

LEGAL REALISM: UNFINISHED BUSINESS

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## I. LEGAL REASONING AS A RENAISSANCE HABIT OF MIND

The great evolutionary biologist Stephen Jay Gould devoted his last book to the relationship between science and the humanities.<sup>1</sup> Gould argued that the Renaissance was not the forward-looking launcher of the scientific revolution that many, inspired by the careful observations of nature in the work of Leonardo Da Vinci, believe it to be, but a backward-looking enterprise.<sup>2</sup> The Renaissance sought to restore the learning of the ancients rather than to advance scientific knowledge through observation of the natural world.<sup>3</sup> Gould gives the example of the “*Historia animalium*” of Ulisse Aldrovandi and Konrad Gesner, the greatest natural historians of the period.<sup>4</sup> That book includes chapters on the elk and the fox, but also on the unicorn and the satyr, not, as Gould is quick to point out, because Aldrovandi and Gesner necessarily thought that unicorns and satyrs exist, but because the ancients had written about those creatures.<sup>5</sup> The Renaissance was oriented toward ancient intellectual authority, not toward the observable world.<sup>6</sup> As Gould puts it, “for the Renaissance, the *recovery* of ancient wisdom, not the *discovery* of novel data, became the primary task of scholarship.”<sup>7</sup> Gould goes on to detail how in the seventeenth century science moved on to focus on reality.<sup>8</sup> The law, however, had to wait another three hundred years to make this move, and in important respects is still waiting.

The Renaissance character of legal studies is one of the most jarring aspects of legal education for American students, who, unlike law students in most other parts of the world, commence their study of law after four years of undergraduate education in other fields of intellectual endeavor.<sup>9</sup> The practice of law to this day is often not oriented toward the observation of reality but toward the observation of legal texts, their categorization and systematization in relation to each other, rather than in relation to the world.<sup>10</sup> The undergraduate major in economics of course learns mathematical models that may be horribly divorced from reality and utterly incapable of answering the pressing economic questions of the day. But the key difference between this experience and that of the law student is that the economic models learned by the undergraduate economics student are *supposed* to reflect reality, however badly they may in fact do that.<sup>11</sup> Even the undergraduate major in

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<sup>1</sup> See STEPHEN JAY GOULD, *THE HEDGEHOG, THE FOX, AND THE MAGISTER’S POX: MENDING THE GAP BETWEEN SCIENCE AND THE HUMANITIES* 1–8 (2003).

<sup>2</sup> *Id.* at 36.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 37.

<sup>5</sup> See *id.* at 37–38.

<sup>6</sup> See *id.*

<sup>7</sup> *Id.* at 36.

<sup>8</sup> See *id.* at 39–47.

<sup>9</sup> See DANIEL R. COQUILLETTE, *LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY* 1 (1995).

<sup>10</sup> The percentage of the text of court opinions that is quoted from other court opinions is a rough measure of the extent of this orientation. To choose an example at random, eleven percent of a recent Supreme Court opinion quotes directly from other legal opinions. See *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

<sup>11</sup> See EUGENE SILBERBERG, *THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS* 1–2 (2d ed. 1990).

comparative literature, who primarily studies chains of authorial influences — can hints of Heraclitus be found in Rabelais? — engages in a course of study that is oriented toward observed fact, even if texts themselves are the subjects of observation. Either there is Heraclitus in Rabelais or there is not.

By contrast, new law students quickly find that what matters in the law is “legal argument,” the drawing of analogies to past cases, rather than argument based on observed fact, on the relationship between particular case outcomes and the world.<sup>12</sup> Getting the case right does not mean identifying the effects of a set of possible rulings on the nation and deciding whether those effects are desirable according to some metric, whether that metric be justice, the carrying out of the expectations of the legislature, or something else.<sup>13</sup> Getting the case right means finding the outcome that best fits past cases, preferably those decided by courts or judges with the greatest prestige.<sup>14</sup> The law in the first instance appears to the new law student not as a system to be back-tested against the world but to be back-tested against itself.<sup>15</sup> In order to solve cases, the law student dives into the law library, which collects reports of past court decisions, not into the university’s main library, which collects works devoted to describing the real world. Just so, the Renaissance naturalist dove into ancient manuscripts to describe the natural world, not into the nearest lake.

