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## OTHER SOCIOLOGICAL APPROACHES

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### Abstract

The following aspects of law and economics important to understanding comparisons to be made to other sociological approaches are set out: (1) the fundamentals of economic behavior; (2) the many worlds of law and economics; (3) the unity of law and economics; and (4) Posnerian law and economics. Other sociological approaches to law, particularly American, are described: (1) case-law research as a sociological approach to law; (2) approaches based on particular theories; (3) empirical sociological approaches generally and as compared with law and economics, particularly Posnerian law and economics; and (4) empiricism as the meeting ground between law and economics and other sociological approaches, a meeting ground in which empirical product rather than competing theories may be the most important aspect. Finally, the positions of law and economics and other sociological approaches as competitors are explored

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### 1. Introduction

Any comparison between law and economics and other sociological approaches is complicated by the fact that there is neither a single law and economics approach nor a single noneconomic sociological approach to law. Moreover, when law and economics takes a serious empirical turn it may for all practical purposes be indistinguishable from empirical noneconomic sociology (see Sections 10 and 11). To deal with these problems of diversity and to make comparison feasible in the small compass of this part, I shall focus on what may be called the Posnerian approach to law and economics (see Section 5). (There is a danger in this, as it is all too easy improperly to equate law and economics with the Chicago School, and particularly Posnerian, economics, see Donohue, 1997. There is, however, no intention of doing so here.) On the sociological side I shall range somewhat more broadly (see Section B).

Part A treats a number of aspects of law and economics important to the comparisons to be made to other sociological approaches: (1) the fundamentals

of economic behavior; (2) the many worlds of law and economics; (3) the unity of law and economics; and (4) Posnerian law and economics.

Part B describes other American sociological approaches to law: (1) case-law research as a sociological approach to law; (2) approaches based on particular theories; (3) empirical sociological approaches generally and as compared with law and economics; and (4) empiricism as the meeting ground.

Finally, Part C considers law and economics and other sociological approaches as competitors.

## A. Law and Economics

### 2. The Fundamentals of Economic Behavior

To understand law and economics it is essential to understand what its practitioners mean by economic behavior.

First, economic behavior is the behavior of individuals, not collective behavior as such. Second, it is behavior that individuals choose from among available alternatives. It is thus distinguishable from behavior over which an individual literally has no control at the time it occurs, as for example where a person with an unfastened seatbelt is thrown against a windshield in a head-on automobile accident. Third and finally, it is behavior an individual chooses by somehow assessing (by no means necessarily consciously) that the benefit of the behavior to the individual exceeds its costs. The latter aspect is so vital to economics that economists have sanctified it by adding an appealing adjective, *rational*.

This adjective is not intended in economics to mean reasonable - it's ordinary usage - and its meaning in law and economics is unclear. (Ronald Coase, 1993, p. 98, cautions against 'any economic concept that includes the word "rational"'.) Nonetheless, its repeated use by economists has led to such analysis being called rational choice theory. (It is by no means clear what this third element - with or without an adjective - adds to the second. When an individual chooses to behave in a specified manner, no matter how self-destructive, bizarre, or even utterly mad that behavior may appear to others, the individual obviously at that instant perceives the benefits as exceeding the costs. Only *unchosen* behavior, that is, beyond any control by the individual, could be otherwise.)

It is also important to point out what law and economists typically do *not* mean by economic behavior. *Economic* is not limited to matters relating to the production, distribution and consumption of material goods and services, the common usage of the term. Typical law and economists most emphatically do not mean that economic analysis is possible only of behavior relating to

material matters. Thus, as used in law and economics, no one, economist or otherwise, can gainsay that rational choice theory *can* be applied to *any* subject about which people make choices. Failure to recognize this can lead to confusion and misplaced criticism of law and economics (see Cotterell, 1995, particularly pp. 347-348, 357 n.2). To avoid such confusion *economics* is here limited to mean rational choice theory, and never used in its common-usage sense.

One of the many consequences of these characteristics of rational choice theory is that it cannot recognize *within its theoretical structure* any kind of relationship among people other than that of competition. Thus the model epitomizes Mrs Thatcher's alleged dictum, 'There is no society, only individuals'. (This is not to say, of course, that the model cannot be or is not used to analyze behavior in what even law and economists - but only while stepping outside their model - would recognize as relationships, including those in which they recognize altruistic elements. Again, of course, the model can also be used to analyze an individual's choice among his or her own competing desires, desires which may impinge differentially on relations with others. This is not, however, a recognition of relations *within the theoretical structure of the model*, such as is typically found in other sociological approaches.)

### 3. The Many Worlds of Law and Economics

In spite of the dominance of rational choice theory, any given work in law and economics may differ from another in at least any of the following somewhat overlapping respects:

- a. Normativism and positivism: ranging from insistence that economic analysis is nothing but positivist prediction to full recognition that it is necessarily normative from start to finish.
- b. Objective of analysis: determining (1) Pareto-superior positions, (2) Kaldor-Hicks efficiency, (3) wealth maximization, (4) distributional effects, or (5) some combination.
- c. Rational behavior: meaning of:
  - (1) Nature: ranging from *any* chosen behavior to requiring inclusion of varying degrees of knowledge, thoughtfulness, and reasonableness (rationality in the usual sense of the word) in the behavior;
  - (2) Consistency of behavior: varying assumptions of consistency of behavior over time;
  - (3) Boundedness: accepting or not recognizing boundedness of rationality;
  - (4) Consistency of use of the term throughout the work in question.
- d. Transaction costs: recognition and assessment of impact: (1) ignored, (2) recognized but explicitly excluded, (3) analyzed as supplemental to

