The Relation of Law and Economics

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THE RELATION OF LAW AND ECONOMICS

During the past fourteen years there have been at the University of Wisconsin not to exceed ten students pursuing the subject of economics for higher degrees who have elected courses in the Law School. During that period approximately eighty Master's degrees and forty-four Doctor's degrees, in which the major or the minor was economics, have been granted. Data are not at hand concerning the graduate work in economics in other institutions. The assertion is ventured, however, that the situation at Wisconsin is typical. It will be accepted without any serious dissent that graduate students in economics do not generally elect law courses, especially courses in private law. It is the exception rather than the rule to find students in economics who have taken any substantial portion of the courses in law and very rare to find an economist who has completed the prescribed course in law and received a law degree. An examination of the catalogues of a number of the universities in this country discloses little or no recognition of law as constituting an essential or even desirable part of the training for the economist. For example, in the work offered by the Department of Economics of Harvard University no law courses are listed and none offered in other departments or schools of the university are referred to, although a prominent member of that department is himself a law graduate and although the Law School of the University is conspicuous as a leader in the scientific, analytical and historical presentation of the law. Likewise, in Yale University in the Department of Economics no law courses, either public or private, are listed or referred to. The same is true in the University of Pennsylvania, Columbia University, University of California, Johns Hopkins University, University of Minnesota, and the University of Illinois. In Cornell University, where the courses in economics are listed under the general head of political science, courses in Constitutional Law, Public Officers, Municipal Corporations, Theory of Law and Business Law are given, the

latter course being "designed primarily to meet the needs of students who contemplate entering business." In the University of Michigan the Department of Economics offers an introductory course to law, a course in the Elements of Law, "especially adapted to the needs of women," a course in Contracts and Commercial Paper, "designed to meet the special needs of students in business administration." In the University of Chicago the Department of Political Economy lists the following courses which are given under the jurisdiction of the Department of Political Science or of the Law School: Elements of Law, Bills and Notes, and Business Law. Reference is made to the following courses given in the Law School: Public Service Companies, Insurance, Corporations, and Constitutional Law. In the Department of Political Science, as distinct from the Department of Economics, at the University of Chicago, Columbia University, and other institutions, there is a recognition of law courses, either to the extent of actually providing instruction in them, or by reference to other schools or faculties where such courses may be had. These courses are quite generally, however, in Public Law, Administrative Law, and International Law. A notable exception is found in the University of Chicago where the Department of Political Science, in addition to the Public Law courses, lists two courses in Private Law, viz., Contracts and Torts, both given by the law faculty. Indeed, the political scientists as distinguished from the economists have much more generally recognized law as constituting a desirable part of an advance course of study in that field. In the report of a special committee of the Political Science Association on Instruction in Political Science the following law courses were included in the list of subjects to be pursued: Elements of Law, Jurisprudence, and Judicial Procedure.[1]

The result of these statistics may be generalized thus: Very few advanced students in economics take any considerable number of law courses, and practically none complete a law course leading to a law degree. Very few departments of economics include law subjects in their courses or even refer to law courses given in other departments or schools or otherwise recognize the desirability of a

[1] *Annual Proceedings*, 1913, X, 249.

partial or extended study of law as a part of the training for an economist. The relation between law and economics seems either not to be perceived, or, if perceived, not to be regarded as a relationship desirable or feasible of very much cultivation.

This apparent indifference, if not aversion, to legal studies is significant. Various explanations may be offered. It may be said that, while there is a close relation between law and economics, the immediate and primary subjects of economics require all of the student's time and there is no place in the curriculum for law. Three years of graduate study are all that can be required for the profession of the economist. It is not feasible to require candidates for the Doctor's degree in economics to make any extended study of law, much less to complete a law course. It may be answered, however, that with some of the learned professions already requiring four years of graduate study and others, including the legal profession, tending that way, that the economists, especially the teachers and leaders, may properly be expected to devote a longer time to preparation and to widen the field to be covered.

It may also be said that the aversion of the economist is not to the law but to the manner in which it is usually presented in the law schools. These schools have been presenting law in a narrow and technical manner designed to train men for the immediate practice of the profession. Furthermore, it has been presented from a strictly utilitarian point of view by men lacking in breadth of training and vision. However well founded this objection may have been thirty or even twenty years ago, it has lost much of its significance today. With the development of the modern law school as an integral part of the university, having a faculty of men devoting themselves entirely to the study and teaching of law, with extensive library equipment, and a student body with a preliminary education equal to two and in a number of instances to four years of college work, it can hardly be said that the law is being taught in the better law schools in a narrow, utilitarian manner.