No wonder American law students experience their first year of legal studies as exceptionally difficult and find their undergraduate performance little guide to their performance on first-year law exams. These students have spent their entire intellectual lives in the Enlightenment, excelling by showing their teachers that they have a better grasp on reality than their classmates.<sup>16</sup> But in law school that skill matters not at all. For some, the result is a crisis of motivation, because they have grown up associating the pursuit of reality with self-worth. For others, it is a moral crisis, as they find legal reasoning leading them to support case outcomes that they believe will be bad for the world. They are taught, however, that accepting that law and justice are two different things is key to joining the profession.<sup>17</sup> For still other students, the crisis is one of skills. They may have been very good at arguing from reality in their prior intellectual lives; all at once, they must learn the very different skill of arguing from authority.

The Renaissance character of legal reasoning gives new law students, and the lawyers they go on to become, unique insight into the intellectual battles of the past, albeit insight they could do without. Gould wrote of the Renaissance that “[w]e often

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<sup>12</sup> See ROBERT J. FOGELIN & WALTER SINNOTT-ARMSTRONG, UNDERSTANDING ARGUMENTS: AN INTRODUCTION TO INFORMAL LOGIC 423–25 (6th ed. 2001).

<sup>13</sup> See BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 14 (1998).

<sup>14</sup> FOGELIN & SINNOTT-ARMSTRONG, *supra* note 12, at 423–25.

<sup>15</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (describing legal reasoning as dealing in “theorems in an independent system” rather than statements about the world); GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 8 (2016).

<sup>16</sup> See COUILLETTE, *supra* note 9, at 1 (acknowledging the conflict between legal education and liberal arts backgrounds).

<sup>17</sup> See FOGELIN & SINNOTT-ARMSTRONG, *supra* note 12, at 459.

get befuddled when we try to comprehend the central belief of the system that the Scientific Revolution hoped to replace, because [argument from authority] strikes us as so strange and archaic[.]”<sup>18</sup> But to the seasoned lawyer, Aldrovandi and Gesner’s approach to natural history is perfectly familiar: there is no better way to win a case than to show that a very important court said something supportive, and the greater the number of courts, and the further back in time that support can be shown to stretch, the stronger the authority still. It does not matter if the result is bad for America or the world, or something that actual legislators, not the abstract “intent of the legislature” to which courts refer in doing legal reasoning, could not possibly have wanted.<sup>19</sup> The fact that other cases support the outcome is enough. The sixteenth century is alive and well in the law.

## II. LEGAL REALISM AS POLICYMAKING

For at least a hundred years now, the legal realist movement has contested the Renaissance approach to the law by insisting that legal argumentation always be reality-based.<sup>20</sup> The question in deciding any case, insist the legal realists, is always what those who framed the law — that is, legislators — would actually want to have happen in the particular case, or, in matters of common law, what the best result would be after taking consequences into account.<sup>21</sup> That is, realists want courts to do what everyone else in government already does: make policy. The term “policy” evokes armies of PhDs in subjects like sociology, environmental science, government, and, above all, economics, working for think tanks, administrative agencies, or the science departments of universities, gathering data and making recommendations about what the President or Congress should do. What the term “policy” does not invoke is the court or the law school. Policy is modern governance,

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<sup>18</sup> GOULD, *supra* note 1, at 36.

<sup>19</sup> *Cf.* Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017) (“[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced. . . . Indeed, it is quite mistaken to assume . . . that ‘whatever’ might appear to further the statute’s primary objective must be the law.”) (internal brackets and quote marks omitted).

<sup>20</sup> See Peter Cane & Joanne Conaghan, *Legal Realism*, in THE NEW OXFORD COMPANION TO LAW (2008).

<sup>21</sup> See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467–68, 474 (1988); FRIED, *supra* note 13, at 14. A reality-based approach to statutory interpretation seeks to answer the question what the legislature would want the court to do in the case at hand. Answering that question requires careful study of the consequences of any particular interpretation, and study of the legislature to determine how the legislature would feel – a word used here advisedly – about the outcome. What legislators happened to say during debates over passage of the law is only one datum among many that are relevant to a realistic statutory interpretation.