- theoretical analysis, (4) entire focus on transaction costs, (5) treatment ranging from casual to systematic empiricism.
- e. Relations, recognition as such: ranging from no recognition of relations other than competition among individuals to primary focus on relations in the institutional school of law and economics (see Section 2).
  - f. Empiricism: ranging from entirely theoretical to heavily empirical.
  - g. Distributional effects: (1) ignored, (2) recognized but explicitly excluded on varying grounds, such as *ceteris paribus*, unimportance, or on the grounds that they should be dealt with apart from the subject being analyzed, for example through general taxation and welfare, (3) treated as essential aspect of analysis.
  - h. Individualism: attitudes towards: ranging from strongly individualistic to a variety of non-individualistic positions.
  - i. Market-solutions: attitudes towards: ranging from pro-market to neutral to anti-market (the latter being rare).
  - j. Politico-legal goals: ranging widely over the political spectrum with varying ranges of obscurity and clarity.
  - k. Power: from ignoring to considering power either as a benefit individuals seek that affects choices or as a social subject requiring analysis per se.

Some of the diversity of these many worlds is shown by De Geest (1995), who, however, suggests a unity greater than that perceived by the authors of this part.

#### **4. The Unity of Law and Economics**

In spite of the foregoing, three factors bring considerable unity to law and economics.

First is the centrality of rational choice theory (see Section 2) with its foundation in the individual. Second, the field remains an area dominated by theoretical and deductive, rather than empirical and inductive, analysis, although the latter seems to be growing in importance. See Donohue (1997); Shelanski and Klein (1995). Third, at least in the United States, there is a dominant school of law and economics, epitomized by the work of Richard Posner (see generally Posner, 1992), to which I now turn.

#### **5. Posnerian Law and Economics**

The Posnerian school falls at the following locations on the spectra set out in Subsection 3:

- a. Normativism and positivism: focuses on allegedly positive prediction and typically claims great formal predictive power, even as it fails to recognize limitations in rational choice theory that require empirical rather than formal proof of conclusions;
- b. Objective of analysis: seeks to promote efficiency and wealth maximization;
- c. Rational behavior: meaning of: is often unclear on the operational meaning of rationality;
- d. Transaction costs: treatment is often cursory and may be inconsistent with the Coase theorem as now generally understood;
- e. Relations, recognition as such: rejects any idea of relations, other than those of competition among individuals (see Section 2.);
- f. Empiricism: empirical work may or may not be done, as it is unnecessary in light of claims to positive prediction by the theoretical model;
- g. Distributional effects: treats distributional effects as beyond the pale; (Posner himself has dealt at considerable length with distributional issues such as measuring inequality, redistribution through liability rules, and taxation, see Posner, 1992, pp. 455-515. Nonetheless it is difficult to find Posnerian analyses of particular subjects where treatment of distributional issues goes beyond, at most, a slighting acknowledgement that the only justification for ignoring the result produced by rational choice theory would be to redistribute wealth.)
- h. Individualism: attitudes towards: has a strong individualist bias, including large organizations within the concept of individuals except when analyzing internal operations of an organization.
- i. Market-solutions: attitudes towards: favors market-solutions; opposes not only government regulation but also any social governance other than that of competing individuals;
- j. Politico-legal goals: is often accused of right wing political biases. To paraphrase Posner: 'Suspicion persists that [law and economics] owes a lot more to visceral [right]-wing political preferences than to any body of theory.' (Posner, 1995, p. 269);
- k. Power: ignores power either as a benefit individuals seek that affects choices or as a social subject requiring analysis per se.

### **B. Other Sociological Approaches**

For an extensive treatment of law and the social sciences see Lipson and Wheeler (1986); respecting law and sociology see Arnaud et al. (1993).

## 6. Introduction

In contrast to rational choice theory, noneconomic sociological approaches treat collective behavior or relationships rather than focusing on individuals as such. They may or may not pay much attention to choice, viewed either individually or collectively. They may or may not pay much attention to the idea of benefits and costs in choosing. And they may or may not pay much attention either to vague concepts of rationality as found in economic analysis or to rationality in the ordinary sense of reasonableness.

Given their social orientation, noneconomic sociological approaches often recognize and focus heavily on social, as distinguished from individualistic, concepts. Thus, for example, in his excellent article comparing law and economics and sociological approaches to law, Cotterell mentions among others such concepts as: law, social change, legal relationships, social relationships, solidarity, general social trends, enduring patterns, mediating forces, culture, broad movements, legal modernity and more specifically, 'power and governmentality,' (Foucault), 'self-referential systems of communication' (Luhmann), 'the "life world" and the public sphere' (Habermas), and other concepts developed by such diverse scholars as Marx, Tönnies, Durkheim, Weber, Parsons, Neumann and Unger (Cotterell 1995). Althusser, Gramsci and Gurvitch would have been worthy additions to this list.

Like economics, sociology means many things, and a wide variety of sociological approaches to law other than law and economics exist, far more indeed than in the world of law and economics itself. (These include law and anthropology, untreated here only because it has its own treatment in 0640. As Cotterell says, '[In] address[ing] the complexities of law's relations to culture ... it seems that no useful line can now be drawn between anthropological and sociological research' (Cotterell, 1995, p. 350). For example, Roscoe Pound advanced the idea of sociological jurisprudence early in this century, and that concept has been important to the study of law ever since. Even legal philosophers one does not usually think of in such terms may consider themselves sociological. For example, as Posner (1995, p. 279, n. 2) points out, H.L.A. Hart described his *The Concept of Law* as 'an essay in descriptive sociology'. Jurisprudence, sociological or otherwise, is not, however, what is generally meant by law and sociology, and I shall address it no further. (We thus omit consideration of such important works as Black, 1989.) Instead, from among the many possibilities in this complex world of law and sociology, focus here is on three kinds of sociological approaches to law: case-law research, particular-theory approaches, and empiricism with little or no theoretical base.

