what John Stuart Mill called the *tyranny of the majority*, in which the

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<sup>63</sup> See, e.g., ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

<sup>64</sup> See DWORKIN, *supra* note 57; for a more recent perspective, see Jamal Greene, *Rights as Trumps?* 132 HARV. L. REV. 28 (2018).

majority may vote, through perfectly legitimate democratic processes, to take away rights from the minority if these rights are not taken out of democratic control.<sup>65</sup>

#### IV. RIGHTS IN LAW AND ECONOMICS

Despite their importance to the law in general, rights are neglected in the field of law and economics, where the utilitarian nature of economic logic excludes their consideration. We can see this clearly in what many scholars hold to be the central “axiom” in modern law and economics, the Coase Theorem: Assuming clearly assigned property rights and no impediments to bargaining, parties in a private legal dispute will always come to the efficient resolution.<sup>66</sup> Coase demonstrated brilliantly that, under these circumstances, the identity of the party holding the property right is irrelevant to the efficiency of the solution, which is the primary concern of economists.<sup>67</sup> Furthermore, in the utilitarian context, efficiency (or welfare-maximization) is all that matters, which implies that the assignment of property rights is *completely* irrelevant, ethically as well as pragmatically, regardless of any moral arguments supporting a particular assignment.

This creates a problem when the conditions for the Coase Theorem are not met, particularly when property rights are not well-defined. Suppose, for instance, that one tenant in an apartment building is bothered by the noise from an adjacent apartment, but it is unclear which tenant has the right to control the noise level. Because the property right is not clearly defined, the economic approach to law would recommend that the judge “mimic the market” and assign the right to the tenant who values it the most, based on the reasoning that that tenant would purchase the right from the one who valued it less (were it assigned to them). Although the particular assignment is irrelevant to obtaining the efficient solution once the property right is assigned, the judge “speeds up” the process by vesting the rights in the hands of the party who would end up with it in

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<sup>65</sup> JOHN STUART MILL, *ON LIBERTY* (1859).

<sup>66</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>67</sup> Another point Coase made, which is not sufficiently recognized, is that these ideal circumstances rarely hold, limiting the application of his “main” result and emphasizing the crucial role of property rights and transaction costs. For an in-depth analysis of Coase’s work, especially on this point, see STEVEN G. MEDEMA, RONALD COASE 63–94 (1994).

any case. This accords with the utilitarian orientation to rights, which focuses on their value in terms of well-being, but conflicts with the traditional view of rights that would grant the right to the person with the greater moral claim to them. This need not be a simple determination, but however it would be decided, few outside the field of law and economics would argue that rights should belong to those who value them most rather than those with a valid moral claim.

This neglect of rights is easily seen in Coase's seminal example of trains throwing off sparks that damage nearby crops. Coase presents this—and all private conflicts regarding property—as a case of *reciprocal harm*:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A.<sup>68</sup>

Again, although this describes the situation adequately for the purposes of explaining the irrelevance of which party holds the property right, it fails to acknowledge the plain fact that A (the train) clearly harms B (the crops).<sup>69</sup> Claiming reciprocal causation is, in the words of Talcot Page, to confuse “a physical harm with the effects of a remedy,” the latter of which attempts to counteract the former, not stand in parallel with it.<sup>70</sup> Nonetheless, Richard Posner writes that “most torts arise out of a conflict between two morally innocent activities, such as railroad transportation and farming,” and asks (in reference to Coase's example): “What ethical principle compels society to put a crimp in the latter because of the proximity of the former?”<sup>71</sup> The ethical principle in question, of course, is a right: in this case, the right of the farmer to the security of his crops against harm from passing trains. It is the neglect of rights in law and economics that contributes

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<sup>68</sup> Coase, *supra* note 66, at 2.

<sup>69</sup> As Richard Epstein notes, even Coase's description of the situation recognizes an injurer and a victim, even though the distinction is not germane to his argument. See Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 165 (1973).

<sup>70</sup> Talcot Page, *Responsibility, Liability, and Incentive Compatibility*, 97 ETHICS 240, 252 (1986).

<sup>71</sup> Richard Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 216 (1973).

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to this refusal to recognize the importance of corrective justice and the enforcement of rights as the basis of tort law (as we will discuss below).