Statutory interpretation today, however, does something quite different: it simply treats records of legislative debates as authoritative texts. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–50 (1992). The detachment of this current approach from reality is evident in the fact that no court appears ever to have mentioned the offices of legislative counsel of the House and Senate of the U.S. Congress, which employ dozens of lawyers who draft the actual texts of the bills proposed by federal legislators. See Office of the Legislative Counsel, Welcome to the Office of the Legislative Counsel of the U.S. House of Representatives, <https://legcounsel.house.gov/> (last visited Sept. 9, 2018). It seems reasonable to suppose that those who actually wrote the language of the laws on the books might be able to explain the intent behind key words. The fact that no court has ever seen fit to ask these bill drafters what their words were meant to convey reflects the Renaissance orientation of statutory interpretation toward texts rather than reality.

in contrast to the Renaissance governance that is still the staple of the law.<sup>22</sup>

The fact that policy is generally associated with institutions other than the courts and law schools reflects how society has dealt with the failure of legal practice to adapt to science: by pushing the legal world aside. It is no coincidence that the rise of the legal realist movement a hundred years ago coincided with the dawn of the administrative state.<sup>23</sup> The legal realist movement and the movement to outflank the law with policy institutions was one and the same.<sup>24</sup> Legal realists wanted judges to get real, and seeing that they would not, sought to take governance outside of the realm of the courts and place it in the hands of administrative agencies staffed with people educated into reality-based intellectual disciplines, people with PhDs, not JDs.<sup>25</sup> The legal realists have created a policy world outside of the law that has vastly more influence today over how the country is run than do courts and their method of legal reasoning. Today federal legislation is pervasive and state statutes have greatly circumscribed the ambit of the common law, from the Uniform Commercial Code, which extracted vast swaths of commercial law from the common law power of the courts, to the more recent tort reform push to reduce the law of punitive damages to statute.<sup>26</sup> Indeed, the federal courts today defer to the vast majority of administrative agency decisions explicitly on the ground that the judiciary lacks the expertise to review them.<sup>27</sup> But this was not always so.

Nineteenth century America was ruled by courts; legislation was uncommon, narrow, and subject to searching judicial review.<sup>28</sup> Nowhere is the change wrought by legal realism on judicial power starker than in the mostly-forgotten history of judicial review of price regulation by administrative agencies.<sup>29</sup> The Supreme Court grudgingly conceded power to Congress to create price-regulating administrative agencies in *Munn v. Illinois* in 1877, but for more than 50 years starting in 1890 the Court insisted on supervising the prices those regulators set.<sup>30</sup> In case after case, the Court sought to use legal reasoning to determine whether the price of electricity, tap

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<sup>22</sup> Harold Berman observes that the scientific revolution brought a focus on cases and evidentiary standards to the law that reflected an interest in the empirical. See HAROLD JOSEPH BERMAN, *LAW AND REVOLUTION, II THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 301 (2006). A focus on cases creates only the semblance of empiricism, however, so long as that focus is mediated by analogical reasoning from precedent.

<sup>23</sup> See FRIED, *supra* note 13, at 14.

<sup>24</sup> See *id.*; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169 (1992); Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 *SUFFOLK U. L. REV.* 631, 636 (2003).

<sup>25</sup> See FRIED, *supra* note 13, at 14. A hundred years ago, the realists would in fact have been replacing LLBs, rather than JDs. The bachelor of law was the main degree awarded by law schools at the time. See J. Gordon Hylton, *Why the Law Degree Is Called a J.D. and Not an LL.B.*, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG, Jan. 11, 2012, <https://law.marquette.edu/facultyblog/2012/01/11/why-the-law-degree-is-called-a-j-d-and-not-an-ll-b/>.

<sup>26</sup> See Shael Herman, *The Fate and the Future of Codification in America*, 40 *AM. J. LEGAL HIST.* 407, 427–32 (1996); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 159–60 (4th ed. 2010).