## 7. Case-law Research as a Sociological Approach to Law

The term 'case-law research' is used here to mean research aimed at finding out what judicial and/or administrative decision-makers have done respecting particular issues. (Case-law research may be and often is, of course, conducted in connection with more formal approaches of various kinds, such as law and economics and various critical theories. The discussion following is limited largely to case-law research not so connected, although much of what is said applies to such instances as well.)

It is seldom, if ever, recognized in academia that - at least as conducted in the United States - ordinary case-law research is a form of sociological study of law. This omission calls for explanation given that such research is by far the most common form of American legal study - both within and without the academy. In spite of the proliferation of academic and quasi-academic journals it may safely be assumed that the majority of such research is done in the day-to-day world of lawyers and judges, administrators and legislators, and their various staff members. Nonetheless, even with the exclusion of such work of the real world, academic case-law research, that in law reviews, other legal periodicals, and monographs of various kinds overwhelms in volume all the more formal scholarly approaches put together.

In the light of this dominance, it is worth pausing to consider what case-law research is in the American context, what are its advantages and disadvantages as a form of sociology, and the general ignoring of such work as a sociological approach.

### *Nature of American Case-Law Research*

The vast bulk of American case-law research focuses on opinions of appellate federal and state courts, although there are important exceptions, particularly where the law is much involved with administrative agencies, as in taxation, various kinds of regulation and government procurement.

The day has long since passed, if it ever really existed, when researchers into American case-law thought they would find Langdellian scientific principles operating in the cases. (There is, of course, an important exception, namely researchers who hold to some theory such as the implementation of principles of efficiency by common law courts or particular theories of oppression characterizing various critical approaches.) The Realist movement, if it did nothing else, legitimized examining cases to see what the courts really were doing, rather than just what they were saying, in laying down the rules of law. (One should properly say re-legitimizing following the long post-Civil War period of relative dominance of the formal style, see Llewellyn, 1960. This is not to say that in such research logic-chopping based exclusively on words is not only commonplace, but probably a good deal more common than

more purposive analyses. Nonetheless, the better work - whether of practitioner, bench or academic - never slights the latter.

Case-law research of this kind is what Twining (1974) has called a 'method of detail'. And it is often, although by no means always, also a kind of 'thick description' (Geertz, 1973, ch. 1), as summarized by Cotterell (1995, p. 350):

Thick description moves social interpretation away from a search for abstractions that attempt to explain complex patterns of actions in terms of a minimum of rationally organized principles related to a general theory. It seeks rather a portrayal of complexity in all its ambiguity and richness. Geertz remarks that the study of mankind often involves substituting complex pictures of social phenomena for simple ones while trying to keep the persuasive character of the earlier simpler ones. (Geertz, 1973, pp. 33-34)

The work of Childres and Spitz (1972) on the parol evidence rule illustrates how purposive case-law analysis can result in thick description, as does Feinman (1995). Childres and Spitz examined a large sample of cases applying a rule stated by the courts as unitary. From the facts of the cases, as distinct from the words of the opinions, Childres and Spitz concluded that in fact there were three markedly different rules, depending upon whether the contract in question was a formal contract, an informal contract, or involved an abuse of the bargaining process. (In quite rare instances work of this kind purports to apply statistical principles.)

An important characteristic of the bulk of case-law research is that it is atheoretical. The researcher typically is interested in finding out what is going on and then drawing various conclusions respecting such things as what the law is in terms of formal rules (favorite of law students), what it is in terms of actual application, what policies are or are not being implemented, and how all these things might be changed for the better as the particular researcher views the world. (Only when the research is conducted in the context of a particular theory, for example law and economics, can it be said to be theoretical in nature.)

#### *Case-law Research as Factual rather than Legal Research*

The great bulk of case-law research is aimed at enhancing knowledge about the law itself (for whatever purpose). Nonetheless it can be and is conducted for the purpose of learning about party behavior as such. Among many possible examples outside the field of criminology are Frasco (1991) (survey of exclusive dealing and tie-in cases to ascertain motivations for such contracts) and Kaufmann and Stern (1988) (the perception of relational exchange norms in commercial litigation; database is trial court records). (Legal historians, who often do not consider their work a sociological approach nonetheless often rely on case-law research to learn about society itself.) A great deal of legal history

is of this nature (see Wahl, 1998, for a survey of all of the nearly 11,000 Southern appellate cases involving slavery). The two motivations for research can easily merge in light of the impact of law on party behavior, as Mnookin and Kornhauser's (1979) phrase 'bargaining in the shadow of the law' suggests.

#### *Limitations of Case-Law Research as Sociology*

Most case-law research is casual in the sense that it is neither exhaustive of all the cases on a given subject nor a statistical sampling of all such cases. (Studies of the kind mentioned in the preceding paragraph tend to be exceptions.) Rather the selection is likely to be made on the basis of hierarchical importance of the courts or agencies rendering the decisions, often with jurisdictional and/or geographical considerations in mind. Casual does not, however, mean lacking in thoroughness, as to which the work varies greatly.

In addition, the formulation of just what constitutes the 'given subject' is generally far less stringent than is expected in formal sociological approaches.

The most important limitation of all is the pathological nature of cases. Invariably they concern situations where not only have things gone wrong, but they have gone wrong so seriously that the resulting conflicts were not settled without litigation, and generally were not settled even after at least one court or agency had rendered a decision. Moreover, the 'facts' of cases are not the facts of the situation giving rise to them, but those facts strained through and distorted by the highly adversarial processes of the legal system. Thus study of cases presents a highly solipsistic and distorted view of both the general social circumstances being examined and the particular facts of each case.

