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# POSITIVISM AND THE SEPARATION OF LAW AND ECONOMICS

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## INTRODUCTION

The modern field of law and economics — that is, the application of economic analysis to legal subjects other than trade and business regulation — is now over thirty years old, but it remains controversial in the legal academy and, to a lesser extent, in the profession at large. Since its beginnings in the early 1960s, the economic approach has provoked substantial opposition and antagonism. The sources of this resistance, however, are a matter of dispute. Many economists and economically influenced lawyers attribute it to more traditional lawyers' reluctance to learn a new and unfamiliar set of concepts and techniques. Critics of the economic approach offer a variety of other explanations. Some are skeptical of the utility of abstract theoretical modeling in the social sciences,<sup>1</sup> others object to economics' central behavioral assumption of rational choice,<sup>2</sup> still others criticize economics' supposed libertarian politics and ideological allegiance to laissez-faire.<sup>3</sup> The explanation that has attracted the most attention by far is economics' commitment to the efficiency criterion: proponents of the economic approach tend to argue that more traditional lawyers have not paid enough attention to efficiency, and its detractors tend to argue that economics

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1. See, e.g., Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

2. See, e.g., Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

3. See, e.g., Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

inappropriately focuses on efficiency to the exclusion of other normative considerations.<sup>4</sup>

All these explanations, however, are too narrow. As with any conflict between rival disciplines, the underlying division between law and economics is methodological and cultural. The two fields use different rhetorics, different styles of discourse, different epistemologies, and different literary forms in developing and articulating their respective accounts of the world. Resistance to interdisciplinary exchange between lawyers and economists comes partly from the fact that neither group wishes to give up its own culture in favor of the other's.<sup>5</sup> It also comes, however, from the two sides' failure to understand each other's cultural practices in full context.

My thesis is that one of the foremost cultural differences between law and economics is economists' methodological commitment to positivism — the idea that it makes sense to distinguish between things as they are and things as they should be, between fact and value, between is and ought. While this distinction has a long tradition in Western thought, it has come under substantial attack in the twentieth century and today is regarded as highly controversial in the field of philosophy in which it originated and in most social sciences other than economics. Economists, however, are for the most part untouched by this controversy; they continue implicitly to adhere to positivism within their professional circles and, when the issue is raised explicitly, typically assert it to be a metaphysical truth. Within economic culture, it is an article of faith that fact and value can be distinguished and that one can talk about the former without talking about the latter.

Accordingly, when their policy recommendations are challenged on normative grounds — typically because the recommendations are based in substantial part on the goal of Pareto efficiency, and the challenger disputes the merit of this goal — economists have tended to defend their arguments by appealing to the positivist distinction. Even if the efficiency norm is controversial, this standard defense goes, economic analysis is still valid as a descriptive theory of human behavior. Hence, it will still help to predict what will happen if the policies under consideration are adopted. For example, in the area of federal agricultural policy, economists will point out that if government price supports for individual crops are cut, then prices will fall, output will rise, farmers will become poorer, and consumers and taxpayers will become

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4. See, e.g., *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980).

5. See James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1987).

wealthier. Furthermore, the net outcome will be a potential Pareto improvement, in that the total dollar amounts gained by consumers and taxpayers will exceed the dollar amount lost by farmers. All this is just a matter of objective fact, economists will say, and can be corroborated by referring to the empirical world. Whether or not the net efficiency gain from cutting farm supports is worth the distributional consequences is an entirely independent question, the answer to which depends on one's normative commitments. There is, after all, often a trade-off between efficiency and fair distribution, and economists do not necessarily expect everyone to like efficiency as much as they do. The proper resolution of this trade-off will have to depend on political, moral, and pragmatic arguments, in which some economists will wish to engage and some will not.<sup>6</sup> The underlying descriptive analysis, however, is an indispensable starting point for anyone who wishes to make an informed normative choice, for it is only through such analyses that we can discover the extent of the trade-off and begin to design policies that best address it. Indeed, as Milton Friedman argued in his classic essay on the subject, *The Methodology of Positive Economics*, a clear positive understanding of the situation often will help resolve normative disagreement.<sup>7</sup>

To a substantial extent, the critics of law and economics have been unmoved by this defense, and it is worth asking why. The beginning of an answer comes from recognizing that while positivism is uncontroversial in economic culture, it is highly controversial in legal culture — especially in late twentieth-century American legal culture. Furthermore, economists are not absolutely consistent in their methodological practices. In their official and quasi-official pronouncements, most economists maintain that proper scientific method requires a clear separation between positive and normative discourse and commonly defend this claim by citing Friedman's essay.<sup>8</sup> This is especially true for those econ-

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6. See, e.g., Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). For a classic defense of economic efficiency as a criterion for public policy, see Thomas C. Schelling, *Economic Reasoning and the Ethics of Policy*, PUB. INTEREST, Spring 1981, at 37. For a pragmatic argument limited to the field of law and economics, see Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

7. See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3 (1953).

8. Typical invocations of Friedman's methodological orthodoxy in the law and economics literature include Fred S. McChesney, *Positive Economics and All That*, 61 GEO. WASH. L. REV. 272 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991)); Paul H. Rubin, *Some Notes on Methodology in Law and Economics*, 7 RES. L. & ECON. 29 (1985). See also

omists trained in the Chicago school, who have been most influential in promoting the economic approach to law. In practice, however, both Chicago and non-Chicago economists often adopt a less stringent approach, mixing positive with normative discourse as their particular purposes require.<sup>9</sup>

This inconsistency between official methodology and actual practice remains workable within the discipline of economics. Indeed, there are good pragmatic reasons for economists to talk this way to each other, as I will explain; it allows them to do their work while communicating with reasonable clarity. When imported into the economic analysis of law, however, this manner of discourse can be confusing and offputting to noneconomists, as the reasons why positivism makes sense for economists in their own professional culture do not necessarily carry over into the legal setting. These reasons usually go unexplained, moreover, because for most economists they are background assumptions, tacitly understood rather than explicitly articulated. Instead, methodological arguments in law and economics are usually presented as self-evident metaphysical assertions, rather than accounts of a pragmatic stance. As a result, many lawyers regard economists as methodologically naïve at best, and incoherent at worst.<sup>10</sup> But what is really going on is a clash of cultures, as economists' accustomed ways of talking un-

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Richard A. Posner, *The Economic Approach to Law*, 53 TEXAS L. REV. 757, 768 (1975) ("It is a general, and in my opinion deplorable, characteristic of legal scholarship that normative analysis vastly preponderates over positive. Academic lawyers are in general happier preaching reform of the legal system than trying to understand how it operates. This is true of many lawyers having a bent for economics . . . and of those economists who view the legal system from the dizzy heights of theoretical welfare economics. The result of the preference for normative analysis is that our knowledge of the legal system is remarkably meager, incomplete, and unsystematic — a situation which, ironically, makes it very difficult to propose sound reforms of the system.").

9. As Friedman himself allowed:

Confusion between positive and normative economics is to some extent inevitable. The subject matter of economics is regarded by almost everyone as vitally important to himself and within the range of his own experience and competence; it is the source of continuous and extensive controversy and the occasion for frequent legislation. . . . Laymen and experts alike are inevitably tempted to shape positive conclusions to fit strongly held normative preconceptions and to reject positive conclusions if their normative implications — or what are said to be their normative implications — are unpalatable.

FRIEDMAN, *supra* note 7, at 3-4.

10. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86-150 (1987); J.M. Balkin, *Too Good To Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (reviewing WILLIAM M. LANDEŠ & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

wittingly feed into the long-standing controversies over positivism in law.

This culture clash stands in the way of open interdisciplinary exchange between economics and law. In order for scholars and professionals to understand the ideas of another discipline, they must understand the implicit context of these ideas, as well as their explicit text. In this regard, the exponents of the economic approach to law have been less successful in translating text than context. Most lawyers do not read the interdisciplinary literature in law and economics, after all, let alone the economic literature. They have little reason to know much about economic methodology, and they certainly lack any basis to appreciate its practical meaning for economists. As a result, the critics and proponents of economic analysis of law often just talk past each other, and few lawyers or economists have the ability to navigate through the fog.

The goal of this essay is to explain this problem and to translate the meaning of positivism between legal and economic cultures, in order to show economists and lawyers why much of the debate about the jurisprudential merits of law and economics misses the mark. My thesis is that it is positivism, and the way economic culture treats the positive-normative distinction, that is responsible for much of the gulf between law and economics — but that it is also positivism that makes economics so appealing to so many lawyers and legal scholars. For a positivist approach can be useful to lawyers as an instrument for pursuing many of their own professional ends.

More specifically, my view is that one's opinion on the worth of economic analysis to lawyers ultimately comes down to which side one takes on the merits of positivism in law. This accounts for this essay's title, which is intended to invoke and pay homage to H.L.A. Hart's classic essay, *Positivism and the Separation of Law and Morals*.<sup>11</sup> Hart's essay was part of a widely celebrated exchange in the 1958 volume of the *Harvard Law Review*, in which he defended his jurisprudential account of legal positivism against the criticisms of Lon Fuller, who argued that Hart's positivism failed to do justice to, and indeed threatened to undercut, the law's implicit moral underpinnings — what Fuller called the internal morality of law.<sup>12</sup> I want to argue that in this debate, law and economics effectively comes down on Hart's side, and its critics come down on the side of Fuller.