Another way to state the problem of the neglect of rights in law and economics is to point out the absence of the language of *wrongdoing* in favor of *harm*, particularly in the study of tort law. The conflict between the railroads and farmers in Coase's example is stated in terms of the harm done by trains to the crops and, in his view, the reciprocal harm done to the railroad by imposing damages on behalf of the farmers. This frame of reciprocal causation not only denies the established property rights that ground the operation of the Coase Theorem itself, but it also fails to acknowledge the corollary wrongfulness of the railroad's violation of the farmer's property rights.

True to its utilitarian basis, the economic approach to tort law focuses on minimizing the total costs—and, by implication, maximizing welfare, given the absence of benefits—associated with accidents, mainly the costs from harm and costs of precaution. The typical result of such analysis is to recommend liability rules that provide incentive for efficient or optimal precaution, from which point additional precaution would cost more than the resulting savings in harm. As will be familiar from our discussion of Kaldor-Hicks efficiency, this focus on optimal precaution and cost-minimization does not take into account compensation, which is a welfare-neutral transfer between parties; all that matters is that any inefficient harm is deterred. In fact, the identities of the injurer and victim are irrelevant; as with Coase's reciprocal causation, it matters not who harmed whom, only that the conflict itself reveals costs that must be allocated (and ideally prevented going forward).

Opposed to the economic approach to tort law is its traditional conception, based on *corrective justice* as originally described by Aristotle and maintained by many legal scholars today, which focuses on addressing wrongful harm and arranging compensation to “make the victim whole.”<sup>72</sup> On this account, the identities of the injurer and victim are of

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<sup>72</sup> See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Richard W. Wright, *Right, Justice, and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David G. Owen, ed., 1995); and Mark A. Geistfeld, *Economics*,

paramount importance as the system of tort law lays out the conditions under which the harmed party can shift their costs onto the party that harmed them.

After causation, the most basic condition for tort liability is that the injurer harmed the victim *wrongfully*, in violation of a right not to be harmed. When Aristotle wrote about corrective (or “rectificatory”) justice, he argued that the law concerns itself with “the distinctive character of the injury, and treats the parties as equal, *if one is in the wrong and the other is being wronged*, and if one inflicted injury and the other has received it.”<sup>73</sup> As modern tort theorists John Goldberg and Benjamin Zipursky explain:

Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.<sup>74</sup>

Jules Coleman and Arthur Ripstein argue that the causation of harm is not sufficient for a tort claim, but some element of wrongfulness must exist based on violation of right or dereliction of duty, “an analytically prior account of what each of us owes one another.”<sup>75</sup>

This necessary element of wrongfulness in tortious harm is completely absent from the economic approach that takes the existence of harm itself as sufficient to merit attention.<sup>76</sup> This shortcoming is evidenced by the way law-and-economics scholars—and economists in general—conceive of externalities, the problem that inspired Coase’s

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*Moral Philosophy, and the Positive Analysis of Tort Law*, in PHILOSOPHY OF THE LAW OF TORTS (Gerald J. Postema, ed., 2001).

<sup>73</sup> ARISTOTLE, NICOMACHEAN ETHICS 1132 (350 BCE), emphasis mine.

<sup>74</sup> John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 937 (2010).

<sup>75</sup> Jules L. Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L. J. 91, 96 (1995). See also Mark Geistfeld, who writes that “what one has lost for purposes of legal analysis depends on what one was legally entitled to in the first instance,” in *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEOR. INQ. LAW 387, 394 (2014).

<sup>76</sup> Elsewhere, Richard Posner writes that “most common” meaning of justice is efficiency: “When we describe as ‘unjust’ convicting a person without a trial, taking property without just compensation, or failing to require a negligent automobile driver to answer in damages to the victim of his carelessness, we can be interpreted as meaning simply that the conduct or practice in question wastes resources,” in *The Economic Approach to Law*, 53 TEX. L. REV. 757, 777 (1975), emphasis mine.

analysis in the first place. His paper “The Theory of Social Cost” was a response to the standard economic response to externalities, Pigouvian taxes, which raise private cost to equal social cost, thereby realigning private incentives with broader utilitarian concerns. The paradigmatic example is pollution, in which private polluters have little incentive (absent intervention) to limit emissions given the lack of property rights over shared natural resources such as air and water (which also make impossible straightforward application of the Coase Theorem).