<sup>27</sup> See Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 *GEO. J.L. & PUB. POL'Y* 103, 105–6, 110–11 (2018).

<sup>28</sup> See HORWITZ, *supra* note 24, at 220–22; Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 *POL. SCI. Q.* 255, 261 (1982).

<sup>29</sup> See generally FRIED, *supra* note 13, at 160–93 (recounting this history).

<sup>30</sup> See *Chicago, M. & St. PR Co. v. Minnesota*, 134 U.S. 418, 458 (1890); *Munn v. Illinois*, 94 U.S. 113, 124–26 (1876); FRIED, *supra* note 13, at 165–69, 176, 186–89; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1208–09 (1986) (discussing *Munn*).

water, or whatever other product was before the court, met a standard of fairness that the Court found in the Due Process Clause of the U.S. Constitution.<sup>31</sup> After decades of withering criticism from the legal realists, however, the Court finally quit the field in 1944, conceding that price setting by precedent should give way to reality-based price setting carried out by experts — economists — trained in understanding markets.<sup>32</sup> Every similar retreat of the courts from constitutional review of regulatory activity over the past century has been a victory for legal realism, for the policymaker over the lawyer.<sup>33</sup>

But unless the administrative state succeeds at doing away with the judiciary entirely, the triumph of legal realism will be complete only if it transforms the way judges do law. In this, legal realism has had mixed success. The realists did take legal *scholarship* more or less by storm, convincing elite law professors that they should never push for a change in the law, or a particular resolution of a pending case, without deploying policy arguments in support.<sup>34</sup> Renaissance-style scholarly pursuits, such as the writing of immense treatises collating all of the cases relating to a particular branch of the law, have ceased to occupy law professors at the best schools.<sup>35</sup> “Law and . . .” scholarly subfields have proliferated, as law scholars have sought to import various reality-oriented intellectual disciplines, from literature to sociology, into the law.<sup>36</sup>

Perhaps the most important of the “law and . . .” subfields has been law and economics, which appeared in two distinct phases.<sup>37</sup> The first was a project of the original group of legal realists, most notably Robert Hale, that sought to push the courts aside rather than reform them.<sup>38</sup> The great triumph of this first law and economics movement was convincing the Supreme Court to get out of the rate regulation business by showing how badly adapted legal reasoning was to deciding what a fair price might be.<sup>39</sup> The second movement, which started in the 1950s, was oriented to the internal reform task of replacing legal reasoning with reality-based economic reasoning.<sup>40</sup> This second iteration should probably be credited with doing more to compel law scholars to focus on results than any other single effort to open the law up to the reality-based intellectual world.<sup>41</sup> But its success has been limited by the shortcomings of economics as a social science. Despite its orientation toward

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<sup>31</sup> See U.S. Const. amend. 5; FRIED, *supra* note 13, at 175–89.

<sup>32</sup> See *id.*; *Power Comm’n v. Hope Gas Co.*, 320 U.S. 591, 601–02 (1944).

<sup>33</sup> A high-water mark was reached in the 1970s, on the eve of deregulation, and since then the scope of the administrative state has contracted to a modest degree. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 232–33 (1999); HORWITZ, *supra* note 24, at 230–68 (describing the reaction against regulation that started at the end of the New Deal).

<sup>34</sup> See Singer, *supra* note 21, at 503–04.

<sup>35</sup> See A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 677–79 (1981).

<sup>36</sup> See Singer, *supra* note 21, at 504; Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 201–06 (1991); CALABRESI, *supra* note 15, at 9.

<sup>37</sup> See CALABRESI, *supra* note 15, at 15–16.

<sup>38</sup> See FRIED, *supra* note 13, at 14.

<sup>39</sup> See *id.* at 186–93.

<sup>40</sup> See CALABRESI, *supra* note 15, at 11–16.

<sup>41</sup> See *id.* at 15–16.

reality, economics ignores large categories of human behavior that ought to be relevant to a scientific approach to law, because economics assumes that all economic actors are rational and have static preferences.<sup>42</sup> Nonetheless, every time a law professor, influenced by economics, argues that the parties to a case will contract around controlling precedent, or that a rule will distort economic incentives, the professor accepts that consequences matter, even if the professor makes no effort to undertake a careful study of those consequences.<sup>43</sup> Law and economics has in this way been a victory for realism.