Finally, those who believe that some theoretical base is essential to worthwhile legal research will see atheoretical case-law research as useless. Those who believe further that a particular theoretical base is essential to understanding law and advocating legal policy will likely see atheoretical case-law research as harmful for obscuring the truth.

#### *The Non-Recognition of Case-Law Research as a Sociological Approach to Law*

There are probably many reasons why case-law research is seldom if ever recognized as a sociological approach to law. Most, if not all, of the limitations described above make it far less systematic and aimed at truth-seeking than a word such as sociology generally suggests. Moreover academic case-law research likely is tainted in many minds by the similarity of its basic techniques to case-law research in the real world of the law. The latter is always highly instrumental and typically highly adversarial, neither characteristic being appropriate to a scholarly investigation in the traditional sense. Finally, for all its factual orientation, case-law nonetheless generates general rules. Case-law research thus can be - and, where formality dominates the law, is likely to be

- nothing more than a way of distilling general rules, as the maddening habits of most law students bring home to every American law teacher. To the degree this is true, case-law research is no more sociology that would be reading a civil code.

The consequences of non-recognition of case-law research as part of the world of law and sociology are quite serious. Probably the most important is the exclusion of a vast body of information as being essentially unworthy in systematic sociological investigation. Nonetheless, flawed though it is, information derived from case-law research is far from useless. This is particularly so because of the close relation between academic case-law research and that in the real world of the law. Another consequence is that such non-recognition exacerbates the separation of academic scholarly work from the work of the legal profession and legal institutions (see Edwards, 1992). Yet another is that it distorts the perceptions of the relationships between competing approaches to the law (see Section 5). Closely related to this is the present day derogation of such work in American law schools. Even the highest quality of original but straightforward case-law research is unlikely to yield tenure in elite American law schools, or perhaps even to generate summer-research grants.

### **8. Approaches Based on Particular Theories**

Professor Cotterell has described sociology of law as 'the effort to develop systematic, empirically oriented, theoretically guided knowledge of law as a social phenomenon' (Cotterell, 1995, p.347). Except that the empirical orientation is often quite thin, this is an accurate description of some sociological approaches to law, hereafter called theory-driven. (Relatively non-theoretical empirical sociological approaches, see Section 9, do not, of course, fit this description.)

Such approaches are like law and economics in that they are based on particular theories. Marxian analysis, now in considerable eclipse, is perhaps the first to come to mind. But of the five examples Richard Posner recently gave of sociology of law being done 'under other names' in the United States (Posner, 1995, p. 265) four - critical legal studies, critical race theory, feminist jurisprudence, and gay and lesbian studies - are theory-driven. (Regarding critical legal studies see Kelman, 1987; critical race theory: Crenshaw et al., 1995; Delgado and Stefancic, 1993; feminist jurisprudence: Decoste, Munro and MacPherson, 1991; George and McGlamery, 1991; Symposium, 1993; gay and lesbian studies: Arriola, 1994; Eskridge, 1994; Robson, 1992; Robson and Duberman, 1997.) Such theory-driven sociology of law is particularly prevalent in Europe. Van Loon, Delrue and van Wambeke (1995, p. 380), for example,

note that 'a lot of the European sociologists of law (of course, also with exceptions) strive for a major theoretical image'. (For examples see Section 6.)

Again like law and economics, in such theory-driven approaches the positive truth of the basic theory, if any is claimed, is assumed rather than proved empirically. Indeed, it is in the nature of such theories that they cannot be proved empirically in anything remotely close to scientific proof. (Many if not most rational choice theorists would probably argue that the positive nature of rational choice theory has been proved repeatedly, and needs no further proof. But what in fact has been proved repeatedly is that - at best - with proper empirical bases it can produce relatively positive conclusions respecting particular applications. Even so, as suggested in Section 10, it is probably the empirical base that supplies whatever positivism exists, rather than the theory.)

These theory-driven sociological approaches, at least American versions, tend to be also like law and economics in that systematic empirical work is likely to be thin on the ground. For example, critical empirical studies seem to come more from individuals like Richard Abel (1989, Abel and Lewis, 1988-89), who is related to the critical legal studies movement than from those commonly viewed as at its center, such as Duncan Kennedy, Mark Tushnet or Roberto Unger (to the extent it can be said to have a center).

Nonetheless, these theory-driven sociological approaches differ from law and economics in a number of respects.

First, their analysis is almost always founded less on individual behavior than on behavior of groups identified by such factors as class (in the case of Marxian analysis and often critical legal studies), race, gender, and sexual orientation.

Second, the focus of analysis is typically on power relations in which power respecting material affairs as such - the principal focus of law and economics - may or may not be a principal concern. Power respecting ideology and culture-formation are of particular interest to many scholars of theory-driven sociological approaches.

Third, within particular subject areas competing theories exist, thereby multiplying diversity of approaches.

Fourth, although all these theory-driven sociological approaches are related, at least in the United States, to groupings with significant socio-political power in the nonacademic world, at the present time they all remain relatively marginal in American law schools. Their heaviest impact in the latter is probably collectively in terms of fostering academic atmospheres which may, for lack of a better description, be described as 'politically correct'. In particular, neither collectively nor separately have they achieved the power position, at least in American law schools, of the law and economics movement.

The foregoing non-mainstream attribute is related to a fifth characteristic: these approaches are all related to particular social causes. (One need not,

however, go as far as Posner, 1995, p. 269, who said: ‘Suspicion persists that critical legal studies owes a lot more to visceral left-wing political preferences than to any body of theory’. None of the causes they represent have, however, been able to achieve more than limited acceptance either within or without academia as compared to the prevailing socioeconomic patterns of modern capitalist-consumer society. To a degree this is true also of law and economics. The latter has nonetheless been markedly more successful in achieving standing and power for its advocates, at least in American law schools, than have all the theory-driven sociological approaches combined.

