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ELLICKSON'S EXTRAORDINARY LOOK AT THE ORDINARY

Henry E. Smith*

It is often said that the mark of great work, and a great theory in particular, is that it seems obvious in retrospect. And among such theories, some of the most impressive are those that aim to explain not just the problems *du jour* but also a range of facts about life that we have tended to take for granted. In law and economics, the Coase Theorem¹ seems self-evident now, and the situations it covers positively homely, but at the time, against the backdrop of the idealizations and obsessions with frictionless worlds of mid-twentieth century economics, it was anything but obvious.² Not only did it take a night's worth of partying in Chicago to make converts there,³ but refutations of the Coase Theorem sprouted up for quite a while afterwards.⁴

Bob Ellickson's work has this character in both respects. That social norms can be more important than—and can even override—contradictory law is now a staple of legal theorizing.⁵ And the hypothesis that close-knit communities will develop efficient norms for themselves—but not necessarily efficient for society overall—is leading to a better understanding of the dynamics of spontaneous order and its strengths and sometime weaknesses.⁶ This and his study of the workings of property itself,⁷ and now the household,⁸ are of clear utility in retrospect. But all of these aspects of Ellickson's work also share the second feature of a great theory: they explain aspects of life that were taken for granted—were not even on the scholarly radar screen—before Ellickson came along.

Now Ellickson considers himself more of a social scientist than a philosopher, but this characteristic of his theorizing—the startling attention to something taken for

* Professor of Law, Harvard Law School. Email: hesmith@law.harvard.edu.

¹ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

² See GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 75–80 (1988).

³ See R.H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239, 249–50 (1993); STIGLER, *supra* note 2, at 75–76.

⁴ See, e.g., STEVEN G. MEDEMA, RONALD H. COASE 82–90 (1994) (providing an overview of literature claiming to refute the Coase Theorem).

⁵ See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

⁶ See generally *id.* (describing a theory where people interact to mutual advantage without help of a hierarchical coordinator).

⁷ See, e.g., Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

⁸ ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH (2008) [hereinafter ELLICKSON, THE HOUSEHOLD]; Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226 (2006) [hereinafter Ellickson, *Unpacking the Household*].

granted—has characterized some of the greatest advances in philosophy and related fields. The one with which I am the most familiar, linguistics, was revolutionized starting in the 1950s when Noam Chomsky changed the goal of linguistics.⁹ Prior to the advent of his generative grammar, linguistics was usually conducted as an offshoot of traditional grammar. Grammar focused on categories, like cases, subject-object word order, and many more subtle ones, that had been useful in describing Latin and related languages. These familiar categories were simply taken for granted, and details of these basic features were modified relative to Latin as an implicit baseline. Only when theorists took a step back and asked some very basic questions could linguistic theory hope to move beyond school-grammar and aim at a theory of human natural language competence in general. But the way to get there was to start noticing the deep puzzles in some of the homely facts staring at us under our noses.¹⁰ Likewise, a lot of very arcane analytic philosophy got its start when people started asking questions about how ordinary language works or why we have our basic moral intuitions.¹¹ The starting point for great theories is often sitting right in front of—or within—us.

What makes Ellickson's work so impressive and inspiring for my own work is exactly this character of putting the ordinary on the agenda in unexpected ways. Let me discuss three major examples, and then how this method calls for some qualification of another major theme of Ellickson's work—the irrelevance of law.

First is Ellickson's work on social norms.¹² In his study of Shasta County, Ellickson's field work went well beyond demonstrating that people did not know or care about law and that they worked things out among themselves in an efficient way. He showed first of all, in great detail, that people often preferred simple solutions over complex ones. Whether the prevailing legal regime was fencing in or fencing out, the fact that the prevailing norm was responsibility by animal owners for invasions of others' land suggests a powerful gravitational pull to the trespass model.¹³ Not in the sense of the somewhat complicated rules of animal trespass, but the basic regime of keep off, and out of, the column of space defined by the *ad coelum* rule.¹⁴

⁹ See, e.g., NOAM CHOMSKY, SYNTACTIC STRUCTURES (1957); Noam Chomsky, *Skinner: Verbal Behavior*, 35 LANGUAGE 26 (1959) (book review).

¹⁰ For a discussion of Chomsky's impact on the field of linguistics, see FREDERICK J. NEWMAYER, LINGUISTIC THEORY IN AMERICA (2d ed. 1986). See also JOHN LYONS, INTRODUCTION TO THEORETICAL LINGUISTICS 136–37, 153–54 (1968); IAN HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? 67–69 (1975).

¹¹ See, e.g., J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); G.E. MOORE, PRINCIPIA ETHICA (rev. ed. 1993); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. E. M. Anscombe trans., 3d ed. 1968).

¹² See generally ELLICKSON, *supra* note 5.

¹³ *Id.* at 52–53, 72–76.

¹⁴ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 388–91 (2001).

