

0500

SCHOOLS: GENERAL

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Abstract

The concept of schools is used to summarise the ideas of thinkers who share common premises on how and what to research, and to contrast them with those of other schools. It is an expositional convenience and should be used only when the differences touch fundamental matters of the field of research. The differences between schools focus attention on questions to be resolved by further research.

Within the current law and economics movement, besides the mainstream, the institutionalists, the neoinstitutionalists and the Austrians constitute distinct schools. Whether the New Haven School constitutes a distinct school is debatable.

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1. Introduction: Schools in General

1.1 Schools

A school of thought in scientific endeavour is a group of thinkers who adopt a common approach, including shared theoretical premises, on how and what to research in a particular field. The term is also used as shorthand for the ideas those thinkers defend.

Originally the term school may have designated a major thinker, founder of the school, and his or her disciples. In current usage the link to a common intellectual leader is no longer essential. The members of a school of thought may, but need not, themselves claim allegiance to the school. Members of a school may consider that the adherence to a set of common precepts allows them to build on each other's work and so to attain economies of scale in research not available if they worked in isolation.

When should we distinguish schools? To speak of schools, one must see groups of scholars defending contrasting, even incompatible, views about fundamental aspects of a field of research and these views must have a certain complexity and logical coherence (De Geest, 1995, p. 458). Classifying such views into schools facilitates exposition (Teijl and Holzhauser, 1990, p. 622; Teijl and Holzhauser, 1997, p. 8). We understand through contrasts. Presentation of schools focuses attention on their differences, which further research, theoretical as well as empirical, should aim at resolving.

The convenience of summarising the thinking within a school through the common ideas should not lead one to disregard the differences amongst the thinkers belonging to that school. Menger, Mises and Hayek, all belonging to the Austrian school of economics, share ideas of spontaneous order and a reluctance towards government intervention designed to correct its imperfections. But they differ in that, for instance, Mises is clearly more aprioristic and deductive in his reasoning than is Hayek and sees no room for empirical testing of his ideas, something Hayek admitted (Teijl and Holzhauser, 1997, pp. 121-128). Whether the Austrian school itself should be distinguished from the neoclassical mainstream is sometimes questioned within economics proper: 'With all the respect due to 'Austrian' economics, its latter-day insistence to differentiate itself from the neoclassical mainstream seems more important to a small band of its practitioners than to the bystander. What matters is that Menger and Wieser argued within the same rational choice 'paradigm' as Marshall and Edgeworth' (de Jasay, 1992, p. 337).

Legal theory shows many instances of schools. The legal realists in the United States, associated with the names of Holmes, Frank, Llewellyn and others, were united in their reaction against what they presented as the excesses of positivism in American law schools of the late nineteenth and early twentieth century. During the same period in France, the '*école de la libre recherche scientifique*' (Free scientific research school) of Gény and Saleilles was a comparable reaction against the earlier '*école de l'exégèse*' (exegetic school), to whom they attributed the view that law was strictly to be found in the Code and statutes. The historical school of Savigny and others in Germany, followed by Maine, Maitland and others in the UK, reacted against what was considered excessive reliance on logic and aprioristic reasoning in German legal thinking at the time. In their view law was to be seen 'as something which evolved from the instinctive sense of right of the community and developed in and by reason of particular social, economic, and other contexts' (Walker, 1980, p. 1106).

1.2 Movements

It is useful to consider a few related terms. Movement is a broader term than school of thought. It designates a large grouping of people loosely sharing

scientific or practical and, in particular, political aims. One could speak of the law and economics movement, but scarcely of the law and economics school.

1.3 Paradigms

Since the 1960s, two new terms, paradigm and research programme, are used to describe aspects of the evolution of scientific thinking (De Geest, 1995, p. 389 f.). Paradigm in normal usage is a very clear or typical example of something. With respect to the evolution of the sciences, it acquired a different meaning as a result of Thomas Kuhn's book (Kuhn, 1970). The term 'research programme' is due to Lakatos, writing in reaction to Kuhn (Lakatos, 1970).