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11. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

12. See Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Let me be more precise about this argument, for it is a cultural rather than a philosophical one. In the fields of law, economics, and philosophy, the term "positivism" can refer to several distinct intellectual positions. One of these positions is classic legal positivism, which is a metaphysical theory about the concept of law. Traditional legal positivism maintains that what counts as law is a matter of social fact, and that law is conceptually separate from morality. The jurisprudential literature on legal positivism concerns itself with issues such as the particular social facts that give rise to law — for instance, does it arise out of the commands of the sovereign, out of some generally acknowledged rule of recognition, or elsewhere — and the extent to which the law can incorporate moral principles while retaining its independent authority and identity.<sup>13</sup> The Hart-Fuller debate is partly, though not entirely, about legal positivism in this narrow sense. A second position, sometimes called logical positivism, combines an ontological claim about language with an epistemological claim about the valid sources of human knowledge. Logical positivism maintains that linguistic statements are not meaningful unless they are either true a priori (that is, reducible to formal tautologies) or verifiable through empirical experience. Modern economic methodology, and Friedman's account of it in particular, is often said to be derived from the tenets of logical positivism.<sup>14</sup> A third, more limited position, overlapping with logical positivism and traceable ultimately to Hume, claims that is-statements simply belong to a different metaphysical category than ought-statements, so that the validity of one kind of statement is logically separate from the validity of the other. This last position is sometimes taken to imply moral subjectivism, and in my experience, it most closely reflects the informal meaning of positivism in everyday intellectual discourse in economics and in law.<sup>15</sup>

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Legal Pos.

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LOGICAL  
POS.  
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HUME/LOG  
POS.  
ES/DOUBT

13. See generally Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (D.M. Patterson ed., forthcoming 1996).

14. In addition, a distinctive aspect of Friedman's methodology is his reliance on falsificationism: the philosophical claim, set forth most prominently by Karl Popper, that the only legitimate way to test a scientific theory is to try to disprove it through empirical observations. On this view, if a particular theory withstands repeated attempts at disproof, it has been verified; it is this argument that leads Friedman to his controversial conclusion that the realism of a theory's assumptions is irrelevant to its usefulness. See MARK BLAUG, *THE METHODOLOGY OF ECONOMICS, OR HOW ECONOMISTS EXPLAIN* 83-111 (2d ed. 1992).

15. See, e.g., Leff, *supra* note 1, at 454-55 ("I will put the current situation as sharply and nastily as possible: there is today no way of 'proving' that napalming babies is bad except by asserting it (in a louder and louder voice), or by defining it as so, early in one's game, and then later slipping it through, in a whisper, as a conclusion.

everyone says  
is—but what  
is it men?

□

From a purely theoretical viewpoint, these various claims are conceptually distinct, and a person consistently might accept one while rejecting the others. From the cultural viewpoint, however, it is reasonable to group them together for purposes of discussion, for all interact in a common cultural matrix, in which rhetoric, ideology, professional identity, and scholarly priorities are jointly shaped and determined. The questions dividing lawyers and economists are ultimately not metaphysical but pragmatic. Their answers depend on the methodological stance that one chooses in order to pursue one's personal, professional, and moral ends.

Obviously, one cannot prove what "really" lies behind the resistance to law and economics, let alone that a single explanation will do. Instead, I intend in this essay to offer a new interpretation of the debate. Why do I think that differences over positivism are important? Primarily because mutual failures of understanding are usually the chief cause of miscommunication, and because the connections between legal and economic positivism are not widely understood by either economists or lawyers. Most economists and lawyers already understand that efficiency might be thought controversial, and are careful to disclose the extent to which they rely on it as a value; when they do rely on it, they often defend it explicitly. Similarly, most economists understand that lawyers may question the assumption of individual rationality; one even sees occasional debates over this assumption within the economics profession. Most economists, however, schooled as they are in Friedman's methodological catechism, do not understand that distinguishing fact from value might itself be thought controversial. Lawyers, in contrast, often do. This difference helps explain why resistance to the economic approach to law comes from a spectrum diverse enough to include adherents to critical legal studies, neorepublicans, communitarians, liberals such as Ronald Dworkin, humanists such as James Boyd White, and contemporary critics of the legal profession such as Anthony Kronman and Mary Ann Glendon, who urge a revival of traditional professional and elite values. These writers may disagree substantially among themselves, but all of them reject narrow instrumental reasoning; and all share a desire to articulate and defend a moral vision of the law.

I am not the first in the literature on law and economics to highlight the significance of positivism for the relationship between the two disciplines. Herbert Hovenkamp also has recognized that lawyers and economists look at positivism differently and that this has consequence

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Now this is a fact of modern intellectual life so well and painfully known as to be one of the few which is simultaneously horrifying and banal.").

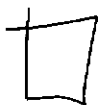
for their interactions.<sup>16</sup> Hovenkamp focuses, however, on the differences between economic and legal positivism rather than on their similarities, and in my view mischaracterizes those differences. He argues that positivism in economics and positivism in law are essentially different ideas that reflect essentially different professional concerns — in his view, prediction in economics and explanation in law. Furthermore, he conflates the issue of positivism with the debate over economic efficiency. Economic positivism, in Hovenkamp's view, ultimately and mistakenly comes down to a commitment to efficiency as an exclusive normative objective, and misunderstanding comes when economists, and lawyers who are fellow travelers, unthinkingly apply this commitment to law. His conclusion, accordingly, is that legal decisionmakers should feel free to reject efficiency and to use economic analysis in the service of a broader set of normative concerns — for example, classical utilitarianism or Rawlsian liberalism.

My thesis is related to Hovenkamp's in one respect: I agree that economists and lawyers get into trouble applying ordinary economic methodology to law without understanding its contextual presuppositions. But in my view, the difficulty goes deeper than the efficiency norm. It is not just that lawyers and economists have different normative commitments. It is rather that they have different ideas of what it means to have a normative commitment, for the objections to law and economics go to the merits of trying to separate fact from value at all. Introducing additional or competing norms such as utilitarianism or Rawlsian liberalism does not address this more fundamental question.

Ultimately, legal positivism and economic positivism are motivated by similar concerns -- the need to separate issues that are a matter of professional expertise from issues that are not. This is a pragmatic problem, not a metaphysical or epistemological one; it is faced by all professions as they seek to define their mission. The way that economists divide up the world into these two categories, however, is not necessarily suitable for lawyers. It might well be suitable in many circumstances, but that conclusion depends on the task at hand and whether economists or lawyers fairly can claim the expertise to perform it. I do not think the answer turns on the difference between explanation and prediction, however, as Hovenkamp suggests. Lawyers are often interested in prediction — for example, when they consider new legal arrangements — and economists are often interested in explanation. Whether one is interested in predicting the future or in explaining the

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16. See Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815 (1990).





past and present, however, similar pragmatic questions arise. Is it useful to suspend judgment on normative issues to get a clearer view of descriptive ones? Is it useful to get one's descriptive account of the world straight before engaging in normative argument? Will such a separation serve consequentialist goals, such as efficiency, utility, or distributive justice? Will it serve noninstrumental virtues, such as honesty and sincerity? The economic analysis of law, and economic culture in general, says yes, but this answer is not obvious. For economists to make the case for positivism to lawyers, they must defend explicitly its pragmatic merits.

### I. WHY (MOST) ECONOMISTS ARE POSITIVISTS

The distinction between positive economics and normative economics is so entrenched in modern economic culture that virtually every introductory text in the field emphasizes the distinction in its opening chapters. Lipsey, Steiner, Purvis, and Courant's explanation is characteristic:

The success of modern science rests partly on the ability of scientists to separate their views on *what does happen* from their views on *what they would like to happen*. . . .

. . . Distinguishing what *is* true from what we would *like* to be true depends on recognizing the difference between positive and normative statements.

. . . *Disagreements over positive statements are appropriately handled by an appeal to the facts.*

. . . *Disagreements over normative statements cannot be handled merely by an appeal to facts.* . . .

. . . It can only obscure the truth, however, if we let our views on what we would like to be bias our investigations of what actually is. It is for this reason that the separation of positive from normative statements is one of the foundation stones of science and that scientific inquiry, as it is normally understood, is usually confined to positive questions.<sup>17</sup>

Similarly, Paul Samuelson writes:

For the most part in science, scholars discuss what *is* and what will be under this or that situation. The task of *positive description* is kept as free as is humanly possible from the taint of wishful thinking and ethical concern about what ought to be. Why? Because scientists are cold-blooded robots? No. This is so because experience shows that a more ac-

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17. RICHARD G. LIPSEY ET AL., *ECONOMICS* 14, 16 (9th ed. 1990) (emphasis in original).

curate job of positive description will be achieved if one *tries* to be objective.<sup>18</sup>

As these quotations illustrate, positive economics denotes the side of the discipline that, modeling itself after the natural sciences, focuses on describing and explaining the external world. Positive economics seeks to explain why economic actors behave as they do and to predict how they will act in the future. For individual behavior, positive economics essentially comes down to the model of constrained maximization — utility maximization in the theory of consumer choice, and profit maximization in the neoclassical theory of the firm. For the behavior of social groups, it comes down to models of equilibrium among maximizing

but need not  
 (see  
 Mises)  
 yet can still  
 be "positive"

Mises too.