These explanations, however, may be regarded as superficial. Back of them lies a more fundamental reason to be found in the nature and scope of economic science, or at least in certain theories

as to such nature and scope. "Scope and method" still constitutes a topic for consideration in a comprehensive treatise on Political Economy. While the extensive discussion which once went on as to whether economics is to be treated deductively or inductively has in large measure subsided, and all agree that neither extreme in the controversy is correct, still a notion of wide prevalence is that economics is "essentially hypothetical in character," and that "however useful may be empirical knowledge, it is yet of slight importance compared with the well-connected and perfectly explained knowledge, which constitutes an advanced and deductive science."[1] The influence of the classical school and the abstractionists and the teachings of the physiocrats of the eighteenth century and their theory of a natural and essential order of human societies still exert an influence upon economic scope and method. The natural-law thinking of the eighteenth century has not been any more completely abandoned by the economists than by the jurists. The effect of all this is the development of an attitude of independence and self-sufficiency as regards kindred fields of knowledge. The fundamental and basic laws of economics are discoverable in the nature of things by a series of rigorous exercises in abstract thinking. The observation and study of concrete data are primarily valuable for the confirmation of general principles deductively reached. These economic laws being of the natural order of things control and ultimately give all other laws. Any system of jurisprudence must ultimately give expression to these economic laws. Economic laws and economic life being prior to legal system, determine the form of laws. Absence of harmony between economic theory and law is more a matter of concern to the lawyer than to the economist. As economics is the basic, fundamental subject lying back of law and ultimately determining the form and content of law, there appears to be no need of a detailed study of existing legal systems.

Even economists who are not abstractionists and who do not accept the theory of a natural order of society appear to assume an independence of jurisprudence or to manifest an interest in the

[1] D. R. Dewey, "Observation in Economics," *American Economic Association Publications*, II, 29.

existing system of law only to the extent of discovering in such a system the cause for the delay in the realization of the complete application of sound economic principles arrived at either deductively or inductively from the study of non-legal data. It is difficult to discover in treatises on economic subjects or in the discussion by economists of the scope and method of their science any recognition that the law has really much of significance to contribute.

In a conference on economic instruction the question may very properly arise whether this attitude is not an entirely defensible one both on grounds of expediency and on principle. Why should the economist make any extended study of law and legal systems? The answer to this question is to be sought in an examination into the nature and purpose of legal systems.

The value of law to economics may be merely pedagogical or because of its subject-matter. There can be no doubt that the material of the law and the method of studying its growth and development are of the highest pedagogical value. The extended study of numerous concrete controversial situations and the development of general principles therefrom afford an excellent means for the acquiring of the mental acumen essential to the successful solution of economic problems. The conclusions of law arrived at in the course of actual litigation are the resultants of extremely controversial discussion in which reason, logic, ethics, and expediency contend for recognition. The law abounds in virile, alert, and aggressive thinking. To master it requires the development of a keen, logical mind capable of sustained attention. But other fields of knowledge have on this basis equal claims to consideration, and one cannot urge the extended study of law for purely pedagogical advantages.

Coming to the subject-matter of the law, what has it to offer to the economist? Law is one of the social sciences. The French economist Gide speaks of law, ethics, and political economy as the "sister sciences."[1] To do one's duty expresses an ethical conception, to exercise one's rights is a legal conception, to provide for one's wants is an economic conception. To whom does it belong? is a legal question. To whom ought it to belong? is a

[1] Gide, *Political Economy*, 3d ed., pp. 2–3.

question on the border land between economics and law. Any classification of the social sciences is a concession to convenience and is inevitably artificial. The boundary lines will always be more or less fluctuating and there will be much common ground. Abstractly and ideally there is much to be said for Comte's contention that any separation of the sciences which deal with human societies is irrational; that there is but one single science embracing all aspects of these societies. It is, however, impracticable and inexpedient to decline to recognize the classification which has grown up and the method of separate treatment. Still the boundaries which have been erected should not obscure the ultimate common object with which each division deals. It is the same object studied from different points of view and with different emphasis. The sharp separation of law in our American universities and its teaching and study by distinct faculties in schools or departments independently organized and administered is peculiar to our educational system. The explanation for it is to be found in part in the narrow, utilitarian conception of the nature and function of law and the function of a law school with reference to the law. The justification for its continuance is to be found in considerations of convenience and expediency. But now that law has taken rank as a university study, and in some institutions as a graduate study, and is presented as a science rather than a handicraft, it should be given the same recognition as other subjects of university grade and its separation from the other social sciences should be regarded as formal rather than real.