The puzzle Kuhn sought to explain is how science grows. The collapse of the best-corroborated scientific theory of all times, Newton's mechanics and gravitation theory, in favour of Einstein's ideas, had scattered the view of scientific growth 'by accumulation of eternal truths' (Lakatos, 1970, p. 92). Popper had used this and like episodes to argue that the best way forward in science is not so much by seeking confirmation of one's ideas through observation, but by seeking ruthlessly to disprove them. The force of scientific theories lies in the attempted refutations they have so far withstood.

Do scientists effectively proceed in this manner? Kuhn's reading of the history of science leads him to argue that they do not. During periods of what Kuhn terms 'normal science', the practitioners of a scientific discipline let themselves be guided by a shared fundamental theory and view of 'methods, problem-field, and standard of solution' (Kuhn, 1970, p. 103). These shared ideas Kuhn termed the paradigm (Kuhn, 1970, p. 10). To attract a following amongst scientists, the paradigm must account for observations and regularities considered certain within the discipline, and for some new ones; it must also be open-ended enough to set a range of new puzzles to be solved. During this period of 'normal science', scientists are engaged in puzzle-solving and the discipline advances without the paradigm being questioned (Kuhn, 1970, p. 10).

As research proceeds and empirical results accumulate, one finds observations tending to support the theory, but also some which tend to disconfirm it. If the latter concern puzzles at the periphery of the theory, one attempts to refine it to yield predictions that better accord with observation. But the contrary evidence may also concern more fundamental aspects of the theory. Such observations do not immediately lead one to consider the current theory refuted. Rather such instances are provisionally set aside as anomalies.

As the number of known anomalies grows, there comes a point when some practitioners of the discipline no longer consider the current paradigm tenable and start looking for a modified or improved one. As this sentiment spreads, the discipline enters into a crisis: practitioners are no longer convinced that their theory and associated research procedures are well-founded. An outsider

may have the impression that research stagnates and that there are interminable discussions about foundations and methodology.

As the crisis deepens the stage is set for a new paradigm to be proposed. The acceptance of the new paradigm bring about what Kuhn calls a scientific revolution. The fundamental advances in science are in his view the result of such revolutions.

1.4 Research Programmes

In Lakatos's eyes scientific advances do not all come by way of revolutions and Kuhn's view suffers furthermore from the difficulty that the transition from one paradigm to another appears to be based on the psychology of researchers rather than on reason. Lakatos sees within any discipline or sub-discipline several competing 'research programmes' which specify at their 'hard core' a set of unquestioned premises about the discipline (Lakatos, 1970, p. 133) and at their periphery a 'protective belt' of matters for which the theory may be further elaborated and which may be subjected to empirical testing. At the periphery, one accepts negative test results without considering the theory refuted. They invite further refinement of the theory.

On this view, scientists adhere to a research programme because of its plausibility and the research agenda it implies. Progressive research programmes, offering a wide open research agenda, attract many practitioners, 'degenerating' or declining research programmes are progressively abandoned. Growth of scientific knowledge in this view is more like the competitive process with which economists are familiar rather than like a 'religious conversion' (Lakatos, 1970, p. 93) or 'a bandwagon effect' (Lakatos, 1970, p. 178).

1.5 Paradigms and Research Programmes in Law and Economics?

Do the concepts of paradigms and research programmes apply to law and economics? Kuhn himself is doubtful about the application of his ideas to the social sciences generally, which he consider pre-scientific. He concedes that any group of scientists may adopt common beliefs and practices to guide their endeavours (even a phlogiston theory), but stresses the difference between such a paradigm and the one guiding the activity of the practitioners of a 'mature' science.

About the 'the transition from the pre- to the post-paradigm period in the development of a scientific field' he writes: 'Before it occurs, a number of schools compete for the domination of a given field. Afterward, in the wake of some notable scientific achievement, the number of schools is greatly reduced, ordinarily to one, and a more efficient mode of science practice begins. The latter is generally esoteric and oriented to puzzle-solving, as the work of a group can be only when its members take the foundations of their field for granted' (Kuhn, 1970, p. 178) and he continues '[w]hat changes with the

transition to maturity is not the presence of a paradigm but rather its nature. Only after the change is normal puzzle-solving research possible. Many of the attributes of a developed science which I have above associated with the acquisition of a paradigm I would therefore now discuss as consequences of the acquisition of the sort of paradigm that identifies challenging puzzles, supplies clues to their solution, and guarantees that the truly clever practitioner will succeed.' (Kuhn, 1970, p. 179).