18. PAUL A. SAMUELSON, *ECONOMICS* 590-91 (11th ed. 1980) (emphasis in original); see also WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 15 (4th ed. 1988) ("Finally, many disputes among economists are not scientific disputes at all. . . . While economists can contribute the best theoretical and factual knowledge there is on a particular issue, the final decision on policy questions often rests either on information that is not currently available or on tastes and ethical opinions about which people differ (the things we call 'value judgments'), or on both."); STANLEY FISCHER ET AL., *INTRODUCTION TO MICROECONOMICS* 4-7 (2d ed. 1988) (writing in a subsection entitled "Is Economics a Science?"); LEE S. FRIEDMAN, *MICROECONOMIC POLICY ANALYSIS* 11-12 (1984) (stating that positive questions depend on facts while normative questions depend on discretionary value judgments); J.P. GOULD & C.E. FERGUSON, *MICROECONOMIC THEORY* 3 (5th ed. 1980) ("The business of an economist is a positive, not a normative, one. That is, given a social objective, the economist can analyze the problem and suggest the most efficient means by which to attain the desired end."); JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 14 (2d ed. 1980) ("Given the social objective aimed at (with which they might in fact personally disagree), scientific economists can use their knowledge of reality to analyze the problem and suggest efficient means for attaining the desired end. This book will touch upon many policy issues, but always emphasizing the positive point of view."); DONALD N. McCLOSKEY, *THE APPLIED THEORY OF PRICE* 2 (1982) ("The disagreements that remain about markets often turn on disagreements about the moral desirability of some event, not its occurrence. Economists can agree on 'positive' economics (i.e., what is), yet disagree on 'normative' economics (i.e., what should be)."); WALTER NICHOLSON, *MICROECONOMIC THEORY* 11 (3d ed. 1985) ("A final feature central to most economic models is the attempt to differentiate carefully between 'positive' and 'normative' questions. . . . Although this book generally will avoid philosophical investigations of such difficult issues, it does take a rather definite position by adopting a primarily positive orientation."); ANDREW R. SCHOTTER, *MICROECONOMICS: A MODERN APPROACH* 4 (1994) (distinguishing between positive and normative statements in economics and stating that only the latter are "objective and verifiable"); and, of course, the master himself, MILTON FRIEDMAN, *PRICE THEORY* 7 (2d ed. 1976) ("Economics is sometimes divided into two parts: positive economics and normative economics. The former deals with how the economic problem *is* solved; the latter deals with how the economic problem *should be* solved. For example, the effects of price or rent control on the distribution of income are problems of positive economics. On the other hand, the desirability of these effects on income distribution is a problem of normative economics. This course deals solely with positive economics.") (emphasis in original).

individuals.<sup>19</sup> Positive law and economics is no exception to this general approach; it sees law merely as a set of constraints within which individual citizens maximize.

The Hand formula for measuring negligence offers a familiar example of positive law and economics.<sup>20</sup> If tortfeasors are held liable for the damages that result when they take less than the legally mandated standard of care, and if they are rational economic actors, then individual maximization implies that they will take precautions when and only when the incremental value of doing so, measured by the expected reduction in accident costs — denoted in Judge Hand's formula by the algebraic quantity  $PL$  — exceeds the incremental cost of taking care — denoted in his formula by  $B$ . Accordingly, if the legal standard of care is set so that  $B=PL$ , then rational economic actors will choose to meet the standard exactly. This will, as a consequence, minimize the expected sum of accident costs and accident prevention costs, measured over society as a whole — putting aside the costs of administration and insurance, and the fact that victims as well as injurers can take precautions.<sup>21</sup>

Normative economics, conversely, denotes the side of the discipline that evaluates behavior and recommends policy reforms. The criteria of evaluation vary, but there is general agreement among economists on basic normative axioms. One of these might be called *subjective utilitarianism*. This view holds that individuals are ordinarily the best — and in extreme formulations, the only — judges of what is in their own interests. Another might be called *normative individualism*. This axiom posits that social welfare consists of nothing more than an aggregation of individual interests. The relative weighting of interests in such an aggregation may be open to discussion, depending on the importance one attaches to distributional equity, but the reducibility of the public interest to private ones is not.

These basic principles are sometimes defended in utilitarian terms and sometimes in libertarian terms. They lead to the efficiency criterion in one form or another, though there are arguments within economics over which variant of the criterion is proper and over whether efficiency should be regarded as an exclusive goal, or simply as one of several to

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19. See, e.g., GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 3-14 (1976).

20. See *United States v. Cartoll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). For a fuller account of the positive explanation in the text, see RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* 1-9 (1982)."

21. For an analysis that takes these complications into account, see Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

be balanced against each other.<sup>22</sup> Again, the Hand formula provides an apt illustration. If negligence is measured according to a cost-benefit test, then potential tortfeasors and victims will be induced to act efficiently when choosing precautions. This provides an argument for negligence as opposed to strict liability — or as opposed to no liability — as well as an argument for measuring negligence by Hand's cost-benefit formula instead of by noneconomic criteria such as tradition or custom.<sup>23</sup>

Why is it important to bifurcate the field of study into normative and positive analyses? Within economic culture, it generally is accepted that one must distinguish between "is" and "ought" in order to have any scientific inquiry at all.<sup>24</sup> Many economists would follow the logical positivists in saying that this is required on philosophical grounds. A majority probably would endorse the proposition that fact and value are fundamentally incommensurable. Both these positions are even more the conventional wisdom in law and economics.

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A. *What's Wrong with Positivism in Economics*

Despite positivism's strong hold on economic culture, however, the idea that one can distinguish strictly between positive and normative discourse in either the metaphysical or epistemological sense is today widely rejected in the other social sciences and in philosophical circles.<sup>25</sup> The reason is that such a strong distinction does not adequately take account of the relationship between observation and observer. In order for any empirical observation and description to be possible, one first must choose both a vantage point and an object on which to focus. This initial choice can be either an accident or an act of will, but it is not itself the product of observation or description. Later descriptions can feed back and lead to an adjustment of one's vantage point or a change in focus, but the feedback does not eliminate the influence of the original choice. The resulting adjustment process, furthermore, may make it difficult if not impossible to consider alternative viewpoints.

Confusing  
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22. Economists who identify with the Chicago school tend to endorse efficiency as an exclusive goal, and those who do not tend to endorse efficiency in combination with other goals, most commonly distributional equity. Economists who emphasize liberty over utility tend to favor the criterion of Pareto superiority, which requires that those who gain from efficient behavior compensate the losers; economists who emphasize utility over liberty tend to favor the Kaldor-Hicks criterion, which holds it sufficient that the gainers gain more than the losers lose.

23. See POSNER, *supra* note 20.

24. See, e.g., sources cited *supra* notes 17-18.

25. See generally ROGER TRIGG, UNDERSTANDING SOCIAL SCIENCE: A PHILOSOPHICAL INTRODUCTION TO THE SOCIAL SCIENCES 21-40 (1985).

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On this account, one's moral <sup>or a priori</sup> vision of the world necessarily will shape the categories one chooses to describe it and in turn will be shaped by those descriptive categories. This interplay between description and evaluation is illustrated by the way we use the word "norm" in ordinary language. "Norm" can be used in the descriptive sense, to refer to what is common or average, but it also has evaluative overtones, referring to what is proper. Because of these dual meanings, and because we have moral views about such things as conformity and diversity, it is hard to prevent one sense of the word from coloring our use of it in the other sense.

It is easy to find examples of this phenomenon in economic discourse. For instance, neoclassical economics explains social behavior as an equilibrium among maximizing individuals. Why focus on individuals as the fundamental descriptive units, instead of groups or classes, as orthodox Marxist economics does? One has to start somewhere, of course; atomistic explanations are powerful and tractable, but they are not wholly insulated from normative influence. Methodological reductionism is a model, not a metaphysical truth, and, like all models, aesthetic and pragmatic considerations influence the decision to use it. One such consideration, an important one, is consistency; another is simplicity. If one is committed to normative individualism, as most economists are, and thinks that individual decisions are of basic normative significance while group decisions are not, as most economists do, then it will seem both consistent and simpler to focus on individual decisions for descriptive purposes. Conversely, if one spends the bulk of one's time describing and investigating the macroscopic consequences of individual maximization, as most economists do in their daily professional lives, one is likelier to come to feel that individual choices should be given normative weight. To the extent there is such an interplay between modeling and aesthetics, economists do not escape taking a position on values by confining their attention to positive description.

This epistemic objection to positivism is a general one, and could be made about any discipline. The culture of economics, however, conflates normative and positive in a number of special ways. Foremost among these is that economics, like other social sciences, studies a set of problems about which people have intense ethical and political feelings. There was a time when this was true of the natural sciences too. People cared intensely and considered it of deep moral significance whether the sun revolved around the earth or the other way around. The normative overtones of natural science descriptions have subsided considerably, though not entirely — as continued debates over "creation

science" illustrate. The normative overtones of economic descriptions, in contrast, remain vital.

Second, and related, economics descends historically from political economy, which began as a branch of moral philosophy, and employs a language and rhetoric that in part were developed for purposes of moral reasoning. It is not surprising, then, that many technical economic terms have normative connotations in ordinary language. Among such value-laden terms are "equilibrium," "perfect competition," "utility," and "efficiency." "Equilibrium," to take just one nonobvious example, has a technical meaning in economic theory, one drawn from the physical sciences; it means a state of affairs that tends to persist or to reinforce itself. Equilibria thus can be inefficient as well as efficient, as all welfare economists know. In ordinary English usage, however, the word "equilibrium" has come to connote a natural and balanced state of rest.<sup>26</sup> It is not usual to use it to describe getting stuck in a rut or being sucked into a whirlpool, even though those things are equilibria in the technical sense. For this reason, students of economics — and teachers as well — are more likely to understand and remember the arguments that conclude that equilibria are efficient than the ones that identify when they are not. I can attest from personal experience as a teacher of economics, in fact, that a fraction of every class will regularly have difficulty even accepting that it is possible for an equilibrium to be inefficient. For such terms, their intuitive appeal in technical discourse draws parasitically on their ordinary language meaning.

Third, economists are methodologically committed to abstraction in theoretical modeling. Mathematical modeling has served the discipline well by allowing both theoretical and empirical arguments to be put forward with greater clarity, to be checked for error more reliably, and to be analogized and generalized more easily. In practice, however, purely abstract models are difficult to learn and remember, even for those with substantial experience in using them. As a result, it is often necessary to simplify and to "motivate" such models with particular illustrative examples, presented in the form of a narrative. Accordingly, in economic seminars, lectures, and articles, it is customary for conversations to proceed in concert on two levels — a formal and often mathematical level, focusing on the details of the abstract model, and an informal and intuitive level, focusing on examples, or on what economists colloquially refer to as the "story."<sup>27</sup> The particular examples and the

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26. Perhaps, ironically enough, this is because of the normative overtones of its historical use in the natural sciences over the last two centuries.

