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LAW, ECONOMICS, AND SOCIETY

*Lawrence M. Friedman**

It might seem a little bold for an outsider to talk about the status and future of law and economics. (It is probably more than a little bold to talk about the future of anything, if the subject is human beings rather than, say, the orbits of planets.) Instead, I want to express an opinion or two about the status of economics and law and economics in the legal academy; and to suggest (at least on theoretical grounds) that the law and society movement has a claim for a similar status. Right now, the two are hardly on speaking terms. I would like, however, to offer a hope for (if not a prediction of) a reconciliation of sorts.

Those of us who are not economists, and who are not in the camp of the economists, have to be careful to keep jealousy from creeping into our opinions. It is hard not to be a little jealous. Economics is incredibly proud and successful, and economists seem to have an unshakeable belief in their field—which, to them, is both superior to the other social sciences, and has a kind of gapless regimen and authority. Beyond a doubt, nowadays, economics is the king of the social sciences. Students see this very clearly, and thousands and thousands of them choose to major in economics in college. This is, after all, the one social science which promises jobs, and which has an official position of authority in the real world. The U.S. government, for example, has a Council of Economic Advisors. This is an important body which is supposed to help the President with monetary policy, fiscal policy, and other weighty matters. In theory, there could be other councils—for example, why not a Council of Social Advisors, made up of sociologists, criminologists, and the like, to help the President with crime policy, family policy, education policy, domestic policy, and so on? There are, of course, experts on all these subjects, and they do play a role in government, in various departments and agencies, and perhaps even in the White House. (One branch of applied social science, public opinion polling, has become so indispensable that the government is positively addicted to

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it.) But the role of the social sciences in the administration of affairs is quiet and subordinate. These fields do not have the exalted visibility, or the official status of the economists. And, of course, there is no Nobel Prize in sociology, anthropology, political science, or psychology.

To be sure, nobody will begrudge the government its economics. It is too obvious for words that economic issues are of enormous importance in modern societies. But are they so important that they are justified in muscling aside, in the academy and elsewhere, the other social sciences? Obviously not, and in practice, governments often ignore the advice of economists, very often, for political reasons. Still, on the symbolic and honorific plane, the message is clear—economics rules. The rest of us, in other parts of the world of social science and the humanities, are like ragged orphan children pressing our noses against the windows of shops filled with luxury goods we cannot afford. It all seems so unfair. The arrogance of (some) economists makes matters worse. Many economists—not all, of course—seem to convey the impression that the other social sciences are muddle-headed, inaccurate, unscientific, and politically biased. Sociology is probably the most maligned.

Economics, on the other hand, claims to be a science, and a hard science at that. It has a lot to back up this claim. Economists tend to be open and explicit about their assumptions. They believe in rigorous analysis of problems, in stating hypotheses, and then trying to prove them with actual data. All this is, on the whole, quite worthy of praise. The rigor and the science come, however, at a price. Human behavior is not exactly simple and uncomplicated. Economists feel that nothing in the human condition is or should be beyond their powers of analysis—family life, love, sex, crime, and the like. As everybody knows, economics tries to cope with human complexity, by simplifying and looking for some sort of practical and workable essence which they can study and perhaps even model mathematically. Many economists will prune away, quite ruthlessly, anything that interferes with the process of making their field formally rigorous. They have tended to base their work on a few key assumptions about human nature and human behavior. Economists know very well that these assumptions do not tell the whole story about human beings and their behavior. Even among economists, there are quite a few who wonder whether the pruning has gone too far. Some economists have worked hard to enrich the menu of assumptions. But economists in general seem to think the classical assumptions work well enough to serve as a jumping-off point. They have faith that their science, as it progresses, will get more and more

sophisticated, and come closer and closer to describing reality more accurately.

The assumptions, of course, have to do with rationality, self-interest, and the like. Rationally self-interested behavior still lies at the core of the science. No other social science, as far as I know, has been so successful, and so explicit, in finding core concepts and assumptions to work from. A few sociologists and others have tried to engage in the kind of theory-building that economists take for granted. The results are either controversial, unsuccessful, or both. Some social scientists, understandably, have found economics and its successes fascinating, even addictive. They have tried to rebuild their own fields on the model of economics. In political science, sociology, and psychology, there are now fellow-travelers, scholars who have tried to borrow the insights and techniques of economics for their own disciplines. There was a time when it almost looked as if economics would end up gobbling up all of its rivals. This has not happened; but the field still casts a long shadow.