Blaug (1980) considers paradigms and research programmes for economics at large. He concludes that a presentation in terms of competing and partly overlapping research programmes is apposite and to be preferred to one in terms of revolutions. He speaks nonetheless of the marginalist revolution in the latter part of the nineteenth century and of the Keynesian Revolution in the 1930s. Wolin (1980) applies Kuhn's ideas to political science, but adopts as the criterion for the merit of a theory the extent to which it is acceptable to various political actors. The approach allows him to demonstrate what he considers to be a paradigm shift in his discipline. But it leaves the reader with the uncomfortable question of what distinguishes a scientific paradigm from a shared social or religious outlook, or even a mere fashion. Surely the distinction must ultimately rest on the possibility to account for observations and to make testable predictions.

Can these concepts of paradigms and research programmes be usefully applied to law and economics? Several writers have recently considered this question (Rubin, 1985; Veljanovski, 1985; De Geest, 1995, p. 389 f.; van den Hauwe, 1996; Teijl and Holzhauer, 1997, p. 7 f.; Ellickson, 1998; Posner, 1998). If the answer is affirmative, further questions concern the scope of the paradigm or research programme and the grounds for preferring one paradigm or research programme to another.

In the piece on the History of Law and Economics (0200) the term 'paradigm' was loosely used in describing different periods of the latest wave of law and economics. The 1950s, 1960s and 1970s might be described, loosely again, as periods of 'normal science': the research agenda seemed clear and researchers spent their time solving puzzles indicated by the 'paradigm'. The 1980s brought debates about various foundational questions. Since then several competing 'schools' present themselves in the law and economics literature. In Kuhn's terms, that could indicate attempts to establish a first scientific paradigm or a crisis in the existing paradigm.

To accept the latter hypothesis, one would have to be able to point to a set of unquestionable scientific accomplishments and to anomalies giving rise to the crisis. Ellickson (1998, p. 551) professes to see the latter in the blindness of the 'classical law and economics' to 'social norms' (which, in his view, would give an entirely different twist to the problem situations envisaged in the Coase theorem). Posner (1998, p. 565) sees no crisis but merely new puzzles to be solved within the existing research programme, the core of which, in his

view, is the rational choice theory. 'A paradigm shift occurs when a theory no longer furnishes acceptable answers to the questions that trouble current researchers, not when it is modified or enriched to cope with new questions or questions previously beyond the grasp of the theory' (Posner, 1998, p. 564).

The question of the criteria to be used for choosing amongst competing theories or research programmes is debated in Rubin (1985); Veljanovski (1985); De Geest (1995, pp. 389 f.); van den Hauwe (1996); Teijl and Holzhauser (1997, pp. 7 f.); Posner (1998). Posner (1998, p. 555) recalls Friedman's prediction test in writing that 'a theory that does not generate predictions is difficult to feel comfortable with'. De Geest, after a lengthy discussion of the issue, proposes what he terms a 'plausibility theory' (1995, pp. 407 f.), which is criticised by van den Hauwe (1996). In De Geest's view, the 'mainstream approach' to law and economics is sufficiently open-ended to absorb, by way of puzzles to be solved, the ideas which are now put forward by competing 'schools'. This view appears close to Posner's (1998).

Teijl and Holzhauser (1997) undertake a comparison of what the 'Chicago school' and the 'Austrian School' have to contribute to law and economics. The Austrian School considers that the optima on which much Chicago law and economics relies are indeterminable. The approaches appear to be radically incompatible and this obliges the authors squarely to face the question of the criteria for choosing between rival approaches. The difficulty is to avoid judging the performance of one approach in terms set by the other. Teijl and Holzhauser opt for the framework of research programmes put forth by Lakatos and propose to examine what each approach has to say on a range of practical legal puzzles within the fields of contracts, tort liability and litigation. In each case, they seek answers to three questions: what are the effects of legal rules can be explained? To what extent do they contribute to society's welfare? How can the emergence and contents of legal rules be explained? (Teijl and Holzhauser, 1997, p. 35). At the end of their study, Austrian economics is presented as perhaps more like the 'armchair economics' than its practitioners would like to admit. Nonetheless the authors profess, in conclusion, to be unable to state a preference between these theories on objective grounds. Ultimately the choice is a matter of acceptance within the scientific community (Teijl and Holzhauser, 1997, p. 365).