### 9. Empirical Sociological Approaches-General

Van Loon, Delrue and van Wambeke (1995, p. 380) have pointed to the ‘greater emphasis on induction, on empiricism, and on methodology in the United States’ compared with Europe. They went on: ‘The American scholars - of course, with exceptions - tend to build theory inductively, from the bottom up, driven by data, policy concerns and empirical observations.’ (see also Posner, 1995, pp. 272-273). Van Loon’s word *theory* needs to be treated gingerly. The *theory* produced by or related to such work, in America at least, is not macrotheory of the type I have called theory-driven law and sociology. Rather it tends, at most, to be what Cotterell calls middle-range theory, usually concerned ‘with analyzing the causal effects of legal change on wider social change or with specifying the social mechanisms by which law can bring about or hinder social change’ Cotterell (1995, p. 352).

Rubin has made these points more specifically in terms of a particular field, contracts:

American sociology tends to be heavily empirical, but law schools lack the intellectual infrastructure to carry out sustained empirical research. Unlike economics, no dominant theoretical approach has emerged in sociology, and the theories of America’s leading theoreticians such as Talcott Parsons and Herbert Garfinkel proved difficult for contracts scholars lacking sociological training to apply. The same is true for German social theory, which may represent a more promising approach. While jurisprudence has been receptive to Habermas and Gadamer, contract scholarship has tended to overlook the more applicable work of their contemporaries such as Niklas Luhmann, Gunther Teubner, and Claus Offe. The result, once again, was the delayed development of a theory for understanding and evaluating the contractual process itself, as opposed to the judicial rules that are applied when that process goes awry. (Rubin, 1995, pp. 113-114)

Before proceeding, the obvious should be noted: theory-driven and empirical approaches as I have used the terms are not watertight compartments. To whatever degree there is serious empirical work they can easily overlap. Richard Abel has already been mentioned as an example of a theory-influenced (driven may be too strong a word in this case) scholar doing extensive empirical work. On the other hand, van Loon and his colleagues, who appear more in the American mode as they describe their work in van Loon and Langerwerf (1990), van Loon and Wouters (1992), nonetheless relate it to Durkheim and Weber (van Loon, Delrue, and van Wambeke, 1995, pp. 382-384)

American sociology of law is related historically to the American Legal Realist movement, which may be summarized by the words in 1926 of Charles E. Clark and Robert M. Hutchins quoted in Schlegel (1980, p. 459): 'We regard the facts as the prerequisite of reform'. The strongholds of that movement were Yale Law School and to a lesser extent, Columbia Law School (see generally Schlegel, 1995). More recently the University of Wisconsin Law School is often considered the center of law and sociology, although the American Bar Foundation is a very important non-law school center. The realist movement is often thought to be dead. It is, however, difficult to understand exactly what that means when present-day names like Lisa Bernstein, Howard Erlanger, Lawrence Friedman, Mark Galanter, John Heinz, Willard Hurst, Richard Lempert, Stewart Macaulay, Robert Mnookin, Ralph Nader, H. Laurence Ross, David Trubek, William Whitford and David Wilkins, to mention a few, are considered. Although law and society is a broader concept than law and sociology, all elements of the law and society movement are, in a sense, realist (see Friedman, 1986).

Oddly enough, criminology, which is a major if not the major area of mainstream academic sociology and law, is less likely to come to mind. This seems to be because the subject has never established a significant foothold in the curriculum of American law schools. For example, the leading list of American law school teachers by subjects contains headings for Criminal Justice and Criminal Procedure (AALS, 1995, pp. 1077-1091), but none for Criminology. So too, names like Morris, Zimring and Jacobs, and their related criminology centers, appear in the AALS Directory, but not as teachers of criminology (AALS, 1995, pp. 691, 989, 529). (Stanton Wheeler at Yale Law School is, however, an exception.) This is in sharp contrast with the comparable list in the United Kingdom, where the list of teachers with a particular interest in Criminology is larger than for either Criminal Justice or Criminal Procedure, although smaller than for Criminal Law (SPTL, 1996, pp. 129-130). (Penology and Sentencing add quite a few more names to Criminology. The comparison between Britain and the United States is rough, because the SPTL lists research interests rather than subjects taught. See, however, SLSA (1996, pp. 282-283, 306) which shows both research and

teaching interests, with about two and half times as many members listing criminology in the latter category as in the former.)

As with law and economics the empiricism of other sociological approaches may range from the most casual to the most systematic. The more systematic it is the more it is likely to be recognized as a sociological approach.

### **10. Empirical Sociological Approaches - Comparison with Posnerian Law and Economics**

Like all noneconomic sociological approaches, empirical approaches focus on collective behavior rather than on individual behavior as such, and are thus sharply different from Posnerian law and economics. Beyond that, the eclectic nature of empirical sociological approaches limits comparison to generalities of the following kinds.

- a. Normativism and positivism: The very nature of the complexities examined and the obvious limitations of the investigative techniques available render ludicrous any claims to the kinds of genuine positivism claimed for Posnerian law and economics. The most that can ever reasonably be claimed is to have made a heavily persuasive case for the existence of particular facts, causes, desirable routes of change, and the like.
- b. Objective of analysis: The objective is to ascertain the social facts seen by the researcher as pertinent to the subject of investigation as defined by the researcher. Thus maximization of wealth as defined by the economic model, the goal of Posnerian law and economics, may (unlikely) or may not be the goal sought by the researcher, and if it is almost sure to be but one of many.
- c. Rational behavior: meaning of: To whatever extent, generally very limited, the noneconomic researcher is concerned with rational choice theory, *rational* means what it means in the theory. As was seen in Section 2, however, the word has many meanings in economics. The obfuscation of the term as used in economics is likely to be exacerbated when used by noneconomic sociologists on account of their tendency to conceive of economics as limited to material human affairs. Thus the word can in their hands, but probably does not, have the same meaning as in Posnerian law and economics. Thus noneconomic use of *rational* is likely to refer to reasonableness, its common meaning among everyone except economists.
- d. Transaction costs: recognition and assessment of impact: Noneconomic sociological approaches in a sense treat nothing but transaction costs. The phrase 'transaction costs' postulates, however, at least relatively discrete transactions as the focus of analysis. It is itself a markedly discrete way of

thinking about the way exchange occurs in relations (see Macneil, 1981). Thus noneconomic empirical sociological approaches deal with transaction costs. Unlike Posnerian law and economics, such treatment is typically from relational perspectives, and quite likely occurs without calling the subject studied 'transaction costs.'