The primary function of the American law school will continue to be the teaching of men to practice the law as it is. Still the successful performance of this function will not prevent the study and presentation of law historically, philosophically, and scientifically, as one of the basic social sciences. With the development within our universities of faculties of law and jurisprudence there has come a truer conception of the nature of law. Economists as well as others have not always perceived accurately the true nature and function of law. For example, the author of a recent treatise on economics,[1] in discussing the relation of political economy to

[1] Fetter, *The Principles of Economics*, p. 6, 1911.

other social sciences, says of law: "Law treats of the precepts and regulations in accordance with which the actions of men are limited by the state." This is a very narrow, partial view of law. It is an expression of the imperative or mandatory theory, and limits law to commands or prohibitions emanating from the state. While the sanction of the state is essential that men's actions may be effectively controlled still the imperative element of law is not its chief characteristic. The living, vital law of a community, the rules to which the individual and collective life actually conform and by which the personal and property rights are defined is vastly more than a matter of precepts and commands. The jurisprudence of a society is the expression of its thinking and experience with regard to ethics, religion, economy, and expediency. To know what a people believes and acts upon in its spiritual and material life a study of its system of law, if not absolutely essential, is certainly of tremendous importance.

The failure to perceive that the law of a community is the embodiment of its prevailing notions of economics and ethics, tempered by reason and expediency, may be offered as a further explanation for the absence of a definite interest on the part of economists in legal studies.

If the law be thus viewed as one of the basic social sciences dealing with the rules affecting and controlling every aspect of community life and if it is presented in true scientific fashion it has a strong claim to the serious consideration of the economist. To judge from the scope of economics as put forth in modern treatises this claim must necessarily be recognized. The following quotation is typical:

> If the study of economic theory has any justification at all, it must fit into the facts of actual business life. There may be, indeed, such a thing as pure mathematics, which discusses conclusions from premises that exist only in the mind of the investigator and find no counterpart in actual life. But if there be such a thing as pure economics in this sense, it would be of no earthly use except as a logical exercise or play of the imagination. Economics is the science of industrial relations,—not as they might exist hypothetically in the mind of the investigator, but as they really exist. Economic law must explain economic facts; the law inheres in the facts, the facts are the embodiment and illustration of the law. . . . . The old distinction between pure and

applied economics is untenable. . . . . Economics is to teach us to understand the principles of industrial life. Its chief object, indeed, is to explain to us what is. If all society, however, is the result of an evolution, we can understand what is only by knowing what has been.[1]

How are the principles of industrial life to be understood and explained adequately without due regard to the legal system past and present which in a very large measure gives expression to those principles, or how can a complete appreciation of what has been be obtained without a study of the development of legal doctrines concerning personal and property rights? If economic law "inheres in the facts," one very significant fact for the economist is the system of law which prevails in the business community and pervades the industrial relations. While the elemental forces of economic life cannot permanently be controlled or determined by legal forms, still the system of law of a community necessarily embodies for the time being at least the accepted economic notions as to ownership, disposition, and enjoyment of economic goods. The law no more than economics has any concern with free goods. Both the personal and property interests which the law recognizes and protects constitute an integral part of the development of any sound economic theory. The production and distribution of wealth, however it ought to be governed, is in reality governed by the principles of the existing legal system. An economic theory may require for the sake of efficient production the holding of land in small parcels, but the legal doctrine of primogeniture and entailment, long a recognized principle in English law, produces large estates. Likewise, an economic theory may require a rule of absolute liability for acts done in the course of productive industry, but the legal doctrine of blameworthiness as a basis of liability and the fellow-servant rule produce different results. Economic theory may require the unity of interests in land and personality, but the law recognizes a diversity of estates and interests, some based upon title and some upon possession; some present and some future. The former legal doctrine of the extinction of a woman's separate property rights upon marriage may be at variance with sound economic principles. A theory of co-operation in production and

[1] Seligman, *Principles of Economics*, 6th ed., pp. 35–36, 1914.

circulation of goods encounters a legal doctrine forbidding the elimination of competition and prohibiting contracts in restraint of trade. The theory of the socialization of property and the problem of inheritances cannot be considered apart from existing theories on those subjects now a part of the prevailing legal system. The doctrine of purchase for value without notice, of constructive trusts, of unjust enrichment, the ethical and moral tenets of equity, the recognized limitations on contractual capacity, the nature, scope, and requisites of contracts, the doctrine of assignability and negotiability of contracts all profoundly affect the control, enjoyment, and disposition of wealth.