Before examining the different schools within law and economics, it may be helpful to summarise the common principles which set law and economics approaches off against other intellectual currents such as Critical Legal Studies, and feminism. As for the sociology of law, popular in Europe in particular as a link between the social sciences and the law, there is debate about the extent to which its practitioners share the premises set out below, in particular the postulate of methodological individualism.

2. Common Ground in Law and Economics

All law and economics research is aimed at gaining new insights in the law by applying economic concepts and theories. The underlying premises are those of economics proper.

2.1 *Methodological Individualism*

The first premise is the postulate of *methodological individualism*. According to this postulate all analyses must ultimately be couched in terms of the behaviour of individuals; all collective phenomena must be explained as compositions or perverse effects of individual decisions.

By way of an example, consider the ‘urban war’ in Amsterdam in the late 1970s and early 1980s opposing about 3000 squatters and their sympathisers amongst the public at large to the police. One might be tempted to attribute this to the climate of the times, in Amsterdam in particular, to large unemployment amongst the young and to the housing crisis. All of these factors have some plausibility but do not touch the heart of the matter. They do not explain how individual participants in this development could rationally act as they did and yet arrive at a collective disaster.

The source of the problem was the rent control policy then in force in the Netherlands. It granted tenants fixed rents and almost unassailable occupancy of rented premises, and placed severe restrictions on what landlords could do with their property. This led landlords recovering possession of their premises to leave them empty while waiting for permission to renovate. As a result there were a lot of vacant buildings in the city. This in turn led squatters forcibly to occupy such buildings, a practice which the courts were reluctant to stop. Once legal ways had been found to secure eviction of squatters, there remained the practical problem of enforcing the judgements. The police called in to enforce were facing a determined group defending a vested interest.

This explanation accounts for the ‘climate’ which developed in Amsterdam in that period. Each step of the development is the result of transparent rational choices made by actors in this game. The overall disaster is a perverse ‘composition’ effect which the law should seek to avoid.

2.2 *Rational Choice*

Individual decision makers are presumed, secondly, to be rationally maximising their satisfactions, or their benefits over costs, as they see them (the *rational choice hypothesis*). This hypothesis is essential for scientific work in that ‘[i]f people do not behave in predictable ways, then the idea that we can regulate society by laws and incentives becomes untenable’ (Veljanovski, 1990, p. 35). It allows one to flesh out predictions of how individuals are expected to react to changes in their environment.

The realism of the rational choice hypothesis is questioned principally on two grounds. Psychological research tends to show that people's decisions tend to deviate from the rational choice model in situations involving in particular small probabilities or great complexity. We do not appear to have the intellectual hardware to perform the calculations that the full rationality assumption attributes to us. Furthermore in real life individuals face decisions fraught with risk or uncertainty. They are often imperfectly informed about the stakes. There is debate about what rationality means in a context where decision makers cannot assess the extent of their own ignorance. As we shall see, these difficulties are the focus of criticism by both the institutional and Austrian schools. The critics propose to attenuate the rationality postulate, but not to reject it. It is one of the matters on which the survey of the history of law and economics (0200) sees room for further research.

2.3 *Stable Preferences*

A third premise is that of *stable preferences* (Becker, 1976, p. 5). Admittedly, preferences are not given at birth, by biological necessity, to remain fixed during one's lifetime; they are shaped or reshaped during one's youth and may shift more slowly during later life. Cultural influences may thus be accounted for (Becker, 1996, p. 3; Sowell, 1998). Yet to make predictions of how individuals will react to change, one must presume their preferences to remain constant in the short run. Whoever submits that preferences have changed must adduce evidence to that effect.

2.4 *Equilibrium*

A fourth premise concerns what happens in human interaction. Barring disturbance, interactions are presumed to tend towards an *equilibrium*, described in bare form by game theory and more elaborately by economic theory dealing with markets, in which (implicit) price adjustments in the process of competition tend to equalise supply and demand for a good or service. Becker (1976, p. 5f.) considers the premise of market equilibrium to be applicable to implicit markets in politics, marriage and other areas as much as to markets in which transactions involving money take place.