It would be a big mistake to infer from the realist success in the realm of legal scholarship a similar triumph in legal practice. The primary currency of argumentation in the world of legal practice remains the analogy from past cases, with more legal realist approaches appearing only occasionally, and then only in the most elite courts in the most important cases.<sup>44</sup> Precedent continues to matter, not because it helps courts determine what the best outcome for America might be, or because the consequences of a lack of consistency in case handling would be bad for the nation — both acceptable realist approaches to precedent — but because precedent came before, just as the unicorn mattered for the Renaissance naturalist, because it came before.<sup>45</sup>

### III. MOSSOFF ON TRADEMARK

#### A. *His Argument*

It is against this backdrop of the continuing contestation of realism in the law that Mossoff's argument that trademark is a property right must be evaluated.<sup>46</sup> Mossoff argues that courts and commentators have tended to deny trademark the status of property because they have failed to analogize trademarks to easements, which permit owners of real property limited access to neighbors' land.<sup>47</sup> According to Mossoff, trademarks, like easements, are linked to ownership of something else.<sup>48</sup>

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<sup>42</sup> See Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 352–53 (discussing the limits of the assumption of static preferences in the advertising context).

<sup>43</sup> See Singer, *supra* note 21, at 503–04.

<sup>44</sup> For a rare example of a realist court opinion, see *Roe v. Wade*, 410 U.S. 113, 141–62 (1972). For an example of a contemporary opinion in the legal reasoning mold, see *supra* note 10.

<sup>45</sup> Much has been made of the spread of factor tests that require judges to balance “conflicting considerations” after 1945. See Kennedy, *supra* note 24, at 675–76; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 147–52 (1997). Judges certainly must consider consequences in order to apply these tests properly, but the persistence of the practice of analogizing from precedents usually prevents judges from properly applying the tests. Instead of considering consequences in weighing factors, judges analogize to past applications of the factors. For example, in one recent case, the Supreme Court applied the factor test for probable cause by mimicking the outcomes of past cases having similar facts, rather than by undertaking an independent evaluation of each factor, even though the Court acknowledged that probable cause is “a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules.” See *District of Columbia v. Wesby*, 138 S. Ct. 577, 586–88 (2018) (internal citations omitted). All else equal, a truly realist approach would give zero weight to the fact that similar cases were decided in a particular way. The popularity of factor tests does not represent the triumph of realism in adjudication.

<sup>46</sup> See Adam Mossoff, *Trademark as a Property Right*, 107 KY. L.J. 1, 3–5 (2018).

<sup>47</sup> See *id.* at 4–5. For the definition of easements, see JESSE DUKEMINIER ET AL., PROPERTY 767 (7th ed. 2010).

<sup>48</sup> See Mossoff, *supra* note 46, at 4.

For trademarks, it is ownership of the business associated with the mark in the minds of consumers.<sup>49</sup> For easements, it is ownership of the real property to which the easement provides access.<sup>50</sup> According to Mossoff, because courts rely on the contingency of easements on a property right to accord easements themselves the status of property, courts should rely on the contingency of trademarks on property in a business to accord trademarks the status of property as well.<sup>51</sup>

### B. *The Missing Consequences*

Mossoff's paper will serve to remind realists of just how bad legal scholarship was before it embraced reality. For the paper argues a legal question over nearly forty long pages with nary a word about legal consequences, let alone what those legal consequences might mean for Americans out in the real world.<sup>52</sup> Treating trademarks as property based on their connection to ownership of the underlying business could suggest to courts that trademarks protect the value of consumer loyalty to that underlying business rather than serving, as the courts believe them to today, to prevent consumer confusion of brands.<sup>53</sup> The concept of genericide, which eliminates trademark protection when a mark like "escalator" comes to be associated by consumers with an entire product category rather than a particular brand, could disappear, for example, because genericide undoubtedly reduces the value of a firm's mark.<sup>54</sup> The likely result would be greater market power for firms with successful brands, for good or ill.<sup>55</sup>

