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Science, Politics, and the Evolution of Law and Neoclassical Economics

JAMES MAY

James Hackney's article¹ provocatively points our attention to very important and underexplored issues concerning the interplay of "science" and "politics" in the dramatic evolution of law and neoclassical economics since the Second World War. At the heart of his article is his rejection of any "reductionist" interpretation of the leading developments in this area. Modern law and neoclassical economics, he argues, cannot be accurately viewed either as merely a faithful, nonpoliticized application of modern social science or, alternatively, as simply a convenient vehicle for the promotion of particular contentious political beliefs. Hackney insists that law and neoclassical economics, both in general and in the specific doctrinal area he emphasizes, is about *both* science and politics. His article seeks to demonstrate this duality and, more broadly, to clarify the general nature and evolution of modern law and economics. Hackney highlights key general characteristics of twentieth-century intellectual thought and examines the influence of those characteristics, as well as the interplay between science and politics, in a series of landmark works on law and economics that have great relevance to recent debates over appropriate products liability standards.

While contributing to a better understanding of products liability developments, Hackney's article also raises a host of important, broader questions concerning the relationship of science and politics in modern law and economics as well as the possible useful directions for future scholarly exploration of this relationship.

Two sets of such broader issues, I believe, deserve particular attention. The

1. James R. Hackney, Jr., "Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory," *Law and History Review* 15 (1997): 275-322.

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first concerns the connection between so-called "old" and "new" law and neoclassical economics. The second concerns the possibilities that our understanding of law and neoclassical economics might be enhanced substantially through expansion of the time frame within which we assess it.

"Old" and "New" Law and Neoclassical Economics

Neil Duxbury, for example, recently has questioned the appropriateness of separating modern law and neoclassical economics into an "old" wing focused heavily on antitrust law and a "new" wing focused heavily on torts.² In contrast, Hackney makes only the barest reference to the early evolution of the former and its possible influence on the latter and thus, at least implicitly, presents the two wings as substantially separate and independent growths.³

Conceptions of the relationship between these two dimensions of law and neoclassical economics logically and in practice have an important bearing on broader understandings of the nature and origins of each. Clarification of this relationship might be advanced substantially by examining the ways in which the key figures in modern law and neoclassical economics have perceived the relationship. Ronald Coase, Richard Posner, and others, of course, often have emphasized the overall unity of the field in both its aspects⁴ and the strong connections between the "old" law and neoclassical economics and the new. At the same time, however, Coase himself has pictured his landmark work on social cost as much more than merely another variant within a common neoclassical intellectual discourse on law that evolved steadily out of the earlier

2. See Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1995), 340–41.

3. In stressing the importance of Friedrich A. Hayek to the evolution of neoclassical approaches to products liability and to tort law, Hackney does link him to modern law and neoclassical economics in general and to the "old" law and neoclassical economics in particular. See Hackney, "Law and Neoclassical Economics," 284, note 42. Drawing on Ronald Coase's brief history of modern law and economics at the University of Chicago, Hackney notes Hayek's role in the establishment of a "Free Market Study" headed by Aaron Director at the University of Chicago Law School. Hackney describes this as one illustration of the same "institutional symbiosis between Hayek and the law and neoclassical economics movement" that he declares also was reflected in the instrumental role that Director and Frank Knight played in the later American publication of *The Road to Serfdom* by the University of Chicago Press. Having noted these early connections, however, Hackney never pursues developments in law and economics at Chicago from the close of the Second World War to the 1960 publication of Coase's "The Problem of Social Cost" or the possible relationship between those earlier developments and the evolution of later neoclassical analyses of tort law.

4. See, for example, Richard A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown and Company, 1992), 21–22; R. H. Coase, "Law and Economics at Chicago," *Journal of Law and Economics* 36 (1993): 239.

efforts of Frank Knight at Chicago. More specifically, he has portrayed his analysis of social cost as a major new departure within the shared intellectual and institutional setting of post-World War II law and neoclassical economics. He has related that this new departure initially seemed alien, and in fact wrong, to the conservative law and economics scholars at the University of Chicago law school, but that it effected a “paradigm shift” within the Chicago School law and economics movement itself after those scholars came to accept it and urged its development into the article that appeared as “The Problem of Social Cost.”⁵

Greater attention to the relationship between the “old” and “new” law and neoclassical economics might help us to evaluate more thoroughly various explanations offered for the rise of each of the two branches. How critical were the efforts associated with the “old” law and neoclassical economics in the 1950s and later, for example, as a foundation or buttress for the rise of the “new” law and economics after 1960? Analytically? Institutionally? To what extent, conversely, did the old and new law and neoclassical economics have separate intellectual, political, and institutional lineages that only serendipitously converged in the flowering of both branches after 1960?