3. Schools in Law and Economics

Within a community as large as the law and economics movement, one must expect differences of opinion about research matters. They may concern such questions as whether particular anomalies should count as tolerable within the existing theoretical framework, rather than as refutations calling for rejection or revision of the theory, or what is admissible simplification of reality within

a model as opposed to unacceptable reductionism. In law and economics, different views are expressed, for instance, on whether inconsistencies in choice or the practice of rule following should call into question the postulate of rational choice.

Not all differences of opinion indicate distinct schools. The term schools ought to be reserved for situations in which several fundamental differences of opinion coalesce to form incompatible approaches at a relatively fundamental level.

The Encyclopedia itself distinguishes in its classification several schools and approaches: Austrian School, Institutionalism, New Institutional Economics, Property Rights Approach, Game Theory Applied to Law, Comparative Law and Economics, Experimental Law and Economics, Law and Economics and Development. Some authors profess to discern even further schools: 'Law and economics and critical legal studies are richly diverse intellectual movements involving a multitude of individual views, methodologies, 'schools', and diverse theoretical traditions. There are, however, other 'schools' [than the Chicago school] within law and economics that exhibit different perspectives. The New Haven school, of Yale University, for instance, has attracted liberal practitioners who adopt the common methodology of the Chicago school but believe that there is a larger need for state intervention in order to cure problems involving market failure' (Minda, 1989, pp. 111-112).

Let us briefly look at each of these 'schools', to determine whether the term school is justified. For convenience we begin with the last item of the classification in the Encyclopedia.

'Law and Economics and Development' is a field to be investigated with the tools of law and economics, but should not be seen as a distinct school. 'Comparative Law and Economics' too is a field for the application of law and economics. It is all the more promising as it exposes law and economics methodology to the test of being applied to legal systems different from its home base of American law and possibly being found wanting. This is not a distinct school, but rather a focus which gives larger scope to existing approaches. 'Game Theory Applied to Law' and 'Experimental Law and Economics' are promising tools or approaches with which to broach law and economics questions. They are not in opposition to older approaches, but complement them.

3.1 The Property Rights Approach

The 'Property Rights Approach' is presented in the chapter on History (0200) as the name economists gave to their attempts at solving a puzzle in economics proper. In neoclassical economic theory - till according to Demsetz (1997, p. 1) 'the central theory of economics' - organizations and the behaviour of individuals within them are puzzling. In studying decentralised socialist

enterprises in the former Yugoslavia, for example, one does not get far by examining policies adopted by the owner of the capital goods, which is to say the State or the bureaucrats nominally in charge of the enterprise (Furubotn and Pejovich, 1974b, p. 250; Barzel, 1989, pp. 98-113). It is more instructive to look at the preferences and decisions of the workers, who were in charge, through the Workers Council, of the policy decisions for their firm. Focusing on the workers, one can readily explain why such firms were loath to let workers go in circumstances which would make such a decision seem logical for a comparable Western firm: the workers making such decisions would cut the branch on which they were sitting.

More puzzling is the question why the firms did not maximise worker salaries, but instead retained some profit as savings for future investments. Why would workers invest in capital goods they did not own? As Furubotn and Pejovich explain, workers would find this to be in their interest in so far as it maximised the present value of the future income stream paid to the average employee. Their conclusion is that the behaviour of the Yugoslav firm is explicable in terms of rational decisions by persons who actually control the use of the resources in the firm. The heuristic Furubotn and Pejovich draw from this insight is that to explain the behaviour of the firm, one must look at the 'property-rights structure' at all levels (Furubotn and Pejovich, 1974b, p. 251).

It is clear that the term 'property-rights structure' is not used here in its legal sense. Property rights, in this usage, mean 'decision authority' (Libecap, 1989, p. 1), the actual power to control the use of a good and to appropriate the fruits. Property rights in this economic sense are a descriptive term, more general than 'right of ownership' (Furubotn and Pejovich, 1974a, p. 4). When one speaks of 'my office', 'my secretary' or when a gang speaks of 'its territory' the possessive term is used in this sense.

The term 'property rights' used in the 'property rights approach' has created confusion with the legal meaning of the term. Be that as it may, the approach no longer seems to constitute a separate school. Its insights have been absorbed into law and economics proper as Posner first unified it.