Mossoff wants to win this debate without any discussion of the policy consequences, of whether ironclad protection of reputation is in fact good or bad for markets. But what Americans care about is whether protecting brand loyalty is good or bad for consumers. Protecting brand loyalty might be good for consumers because it allows firms to reap rewards from investing in the production of better products. Or protecting brand loyalty might be bad for consumers because it magnifies the power of seductive advertising or the familiarity generated by having been first to market to create irrational brand attachments, leading to higher prices and harm to more-innovative but less-well-known competitors.<sup>56</sup> Legal realism demands that the debate over trademarks be carried out in these terms, in terms of effects. Mossoff

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<sup>49</sup> In fact, Mossoff claims that the link is to the reputation of the business, which he calls goodwill. *See id.* at 11–18. Trademark has traditionally been tied not to goodwill in particular, however, but to the business, or more specifically to the assets that generate the product that is associated with the mark in the minds of consumers. *See* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 909–10, 963–64 (6th ed. 2012) (discussing *inter alia* unsupervised licensing). This response essay will proceed as if Mossoff had made the more accurate claim of a link to the business, rather than to goodwill.

<sup>50</sup> Actually the tie exists only for "appurtenant" easements, whereas easements "in gross" are not tied to ownership of other land. *See* DUKEMINIER ET AL., *supra* note 47, at 767.

<sup>51</sup> Mossoff, *supra* note 46, at 4.

<sup>52</sup> *See id.* at 10–11.

<sup>53</sup> *See* MERGES ET AL., *supra* note 49, at 765.

<sup>54</sup> *See id.* at 795–98.

<sup>55</sup> Frederic M. Scherer, *First Mover Advantages and Optimal Patent Protection*, 40 J. TECH. TRANSFER 559, 570–76 (2015) (discussing the consequences of brand loyalty in the first-mover advantage context).

<sup>56</sup> *See* MERGES ET AL., *supra* note 49, at 766–68.



would resolve the entire question based on an analogy to the law governing whether a farmer can use a neighbor's field to get to the road. Because a court once said the farmer could get to the road, Mossoff would say that a trademark can never be set aside so long as it remains valuable to its owner.<sup>57</sup> Just so, the Renaissance scientist looked to Hesiod rather than the hills for information about the natural world.

### C. Indeterminacy

The failure of legal reasoning to take account of consequences, of which Mossoff's paper is an example, is damning enough. But the realist critique of legal reasoning always goes further, to show that legal reasoning not only fails to take the real world into account, but cannot even provide courts with clear guidance about how to resolve cases.<sup>58</sup> Legal reasoning, argue the realists, is more like rhetoric than mathematics.<sup>59</sup> For the realist, legal reasoning lacks the determinacy of mathematics because, looked at from the right angle, anything can be analogized to anything else. Trademarks are like easements in that they are both contingent on ownership of something else, but they are also like turtles in that they both start with the letter "T." The only way to really win an argument through legal reasoning is therefore to assume your conclusion.<sup>60</sup> Mossoff cannot argue that trademark is property because trademark rights happen to have a structure (existence contingent on ownership of a piece of property) that resembles the structure of some other rights that the law treats as genuine property rights. If the law does not actually say that trademark is property — and it cannot because Mossoff's purpose is to fill that silence with his legal reasoning — then the fact that trademarks merely resemble rights that have been designated as property rights tells nothing about whether trademark rights should be treated as genuine property rights.<sup>61</sup> The resemblance just poses the question whether there should be a rule saying that everything that resembles a property right is a property right. If the argument is that yes, there should be such a rule, then an argument must be made for why that rule should be adopted, returning the argument more or less to where it started, which was to find a way to argue from existing law to the need for recognition of a new rule of law that resolves the question whether trademark should be treated as property.

To his credit, Mossoff's target is an equally specious example of legal reasoning: the argument that trademark *cannot* be property because it does not

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<sup>57</sup> See Mossoff, *supra* note 46, at 24.

