LAW, SCIENCE, AND LAW AND ECONOMICS

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Those familiar with my legal scholarship might expect me to denounce the "law" part of law and economics as right-wing ideological trash. Now, of course there is some right-wing ideological trash in law and economics.[1] But I doubt that the equilibrium level of right-wing ideological trash in law and economics is much different from the level of left-wing or centrist ideological trash: we all have our albatrosses to bear.[2]

Assume that what we are after is some more-or-less general way of understanding what happens in the law that has more generality than the flat statement of black letter rules.[3] It is clear that law and economics offers some people a way of gaining that understanding.

Where law and economics goes wrong, when it does go wrong (which is not to say that it always or even often does), is in claiming to be more than a general way of understanding. So, for example, it goes wrong when its proponents claim that it offers a privileged—in particular, a scientific—take on the law. The claim of privilege is something like this: Economics offers the best way for any reasonable person to get a general understanding of the law.

The reason people sometimes go wrong here is, I think, not hard to see. Proponents of law and economics offer the market as the model for thinking about law. And the difficulty, to put it as a provocation, is that there is no such thing as "the market."

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1. Out of politeness, I refrain from including specific references.

2. I have toyed with the thought that the level of ideological trash is higher for centrist than for right- or left-wing work, but have concluded, at least for the moment, that the difference is not in the level but in the content: centrist ideological trash is vacuous, whereas its competitors are not.

3. By *understanding*, I mean both explanation and prediction, if one thinks those are different.

Or, to put it less provocatively but more accurately, there are actually two sets of things called "the market."

The first set encompasses all the real markets in the world. These markets are historically constituted and consist of a complex blend of practices, including a fair amount of what is called government regulation and a fair amount of what is called individual choice. And in these real, historically constituted markets, the choices individuals make are themselves historically constituted as well, in the sense that we can offer accounts of why people come to make the choices they do.

One way to think about what happens when we see real markets as historically constituted is to think about how we can understand the effects of some legal intervention—some change in the rules, either the general background rules or some more particular regulatory rule. Of course we can say things like this: "A legal intervention that increases the cost of some course of action is likely to decrease the incidence of that action."[4] But in real, historically constituted markets, there are, as we might say, a large number of margins on which legal interventions work. And whether the intervention will actually decrease the incidence of the action depends on how the intervention works on every real margin. Perhaps the more the margins are purely economic, the better the economic account. But even purely economic matters have some cultural margins.

Consider two examples, one large-scale and the other small-scale. Countries in Central and Eastern Europe are introducing different forms of privatization of property. Suppose we identified one marginal difference between the form of private

4. Professor BeVier offers a "catalogue of human frailty" along these lines. Lillian R. BeVier, *Law, Economics, and the Power of the State*, 21 HARV. J.L. & PUB. POL'Y 5 (1997). I wonder, however, how much analytic bite that catalogue has. In the Nineteenth Century, before the rise of neoclassical economics, judges appreciated the existence of scarcity. I believe that the work even of such a judge as William J. Brennan contains an awareness of the consequences of scarcity and of the fact that rules developed *ex post* create incentives for future action. Consider, for example, the proposition that Justice Brennan's opinion in *Goldberg v. Kelly*, 397 U.S. 254 (1970), rested on a hypothesis about the political dynamics of a rule increasing the costs of depriving people of public assistance—that such a rule would induce bureaucrats and legislators to increase appropriations for public assistance rather than keep appropriations at the same level and decrease the benefits to individuals. That hypothesis might be wrong, but it does not fail to demonstrate awareness of the "catalogue of human frailties." In general, if law and economics is said only to contribute an awareness of such a catalogue to legal decision-makers, judges and legislators have been doing law and economics all the time.

ownership of apartments in Hungary and Slovakia. Someone who knows law and economics will be able to tell us: "In light of this difference, there is going to be a tendency for apartments to be transferred from their present occupants more quickly in Hungary." But someone who knows the politics and cultures of the two countries may be able to tell us that the tendency is going to be quite weak, and that in fact, given the cultures and so on, we might observe quicker transfers in Slovakia. This does not mean that the law-and-conomics take on the issue is wrong, but only that there are other margins whose effects might be greater than the one law and economics helps us identify.

Second, a recent study concludes that counties that require their sheriffs to issue permits to carry concealed weapons have lower rates of murder, rape, and assault—and higher rates of burglary—than counties that do not have these "must issue" laws.[5] A law-and-economics perspective helps explain why: If you are a potential criminal trying to decide what to do, you are going to be more reluctant—on the margin—to confront someone who might have a concealed weapon, and the "must issue" laws increase your uncertainty about whether your potential target is such a person. This result makes sense to me, but it turns out that the result apparently depends quite strongly on results from a single state, Florida. If you take Florida out of the statistics, the results on some of the crimes simply disappear. So, to understand the effects of the "must carry" laws, we probably need to consult someone who knows something about the culture of Florida and the other states studied. Again, the law-and-economics perspective increases our understanding but does not provide the whole story.