3.2 The Austrian and Institutionalist Schools

The clearest case for distinct schools within the classification adopted in the Encyclopedia could be made for the Austrians and for the old and the new Institutionalist approaches, in contrast to the mainstream or Chicago approach to law and economics. The distinctions correspond to 'schools' in economics proper.

Readers are referred to the chapters on these three schools (0510, 0520 and 0530) for detailed accounts of what these schools stand for and the differences with the mainstream approach. The differences between schools and the mainstream point to matters that are part of the agenda for future research

presented in the conclusion of the piece on the History of Law and Economics (0200): the role of institutions, historical research, the place of uncertainty, discovery and entrepreneurship, strategic behaviour and bounded rationality.

3.3 The New Haven School

Minda sees room for the New Haven school: 'There are, however, other 'schools' within law and economics that exhibit different perspectives. The New Haven school, of Yale University, for instance, has attracted liberal practitioners who adopt the common methodology of the Chicago school but believe that there is a larger need for state intervention in order to cure problems involving market failure' (Minda, 1989, pp. 111-112). The school warrants an 'Aside' in Mercurio and Medema's chapter on Chicago Law and Economics (Mercurio and Medema, 1997, pp. 79-83).

The New Haven school goes back to the writings of Calabresi (see review of History of Law and Economics - 0200), whose views are quite distinct from the Chicago law and economics (Duxbury, 1995, p. 393). Without taking issue with any of the postulates of the neoclassical model, Calabresi believes that efficiency which the model stresses could never be the whole story in so far as legal rules are concerned. Justice and distributional concerns would always have to have their due (Duxbury, 1995, p. 393).

Susan Rose-Ackerman articulates what she sees as the central tenets of the 'school' following in Calabresi's footsteps (Mercurio and Medema, 1997, p. 79-83; Rose-Ackerman, 1989, 1992). Distributional concerns remain central. Market failure is held to be more prevalent than Chicago law and economics would make it out to be and government intervention is expected to be capable of correcting it, although it may not succeed in all circumstances. The overall philosophy of this group is presented as less 'politically conservative' than the Chicago law and economics group and the public choice group.

On the whole, the differences seem to be a matter of political colour. The theoretical premises and methods the New Haven group adopt are insufficiently distinct from the mainstream view to constitute a separate school.

3.4 The Freiburg School

The Ordo-Liberal or Freiburg school of law and economics is now mainly of historical interest. It was founded in the 1930s and influential in the years immediately following the Second World War. It included well-known scholars and politicians such as Walter Eucken, Wilhelm Roepke, Ludwig Erhard, Franz Böhm. The school has only recently been recognised internationally as an interesting intellectual current of law and economics, as a result of the translation of the major works of Böhm and Eucken in particular. (Vanberg, 1998, p. 172). Several articles on the movement as a whole and on individual

members have appeared recently (Backhaus, 1996; Behrens, 1984, p. 8, 1993; Grossekkettler, 1996; Lenel, 1996; Streit, 1992).

The Freiburg school focused on the proper role of government in an open society which had evolved out of the earlier feudal structures, on preventing factions from controlling the state and on competition policy as fostered by the state. The paradox of the state as grantor of special privileges and at the same time as guarantor of competition was, in their view, to be solved by constitutional design. This focus brings them close to the agenda of the public choice and the constitutional political economy groups.

4. Conclusion

Schools are an expositional convenience to summarise the ideas of thinkers who share common premises on how and what to research, and to contrast these with those of other schools. They focus attention on questions for further research. One should not lay too much stress on the alleged differences amongst schools (De Geest, 1995, p. 468). It may be worthwhile to see them as puzzles to be solved within a broadly defined 'mainstream approach' (Posner, 1998).

Within the current law and economics movement, the mainstream, the institutionalists, the neoinstitutionalists and the Austrians may be regarded as distinct schools, as they are in economics proper. Whether the New Haven School constitutes a distinct school is a moot point.

The differences between the schools point to questions which should be part of the agenda for future research: the role of institutions, historical research, the place of uncertainty, discovery and entrepreneurship, strategic behaviour and bounded rationality. These matters have been presented in the piece on the History of Law and Economics (0200).

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