<sup>58</sup> See FOGELIN & SINNOTT-ARMSTRONG, *supra* note 12, at 427; FRIED, *supra* note 13, at 14; Singer, *supra* note 21, at 468–69.

<sup>59</sup> In emphasizing the indeterminacy of the law, the critical legal studies movement carried the banner of this second aspect of legal realism in the last half of the 20<sup>th</sup> century, but the movement seemed to find little value in the orientation toward consequences and reality demanded by the first aspect of legal realism. See KENNEDY, *supra* note 45, at 339–44. Critical legal scholars tended to assume that the indeterminacy of policy analysis made realism's focus on consequences no more valuable than legal reasoning's focus on analogy and precedent, no less a mystification, despite realism's orientation toward reality. See *id.* at 147–52.

<sup>60</sup> See Cohen, *supra* note 15, at 814, 820.

<sup>61</sup> See Mossoff, *supra* note 46, at 9–11.

resemble other property rights.<sup>62</sup> That textbook take on the relationship between trademark and property holds that trademark rights are not property because their limitation to use in conjunction with the underlying business makes them unlike basic property rights, which, on this telling, do not have any limits on use.<sup>63</sup> But just as resemblance cannot be used to make a property right, non-resemblance cannot be used to deny a property right. Neither resolves the question without assuming its conclusion. The fire of legal reasoning cannot be fought with the fire of more legal reasoning. The true realist approach would be to ask whether making trademarks count as property would be good for America and to proceed to treat trademarks as property if the answer is yes.

Of course, the realists' beloved policy analysis is just as flexible, and determinate, as legal reasoning.<sup>64</sup> Considering the consequences of laws never actually definitively resolves the question what the correct law should be.<sup>65</sup> That requires the addition of a rule of decision, a value system such as human rights, or maximization of social welfare in the economic sense.<sup>66</sup> The position of the realists, however, is that legal reasoning is no more exact, no more determinate, than policy analysis.<sup>67</sup> As between two approaches that are equally open to interpretation, the realists would choose the one that is informed by reality. After a bout of legal reasoning, the lawyer ends up without an airtight argument for any particular result, plus no sense of what any particular result would mean for the country.<sup>68</sup> At least with legal realism, the lawyer obtains a sense of the consequences, and that in turn gives the lawyer a feeling for which outcome might be best.

#### D. Confusion about Realism

Mossoff mistakenly associates the textbook case against trademark as property — the specious argument that because trademark does not resemble other property rights it cannot itself be a property right — with legal realism.<sup>69</sup> He sees the realists in the textbook case because he mistakenly believes that the realists define property as a plenary right of control — absolute dominion — over the owned thing, a position Mossoff associates with the phrase “right to exclude.”<sup>70</sup> If a right must have that plenary character in order to be a property right, then it follows immediately that the limited right to use marks that is conferred by trademark law is not a property right.<sup>71</sup>

But the view of property Mossoff attributes to the realists could not be more different from the realists' actual view, because the view he attributes to the realists

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<sup>62</sup> See *id.* at 7, 20–21.

<sup>63</sup> See MERGES ET AL., *supra* note 49, at 765.

<sup>64</sup> See *id.* at 147–52.

<sup>65</sup> See *id.*

<sup>66</sup> See Singer, *supra* note 21, at 474.

<sup>67</sup> See *id.* at 473.

<sup>68</sup> See Cohen, *supra* note 15, at 821.

<sup>69</sup> See Mossoff, *supra* note 46, at 7, 20–21.

<sup>70</sup> See *id.* at 20–21.

<sup>71</sup> See *id.*

is the very same view that the realists attacked, and demolished, a hundred years ago.<sup>72</sup> Nineteenth century courts used the view of property as conferring absolute dominion over a thing to resist realist attempts to shift governance to administrative agencies.<sup>73</sup> The courts argued that all administrative action deprives owners of their property, in violation of the due process protection for property contained in the U.S. Constitution.<sup>74</sup> The view of property as absolute dominion allowed the courts to argue that when a rate regulator fixed a price for a good, for example, the owner's property rights were violated because those rights extended to all uses of the good, including the choice of the price to charge for the good's sale.<sup>75</sup> The realists fought back with the now-familiar argument that property rights are whatever the courts want them to be.<sup>76</sup> The courts could just as easily define property not to include a right to set the price as to define it to include a right to set the price.<sup>77</sup> The concept of property did not *require* that the courts view rate regulation as a deprivation of property. In the view of the realists, the courts were free to choose the definition of property with the best consequences for America, and in the realists' view that was the definition that would facilitate administrative action.