If we see the two parts of neoclassical law and economics as closely intertwined and conclude that they arose simultaneously out of largely the same or closely similar intellectual and practical circumstances, how well does Hackney’s account, focusing specifically on products liability developments, explain the earlier rise and subsequent history of law and neoclassical economics within antitrust law, the most prominent component of “old” law and neoclassical economics? To what extent was the new Chicago turn in antitrust law that was well underway by the 1950s spurred or shaped by the very general twentieth-century changes within economic social science that Hackney describes?⁶

In this connection, how should we treat Aaron Director’s steadfastly repeated self-conception that he was not applying any new approach to economic science but an old one, a return to the principles and approaches articulated by the great liberal economists of the nineteenth century?⁷ Indeed, if the “old” and the “new” law and neoclassical economics are perceived as inextricably intertwined both practically and intellectually, can a persuasive story of origins leave out Director, Edward Levi, and various of their students such as Ward Bow-

5. See Coase, “Law and Economics at Chicago,” 248–51.

6. Further examination of this question might focus, for example, on the fundamental belief in the importance of marketplace competition and appropriate legal rules to govern it that Hackney finds central to the thought of both Hayek and Knight. See Hackney, “Law and Neoclassical Economics,” 286–87, 297–98, 301.

7. See Edmund W. Kitch, ed., “The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970,” *Journal of Law and Economics* 26 (1983): 163, 201.

man, John McGee, Lester Telser, and, most famously, Robert Bork, while giving center stage to Frank Knight and Friedrich A. Hayek?

The strength of the possible connection between the rise of each of the two general phases of modern law and neoclassical economics suggests that it might be useful to expand the depiction of the postwar political and cultural context offered in Hackney's article. Quoting from Carl Schorske,⁸ Hackney suggests that a political/cultural crisis in immediate post-World War II America created an intellectual environment very conducive to the reception of "the analytic turn" in science and an antistatist orientation in politics. Following Schorske, Hackney stresses the collapse of earlier New Deal and wartime historical and social optimism as a result of the shattering international and domestic developments of the early Cold War. These developments, Schorske and Hackney say, led to an intellectual "revolution of falling political expectations."⁹

But the "old" law and neoclassical economics, whose foundations largely were developed at Chicago in this same early Cold War period, at least in part strongly reflected some quite different changes in the postwar intellectual environment. For example, the foundations of the "old" law and economics rested heavily on heightened economic optimism and a related belief that extended government intervention, whatever its potential efficacy in general, was less *necessary* now than it earlier had been in more trying economic circumstances.¹⁰

In any event, contemporary reactions to the rise of the "old" law and neoclassical economics seem to call into question how hospitable postwar American culture may have been to the changes in scientific and political thought Hackney stresses, at least if the "old" as well as the "new" law and neoclassical economics is thought heavily to have reflected such changes. In the introduction to his article, Hackney declares that in post-World War II America the precepts of the analytic turn and of Hayek's *Road to Serfdom* "set certain scientific and ideological parameters that were far more congenial to a neoclassical than to an institutionalist perspective."¹¹ In the immediate postwar decades, however, the intellectual, political, and jurisprudential environment outside the classrooms of the University of Chicago proved to be anything but highly receptive to the general approach and specific analyses of the "old" law

8. Carl Schorske, *Fin-de-Siècle Vienna: Politics and Culture* (1961; reprint, New York: Vintage Books, 1981).

9. Hackney, "Law and Neoclassical Economics," 283, quoting Schorske, *Fin-de-Siècle Vienna*, xxiii.

10. See, e.g., Aaron Director and Edward H. Levi, "Law and the Future: Trade Regulation," *Northwestern University Law Review* 51 (1956): 281, 282-84. For an extended discussion of this landmark early expression of Chicago School antitrust analysis and its relation to both prior and later antitrust developments, see James May, "Redirecting the Future: *Law and the Future* and the Seeds of Change in Modern Antitrust Law," *Mississippi College Law Review* 17 (1996): 43.

11. Hackney, "Law and Neoclassical Economics," 278.

and neoclassical economics. Instead, academics, legislators, enforcement officials, and judges in those years all strongly continued to embrace approaches to antitrust law, at least, based quite heavily on institutional economic perspectives. The Chicago School of antitrust analysis attained substantial, but never complete, influence among scholars, politicians, government officials, and courts only much later.