27. See generally DONALD N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985).

rhetorical aspects of the narrative, being chosen with the goal of persuasion, necessarily will reflect the individual preferences and normative commitments of both the modeler and the audience. This is especially the case when the examples used are drawn from introspection.<sup>28</sup>

The model of utility maximization presents a good example of this phenomenon. Most mathematically trained economists view utility maximization as an abstraction and doubt that utility is measurable by any direct observation. Indeed, in modern treatments of economic theory, the concept of utility typically is represented in the form of a mathematical function with certain formal topological properties like continuity, convexity, and transitivity.<sup>29</sup> This terminology poses no problem for mathematical economists who have good intuitions regarding the implications of topological mappings. For those without the special background necessary to appreciate the aesthetics of this way of looking at the matter, however — and this includes not just noneconomists but most applied economists as well — some additional explanation is needed. Various explanations are available for this purpose, depending on the sophistication of the audience and the specific focus of the model. In the field of law and economics, for instance, it is common to simplify things by equating utility with money; most audiences will find this idea intuitive and no theoretical generality is lost so long as considerations of risk allocation are not at issue. This simplification, however, sends an obvious, though implicit, normative message: it is normal — and hence appropriate — for people to pursue monetary wealth to the exclusion of other goals. This is not the only story that can be told about individual consumer behavior, of course. An alternative though more complicated account would incorporate what introductory textbooks call diminishing marginal utility and what mathematical economists call convexity. This latter narrative will invoke images of satiation and boredom, and will send a rather different normative message: that more money does not always buy more happiness.

Fourth, economics' central normative concept — efficiency — is a peculiar blend of the positive and the normative. Indeed, there is substantial inconsistency in the literature in this regard, with some writers classifying efficiency analysis as part of positive economics and others

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28. Cf. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (arguing that the apparent precision of mathematical models misleads those who use them into believing that all relevant considerations have been included).

29. See, e.g., E. MALINVAUD, LECTURES ON MICROECONOMIC THEORY 12-42 (A. Silvey trans., North-Holland Publishing Co. 1972) (1969); HAL R. VARIAN, MICROECONOMIC ANALYSIS 111-70 (2d ed. 1984).

categorizing it as normative economics.<sup>30</sup> This inconsistency has generated some confusion, but it is fair to say that both usages have some basis. In one sense, to say that a policy or rule is efficient is to make a complex descriptive statement. It means that either (a) some people gain from it in their own sights and no one loses from it in their own sights, or (b) some people gain from it, some people lose, and that the cumulated gains of the winners, measured by the amount of money one could take away from them and leave their situation unimproved on balance, exceeds the cumulated losses of the losers, measured by the amount of money one would have to give to them in order to compensate them for the loss. Because all of the elements of these compound statements are descriptive, the compound statement about efficiency is descriptive.

This is, I take it, the position of the economists who regard efficiency as a positive issue. Efficiency seems a descriptive concept to these economists because they have a well-defined algorithm for checking its presence that is elaborate enough to be interesting as a basis for professional discussion. Compare, for example, the algorithm for checking whether a mathematical proof is valid — it is also well-defined, but still complicated and uncertain enough in its application for mathematicians to have interesting arguments over it.

In full context, however, while statements about efficiency imply such compound descriptive statements, they are not equivalent to them. This is because in economic discourse the statement "X is efficient" is often — though not always — made in an interpretative context in which it is mutually understood that the speaker and listeners subscribe to efficiency as a normative goal and that this goal is relevant to the subject being discussed. In such a context, to say something is efficient also implies the statement that it ought to be done, absent some countervailing reason. By way of comparison, there are various accounts of distributional equity that can be checked by similarly well-defined and interesting algorithms — for instance, John Rawls's maximin rule.<sup>31</sup> But this hardly makes Rawls's theory a positive one under ordinary interpretive circumstances, nor does it make discussions of distributional equity into positive discourse.

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30. See, e.g., GOULD & FERGUSON, *supra* note 18 (presenting efficiency as part of positive economics); NICHOLSON, *supra* note 18 (presenting efficiency as part of normative economics). For discussions of this inconsistency, see BLAUG, *supra* note 14, at 112-34; Hovenkamp, *supra* note 16, at 822-26.

31. See John Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141 (1974).



Another way of saying this is that efficiency is what some philosophers call a “thick” or “blend” concept. It denotes something that is good, but it is a specific sort of good, not an all-purpose one. This makes it appear simultaneously descriptive, because of the specificity, and evaluative, because of the denotation of goodness.<sup>32</sup> Because of the background interpretive context of most economic discussions, therefore, I do not think that the concept of efficiency can be described fairly as a purely positive one in ordinary discourse.<sup>33</sup>

Those who claim that efficiency is part of positive economics, however, are right in one respect: as with any blend concept, the evaluative aspects of efficiency do depend on description. The manner in which efficiency is regarded as good is contingent, not absolute; procedural, not substantive. What is efficient depends on the empirical configuration of individual tastes and preferences, and changes as those preferences change. Another way of saying this is that efficiency as a normative concept is based on means and not ends. We speak of processes being efficient: an efficient path from point A to point B, an efficient diet for losing weight, or an efficient management structure. It would not be consistent with the usual meaning of the word, however, for us to describe an end goal as efficient. We could not say whether it is efficient to go to point B in the first place, except as a means to get somewhere else such as point C; and we could not say whether it is efficient to lose weight, except as a means to improve one’s health, budget, or social life.

Since efficiency only requires us to evaluate means, it allows us to engage in — or to assist — normative analysis without subscribing to the ends we pursue or even committing to an opinion of whether those ends are good ones. In introducing economics to law students, for instance, I use the hypothetical example of a pious monk whose sole interest lies in increasing the glory of God. This can be done in various

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32. For an explanation of this concept, with an emphasis on legal applications, see Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994). Feldman, who maintains that most legal categories depend on such blend concepts, offers several examples, including “rude” (carrying a negative evaluation, though not in all circumstances), “loyal” (carrying a positive evaluation, though not in all circumstances), and “negligent” (carrying a negative evaluation in all the contexts that lawyers care about).

33. To be fair, those economists who describe efficiency analysis as positive economics are not wrong in principle. Instead, they are simply insensitive to interpretation and to culture, and have failed to realize that the context they are thinking of is not the usual one. It is possible to discuss efficiency from an external perspective; some critics of law and economics do it regularly. If economists wish to talk about efficiency in a nonstandard way, they may be able to, but will have to extricate themselves from an evaluative context and make clear that they are engaging in specialized discourse.

ways, including prayer, meditation, and good works, but since there are only so many hours in the day, and since the monk must spend a certain amount of time eating and sleeping in order to remain alive, it is necessary to make choices about how much time to spend doing what. The monk's problem of allocating scarce time, I suggest to my students, may not be formally different from the problem faced by a selfish yuppie who must allocate his lavish but finite monetary income among various material goods.<sup>34</sup> Conversely, efficiency easily can be put in the service of affirmatively evil ends. It would not stretch the usual meaning of the word efficiency at all to describe Eichmann's managerial arrangements for the concentration camps under his supervision as an efficient approach to the Nazi program of genocide. In this usual sense, efficiency can appear to be value-free, because whether it is desirable depends upon whether the ends it serves are desirable.

For all these reasons, most economists mix normative and positive discourse with some regularity. The official methodology is probably impossible to follow strictly as a psychological matter, even if it were epistemologically coherent. As a result, normative rhetoric in economics is much more important and frequent than official methodology would hold it to be.

#### B. *What's Right with Positivism in Economics*

Does all this mean that the introductory textbooks are wrong in trying to distinguish positive economic issues from normative ones, or that economists' ordinary discourse is incoherent? It does not, because within economics, the positive-normative distinction is pragmatically useful. It helps economists to separate out professional arguments, which get classified as positive, from extraprofessional arguments, which get classified as normative. The distinction helps to guide the direction of professional efforts and to promote the development of expertise within the discipline. Given the common purposes and culture of the economics community, this can be done with reasonable consistency — just as the legal community manages largely to agree on the practical boundaries of formal legal categories such as consideration and duress despite the overlap among and tension between those categories at a theoretical level.

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34. On the other hand, the example is an intentionally subversive one, for it encourages students to consider, specifically, whether this is really what we mean by piety, and generally, whether there are important values that cannot be captured fairly by the deliberate pursuit of an end goal. In this regard, see *infra* Part IV.

The reason why it is useful to separate out professional from extraprofessional discourse is that there are and always have been substantial normative disagreements among economists over the issues of redistribution, desert, and the relative importance of liberty and economic welfare. Like any other social grouping, economists display a range of opinion on these issues; between the Chicago and non-Chicago camps the range is particularly wide. The range of opinions was wider still when Friedman wrote his classic essay, for at that time substantial numbers of economists were socialists and the idea of running a centrally planned economy on market principles — what is sometimes called Lerner–Lange socialism — was taken quite seriously in the economic mainstream.<sup>35</sup>

As an empirical matter, these differences in economists' views on redistribution are imperfectly correlated with their views on other matters such as whether most markets are workably competitive, whether centralized or decentralized institutions are relatively more efficacious in allocating resources, or whether equilibrium or disequilibrium is the more useful concept when describing the behavior of the macroeconomy. Quite often economists can agree on these issues even when they disagree on the merits of redistribution; certainly Friedman believed this to be the case.<sup>36</sup>

As a rule, however, contemporary economists for the most part do not think they have anything particularly useful to say qua economists on the merits of redistribution. They do think, however, that they have useful things to say about efficiency. Moreover, economists may be able to agree on predictions regarding the efficiency of a proposed policy even when they do not agree on predictions regarding its distributional incidence. The two effects can be measured with different theoretical tools: efficiency calculations often can be obtained by an arbitrage or a marginalist argument while distributional calculations cannot. Under some circumstances, formalized in what economists call the second theorem of welfare economics, efficiency and distributional issues can even be segregated without any loss of theoretical generality.<sup>37</sup>

35. See OSKAR LANGE & FRED M. TAYLOR, *ON THE ECONOMIC THEORY OF SOCIALISM* (Benjamin E. Lippincott ed., McGraw-Hill Book Co. 1964) (1938); ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* (1944); Tibor Scitovsky, *Lerner's Contribution to Economics*, 22 *J. ECON. LITERATURE* 1547 (1984).