- e. Relations, recognition as such: Noneconomic sociological approaches by definition focus on relations of all kinds and are thus antithetical to Posnerian law and economics with its focus on individuals whose only relationship is competitive.
- f. Empiricism: This is the core of this approach, and is in sharp contrast to Posnerian law and economics, where it is typically slighted.
- g. Distributional effects: Likely to be considered where viewed as pertinent and significant to the subject, and thus once again sharply at odds with Posnerian law and economics.
- h. Individualism: attitudes towards: Nothing in the nature of empirical noneconomic approaches favors or disfavors individualism, and it is thus theoretically more neutral than Posnerian law and economics on this score. But see the discussion of attitudes towards market-solutions below; similar things could be said about individualism.  
Noneconomic empirical sociologists are less likely than Posnerians to consider large organizations to be individuals for the purpose of investigation.
- i. Market-solutions: attitudes towards: Nothing in the empirical approach as such favors either market or nonmarket solutions, and it is thus theoretically more neutral than Posnerian law and economics on this score. Nonetheless empiricists with a strong bent towards market solutions are likely to end up in the law and economics camp, empirical side, rather than in noneconomic sociology. This is particularly so of American legal educators, given the power in American law schools of law and economics, especially Posnerian law and economics, see Posner (1995). Thus American empirical sociological approaches are more likely to be conducted by individuals who range from having relatively neutral views about market-solutions to those who heavily favor governmental and other regulatory solutions.
- j. Politico-legal goals: There is nothing in the nature of noneconomic empirical sociological approaches that precludes right wing political biases. Nonetheless, in the American context at least, those engaging in such approaches are probably generally thought of as political liberals ranging from middle to leftish, but not radicals in the various critical camps mentioned in Section 8.
- k. Power: In contrast to Posnerian law and economics, power may be recognized as an important factor either explicitly or implicitly.

## 11. Empirical Studies: the Meeting Ground

Empirical work apart from case-law research has been mentioned respecting all three of the major sociological approaches treated in this part: law and economics, other theory-driven sociology, and other nontheory-driven empirical sociology. (This is not to suggest that *any* social investigation can ever be free of ideology and unexpressed theories.)

Empirical work is where all approaches can meet in equal competition. Or to put it in another way, where empirical work is a central focus of study the approach behind it may be singularly unimportant. Consider, for example, Ellickson's investigation of the ways in which farmers and ranchers in Shasta County, California work out animal trespass disputes. Ellickson used social science methods in his study, focusing on a local case study (a narrow but deep wedge of location and time), gathering demographic and documentary evidence, and conducting extensive field interviews with a range of participants. He then used this finely detailed, highly localized data as a basis for theorizing about a broader slice of reality (Larson, 1995, p. 229, citing Ellickson, 1986, pp. 627-628; see also Ellickson, 1991).

'Ellickson concluded that high transaction costs were such a barrier to legal recourse that neighbors instead had worked out their problems in a neighborly fashion, developing a set of customary norms that became their "Order Without Law"' Larson (1995, p. 232 n. 278). As noted, this investigation was conducted in terms of transaction costs by its author, a devoted law and economist. See Ellickson (1993). Moreover, he keyed his work to Coase's theory about social costs, Coase (1960), a Posnerian Bible until Coase explained what he really meant: what matters is not what happens theoretically when there are no transaction costs, but what happens in reality when there are. Coase (1993).

To those of genuinely empirical bent, what counts about Ellickson's Shasta County study is not its origin in the mind of a law and economist or what it may or may not show about rational choice theory. What matters is the quality of his empirical work and the knowledge of human behavior that can be derived therefrom.

This is equally true of sociologists proceeding from other viewpoints. To those of genuinely empirical bent, what counts about the studies of van Loon, Delrue and van Wambeke of litigation, for example, is not their origin in the minds of Weberian-Durkheimians or what they may show about Weberian-Durkheimian theory. What counts is the quality of their empirical work and the knowledge of human behavior that can be derived therefrom.

Various authors have talked about the coming together of law and economics and sociology - Campbell (1996), De Geest (1995), Posner (1995) - as well as economics and sociology more generally - Baron and Hannan (1994). Posner, for example, urges 'the erasure of the remaining disciplinary

boundaries that are retarding the complete merger of sociology with the other scholarly disciplines that study law' (Posner, p. 266).

If such a merger is in prospect the question is *how* they come together, and here there are great variations. It is clear enough that Posner means a merger along the lines of the Norman conquest of the Anglo-Saxons, with Posnerian law and economics in the role of the Normans. (Just as Norman England was a merger and not genocide, so too Posner would leave something of noneconomic sociology intact, such as the impact of social class on economically inexplicable behavior, see (Posner, 1995, p. 278.) De Geest, on the other hand, sees law and economics as already a combination of economics, sociology, psychology and other sciences, a pattern very much at odds with Posnerian law and economics.