But not all cases of externalities are so thorny, nor do all involve wrongfulness in addition to harm. Some harms result from unremarkable social interaction in the context of scarcity, such as two employees competing for a promotion, or conflicting tastes and preferences, such as a homeowner who takes insufficient care of his lawn and offends his neighbors (possibly lowering their property values). In each of these cases, one party is causing harm to another, but in the absence of rights violations, there is no justification for official action to “correct” it. (The irate neighbors may have a nuisance claim, but this would imply a rights violation that would justify legal action to address the harm.) Even a more serious case of externality such as traffic congestion, in which drivers entering the highway during rush hour fail to consider their impact on their fellow drivers, is a simple case of overuse of a scarce resource, but one involving no wrongdoing. In many jurisdictions, congestion taxes have been the Pigouvian solution, with the Coase Theorem rendered inoperable by the impossibility of bargaining among countless anonymous commuters. But the more significant ethical issue with congestion taxes is there is no wrongful action or rights violation to be addressed: No driver has a right to a certain commuting time, and has no claim against an additional driver who adds to it. Policymakers are clearly acting in the spirit of utilitarianism to optimize congestion costs, but in doing so they are penalizing action that is not wrongful (which also may fall disproportionately on the poor and those unable to shift their commute times).

The common feature among all three examples is the absence of clear wrongdoing that is necessary to justify addressing what is otherwise merely incidental harm. Only in the case of the negligent homeowner might there be a legitimate nuisance issue that would justify

official action to address the harm, reflecting the necessary presence of wrongdoing to merit addressing harm. Economists, including legal economists, focus on harm without considering if it needs to be addressed at all, but not all harms require attention because not all harms are wrongful. Furthermore, those that are wrongful—such as the trains throwing sparks on nearby crops—fall under the purview of the tort system, which is designed to address such situations based on the wrongfulness evidenced, and renders the economic analysis irrelevant, all for a neglect of rights. In other words, externalities that are wrongful can usually be handled in the courts under tort law that developed for precisely that purpose, and externalities that are not wrongful are of no concern to law or policy, leaving little room for economists to be concerned with them at all.<sup>77</sup>

Not only do many harms occur “innocently,” without wrongdoing, but many harms result from the legitimate exercise of rights, such as the actions protected by civil rights, including the rights to free speech, worship, and assembly, even if they cause serious offense or disruption. In terms of the examples given above, eligible employees have the right to compete for a promotion, even if only one earns it and thereby harms the ones who did not. (No economist would challenge this kind of externality, but only because competition in general promotes efficiency, not out of recognition of any right to compete.) By the same token, a homeowner has a right to maintain his lawn (or paint his house, and so on) as he chooses, even if it is regarded as unsightly by his neighbors, unless it is legally determined to be a nuisance (rendering the conflict a case of one right conflicting with another, rather than a right being suppressed merely for the sake of utility or welfare). And certainly commuters have the right to use the roads in a lawful fashion, even if they impose time costs on other drivers; although congestion taxes do not deny drivers this right, they do place a burden on the exercise of it (adding to the existing time burden they voluntarily if resentfully endure).

Perhaps the most significant case of harm addressed in the absence of wrongdoing is antitrust law—which could be considered the “original” law and economics—in which firms are held responsible for business practices, such as collusive price fixing and

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<sup>77</sup> For more on externalities and the distinction between harms and wrongs, see Mark D. White, *On the Relevance of*

mergers that result in an overly concentrated industry, that harm consumers, chiefly through higher prices. Although the harm is unquestionable and can be quite large, it is very difficult to claim that any consumer's rights are violated by these actions: Consumers are not normally understood to have a right to a certain (low) price, especially when a firm can raise prices unilaterally, with the same effect on consumers, while facing no legal challenge. Furthermore, the behavior forbidden by antitrust can be considered a legitimate exercise of business owners' property rights, particularly the right of disposal, as well as the right to enter into mutually agreeable contracts with customers and other firms. Seen this way, antitrust law finds its justification solely in utilitarian logic, with no basis in rights violations on the part of harmed parties and, more important, in direct violation of the rights of those targeted.<sup>78</sup>

## V. CONCLUSION

With its utilitarian focus on costs to the exclusion of deontological factors such as rights, law and economics sees every problem as harms to be optimized without considering that they may also represent wrongs to be corrected. This has important rhetorical effects in cases such as pollution, an externality that involves both tremendous harm as well as blatant wrongdoing, even in the absence of clearly defined property rights, according to what Mark Geistfeld calls an "underlying entitlement to physical security."<sup>79</sup> Any economics or law professor who has explained that cost-minimization requires optimizing pollution rather than eliminating it is familiar with the disbelieving looks from students who cannot understand why a moral wrong would be tolerated by design (rather than by necessity).

The neglect of rights also shows up in many other areas of law and economics. For example, a central concept in the economic approach to contract law is *efficient breach*, by

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*Wrongfulness to the Concept of Externalities*, 5 *ECONOMIA* 313 (2015).