These legal doctrines are not the result of whim or caprice, nor the expression of a passing fancy, nor the embodiment of imperative and mandatory rules imposed from the outside by the paramount authority of the state. They have developed gradually and have persisted through long periods and represent the embodiment of the predominant and prevailing notions of the community as to what is desirable and proper in the light of ethics, economics, and expediency. They manifest concretely the formal expression of an economic and ethical theory of society, and therefore constitute one of the "facts" that "are the embodiment and illustration of the (economic) law." A legal system always rests in part upon certain economic theories, although not necessarily sound ones. An economic theory that has become embodied in law and has been actually observed for a long time can scarcely be other than a significant "fact" for the economist. Jurisprudence is to be economically, rather than, as heretofore, politically interpreted. A successful interpretation on this basis requires a group of scholars who are thoroughly trained in both juristic and economic science and thinking. This training can come only when economists, as well as jurists, recognize the intimacy and interdependency of their respective sciences and each knows adequately the field of the other. If the problem of the economist is to determine what has been, what is, and what ought to be the governing principles in "wealth-getting and wealth-using";[1] if "economics is a study of men as they live and move and think in the ordinary business of

[1] Ely, *Outlines of Economics*, p. 4, 1914.

life"[1] it would seem that past and existing legal systems constitute material of prime importance deserving to be considered extensively and critically.

> All systems of law are in the main the crystallization of long-continued social usage. Social customs are coeval with the origin and growth of society itself; the mandatory force of the positive law comes at a later stage in the evolution. The unwritten gradually turns into the written law, until the positive enactment is invested with the sanction of a sovereign command. As society develops, the law is in a perpetual process of change. No code is final; it always represents a given stage of social life. The law is the outward manifestation; the social, and especially the economic, fact is the living force. The formal juristic conception may remain the same; its content must be modified by every change of economic life. Legal history is really a handmaid to economic history; legal development is inexplicable apart from economic forces. The economic fact in this sense is the cause; the legal situation is the result. . . . . Life indeed consists of a perpetual adaption of outward forms to inner forces, and thus the economic basis of a legal system is really the important fact to the social philosopher. In practical life, however, we deal with outward forms, and thus the legal shape of economic relations must never be lost from sight. In economics and jurisprudence there is continual action and reaction.[2]

It would be difficult to state more aptly or effectively the interrelation and interdependency of law and economics or to put forth more cogently the need of a study of law by the economist and a study of economics by the jurist. If law is the "result" of the economic fact, if its content is modified and determined by every change of economic life then law becomes a true and faithful reflector of the growth and development of economic theories, and as such demands the extended and critical attention of the economist.

So much for the general claim of law for the attention of the economist. To be specific, what is desirable and feasible? Ideally, the completion of a thorough course in substantive and adjective law, including Roman law and jurisprudence, as offered in the better university law schools, is none too much; certainly none too much for those who are to teach economics and lead in economic thought. If, however, limitations of time and expediency make this impracticable, there should be at least a detailed study of the basic subjects of law, followed by a course in Roman Law and

[1] Marshall, *Principles of Economics*, 5th ed., p. 14, 1907.

[2] Seligman, *op. cit.*, pp. 33–34.

General Jurisprudence. The following subjects are suggested, the study of which would give the economist the point of view of the jurist and a more adequate appreciation of the nature and theory of law and would disclose the economic theories which are embodied in our existing legal system: Contracts, Torts, Real and Personal Property, Law of Persons, General Principles of Equity, Law of Associations (including Partnerships and Corporations), Negotiable Instruments, Trusts, Constitutional Law, Roman Law, General Jurisprudence. The completion of these subjects would require, as the instruction is now organized in most law schools, approximately three semesters. Without seriously imperiling its efficiency the instruction could be so organized as to enable the work to be completed in one academic year. This may seem a very large amount of time to devote to law. It is impossible, however, to arrive at any adequate comprehension of the fundamental concepts of jurisprudence in a shorter period. The short courses now given in some universities in the Elements of Law, Elementary Jurisprudence, and general survey courses in commercial law are wholly inadequate, especially since they are given very often by teachers not primarily trained in law and whose main interest lies in other fields. If the study of law is to contribute to the efficiency and capacity of the economist and is to be really worth while it must be pursued a sufficient length of time and in sufficient detail under the direction of teachers trained widely in the law and skilled in juristic thinking and in the interpretation of legal history. Some of the necessary time for the proper study of law might well be obtained by a re-organization of the curriculum in economics. If a layman might venture a criticism, it seems that many of the courses now offered in economics deal with rather ramified, highly differentiated derivative phases of more general topics. The curriculum seems disproportionately occupied by detailed courses in applied economics. If these could be curtailed more time would be available for the fundamental and basic courses both in economics and in law.

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