I too see a possible merger in the offing, one closer to De Geest's than to Posner's position. What is suggested here is that empirical studies of law themselves may be in the process of establishing a field of study that essentially transcends the economic and noneconomic boundaries. In that field the competition will be over empirical quality with theoretical approaches playing only a secondary role. Out of such an eclectic body of research could come an eclectic social science in which a wide variety of theories all were viewed as valuable analytical tools, but with none having a monopoly on whatever limited positivism is possible in social investigation. For a suggestion of a merger along somewhat similar lines relating to crime, see Panther (1995, pp. 372-375).

### **C. Standing in the Competition of Law and Economics and Other Sociological Approaches**

There can be little doubt that much competition exists among the proponents of these various approaches for prominence in the study of law. Richard Posner has proclaimed more or less total victory in this competition for law and economics, at least insofar as American legal studies are concerned (Posner, 1995).

#### **12. Victory?**

It would be foolish to deny that law and economics has become the most powerful single monofocused discipline in American legal studies. Nonetheless, the victory is neither as complete nor as satisfactory from a Posnerian standpoint as might appear from reading Posner's account. Before taking up more serious aspects, it might be noted that although Posner professed to be unaware that sociology of law is commonly taught in American law schools (Posner, 1995, p. 275), half again as many names are listed as teaching Law

and the Social Sciences as Law and Economics in AALS (1995, pp. 1153-1154, 1158-1160). It is true that the former category is a potpourri. It even includes some teachers, for example, Guido Calabresi, who prefer their law and economics teaching to be so categorized rather than under the more specialized heading. Nonetheless, a riffle through the entries for some of the teachers so listed suggests that some form or aspect of law and sociology is taught in American law schools a good deal more than Posner suggests. (In terms of expression of law teacher interests the picture in Britain is dramatically opposite from Posner's view. Only 5 law teachers identify an interest in law and economics, compared to 14 for sociology of law and 7 for socio-legal studies. SPTL (1996, pp. 130, 135, 136).) I turn now to more significant tests of success.

First, when academic case-law research of the type described in Section 7 is counted as a noneconomic sociological approach, law and economics falls into a very distant second place. Moreover, academic case-law research has a mighty sibling in the day-to-day work of bench and bar. Although law and economics may dominate a few areas of legal practice, most notably antitrust and restrictive practices, and may, as Posner claims, have had an effect on the deregulatory movement, it is a long, long way from dominating or even playing a major role in most areas of the law. There are undoubtedly a growing number of judges relatively literate in law and economics. That does not, however, mean that they are necessarily converts who view economic analysis as a primary, much less the primary, tool of their trade. (For a critical discussion of the relationship between theoretical studies like law and economics and the legal profession, see Edwards, 1992.)

Second, as noted in Section 3, there are many worlds of law and economics, a field not originated by Posner. Nor, in spite of Posner's prolific work and the dominance of Posnerian thinking, by any stretch of the imagination has Posnerian law and economics ever occupied the entire field of law and economics. Furthermore, even apart from its diverse origins, the centrifugal forces afflicting any maturing ideology seem to be well and truly loose in law and economics. Moreover, other theories, in particular game theory, have come muscling into law and economics. Game theory proceeds from the individualistic benefit/cost concept as does law and economics. Nonetheless, game theory, with its stress on asymmetric information and strategic behavior, brings uncertainties to the picture utterly inconsistent with the kinds of claims to positivism often made on behalf of law and economics. ('[T]he strong predictions of the price theoretic models quickly degenerate into a fragmented array of models whose predictions are highly dependent on the nature of the initial assumptions', Donohue, 1997).

An illustration of the centrifugal forces affecting law and economics comes from the institutional school of which Oliver Williamson is the leading voice.

Williamson responded to Posner's analysis of that school (Posner, 1993), in the following manner:

Posner (1) has not understood the Coasian message (or does not like what he hears), (2) misconstrues transaction costs economics, (3) misconstrues game theory, (4) has a truncated understanding of bounded rationality, the economics of information, and maximizing, and (5) mischaracterizes empirical research in transaction cost economics. (Williamson, 1993b, p. 99, replying to Posner's attack on Williamson, 1993a. Such comments hardly augur well for a unified law and economics under the Posnerian banner)

The presence of these forces swirling around Posnerian law and economics goes blithely unrecognized in Posner's mention of Guido Calabresi as one of the six law and economics academics on the federal Courts of Appeal (Posner, 1995, p. 281, n. 30). Calabresi, who with Coase has legitimate claim to be the co-founder of law and economics, never has been in the Posnerian school. Moreover, four years before this citation of his name appeared, Calabresi specifically and vigorously rejected several of the most fundamental principles underlying Posnerian law and economics (Calabresi, 1991).

Given these divergent forces, whatever claim may be made for a victory of economic analysis over other sociological approaches does not, as Posner clearly would like us to think, support a claim of such victory for Posnerian law and economics.

Third, and perhaps most important respecting any claim of a Posnerian victory, is the impact of empiricism on the relationship between law and economics and other sociological approaches. As suggested in Section 11, what matters about empirical work is its quality, not the particular intellectual camp from whence it comes, for example, Ellickson's Shasta County study (Ellickson, 1986). Ellickson analyzed the outcome from the standpoint of transaction cost economics. The social facts as found by Ellickson, however, equally vindicate relational contract theory in which transaction costs are viewed as too narrow a social concept (Macneil, 1981). Thus, in terms of the empirical work itself, Ellickson's work is just as much a part of the noneconomic sociological approach of relational contract as it is a part of law and economics. Ellickson's fine work turns out not to be victory of law and economics over a noneconomic sociological approach, but a victory for empiricism.