36. See FRIEDMAN, *supra* note 7, at 5-6; sources cited *supra* notes 17-18; see also J.R. Kearl et al., *A Confusion of Economists?*, *AM. ECON. REV. (PAPERS & PROC.)*, May 1979, at 28 (presenting results of opinion surveys demonstrating that economists agree on a variety of applied policy issues).

37. See A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 *HARV. L. REV.* 1655,

The desire to keep disagreement over politics and policy from disrupting analytical progress is not new, as an example drawn from the history of economic thought will illustrate. A similar problem arose in the nineteenth century out of the political and philosophical controversies over classical utilitarianism and its implications for the distribution of wealth. While nineteenth-century utilitarians such as Bentham and Edgeworth argued that one reasonably could compare utility across different individuals, the political consequences of doing so were potentially radical. Diminishing marginal utility implied that the greatest good for the greatest number might be achieved best by a leveling of incomes, since a dollar taken from an aristocrat would cost less in utility terms than the same dollar would provide to a common laborer.<sup>38</sup> Modern utility theory, as developed by Pareto in the early decades of this century, avoids such controversies by refusing to measure utility except in subjective terms. On the modern view, willingness to pay is a simple observable fact; it can be made empirically measurable and hence objective. Utility is a subjective value, in contrast, and is not regarded as empirically measurable; so there is no interpersonally valid way to distinguish between the utilities of the aristocrat and the laborer — or, indeed, between those of Eichmann and the pious monk. This historical example shows, accordingly, how positivism has long helped to establish and maintain economics as a separate discipline, by keeping political controversies outside the field of professional discourse rather than inside.<sup>39</sup>

Furthermore, the role of positivism in professional economic discourse is not strictly defensive, as it also helps keep economists focused on their discipline's fundamental contributions and insights. The fact-value distinction has figured prominently in economic culture for two centuries in large part because it resonates with the central concept of scarcity. Economics has been derided as the "dismal science," after all, ever since Thomas Malthus argued that mass famine was an inevitable

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1667-69 (1974); see also Kenneth Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, in PUBLIC EXPENDITURES AND POLICY ANALYSIS 59 (Robert H. Haveman & Julius Margolis eds., 2d ed. 1977).

38. See Ross Harrison, *Jeremy Bentham*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 226 (John Eatwell et al. eds., 1987); Peter Newman, *Francis Ysidro Edgeworth*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS, *supra*, at 84; cf. A.C. Pigou, THE ECONOMICS OF WELFARE 89 (1920) ("[T]he old law of diminishing utility thus leads securely to the proposition: Any cause which increases the absolute share of real income in the hands of the poor, provided that it does not lead to a contraction in the size of the national dividend . . . will in general, increase economic welfare.").

39. See generally Robert Cooter & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LITERATURE 507 (1984).

consequence of the fact that population grew exponentially while food production could grow only at a constant linear rate.<sup>40</sup> Within the discipline, such a dispassionate if not dismal attitude has come to be thought essential to arriving at a realistic account of the world — else wishes based on our unlimited wants might prevent us from making best use of the scarce resources we are lucky enough to have at our disposal and lead us to disaster. Drawing a strong distinction between “is” and “ought” helps reinforce this central lesson.

Still, economists feel as strongly about distribution and liberty as anyone else. Considering that they spend much of their professional time analyzing issues of public policy and institutional organization about which most ordinary folk have intense moral feelings, it is not surprising that they sometimes find it difficult to keep such concerns from creeping into their professional discourse. For this reason, it is highly useful for them to have a convention that enables them to clarify whether their disagreements are primarily caused by differences in their moral opinions, or whether they reflect professional disagreement over technical issues. Having the issue of redistribution up for grabs in ordinary professional discourse would create more heat than light.

So, to make the most of professional discourse and argument, economic culture has developed a distinctive strategy: focus primarily on individual maximization, group equilibrium, and efficiency issues, and defer controversial distributional issues to someone else — the legislature, perhaps, or the citizenry at large. Economists of the Chicago school follow this strategy by confining their economic policy recommendations to what is efficient. Outside the Chicago school, the standard approach is to report the trade-off between equity and efficiency and let the polity decide what to do. Both versions of the strategy, though, are essentially ways of diverting controversy outside the field of economics. Indeed, modern welfare economics implicitly suggests, by analogizing the choice between equity and efficiency to consumer choice among goods, that the efficiency–equity trade-off cannot be resolved objectively.<sup>41</sup> The strategy has been highly successful as a matter of professional harmony, if nothing else; economists are more unified in their methodology, if not in their personal politics, than any other group of social scientists. ✓

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40. See ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* 75-104 (6th ed. 1986) (titled chapter 4 “The Gloomy Presentiments of Parson Malthus and David Ricardo”).

41. See ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975); A. Burk [Abram Bergson], *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310 (1938).

Ultimately, the positive-normative distinction separates controversies in which economists have enough common ground to assert professional expertise from those in which they do not. As such, the distinction makes sense for the same reasons that professional roles make sense. In a field that stresses opportunity cost and comparative advantage, there is strong pressure to leave redistributive debates to other persons and fora who are likely to be no worse at such debates, to conserve professional resources for problems where they will make a difference. As Robert Lucas, the leading macroeconomist of the modern Chicago school, has remarked in a published interview:

*Interviewer:* Do you think that the distinction between the positive and the normative side of economics is useful?

*Lucas:* Yeah. It's an essential distinction [pause]. We've been arguing about that around here a lot lately. There's a feeling, and I guess I've helped encourage it, among a lot of younger people that the politics and the political role that economists play ha[ve] had a very bad effect on macroeconomics. A lot of older economists seem to me to be solely concerned with politics, as opposed to scientific matters. People are asking the wrong questions; they are taking questions from Washington, rather than thinking about what's puzzling them or taking more scientific points of view.<sup>42</sup>

Given their common purposes, the majority of economists can often agree on which problems are worth their professional attention. This explains why economists, and lawyers who have studied economics, can think of efficiency as a positive issue despite its normative aspects. What they really mean is: economists have something to say about efficiency as a matter of professional expertise.

Of course, to the extent that positivism serves the purpose of defining professional role, it should also be useful to lawyers. They have professional expertise of their own: they can read cases and separate holdings from dicta; they can interpret statutes; and the like. Accordingly, they should also find it useful to distinguish professional from extraprofessional issues. Why then, should economic positivism be so problematic for lawyers?

## II. WHY (MANY) LAWYERS AREN'T POSITIVISTS

It is an understatement to say that positivism also looms large in legal culture. In American jurisprudence in particular, it has been a cen-

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42. ARJO KLAMER, CONVERSATIONS WITH ECONOMISTS 52 (1983) (emphasis omitted). This book, which presents interviews with a number of leading modern macroeconomists, offers an excellent and rare window on the methodological culture of professional economics.

tral theme since Holmes articulated his famous prediction theory of law.<sup>43</sup> The influence of legal positivism, however, derives only in part from the metaphysical and epistemological questions it addresses. There is also an important sociological component. Lawyers' traditional social role, like economists', depends upon the existence of a distinctive and specialized form of discourse that only they know how to engage in; this is what allows them to claim expertise and professional status. Over the history of the legal profession, various justifications have been put forward for this claim. At certain times in the history of the legal profession, the metaphysical existence of an objective thing called "the law" was asserted to provide such a justification, as in accounts given by proponents of Legal Science such as Langdell.<sup>44</sup> At other times, it was sufficient to argue that there were special and distinctive methods of reasoning, as in Karl Llewellyn's later writings glorifying lawyers' "situation sense," and in the 1950s legal process materials of Hart and Sacks.<sup>45</sup> Legal positivism, by separating law from morality, gives lawyers something to do that not just anyone can do.

But lawyers' views of positivism also reflect a distinctive political concern, one that economists do not share. Law is coercive; it demands obedience and confers authority. When human law was thought to originate in divine commands, its authority was inherent and automatic. In an age when natural law has gone out of fashion, however, we are left with questions about the authority of the law and our obligation to obey it. One could defend the authority of law on purely pragmatic grounds; even a tyrannical regime might be necessary as protection if the alternative is a Hobbesian state of nature. Our constitutional and political traditions, however, have never comfortably accepted accounts of legal authority based purely on prudence. Participants in modern legal culture regard law as more than the commands of an arbitrary sovereign whom it is convenient to obey; instead, they expect law to reflect principle. Positivism is politically and ethically controversial because it suggests to some that in some sense we might be obligated to obey unprincipled laws.

43. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

44. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

45. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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Given the events of this century, many have found it tempting to judge positivism in just such terms. The regimes of Nazi Germany and Soviet Russia, which brought both law and modern science into the service of morally odious sovereigns, magnified and dramatized the political stakes of the debate. Not incidentally, they also raised the issue of whether lawyers and scientists could be blamed for the consequences to which their professional efforts could lead.<sup>46</sup> On one commonly articulated view, positivism, by fostering an intellectual climate of moral relativism, helped lay the path for the rise of totalitarianism. Proponents of this view have argued that relativism works to break down liberals' moral defenses against totalitarian ideologies by depriving liberals and democrats of any claim that their values are objectively superior. Advocates of positivism, in response, have argued that it fosters a skeptical and questioning attitude — the best defense of freedom and of the rule of law. This intellectual debate underlay and gave context to the subsequent jurisprudential debate between Hart and Fuller. Specifically, in the 1950s — a decade overshadowed by the memories of World War II and the beginnings of the Cold War — totalitarianism came to be seen in legal culture as a failing of the rule of law. In this context, the post-war trials at Nuremberg and elsewhere took on central importance for Western lawyers, for they offered the opportunity to reconstruct the rule of law and reassert its role as a pillar of civil society. The Hart–Fuller exchange was motivated in substantial part by the question of whether separating law and morality would serve or undercut this purpose.<sup>47</sup>

Hart and Fuller agreed that the discipline of law necessarily incorporated some normative values: consistency, treating like cases alike, and fair notice — what Fuller called the internal morality of law. Where the two differed was over the issue of whether it was better to bring other, external, values into the system of legal norms or to leave them outside, where they could serve as a potential source of moral criticism. Take for example the central doctrinal question of the Nuremberg trials: the validity of Nazi law. Should one properly regard the Nazi laws as real laws, though grossly immoral, or as not law at all, because they were grossly immoral? This question was not merely an academic one, for it directly bore on the outcomes of some of the postwar trials, as the defendants raised Nazi statutes as defenses for their actions. Both Hart and Fuller thought that German lawyers should have used more of their influence to prevent the abuses of the Nazi regime, but they disagreed

POSITIVISM

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MORAL

RELATIVISM.

e.g. Friedman

What does this mean?

This is just SEMANTICS. OPTUNAL.

46. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159–96 (1973).

47. See Fuller, *supra* note 12, at 632–33, 644–46, 649–61; Hart, *supra* note 11, at 615–21.



on how best this could have been done. Hart argued that it would have been better to concede that Nazi laws were valid law, and argue against them on moral grounds.<sup>48</sup> On this view, Nuremberg was not a ~~legal proceeding, but a moral one.~~ Fuller, in contrast, took the position that the Nazi statutes were not law at all. This latter viewpoint conferred legal status on the Nuremberg proceedings, justifying the imposition of what otherwise would have been *ex post facto* liability.<sup>49</sup> VV

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This debate hardly turned on metaphysics alone, as many have subsequently observed.<sup>50</sup> From a utilitarian viewpoint, one can ask: Was it better to punish the Nuremberg defendants using the forms of law, to punish them without the forms of law but under the substance of morality, or not to punish them at all? Which course of action would better instill respect for liberal and democratic values in the future? Within a deontological framework, one can ask: Was it right to punish using legal forms, to punish without legal forms, or neither? Which would best correct the evils that had been done in the past? These are applied questions of ethics and morality on which laymen as well as lawyers can take different views, but for lawyers and lawyers alone, there was a special professional dimension to this debate. What was the proper place of professional expertise and status under such circumstances? In essence, Hart argued that the purposes of Nuremberg were best served by lawyers' stepping outside of their professional roles. Fuller argued, in contrast, that they should have remained within role. The argument was in large part, to force things into an economic metaphor, over the best use to be made of lawyers' professional and moral capital.

Though these questions are pragmatic and moral ones, the jurisprudential debate in which Hart and Fuller engaged is nonetheless relevant to their resolution. Whether lawyers step out of role when they talk of morality depends on what we think this role includes. If legal argument entails moral argument, or even if it merely includes it, then Fuller was right; good lawyering requires attention to moral issues. If legal argument is separate from moral argument, then Hart was right; our professional capital is scarce and we must take care not to squander it.

This connection between jurisprudential theory and methodological practice is made clear by subsequent debates between Hart and Ronald Dworkin on the nature of law. Dworkin famously has argued that legal reasoning is fundamentally an interpretive task, and that interpretation

48. See Hart, *supra* note 11, at 620-21.

49. See Fuller, *supra* note 12, at 649-55.

50. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 228-39 (1990) (arguing that the question whether the Nuremberg judgments were lawful is meaningless).

necessarily entails a normative dimension.<sup>51</sup> In Dworkin's view, one can never fully understand a legal system, or indeed, engage in any act of interpretation, from the outside; a proper account requires taking, if only temporarily, an internal perspective. Thus, in order to say whether a legal result makes sense, we must engage in some normative argument. Hart's response to this argument was that even if true, it does not undercut positivism in any interesting way. One need not adopt the legal insiders' point of view in order to understand it, or give up description in order to interpret. There is still an essential difference between internal and external perspectives on the law. Recognizing this difference, and taking a clear-eyed external perspective when appropriate, is still a central part of what lawyers are supposed to do.<sup>52</sup>

The apocalyptic tone of the Hart-Fuller debate was partly a function of the specter of totalitarianism that loomed over the 1950s. Happily, such threats are less immediate today, and the heated language in which such issues were discussed has cooled — even though one sees vestiges of the old rhetoric in modern arguments over multiculturalism and so-called political correctness. Debates over positivism, formalism, and the subjectivity of values, however, remain in our public life and continue today within legal culture. The pragmatic issues, moreover, are the same for us as for Hart and Fuller. If one is going to criticize legal institutions, is it better — or from a deontological viewpoint, right — to criticize from within the law, or from without? Is it better to argue that the law should be reformed in the service of one's preferred normative values, whether progressive, New Deal, libertarian, liberal, or conservative; or is it better to argue that a true understanding of the law already includes one's normative values? Or is drawing such a dichotomy incoherent and misleading?

It is worth considering these questions in light of the central problem of twentieth-century American jurisprudence: judicial legitimacy. Here there is room for only a thumbnail sketch, but a sketch will suffice.<sup>53</sup> By the end of the nineteenth century, judicial legitimacy came to be grounded in a generally accepted view of law as an autonomous dis-

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51. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

52. See H.L.A. HART, *THE CONCEPT OF LAW* 238-76 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

53. No originality is intended here; the following story is thoroughly conventional and has been told well many times before. See, e.g., WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (University of Okla. Press 1985) (1973); Leff, *supra* note 1; Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

cipline, founded in substantial part on professional expertise. This view, today commonly denoted by the term "formalism," was in turn celebrated as "legal science" by its proponents and derided as "mechanical jurisprudence" by its critics. In the twentieth century, however, the formalist account of law came under attack from a number of quarters, and this critique reached its apex with Legal Realism. The essence of the Realist critique was to attack the conception of law as autonomous. There were various pieces of the critique, not all of which fit together: attacks on the supposed indeterminacy of legal doctrine, studies of the underlying social and psychological determinants of judicial decision-making, and the embrace of explicit instrumental reasoning based on social consequences and guided by social science.

In large part, this critique succeeded in undermining the formal system of legal doctrine and establishing a more openly instrumental approach. Legal Realism became the new conventional account of law, and remains so to this day. In the immediate postwar period, however, the degree to which Realism had undermined traditions of judicial legitimacy was masked by the relative social consensus of the time. The optimism occasioned in public and political life by the defeat of the Axis powers and the end of the Depression was paralleled in legal culture by the rise of consensus theories of jurisprudence. Llewellyn's later Realism, for instance, found the basis for consensus in lawyers' "situation sense" — their professional skill at detecting the underlying social customs and conventions that made legal outcomes predictable.<sup>54</sup> Similarly, the legal process school of Hart and Sacks found room for consensus in procedural and institutional analysis; on this view, legal professionalism consisted of expertise in procedural structure, and judicial power was justified on the basis of the judiciary's special institutional competence to engage in case-by-case analysis.<sup>55</sup> In this way, Realist insights were used to rebuild a new sort of legal positivism, one more responsive to social needs than traditional formalism had appeared to be, but still based on the idea that there were certain questions specially suited to lawyers' professional expertise. This approach was epitomized in public law by Herbert Wechsler's celebrated article arguing for the establishment of neutral principles in constitutional law,<sup>56</sup> and was epitomized in

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54. See LLEWELLYN, *supra* note 45.

55. See HART & SACKS, *supra* note 45.

56. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

private law by the promulgation and adoption of the Uniform Commercial Code.<sup>57</sup>

The political experience of the succeeding generation of lawyers, however, was fundamentally different. In the 1960s and 1970s, the new version of positivism ceased to provide sufficient legitimacy within the profession. The larger political and social consensus of the 1950s disintegrated as well, as part of the schisms resulting from desegregation, the Vietnam war, the African-American and women's liberation movements, and the transformation of the world economy from growth to relative stagnation. In this context, scholars associated with critical legal studies and other postmodern schools of jurisprudence argued that the consensus always had been illusory. Lawyers had perceived a consensus, the argument went, only because of their social homogeneity and privileged position as an elite social class. Indeterminacy in law existed not just at the level of rules, according to this critique, but at the deeper level of principles.<sup>58</sup> On this view, Wechsler's plea to find "neutral principles" could be cast in hindsight not as Realism but as a new kind of formalism — a conservative attempt to paper over conflict about fundamental values.<sup>59</sup>

Thus today, for many in the contemporary legal academy and in the legal culture as a whole, the central pragmatic issue of positivism remains: how to construct a normative order for law. Legal positivists, either of the traditional or of the "legal process" school, remain influential. They continue to dominate the practicing bar and the senior generations of the legal academy. But, their view is challenged frequently — by critical theorists, communitarians, and humanists of various stripes, ranging from Roberto Unger to Cass Sunstein to Catharine MacKinnon to James Boyd White. And more recently, conservative expressions of the same critique have been advanced by commentators such as Anthony Kronman, Mary Ann Glendon, and Harry Edwards. These latter authors argue for a revival of a traditional elite professional culture and criticize both CLS and law and economics for their supposed nihilism.

Viewed from a more skeptical viewpoint, all these authors display a romantic tone of one sort or another. Some are nostalgic, and some are millenarian; some conservative and some radical. Each, however, in

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57. See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

58. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

59. See Peller, *supra* note 53, at 606-17.

his or her own way, is attempting to rebuild a normative structure in law in response to its apparent breakdown. This is legal culture's version of the "culture wars" now being waged in the wider academy and of the "values" debate going on in public life as a whole. For many contemporary lawyers, addressing this debate is their central professional task.