In point of fact, there are other starting points for the study of human behavior—one need not concede monopoly control to economics. One can begin the hunt for knowledge and insight from axioms that are, in a way, the very opposite of the axioms of economics. One could begin, for example, by assuming that everything we do is the product, not of rational self-interest, but of customs, norms, habits, and traditions. Social scientists would then fall back on rational maximizing and self-interest as explanations if and only if these other explanations fail. If this approach seems exaggerated, or unrealistic, just think of the daily behavior of most people, ordinary people, in most societies, most days of their lives. People get up in the morning, they dress, they eat, they interact with each other, with their families, with children or parents, they work, they play, they make love. Most of what they do, say, and think during the day has little or nothing to do with “contractual” behavior, or of “maximizing” in any reasonable or realistic sense. Most of it follows well-worn patterns. Most of it is unthinking, habitual, responsive to hidden and unconscious cues. I am, of course, talking about people, not business firms competing in the market, or stock exchanges and the like. I suspect that we could explain a good deal of the behavior even of businesses in terms of rituals, customs, social norms, habits, and other fuzzy concepts—much more of that behavior than we think; but I will leave that point for now.

People, in other words, are creatures of tradition, custom, norms, and habits, in most of what they do and even most of what they think. Yes, there is a zone of active and deliberate choice. But even this zone is constrained in ways most of us are hardly aware of. The public is made

up of ordinary folks, not trained anthropologists. On the whole, people are blind to the ways in which convention, habit, and tradition run their lives. They are ignorant of limits and of the narrowness of options. We are all like animals born and raised in zoos, with no concept of the outside world at all. When I buy a shirt, I think of it as entirely my choice—what color to wear, when to buy, at what store, and whether to buy cheap or dear. I never ask myself why I buy a shirt and not a toga, or why blue strikes me as a reasonable color, and why I reject orange or purple. The cage of constraints binds us even in our own modern societies which have made the journey from status to contract. To be sure, the zone of choice has unquestionably gotten much larger, compared to most historical societies; and for more people. Older and less developed societies have been infinitely more constrained. The more our attention is focused on, say, the Anadaman Islanders or the ancient Hittites rather than on modern Americans or Finns, the more we find ourselves talking about the prison-house of custom, the more pre-determined patterns of behavior rather than rational maximizing seem to govern every waking hour, and the less the society emphasizes individuality and self-realization.

Unless I am badly off course, economic science can tell us very little about many kinds of behavior even in modern society; this includes big, important behaviors, as well as little, marginal ones. Economics has little to say about what we might call fashion or taste, words we can use in both broad and narrow senses. It is fairly powerless to explain why sushi, which seemed utterly disgusting to Americans before, is now all the rage in big cities. It has no formula to model why thousands of young men want to buy very baggy pants, wear baseball caps backwards, and why these teenagers consider these fashions “cool.” Not that anybody else necessarily has a better handle on such matters. Still, other social sciences are at least curious about such questions. Law and economics, similarly, does not strike me as doing a very good job of explaining changes in legal fashions and tastes (as it were)—why no-fault divorce swept the country after 1970,¹ why crime rates rise and fall, why drug laws get passed when they do, and why there is a sudden passion for historic preservation laws. On the other hand, a respectable literature in legal sociology and socio-legal history does attempt to account for each and every one of these trends. Whether these attempts are successful or not, I leave for others to judge.

1. See LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 72-75 (2004).

The essential point is simply this: some human behavior is culturally determined, and all human behavior is culturally grounded. Human behavior always depends on time and place. None of it takes place in that clean, clear, abstract world which mathematical models describe. Not that these models do not work at all, but their zone is distinctly limited. The domain of free choice, of rational behavior, can expand or contract. There may be limits beyond which it cannot go. How much there is, or can be, in any given society, is an empirical question (but not an easy one). I do not want to exaggerate. Human freedom is more expansive than the freedom of an animal in a cage in the zoo. It is more expansive than the freedom of animals in wild animal parks. But it is much smaller than most people assume. This does not mean that the zone of freedom is morally or politically unimportant—it is vital to those of us who live in contemporary times. It is part of our culture, part of our needs. It has to be nourished and protected. But it also has to be understood for what it is, what it has been, and what its boundaries are.

What all of the social sciences sorely need, in my opinion, are theories about social change—theories to explain why the human world changes, and so drastically and rapidly. Most of the social sciences, including economics, are better at explaining why things do not change and why they remain as they are—their theories tend to be about stasis, not theories of change. They are best at accounting for contemporary times and contemporary culture, if they are any good at all. Where we came from and where we are going is more difficult to get a grip on. Obviously, the legal order, as a part of society, changes when society changes. It changes when the pattern of demands and expectations change—when the people who have a say in the matter put pressure on the system to change. In short, what I have elsewhere called the legal culture—a pattern of demands and expectations—is the immediate source of legal change. Many factors influence or affect the legal culture. One obvious factor in our present society is the amazing burst of new technology. Consider, for example, the incredible influence of the automobile on society. Or antibiotics. Or air travel. Or the computer and the Internet. As each of these changes the context, it changes the legal culture as well, and that in turn brings about a massive amount of legal change.