The dangers to Posnerian orthodoxy, or even to the minimum of economics orthodoxy, of high quality empirical work by law and economists should be obvious. Such work focusing on transaction costs, and/or taking into adequate account asymmetric information and the possibilities of strategic bargaining, may come perilously close to demonstrating the validity of noneconomic approaches with their emphasis on complex social worlds. It could thus lead to what Posner (1995, p. 266) called an 'erasure of the remaining disciplinary

boundaries'. A merger of law and economics and other sociological approaches at the empirical level with theory being very much of secondary importance is not, however, the erasure Posner had in mind. His was an erasure of disciplinary boundaries whereby rational choice theory would take over the world. (Not surprisingly he denies this in *idem.* pp. 277-279.)

### **13. The Causes of the Relative Success of Law and Economics in America**

Posner attributes his claimed victory of law and economics to the following: Max Weber's bequest to sociology of a 'useless methodology', *idem.* pp. 267-268); insofar as criminology is concerned 'a discredited approach to criminality and its control' (p. 270); the 'lack of theoretical and empirical [sic!] ambition' of American sociology of law compared with law and economics (p. 272); a lack of normative punch compared to law and economics (p. 273); the failure of law and sociology 'to retool with the methods of a rival discipline', that is, law and economics (p. 274), prevented by such factors as the 'left-liberal bent' of law and sociologists who perceive law and economics as being 'politically conservative', reluctance to accept the 'knowledge-claims' of other disciplines, and professional envy (pp. 274-275).

Whatever one may think of the merits of Posner's factors purporting to foster the relative success of law and economics included, his list is far from complete. Other factors are not only important, but might well be thought to be substantially more important than those listed.

Perhaps the most important factor Posner omits is the political climate developing in America (and elsewhere) as law and economics was getting its foothold in American law schools. Reactions against the State from right and left achieved national prominence with the Republican nomination of Barry Goldwater in 1964 and the anti-war movement of the late 1960s and early 1970s. Opposition to the bureaucratic welfare state legacies of the New Deal, Fair Deal, and Great Society increased during the period until it culminated in the presidency of Ronald Reagan in 1980. Anti-regulation, pro-market positions such as those of Alfred Kahn respecting the airlines became politically respectable in a way that they had not been since the days of the Hoover administration. Nor was this confined to the far right or even the right. On the international scene the liberal establishment, heavily eastern and Republican, long had been supporters of free trade. It is hardly surprising that law and economics, particularly of the ideological Posnerian variety, thrived in such an atmosphere. Nor is it surprising that sociological approaches more likely to be neutral or favorable towards regulation were less likely to thrive. (Interestingly enough, Mrs Thatcher's 1979 triumph seems to have largely failed to produce a similar pattern in British academia; perhaps this in part

reflected that, unlike Ronald Reagan, she never enjoyed the support of much more than 40 percent of the electorate.)

Even the most casual observation of American law schools, particularly the more elite law schools, reveals how responsive their curricula and research are to what is going on in the outside world. The 1940s saw a proliferation of law school activity in areas like labor law (collective bargaining and unfair labor practices) and administrative law reflecting the the New Deal. Comparative and public international law blossomed in the postwar Cold War era with America's new world role. Law and poverty and civil rights courses came with the Lyndon Johnson's Great Society. Courses and studies relating in a wide variety of ways to international trade have blossomed as its importance to the American economy have become more and more widely recognized. It is hardly surprising that a market-oriented and often right-wing subject like law and economics thrived in the 1970s and thereafter. Indeed it would have been simply amazing had it not.

A second factor in the relative success of law and economics undoubtedly has to do with the speed and simplicity of effort required for various kinds of intellectual work. For example, case-law research and empirical studies based on published statistical information can be done in a library with far greater speed and simplicity of effort than empirical studies can be done in the field. This is almost certainly the primary reason that the empirical studies envisioned by the early American realists, and sometimes conducted on a pilot basis, caught on in American law schools only to a extremely limited degree. Theoretical law and economics can in turn be done with far greater speed and simplicity of effort than can be case-law and other library-based research.

None of the foregoing is to make any judgment whatever about the intellectual challenge or difficulty of the different kinds of enterprise. It is simply that most thought-experiments based on hypothetical situations can typically be done faster than activities requiring fact-gathering, and that library fact-gathering can typically be done faster than field fact-gathering. Thus theoretical law and economics is in cost terms at a significant advantage in competition with case-law research. It is at an even greater advantage in competition with empirical approaches, particularly field studies. In an academic world increasingly focussed on publish-or-perish this has made law and economics singularly attractive to those with real or imagined ability to carry out such analysis. This is especially true in any law school where article-counting is an important aspect of promotion and tenure.

The big challenge to law and economics on this score will come to whatever degree it shifts towards empiricism and particularly towards the more time-intensive forms of field study such as that of Ellickson in Shasta County. To whatever degree law and economics shifts in this direction its competitive advantage will tend to disappear.

A third important factor in the relative success of the law and economics movement has been its considerable financing from sources with pro-market, and often right-wing, ideologies, of which the Olin Foundation stands out. This financing included particularly a major effort to proselytize law teachers. Starting in the late 1960s Henry Manne, a Chicago School enthusiast, organized a well-financed and most attractive summer program, first at the University of Rochester and later at the University of Miami. A very substantial number of law teachers were both taught the basics of law and economics and propagandized about its merits by this program. (It was nicknamed Pareto in the Pines and after its move south, Pareto in the Palms.) Manne continued such well-funded programs and others after moving to Emory University in 1980 and later founding a law and economics law school at George Mason University. Nothing on a remotely comparable scale has ever been available to provide financial support for noneconomic sociological training and propaganda.

#### **D. Conclusion**

In conclusion, the great and probably unbridgeable gulf between various other sociological approaches and Posnerian law and economics is much smaller respecting other varieties of law and economics, particularly institutional law and economics. These smaller gaps are likely to become smaller yet to whatever extent both law and economics and other sociological approaches move in the direction of empirical studies.

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