The realists' attacks on the view of property as absolute dominion is also the origin of the famous realist view of property as a bundle of rights.<sup>78</sup> The point of the bundle metaphor was that a regulator could break property down into pieces, take out the pieces that were preventing the regulator from operating, and then bundle the remaining pieces back together, without the bundle ceasing to add up to property.<sup>79</sup> A true realist would never argue that the contingency of trademark rights on ownership of the underlying business means that trademarks cannot be property because, for the realist, the contingency of the trademark right just means that the bundle of rights that is a trademark lacks a few of the sticks that make up absolute dominion over the owned thing. But, for the realist, that alone is no more reason to

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<sup>72</sup> See Singer, *supra* note 21, at 490–94; Cohen, *supra* note 15, at 820. What seems to have confused Mossoff in the “right to exclude” rhetoric of the realists is the realists’ position that all rights, of property or otherwise, interfere with the rights of others. See FRIED, *supra* note 13, at 53–56. Nineteenth century courts tried to maintain that property rights are a purely private affair, distinct from government exercise of coercive power. See *id.* For these courts, property involved a relationship between a person and the owned thing, and nothing more. See *id.* at 50–51. The realists countered that property rights involve relations between people, because it is inherent in the notion of a right over something that someone else’s right over that thing must be limited in some way. See *id.* at 53–56. Owning land implies a right to keep others off the land, at least at some times for some reasons. See *id.* It follows that state guarantees of property rights amount to the use of coercive government power against some people (the non-owners) in favor of the owners. See *id.* Property is therefore just as much a matter of government regulation as are the administrative agencies favored by the realists, and the courts therefore cannot cast their resistance to the regulatory state as a struggle between private property and government. See *id.* Private property is government too.

Because their antagonists considered property to be absolute dominion, realists argued that property amounts to a right to exclude everyone without limitation. But that does not mean that realists think that the right to exclude granted by property must always be total. Realists are just as happy viewing limited rights, such as trademark rights, as rights to exclude. Their position is that all rights are rights to exclude to a greater or lesser extent.

<sup>73</sup> See FRIED, *supra* note 13, at 176.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See Cohen, *supra* note 15, at 820.

<sup>77</sup> See *id.*

<sup>78</sup> See FRIED, *supra* note 13, at 51–52.

<sup>79</sup> See *id.* at 53.

deny trademark the property moniker than it is to grant trademark the property moniker.

#### IV. CONCLUSION

Mossoff can be forgiven for confusing the textbook case against trademark as property for realism because today many scholars take for granted that realism dominates scholarship.<sup>80</sup> It would seem to follow that the textbook view must be a realist view. The fact that the textbook view is instead of the Renaissance variety is a measure of the extent to which the legal realist project remains unfinished in the law, and scholars on both sides of the trademark debate who should know better continue to engage in legal reasoning. Despite the immense practical importance of intellectual property law, and the rich body of reality-based economic and social scientific scholarship devoted to intellectual property issues, the legal study of intellectual property law today remains perhaps more mired in the Renaissance, in Felix Cohen's "heaven of legal concepts," than any other area of legal scholarship.<sup>81</sup> The debate over whether trademark is property provides but a glimpse of the problem. But that is a story for another day.

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<sup>80</sup> See Singer, *supra* note 21, at 467.

<sup>81</sup> For an excellent example of the economic analysis of intellectual property, see Vincenzo Denicolò, *Do Patents Over-Compensate Innovators?*, 22 *ECON. POL'Y* 680, 681–99 (2007); Scherer, *supra* note 55, at 560–76. For a discussion of realist approaches in a leading casebook, see MERGES ET AL., *supra* note 49, at 10–16. For the "heaven of legal concepts," see Cohen, *supra* note 15, at 809.