Whatever it was that triggered the scientific and technological revolution, the consequences have been fantastic. Whether capitalism came before this revolution, or after it, or simultaneously, the two are clearly linked in some fundamental way. Capitalism, in turn, has had a truly fundamental influence on the way people think, work, and live. It depended on and produced a radical kind of individualism; it destroyed

old habits, old constraints and traditions; it broke down old cages (and produced new ones, to be sure, but of a different kind). Capitalism thrives and thrived on choice—on making and buying and selling. One of its most crucial institutions is advertising. Capitalists have to sell, and persuade people to buy. Their world is a world of consumerism, a world of desire and fulfillment. The culture of capitalism created the legal culture of capitalism; and that is a culture of individual rights and of freedom for the market place. It is also, perhaps paradoxically, the culture of the welfare state. At any rate, these are big, global facts, and complicated ones, and spelling them out, with their consequences, is obviously beyond the scope of this little essay. It is important to note though, that the science of economics is the child of this period of human history. Its assumptions are the assumptions of contemporary times. Nobody in feudal Japan could have imagined a science based on free contract and rational self-interest.

Nor, for that matter, could they have imagined a science like anthropology or modern sociology. These disciplines depend heavily on ideas of cultural relativity, which are also distinctively modern. Take anthropology, for example: the basic premise or attitude is a kind of detachment, a willingness to look at other cultures, to try to understand them as they are, in their own context, as coherent wholes. The imperialists and explorers of the last few centuries generally despised the native peoples they encountered. They defined them as crude or primitive savages. The sooner they were conquered, killed, or converted to Christianity, the better. Sociology, too, depends on the same detachment as anthropology, the same willingness to suspend judgment and examine the functions and norms of various societies. Sociology may seem fuzzy and biased (and at times it no doubt is); but much of the work, on the contrary, is rigorous and quantitative. Its general methodological premises are not that different from the ones many economists use.

Law and economics is a late development in economics.² Similarly, the law and society movement does not have a particularly long history.³ Sociology itself, as a discipline, really has little more than a century or so to its credit. In the past, it paid very little attention to law, with some famous and honorable exceptions. The most important exception, of course, was Max Weber, whose writings on the sociology of law are still fruitful and valuable.⁴ Sociology on the whole, however, was much

2. Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 758-59 (1975).

3. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 764 (1986).

4. See Reinhard Bendix, *Max Weber's Sociology Today*, 17 INT'L SOC. SCI. J. 9, 9, 12

more interested in social norms than in legal norms and much more concerned with the informal than the formal. The law schools, of course, had hardly any interest in how society worked at all. They peddled their dry, didactic concept of law.

The situation began to change after the end of the Second World War. One influence, perhaps, was the Supreme Court's school desegregation decision, and some of the other striking cases coming out of the Warren Court.⁵ If nothing else, these decisions pushed the legal system into the sociological spotlight. A number of scholars sat up and took notice—law seemed suddenly important, suddenly significant. A certain amount of foundation money began to dribble into the sociological study of law: foundation money, for example, paid for a notable study of the jury system, carried out at the University of Chicago in the 1960s. The University of Wisconsin Law School, under the leadership of Willard Hurst, was a significant center of study.⁶ Hurst was a legal historian, not a sociologist; but his influence was felt far beyond his own specialty. Hurst's history was not dry, lawyer history—it was vibrant, dynamic social and economic history. It was history which concentrated on living law, not simply what was on the pages of law books. It asked what difference law, lawyers, and the legal process made in society. A small group of youngish scholars, mostly sociologists, got together and founded what became the Law and Society Association (the "Association").⁷ The Association began to hold annual meetings, and it founded an important journal for studies in law and society. The Association became the intellectual home of those social scientists interested in the study of law, together with a growing number of fellow-traveling law professors. The members include sociologists, anthropologists, political scientists, psychologists, historians, and others. The Association has never been quite so attractive to economists, though a fair number of them are members, especially empirically-minded economists. A few economists are quite active in the organization.

To be sure, the law and society movement is broad, ragged, and has much less of a common core than law and economics. It has also had much less influence in the academy—particularly in law schools. There are elite law schools with three, four, or five Ph.D.'s in economics on

(1965); see generally MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Harvard Univ. Press 1966).

5. For example, *Brown v. Board of Education*, 347 U.S. 483 (1954), which banned segregation laws, as well as many dramatic cases on defendants' rights, such as *Miranda v. Arizona*, 384 U.S. 436 (1966).

6. Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 44-45 (1975).

7. See Friedman, *supra* note 3, at 773.

their faculties; only a handful of law schools feel they can afford even one sociologist, and most have none at all.⁸ In the law and society movement, there seems to be no general agreement on methodology, on approaches, on a canon, or on basic theory. In fact, there is probably more consensus than meets the eye; but what meets the eye is fairly chaotic. And the field seems much less cumulative than law and economics. It seems, at times, to be going in circles. My own view is a bit more positive. The circles are, in fact, spirals, and the general direction is steadily upward. But not everybody would agree.

Still, I find a lot more humanity, a lot more understanding, and sometimes a lot more insight, than in some of the work in law and economics. The literature at its best seems to have more flesh and blood, more life. It concerns itself more with actual human beings and their actual minds and bodies. For many of us, the work in law and economics mostly seems dead, dry, and formalistic. Maybe this is the result of bias. Or perhaps, as I suggested, of envy. In any event, I prefer not to trash law and economics. For one thing, it is certainly here to stay. And of course it should be. Economic analysis is essential for at least some aspects of law. Yes, I wish some of its practitioners were more empirical and less interested in “theory.” I wish some of them were less imperialistic. I wish some of them would open their minds more—would try to listen to and understand what sociologists, historians, and other social scientists are trying to say to them. To tell the truth, if economists opened their ears to sociologists and others, they would hear, among the clatter of voices, a lot of noise, a lot of wrong-headed, sloppy, and foolish messages. But no field has a monopoly on bad scholarship.

Unless I am missing something, it seems to me that law and economics is, in fact, getting broader and more ecumenical. Or rather, that economists in law schools, or who study law, are getting away from “law and economics,” and simply studying legal behavior using economic techniques and insights. There seems to be more interest in institutions, in “non-economic” behavior, and in studies of human behavior in the field—even, at times, an interest in attempts to verify or disprove basic economic assumptions. Maybe it is time to be optimistic about the future of socio-legal studies in general. Maybe a better synthesis is on the way.

In fact, I believe sociology of law and the economic study of law could make quite a team, if they could only find a way to work together. They have, after all, a common enemy—traditional legal scholarship. As I said, law and economics has definitely made a dent in the curriculum

8. See Friedman, *supra* note 3, at 773-74.

of law schools, and in the thinking of quite a few legal scholars. (Law and society, as I also said, has had much less success.) But neither of them has been able to penetrate many tight and tough citadels of legal scholarship. Most legal scholarship is sadly lacking in rigor and objectivity. Every year, law reviews publish thousands of pages of old-fashioned legal writing—blind to the realities of society, incurably solipsistic, and inbred. To be frank, constitutional law is a particularly arid field. It seems incurably devoid of interest in empirical data. Its very success, its very relevance to public issues, breeds scholarship that is either pure ideology and punditry, or the elaborate exposition of doctrines that make little or no difference to outcomes, to life in society, or reality. Most writing in the field is bloated, dismal, and biased. Many of the scholars seem eager only to spin out their own pet theories, which rest on their own particular prejudices, and pass these off as some sort of eternal truth. If not eternal truth, then as what the Constitution really means. As a legal historian, I find the pseudo-history of some constitutional lawyers, the habit of passing off their normative arguments as history, particularly irksome. The “originalists” are the most guilty of this crime; but they are not the only ones by any means. As an amateur legal sociologist, it bothers me that legal scholars seem so uninterested in whether doctrines and decisions make any difference in the real world. Maybe they assume that anything the Supreme Court says has some magic effect in society. Almost all of the “impact studies” come from political scientists. Nobody else seems to see any use for actual data.

And yet, in the study of law, could anything be more important than impact? Does a loyalty oath really have a “chilling” effect? Does the “one man, one vote” doctrine change the way legislatures behave? Do easy divorce laws induce more families to disintegrate? Does an increase in the penalty for burglary on the books mean that burglars will actually serve longer sentences? And will it reduce the number of burglaries? Do medical malpractice cases induce doctors to practice “defensive medicine?” The list of questions is endless. But there is a shortage of answers, because there is a shortage of studies; and of those studies that we have, not many come out of law schools.

Sociology and economics, when approaching law, begin from radically different premises. But ideally, they are committed to the same goals—understanding how law works in society and why. They are even, in large part, committed to the same cluster of methods. They have or should have the same ideology of rigor and objectivity. Nobody, I suppose, is truly objective in an absolute sense—but still, there is a world of difference between normative hot air and wild guesses, on the

one hand, and carefully structured research on the other. In any event, in a perfect world, the two fields would be allies and brothers. This perfect world, of course, is not yet here.