Indeed, *ad coelum* thinking is very prevalent without anyone having to utter the words "*ad coelum*."¹⁵ Likewise, in whaling norms, the most prevalent norm is the fast-fish-loose-fish rule made famous by Melville,¹⁶ which accords with everyday and widespread notions of possession and control. Only in more high-stakes environments did whalers devise special rules.¹⁷

Ellickson also showed that people could deal with complexity best when their interaction was close-knit.¹⁸ Keeping a variety of accounts, in which favors were traded but which could offset each other, is not an easy task, but that is the way people behave.¹⁹ This keeps formal transaction costs low but taps into complex behavior at which people are skilled, perhaps because that is how we evolved, in groups of a maximum of about 150 people.²⁰ Governance rules based, as these are, on very vague standards were not possible when it came to more anonymous interactions, like automobile-animal collisions, which sometimes required the intervention of insurance professionals and even the legal system.²¹

In his work on property, Ellickson noticed details that are quite homely, but are fundamental to how property, both legal and nonlegal, is organized. Ellickson is sometimes associated with the proposition that dogs are what made property possible—in the sense that because of their territorial instincts, dogs can be trained to guard boundaries in an exclusion regime—*ad coelum*—but neither dogs nor robots can detect shirking by someone with privileged access to a resource.²² The fact that exclusion strategies are this simple to implement goes a long way toward explaining why they are the starting point for property.²³

The flip-side is that locally and among close-knit groups, more detail can be tolerated. In his proposal to make local social norms the standard for nuisance law,²⁴ Ellickson follows a distinguished tradition of allowing custom to form the basis of legal content but also in a way that legal institutions would find difficult to create and

¹⁵ *Id.* at 389 n.131.

¹⁶ HERMAN MELVILLE, *MOBY-DICK* 412 (Bantam Books 1967) (1851) ("I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it."); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 89–90 (1989).

¹⁷ Ellickson, *supra* note 16, at 90–94.

¹⁸ ELLICKSON, *supra* note 5, at 167, 177–78.

¹⁹ *Id.* at 55–56; Ellickson, *Unpacking the Household*, *supra* note 8, at 320.

²⁰ See, e.g., R. I. M. Dunbar, *Coevolution of neocortical size, group size and language in humans*, 16 BEHAV. & BRAIN SCI. 681 (1993); R. I. M. Dunbar, *Neocortex Size as a Constraint on Group Size in Primates*, 22 J. HUMAN EVOLUTION 469 (1992).

²¹ ELLICKSON, *supra* note 5, at 94–100.

²² Ellickson, *supra* note 7, at 1329.

²³ Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–56, S467–78 (2002).

²⁴ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728–33 (1973).

apply directly. Indeed, Ellickson focuses attention on how the different scales of land-use problems call for different regimes—in some self-irony he applies the “highly sophisticated adjectives” to these events and the areas they affect—ranging from the *small event* like the growing of a tomato plant, to the *medium event* like the building of a small dam, to the *large event* like a fire that emits fumes over a large area.²⁵ Because problems of scale sometimes call for different regimes to respond to them at the same time, we face the thorny question of how different property regimes interact with each other. This was the inspiration for my articles on the semicommons in which small-scale grain growing uses and larger-scale grazing called for private property and common property regimes that could damage each other through strategic behavior.²⁶ Seeing that problems of scale require interlocking sets of solutions will continue to be very fruitful for property theorists for a long while to come.

Most recently, Ellickson has focused on the household.²⁷ The household itself is quite easy to overlook despite the fact that each of us is a member of one. He rightly distinguishes the household from the marriage and the family.²⁸ In other societies, medieval Iceland for example, the distinct character of the household—a group of people who sleep under the same roof and share eating facilities—was quite distinct from the family and the marriage.²⁹ The household is also full of rules that are surprisingly simple, such as the equity owners of the house getting to set the rules for use.³⁰ Other behavior, like that of the cattle ranchers, is low in transaction costs but complex in the application of social thinking. Exchange within the household occurs on many fronts over a long period of time.³¹ Given a certain amount of self-servicingness on the part of members, it is quite remarkable that household members can rely on implicit gift exchanges that will even out in the long run.³² As with land ownership in general, it will be very fruitful to show how regimes tailored to the individual, the family, and the household interact.

Another mark of great work is that it throws new light on some of its initial assumptions. Coase’s insights can be turned on some of his assumptions.³³ In his view of property, Coase was a hyper-realist.³⁴ He assumed that law regulated activities and that speaking of ownership merely confused things.³⁵ In his treatment of

²⁵ Ellickson, *supra* note 7, at 1325.

²⁶ Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

²⁷ See, e.g., ELICKSON, THE HOUSEHOLD, *supra* note 8; Ellickson, *Unpacking the Household*, *supra* note 8.

²⁸ Ellickson, *Unpacking the Household*, *supra* note 8, at 229–30, 234–35.

²⁹ *Id.* at 229–30, 257–61.

³⁰ *Id.* at 277–87.

³¹ *Id.* at 306–07. See generally ELICKSON, THE HOUSEHOLD, *supra* note 8.

³² Ellickson, *Unpacking the Household*, *supra* note 8, at 306–09.

³³ Merrill & Smith, *supra* note 14, at 376–77.

³⁴ *Id.* at 366.