### III. LAW AND ECONOMICS CONFLATED

Where, then, does law and economics fit into this picture of contemporary legal culture? One way in which it might be thought to fit in is as a new consensus theory. Law and economics arrived at the jurisprudential door in the 1960s and 1970s just as the standard postwar consensus theories came under attack. In that context, its most ambitious proponents — Richard Posner, primarily, and to a lesser extent Guido Calabresi — put it forward as a potential successor to Legal Realism: a theory that could promote social consensus because the policies it recommended and rationalized were potentially Pareto superior.

Law and economics could appear a plausible candidate for a new consensus theory of law for a variety of reasons. It fit in well with the strands of Legal Realism that emphasized reliance on administrative expertise, and in its emphasis on value creation and economic growth, it also drew on aspects of the legal process tradition. Additionally, the mid-to-late 1960s saw the high point of prestige for the American economic profession. The national economy had just come through the longest sustained period of growth in modern times. Federal agencies, led by Robert McNamara at the Defense Department, had begun to introduce systematic cost-benefit analysis as a tool for procurement. For the first time in history, under the influence of the Kennedy administration's Council of Economic Advisers, the federal government adopted Keynesian economic theory as the theoretical underpinning of its fiscal policy. Reputable economists actually believed that the business cycle had been solved and that there would be no more major recessions. Even Richard Nixon announced himself to be a Keynesian.<sup>60</sup>

The prestige of expertise, however, was not the only reason why economics offered appeal as a potential consensus theory. Equally important was the way in which economic culture dealt with positivism —

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60. See HERBERT STEIN, *THE FISCAL REVOLUTION IN AMERICA* 379-84 (rev. ed. 1990) (describing economists' influence on the Kennedy tax cut); AARON WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 138-44, 193-96 (4th ed. 1984) (describing and critiquing the use of program budgeting in the Defense Department); HUGH S. NORTON, *THE EMPLOYMENT ACT AND THE COUNCIL OF ECONOMIC ADVISERS, 1946-1976*, at 216-25 (1977) (relating Nixon's ostensible conversion to Keynesian economics).

that is, by conflating the positive and the normative. As Arthur Leff trenchantly observed in his review of the first edition of Posner's *Economic Analysis of Law*, law and economics offered a style of analysis that lawyers could see as either value-free or value-laden, depending on how they looked at it.<sup>61</sup> Law and economics also provided a workable and appealing normative criterion: that of Pareto efficiency. This criterion required technical expertise to master, and thus reinforced legal traditions of professionalism. This criterion was instrumental; it could be placed in the service of any number of social ends, depending on what was desired. Thus, efficiency held out promise as the long-awaited neutral principle.

There was just one problem: the novelty of the efficiency concept in law interfered with its neutrality. While the arguments of law and economics might justify legislative or administrative reforms, so long as they were new arguments they could not provide a basis for judicial legitimacy, the fundamental problem for disillusioned post-Realists. In Ronald Dworkin's terminology, efficiency might work as a policy for the future but not as a principle for deciding existing disputes.<sup>62</sup> It is in this context, therefore, that one best can appreciate Posner's thesis that the common law was motivated primarily by the efficiency norm — what has come to be called the "positive economic theory of the common law."<sup>63</sup>

Whatever one thinks of this thesis on the merits, to call it a purely positive theory is incomplete at best and misleading at worst. First of all, the theory does not much correspond to what a mainstream economist would call positive economics. The focus of analysis is overwhelmingly on efficiency. There is no attempt to measure economic variables systematically. At most, the counting is of cases and doctrines. Second, the focus of the theory is not on individual policies and rules, but on the system of common law as a whole. This would not be the typical approach within economic culture, where a typical claim in positive economics would discuss the effects of a particular government policy or business practice. For example, a profit-maximizing business

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61. See Leff, *supra* note 1.

62. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Ronald Dworkin, *Why Efficiency?: A Response to Professors Calabresi & Posner*, 8 HOFSTRA L. REV. 563 (1980).

63. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 8.1, at 179 (2d ed. 1977) ("Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character. . . . The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities.").

facing two distinguishable consumer groups who cannot resell to each other might be predicted to engage in price discrimination; output would then increase, and so on. Banning price discrimination would interfere with this behavior and lead to changes in prices and quantities, and so on.

Typically, positive economic discourse of this sort is atomistic and reductionist. The goal is limited — to find a good explanation of an economic phenomenon or of an aspect of that phenomenon. The premise is that the pursuit of knowledge is a collective endeavor and a cumulation of views will lead to insight. The economic theory of the common law, in contrast, is not atomistic; it is like traditional legal discourse, tending to a holistic style. The goal is grand: to explain all the cases with a unifying theory. An analogy in traditional economics might be the study of whether capitalism as a whole is efficient. Economists have had, and continue to have, arguments over this general claim, but these are not understood as ordinary positive discourse within economic culture.

Nor can the task of bringing order to legal doctrine be understood as solely a descriptive endeavor within legal culture. Various patterns can be found in a complex sequence of case law, or imprinted on it. Because empirical experience is roughly consistent with a variety of theoretical patterns and perfectly consistent with none, which pattern seems most appealing will influence and be influenced by the purposes of the viewer — as Dworkin's critique of Hart made plain.

Furthermore, the construction of doctrinal order carries normative force for lawyers. This is because within legal culture, precedent and pattern are blend concepts. The community attaches normative weight to consistency and to the related values of fair notice, impartiality, and treating like cases alike. This is especially so when the task of bringing order is undertaken by inside members of the culture as opposed to outsiders, since insiders have a stake in the coherence of the system while outsiders do not. To illustrate, when discussing a foreign legal system, one might ask "does Finnish law reflect the efficiency norm" in the same way that one might ask "does Finnish law contain a doctrine of adverse possession." The former question is more complicated, and would require a greater number of ad hoc empirical judgements, but as an outsider one conceivably could ask the question without caring much how the answer comes out. Insiders, however, care; they will view the legal rule as something to be followed once discerned. Thus, description by insiders will always have stronger overtones of normative argument

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than description by outsiders.<sup>64</sup> In this regard, it is telling that the so-called positive economic theory of the common law was propounded much more often by lawyers and lawyer-economists than by economists without legal training.

Compare our earlier discussion of how statements about efficiency operate in economic culture. Just as in economic culture it is mutually understood that the speakers and listeners subscribe to the normative goal of efficiency, in legal culture it is understood that the speakers and listeners subscribe to the normative goal of consistency. Just as within economic culture to say something is efficient implies the corollary that it ought to be done, other things being equal, within legal culture to say that there is a pattern in legal doctrine is to say that the pattern ought to be followed. Thus, it is misleading to call the "positive economic theory of law" purely positive for the same reason it is misleading to call efficiency discourse in economics purely positive. Statements about legal precedent entail positive statements about legal facts and cases, just as statements about efficiency entail statements about costs, benefits, prices, and quantities, but they are not equivalent to them. The primary point of the positive economic theory of the common law was never just to count a collection of cases for the sake of the count, but to elevate efficiency to the status of a principle. Indeed, in a series of writings in the 1980s, Posner offered an explicit defense of this principle, arguing that justice consisted of nothing more than efficiency.<sup>65</sup>

We know from hindsight that while law and economics gained a great deal of influence, it did not pan out as a new consensus theory. The prestige of the economics discipline fell in the 1970s and 1980s as economic growth leveled off and was replaced by stagflation in global and national economies both. Posner's writings failed to persuade the legal profession that efficiency and justice were the same thing, and the efficiency criterion found itself subject to the same kinds of attacks that more traditional candidates for neutral principles had suffered earlier. The tension among efficiency, equity, and other aspects of justice remains as controversial as ever in public discourse.

That law and economics did not succeed at this level, though, was inevitable. Modern neoclassical welfare economics never was suited to the task of constructing a normative order for law. In fact, it does not even play that role in economic culture, where the majority of economists are content to leave larger moral questions outside the discipline.

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64. Posner, incidentally, has conceded this point. See POSNER, *supra* note 50, at 373-74.

65. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 48-87 (1981); Posner, *supra* note 6.



A normative concept rooted in positivism and not even regarded as decisive in its home field hardly could serve as an organizing concept for a separate discipline that traditionally has treated normative analysis as a central part of its task.

#### IV. LAW AND ECONOMICS SEPARATED

To summarize the argument thus far: With the transformation of political economy into modern neoclassical economics, economists reached consensus within their own culture. They did so in part by redrawing the discipline's boundaries so that the most controversial political issues — redistribution and objective conceptions of utility — were defined to be outside the scope of professional discourse. Law and economics in the larger sense of a jurisprudential movement failed to pan out because lawyers were and remain unwilling to redraw their professional boundaries in the same way. What, then, can economics offer to lawyers who choose not to accept the account of professionalism that dominates economic culture?

The key to making the exchange between law and economics a useful one is the same as with any other cultural or interdisciplinary exchange. One must consider the foreign discipline's practices on its own terms, and only then consider whether and how those terms and practices shed light on one's own. It will not do to borrow superficially the practices of another discipline or culture, such as efficiency analysis or formal modeling, without understanding the larger terms in which those practices are understood. (Think, in comparison, of the way in which some New Age, pop-spiritual philosophies borrow superficially from Native American and Asian cultures.) But this will require, in its way, becoming multicultural, as does all true interdisciplinary exchange. It requires insiders to think about what it is like to be an outsider; it requires natives to act occasionally like anthropologists.

I have argued above that while positivism is problematic as an epistemology, there are good and sensible pragmatic reasons for economists to proceed in their professional conversations as if it were valid. First, it helps distinguish professional arguments from extraprofessional arguments. Second, it helps distinguish arguments over means from arguments over ends. Third, it helps promote the development of expertise in the pursuance of ends. These are valid pragmatic reasons in all professions and disciplines, and they can be valid for lawyers too, at times. But what are those times?