<sup>78</sup> For more, see Richard A. Epstein, *Private Property and the Public Domain: The Case of Antitrust*, in *ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV* (J. Roland Pennock and John W. Chapman, eds, 1982); ADI AYAL, *FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK* (2014); and Mark D. White, *On the Justification of Antitrust: A Matter of Rights and Wrongs*, 61 *THE ANTITRUST BULLETIN* 323 (2016).

<sup>79</sup> Geistfeld, *supra* note 75, at 389.



which expectation damages align the incentives of the party intending to breach with the total costs in the situation (much like a Pigouvian tax), rendering any decision to breach efficient from the point of view of total welfare. But this analysis excludes any nonfinancial basis of complying with an agreement, such as promise, consent, or autonomy—in other terms, the right of both parties to enforce the agreement and compel performance.<sup>80</sup> This is recognized by the doctrine of *specific performance*, which can also lead to efficient breach through negotiation (based on the Coase Theorem), but enforcing performance is seen by many scholars and judges alike as needlessly coercive and to be avoided if possible.<sup>81</sup> As Oliver Wendell Holmes, Jr., who can be considered an early law-and-economics scholar in spirit, wrote, “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else.”<sup>82</sup> This utilitarian perspective on contracts neutralizes the heart of the concept and renders agreements meaningless; without a meaningful right or duty created by the agreement, contracts are merely transactions, economics at its simplest.<sup>83</sup>

This, ultimately, is the crux of the problem with the neglect of rights in law and economics: Because rights are integral to the law itself, determining legal duties, wrongs, and their appropriate remedies, their exclusion from law and economics leaves only the economics and its utilitarian foundations, to be applied to legal concepts without appreciation of their morally rich nature. When that happens, as Fletcher suggested in the passage quoted at the beginning of this essay, persons stop being distinct individuals and become anonymous, interchangeable contributors to total utility. To mainstream law and

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<sup>80</sup> On contract as promise, see CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); on contract as consent, see RANDY E. BARNETT, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS* (2010); and on contract as choice (reflecting autonomy), see HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017).

<sup>81</sup> See, e.g., Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349.

<sup>82</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>83</sup> And the less said about the economics of crime the better, a field in which theft is regarded as inefficient because it draws resources from productive to protective uses, rather than a wrongful violation of property rights, and sexual assault is rationalized as a response to missing markets in sexual services rather than a perverse violation of rights to bodily autonomy and security. As Jules Coleman wrote, “such a theory has no place for the moral sentiments and virtues appropriate to matters of crime and punishment: guilt, shame, remorse, forgiveness, and mercy, to name a few. A purely economic theory of crime can only impoverish rather than enrich our understanding of the nature of crime,” in *Crime, Kickers, and Transaction Structures*, in CRIMINAL JUSTICE: NOMOS XXVII (J. Roland Pennock & John W. Chapman, eds, 1985), at 326. This critique goes far beyond the refusal of law and economics to recognize rights and wrongfulness, but it shows that the problem such neglect poses for the study of private law is only the beginning.

economics, justice is reduced to efficiency and rights to utility, but at what loss? If persons are to have any shield of liberty against utilitarian policy, rights must be “taken seriously,” lest the law become a tool of the subordination of each to the goals of the whole—or the few who determine them.

The only question remaining is how to incorporate rights into law and economics, given its current utilitarian and quantitative orientation? This makes necessary a revision to the mathematical nature of the discipline, acknowledging absolute limits to some optimization problems that resist marginal trade-offs, and eliminating the consideration of optimization when it is judged inappropriate. Optimization is still valuable within the bounds of law as defined by rights, and it can even inform decisions on the margins of rights or when they point to opposite conclusions. Apparently irreconcilable conflicts between principles, rights, or duties, all of which resist consequentialist logic, *can* be made using consequences if there is no deontological basis on which to make a decision.<sup>84</sup>

There is still plenty of room for economic logic in the study of law, but it must operate alongside the more crucial concept of rights. To the extent the law is supposed to protect individuals, rights are essential, and any economic approach that neglects them is abandoning this responsibility in favour of utilitarian social engineering.

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<sup>84</sup> For more discussion, see Mark D. White, *Pro Tanto Retributivism: Judgment and the Balance of Principles in Criminal Justice*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* (Mark D. White, ed., 2011), and *Judgment: Balancing Principle and Policy*, 73 *REV. SOC. ECON.* 223 (2015).