³⁵ See *id.* at 366–75 (distinguishing Coase from the prototypical legal realist scholar).

nuisance disputes he tended to regard every dispute as posing a freestanding economic problem, at least in principle, and this certainly facilitated his insight about reciprocal causation.³⁶ Of course, as some warned us, including Bob Ellickson among the very earliest, Coase was not asserting that transaction costs are zero, and the whole point of the Coase Theorem is that transactions are important.³⁷

If, in a zero transaction cost world, the allocation of an entitlement does not matter to efficiency (holding effects like wealth constant) or, in a stronger version, to the allocation of resources, the Coasean thought experiment points to the importance of positive transaction costs in our actual world.³⁸ In particular, positive transaction costs not only make the allocation of the entitlement matter, but are the reason why we always have to ask the comparative question of how best to handle problems in the presence of transaction costs: what will maximize the benefits of solving such problems net of the cost of solving them through contracts, taxes, regulations, or whatever. But this suggests that one such device is the shape of the entitlement itself: property rights are not free-floating sticks and law does not always take the activity as its unit of analysis. Property rights are often lumpy rights to exclude from things—rights that sweep in a lot of unspecified uses.³⁹ Owning Blackacre gives the right to grow crops and to park cars, but not to pollute adjacent parcels, for which an easement is needed. This structure of entitlements causes and reflects a non-reciprocal view of causation, but all of this is explainable in broad Coasean terms: transaction costs, including information costs, prevent the hyper-realist bundle of rights theory that might work in a world of zero transaction cost from coming close to reality in our world.⁴⁰

Similarly, Ellickson's work on social norms, property, and the household seems to suggest that law is not important, and in a sense this is true.⁴¹ But in another sense, the patterns of simplicity and complexity he found in social life, and the norms that govern it, also apply in little-appreciated ways to law and the legal system itself—and which suggests their importance after all. First, the basis for property in the right to exclude from a thing resonates with a non-legal and pre-legal set of social intuitions and morality.⁴² Even from within a law-and-economics paradigm, there are good

³⁶ See *id.* at 391–94.

³⁷ See Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 611–30 (1989).

³⁸ See *id.* at 612–13 (showing how Coase adopted and amplified Legal Realist assumptions about property).

³⁹ See Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 76 (2005).

⁴⁰ See generally *id.* (discussing the law of self-help).

⁴¹ See generally ELLICKSON, *supra* note 5 (discussing the need for emphasis on social norms).

⁴² Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1860–66 (2007).

information cost reasons for property to anchor itself to this set of social institutions. Only in higher-stakes situations, especially new ones that come along from time to time, do we need to refine this basic set-up.⁴³ Sometimes this can be accomplished by contract, and sometimes we need a set of group- or society-wide solutions. But just as Ellickson critiqued legal centralism for being too focused on law, and not enough on what actually governed social behavior, there is also a tendency to focus on fine-grained solutions and rules of governance of proper uses—whether they be social norms or laws—and to forget that these refinements stand at the apex of a pyramid of institutions with basic order-maintaining exclusionary regimes of property at the base.⁴⁴ Second, lay views of the world are more relevant to law than the legal centralist that Ellickson takes as his foil would admit.⁴⁵ But this should not stop us from analyzing law itself in terms of the information cost advantages of being in accord with lay intuition. For example, Coase's reciprocity of causation is a brilliant theoretical insight and utterly at odds with lay views of causation.⁴⁶ But before labeling the latter as incorrect, we should recognize that in our world, questions are not as much up for grabs as they are in a journal article. Both in law and, as Ellickson has shown, in norms, our entitlements are quite lumpy, and this prevents us from seeing land use and other conflicts as reciprocal.⁴⁷ The assignment of lumpy entitlements means that I get to repel all sorts of invasions without having to consult cost-benefit analysis or any other complicated theory. The lumpy entitlement carries with it information cost advantages and is presumptively the answer to the conflict, making it incorrect to say that the lay view is incorrect. In this, the law and social norms dovetail quite closely.

Another way to extend Ellickson's approach would be to ask how law *should* respond to social norms. The role of custom in law—or the role of custom as law—used to be quite central.⁴⁸ The more we can see the importance of social norms and detect the conditions under which they are likely to be efficient and fair, the more that law can benefit from spontaneous order.⁴⁹ This approach would be quite traditional and appealing to the lay mind. Just as norms were invisible to legal theorists for a long time, there is a hidden part of the legal iceberg that Ellickson's type of extraordinary attention to the ordinary can bring out into the open.

⁴³ See Smith, *supra* note 23.

⁴⁴ See Merrill & Smith, *supra* note 14, at 398.

⁴⁵ See, e.g., Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQ. L. 5, 7–12 (2009).

⁴⁶ See Merrill & Smith, *supra* note 14, at 391, 394; Merrill & Smith, *supra* note 42, at 1860–66.

⁴⁷ ELLICKSON, *supra* note 5, at 52–53, 72–76.

⁴⁸ See Merrill & Smith, *supra* note 46, at 36–41 (discussing the importance of custom as a baseline).

⁴⁹ See generally ELLICKSON, *supra* note 5.