I seriously doubt that law and economics gives all of us privileged access to general knowledge about how these interventions work on every margin. I want to be clear that my claim is fairly modest here. It is only that for at least some people there are better ways of understanding how a legal intervention works than the ways law and economics offers. So, for example, some people may get a better understanding of how the intervention works by reading deeply in classic works of

5. John D. Lott & D.B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEG. STUD. 1 (1997).

literature, which for them illuminate more of the margins than economics does. Others, of course, may find these works quite barren, and may get a better understanding through the economic way of thinking. For them, the market metaphor illuminates. But it is only a metaphor, with no greater status than other metaphors that illuminate better for other people. So, for example, if you are teaching a class about the legal implications of cloning human beings, you probably will reach more students more quickly by telling them to spend a couple of hours seeing the film *Bladerunner* than by telling them to spend the same amount of time reading Richard Posner.[6]

My guess, unsupported by any evidence other than a sense of the legal academy, is that people sort themselves out pretty well. That is, people who are likely to understand more by thinking in law-and-economics terms tend to gravitate toward law and economics, and people who are likely to understand more by thinking in law-and-literature terms tend to gravitate toward law and literature. If that's right, the only issues are questions of what I would call institutional imperialism or, from the other side, institutional tolerance. If, as I think, neither law and economics nor law and literature, nor anything else, offers privileged access to general ways of understanding the law, it is hard for me to see any ground on which to rest the claim that one or another way of arriving at understanding is generically preferable.[7]

The claim for privileged access for law and economics frequently takes a form that deserves special attention. I am going to unpack it in a particular way, which I think captures the central tendencies in the form. It starts with an assumption about the enterprise with which we began, the effort to come up with some general understanding of the law. The assumption is that the best, or in some versions the only, way of acquiring a reliable general understanding is through science, and that economics is a progressive science in a way that its competitors are not. The inference we are invited to draw is that no matter

6. This would be true even if the assignment were to read an article by Richard Posner on the legal implications of cloning human beings, which I am sure would exist by the time you had to make the assignment.

7. Of course, there are obvious economic, institutional, and personal reasons for deploying the rhetoric of privileged access, but they have no particular intellectual status.

what we might say about the *current* relative position of law and economics and its competitors in generating general insights about the law, in the long run law and economics will produce more or deeper insights than its competitors.

A couple of preliminary points here. First, the notion that science on the model of physics is necessarily the best way of acquiring a general understanding about law seems to me insupportable in light of what serious philosophers of the social sciences have had to say about understanding human behavior. It is not at all clear to them that knowledge about human behavior is actually gained on the model of knowledge about the physical sciences.

Second, even if the claim about reliable knowledge in the long run is true, I doubt that it has much to say about how any person ought to invest his or her time. Because we all live in the short run, retooling is likely to be the wrong investment in any particular person's human capital if the payoff comes only in the long run.[8]

Even if the physical sciences provide the right model, however, we still have to ask how close the analogy is. Law-and-economics literature has an interesting rhetorical trope in connection with the claim of scientific status: the citation of Nobel Prize winners in economics. To see the limits of the scientific analogy on which this trope trades, we need to turn to the second set of markets mentioned earlier. This set actually has only one member: the market as constructed in the mathematically precise formulations of rigorous economic theorizing. Now, *this* market really is subject to scientific analysis, through the mathematical manipulations that real economists do, and awarding Nobel Prizes for work dealing with mathematical markets may make sense.[9]

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8. If true, it might have some bearing on institutional planning, decisions about whom to hire and the like.

9. Some points deserve making. (1) I doubt that the claims of science would seem quite as strong if the prize were called the Federal Reserve Bank Prize in Economic Science in Memory of Andrew Carnegie. But the real name of the prize is this: the Bank of Sweden Prize in Economic Science in Memory of Alfred Nobel. (2) In the early years of the prize it was evident that those awarding it were acutely sensitive to political considerations. So, for example, the co-winners in 1974 were Friedrich von Hayek, in political terms a libertarian, and Gunnar Myrdal, a socialist, and in 1975 they were Tjalling Koopmans, a mainstream Western economist, and Leonid Kantorovich, an economist from the then-Soviet Union. I doubt that there is much reason to think that

The problem, however, is this: serious people who have studied the philosophy of modern economics seem to agree that the mathematical market appears to have only the loosest connection to real, historically constituted markets. So, asserting that what happens in real markets follows from what happens in the mathematical market has no scientific warrant. Again, I do not want to overstate here. Sometimes people will get insights into what happens in real markets from looking at what happens in the mathematical market. But, then, some people get insights like that from going to a museum and looking at paintings by Watteau or James Rosenquist.[10]

To conclude, I am a tolerant sort. To put it rather pompously, since the Enlightenment there has been a long conversation about the relationship between science and freedom. Modern law and economics is one contribution to that conversation. There is, I think, no reason to believe that that contribution has brought an end to what that conversation can add to human understanding or that it has definitively resolved questions about the relationship between science and freedom. If law and economics is the church at which you worship, I am hardly going to tell you to stop. But I doubt that there is much reason for people who are not turned on by it to try to learn the catechism.

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the awarders have lost all political sensitivity since then; rather, the political environment in which they operate has changed. (3) There have been some notable mistakes in awarding the prizes in the real sciences, most dramatically the 1949 award in physiology or medicine to the inventor of the frontal lobotomy as a treatment for mental disorder. We are not so far away from the award of many of the economics prizes to be sure that some of them are not clunkers either. (4) People who win prizes for one accomplishment sometimes do not have much to say beyond their particular accomplishments. Here the most recent example is Kary Mullis, who had one great idea about DNA for which he deservedly won the prize and is otherwise a complete loon, even on matters related to DNA. So too, perhaps, for some of the economics winners when they say things outside the domain of their specialization.

10. When we reach levels of real detail, as in Jonathan Macey's suggestion, raised at The Sixteenth Annual National Student Federalist Society Symposium on Law & Public Policy (1997), that law and economics might offer more guidance than law and literature, or art, on the question of whether we should set a ten- or seventeen-day disclosure period for stick acquisitions, I am truly agnostic. I suspect that economic studies will provide a great deal of inconclusive empirical data, and that in the end, someone will have to make a judgment about what is likely to work better. And perhaps a judgment by someone informed by serious study of art or literature will be just as good as, or better than, the judgment of someone who has studied only economics.