Law and Economics in a Broader Time Frame

Future scholarly explorations of the overall nature and evolution of modern law and neoclassical economics might benefit not only from further examination of the connection between the “old” and “new” phases but also from extension of the time frame within which these modern developments are assessed. Additional scrutiny of the influence of science and politics on economic analysis in law *prior to* the ascendancy of institutional economics and legal realism might suggest additional illuminating intersections between social science and political orientation. Indeed, such an examination might make clear the earlier establishment of an ongoing, general interconnection that otherwise might be attributed too strongly to the rise of “the analytic turn” itself.¹² To put the matter another way, to what extent should the fact of some integral interrelationship “at the core” between science and politics in the economic analysis of law be seen as largely a new twentieth-century development? Might such a fundamental interconnection within modern law and economics more usefully be pictured as a new variation on a much older story?

12. There seem to be some strong parallels between major aspects of late nineteenth-century economic thought within law and the connections Hackney stresses among science, politics, and neoclassical economics in the mid- to late twentieth century. First, in both of these periods, invocations of economic principles and analyses in law strongly reflected the prevailing assumptions, methods, and general perspectives of contemporary social science. Second, the relationship Hackney (*ibid.*, 286–87) finds between politics, economics, and the importance of legal rules in Hayek’s work seems to echo substantially the classical economists’ belief that appropriate legal rules were crucial to the maintenance of the competitive free market system that they, too, thought to be fundamental, even if Hayek and modern neoclassical scholars would employ different standards for evaluating the legitimacy of particular legal rules than would earlier classical economic thinkers. Finally, the operation of political values that Hackney (*ibid.*, 300–303, 321) finds behind differing appropriations or applications of contemporary economic science today appears to be paralleled strongly by the differing appropriations or applications of general economic theory in late nineteenth- and early twentieth-century legal thought as a result of the differing political values and sympathies embraced by various legal analysts in that period. For an extended discussion of these and other aspects of the interrelationship of economic and political theory within law in the late nineteenth and early twentieth centuries, and a comparison of that pattern to modern law and economics, see James May, “Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918,” *Ohio State Law Journal* 50 (1989): 257, 258–309, 391–95.

If seen as a new configuration of an old interrelationship between science and politics in economic analysis within law, what might be gained by comparing at greater length, for example, the specifics of the interrelationship prevailing at the close of the nineteenth century and at the close of the twentieth, and what might the key components in such a comparison be? It is possible, for example, that a more detailed comparison might refine our thinking about the evolution of modern law and neoclassical economics by focusing greater attention on the extent to which the differences in the relationship between science and politics at these two moments can be attributed alternatively to broad changes in intellectual thought or to more immediate influences and constraints.¹³

Finally, the ongoing, larger exploration, to which Hackney creatively contributes here, might gain much through a closer consideration of the current state of various aspects of the modern law and economics project. For example, if major components of the "old" branch, such as Chicago School anti-trust analysis, have encountered substantially different intellectual or practical challenges than have neoclassical approaches to products liability issues, what primarily accounts for the differences? Might the comparison suggest anything about the essential similarity or dissimilarity of the types of analyses pursued in the two branches? What might it say about the changing mix of factors shaping the ongoing development and relative success of such diverse parts of law and neoclassical economics overall?

Hackney's article is a thought-provoking contribution to our better understanding of this large and important area of twentieth-century American legal history. His work undoubtedly will spur further illuminating explorations of this field and a better understanding not only of the issues he himself addresses but also of the numerous broader questions his article raises.

13. Illuminating comparison over time of the relationship of science and politics in economic analysis within law, of course, may well require some further clarification of the relationship between science and politics in economic analysis before the rise to prominence of institutional economics. Scholars continue to disagree substantially about the interrelationship of economic science and political belief in late nineteenth- and early twentieth-century America. Herbert Hovenkamp, for instance, has declared that late nineteenth-century substantive due process doctrine was "fundamentally about economic theory, and not merely about imperfections in the legislative process." See Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991), 182. Conversely, other scholars such as Michael Les Benedict have urged that constitutional law scrutiny of regulatory legislation in this period rested on a "libertarian rather than economic basis." See Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985): 293, 304. For a discussion of these differing views and an alternative interpretation suggesting a more integral interrelationship in law between classical economics and the libertarian ideals of political liberalism, see May, "Antitrust in the Formative Era," 269.