Some lawyers will be willing entirely to adopt a view of professionalism that resembles that of economics, at least some of the time. Call this view "instrumentalism," or "law as policy analysis." Under

it, lawyers would use economics, along with other tools such as psychology, political science, and organizational theory, to choose the set of institutions that best promote and mediate among the goals of independent and free individuals. A prominent example of this view can be found in Gilson's proposal that lawyers should regard themselves as "transaction cost engineers."<sup>66</sup>

The instrumentalist model appeals to an important and long-standing aspect of lawyers' professional tradition: the role of adviser to a client. In this familiar role, lawyers are accustomed entirely to ceding normative judgment, setting out alternatives, and letting the client choose among them depending upon her goals and needs. Similarly, most lawyers will be familiar with the task of taking the client's goals as given and trying to design arrangements that will serve them best. Such a professional role can have substantial ethical content, centered around the norms of loyalty, trust, and fiduciary obligation.<sup>67</sup> It also very much resembles economists' professional commitment to efficiency as a norm. As a professional, one can take preferences as given but still exercise judgment in figuring out the cheapest way to promote them. This, I think, is why the economic approach may be easier to apply and more appealing in private law settings, where lawyers identify more with clients, than in public law settings, where lawyers identify more with the public interest.

Notwithstanding its roots in the profession's traditions, however, many lawyers will find this view of professional responsibility neither a sufficient account of their culture nor an appealing aspirational model. Among these are critical theorists from CLS and elsewhere, communitarians of all political allegiances, and elite traditionalists such as Kronman and Edwards who regard the law as a special calling. Even within the attorney-client relationship, after all, lawyers have a long tradition of counseling clients on ends as well as means. Lawyers who too narrowly serve their clients' ends are commonly censured in the popular mind as "hired guns." Holmes's skeptical account of the "bad man" plays off this popular sentiment, for he depicts this bad man as a fit client for the positivist lawyer.<sup>68</sup>

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66. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

67. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (arguing that lawyers serve as special-purpose friends protecting individual autonomy within the adversarial system of the law).

68. See Holmes, *supra* note 43, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons

Law as policy analysis, moreover, slights two other important aspects of lawyers' professional tradition: rhetorical advocacy and participation in public deliberations over public values. These aspects of professional role are especially cherished in the academy; indeed, even economically influenced legal scholars remain primarily oriented toward public law reform scholarship notwithstanding their presumptive belief in the efficacy of private ordering.<sup>69</sup> From the viewpoints of these competing professional values, economic analysis is at best a corrupting distraction. It declares itself indifferent toward the content of ends. It glorifies self-interested behavior rather than stigmatizing it. With its focus on efficiency, it takes the existing distribution of wealth and income as given and thus implicitly endorses this distribution by not criticizing it.

For economists, not saying anything about ultimate ends, self-interest, or distribution is a professional virtue because it means that their analyses and theories are general ones; their conclusions do not depend on the particular content of the ends being analyzed, or on political controversies. From the viewpoint of law, however, this undermines much of what lawyers traditionally have seen as central to their own professional culture. Economists take preferences as given, but notwithstanding Holmes's bad man, many lawyers feel they cannot. A main function of law is to alter preferences. Laws are not just constraints but, when viewed from an insider's perspective, also norms that command one's loyalty.

Accordingly, lawyers who hold these other traditions dear will not want the rhetoric and culture of economics to take over the rhetoric and culture of law. This explains, for instance, why Posner and Landes's discussion of adoption as a market<sup>70</sup> has gained such notoriety in the debate over the economic analysis of law even though most economists would regard it as a peripheral and inessential application of economic method. The idea of extending the market into the family evokes fears of alienation and commodification, of undermining nonmarket values. Those who oppose the intellectual exercise of doing so worry that the positivist aspects of market culture will promote ethical relativism.

For all these reasons, the pragmatic justifications for positivism within the economics profession may not always carry over to legal cul-

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for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."').

69. I discuss this irony in Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745 (1996).

70. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

ture. Within their own culture, economists safely can restrict their attention to means — that is, to efficiency — knowing that some other actor or institution will see to the content of ends. Lawyers may not feel they can abdicate responsibility for these other goals, and citizens and public officials surely cannot adopt such an approach.

For lawyers who object on ethical grounds to instrumentalism, then, what use can one make of positive economics? Some will want to reject it entirely, on the ground that focusing on positive concerns will mean that normative ones will be sacrificed. Such a position could be taken coherently on grounds of opportunity cost alone: taking ends as given forfeits the opportunity to deliberate over them and criticize them. Alternatively, if one views positive and normative discourse as inherently linked at an epistemological level, trying to engage in positive discourse in isolation simply will confuse and cloud the normative issues and make it harder to engage in normative discourse at all. This is an objection that should be familiar to American lawyers, as it was a chief plank in the Legal Realists' critique of traditional formalism.

Finally, there is a risk that if one spends too much time calculating how best to pursue others' ends, one will come to adopt them, losing one's own in the process. This is surely a real possibility; as a matter of social interaction, lawyers commonly come to identify with the interests of clients, just as many economists who study business organizations come to identify with the interests of their subjects. Our own students recognize this phenomenon when they lament the supposed "corporate track" in legal education.

One can, as Hannah Arendt did in her celebrated essay *Eichmann in Jerusalem*, find apocalyptic illustrations here as well.<sup>71</sup> Arendt's aphorism, the "banality of evil," can be interpreted as a comment on positivism; its import is that it is far too easy for moral choices to get lost in the ordinary pursuit of instrumental goals. Still, one cannot live as if every moment were the apocalypse. A professional culture will break down if it cannot identify some issues as its own and leave others to the culture at large. We may no longer be able to regard law as autonomous in the way lawyers perceived it to be before Legal Realism, but that does not mean it must be reduced to politics, morality, or economics.

In this regard, it is helpful to return to the debate over legal positivism, and to Hart's defense of it. To the extent that Hart's jurisprudence is coherent, lawyers can, with proper technical skills, recognize settled legal questions, usefully distinguish them from unsettled bound-

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71. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (rev. ed. Viking Press 1964) (1963).

ary disputes, advise clients, and recommend reforms to legislators and government administrators. Hart argued that while there always would be close cases on the periphery of the law to be resolved in discretionary fashion, rules could and would govern in the core. This account of legal rules was disputed by Fuller and later by Dworkin, who argued that first, even within core cases, there is room for moral argument, and that second, at the margins, there is never mere discretion, but instead an obligation to decide in good faith on the best interpretation of all the legal, moral, and cultural materials that are available.<sup>72</sup>

If one takes this latter view literally, however, then the values of legal culture are implicated in all cases and are, at least potentially, up for grabs all the time. Indeed, this is essentially the position of critical legal studies and of legal postmodernism — that indeterminacy is everywhere, every case is close, and everything *is* up for grabs all the time. But if all values and perceptions are up for grabs all the time, and not just in the occasional hard case, then there is no opportunity for normal life, or for ordinary work to get done. Indeed, this is one of the most telling objections to economic culture; the way it also puts things up for grabs all the time, by posing choices all the time and expecting us to maximize. We might reasonably prefer in many instances to avoid the fact that we are making choices; and to satisfice.

One can draw an analogy here to Thomas Kuhn's account of theoretical revolutions in the natural sciences.<sup>73</sup> Most of the time, scientific culture takes fundamental issues for granted and does "normal science." Only occasionally do revolutionary moments come along to punctuate ordinary practice. Not every moment, however, can be revolutionary; there needs to be something to revolt against. This means making time for normal work — time for taking ends as given and focusing on means. Such times are when positivism will be useful — both in law and in economics. If we are lucky enough to be able to live a normal life most of the time, then positivism will be useful most of the time.

Economic positivism, therefore, can be pragmatically useful to lawyers for pretty much the same reasons that legal positivism can be pragmatically useful, and anyone who appreciates the pragmatic point of legal positivism should be able to appreciate why economists talk and analyze the way they do. Lawyers who regard legal positivism as unhelpful are unlikely to have much use for law and economics, con-

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72. See, e.g., Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972).

73. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2 Intl. Encyclopedia of Unified Sci., No. 2, 2d ed. 1970).

versely, but at least they and the economists who argue with them should be able to understand why this is the case.

All this suggests various ways in which economic analysis could be applied usefully to law, notwithstanding the differences in the two disciplines's methodological attitudes. One way would be for law and economics to be done in economics departments, by economists, as part of the standard applied microeconomic research program. Indeed this is now being done and is probably the major area of growth for law and economics in the last ten years. The economists doing this work can present their conclusions in the form of trade-offs and defer to lawyers' and the public's normative judgments regarding the ultimate trade-offs to be made — just as they traditionally have done in other areas of public policy.

Second, lawyers could in appropriate circumstances adopt a view of professionalism closer to that of economists. This would mean confining themselves to presenting the advantages and disadvantages of available choices as honestly as possible and then deferring to other decisionmakers. In private contexts this would be entirely consistent with lawyers' traditional obligations to their clients. In public contexts, though, it would require lawyers to place less emphasis on their roles as advocates and participating decisionmakers, and to view the government — or the public — as their client. This view would, if taken seriously, require the sorts of tasks that private lawyers undertake in regard to their clients; in particular, it would mean consulting the public and paying attention to its actual views. Such an approach might be novel, but it could help bridge the increasingly lamented gap between the legal academy, which has in recent years focused on advocacy and deliberation as its primary values, and the practicing bar, which has remained much more attached to the model of client service.

Third, to the extent that legal professional identity requires normative advocacy and choice, lawyers need not and should not abandon honest attempts at description. While the task of description does presuppose a perspective, that perspective need not be permanently fixed. Positive analysis, whether of law, economics, or the natural world, will reveal information about a variety of perspectives other than one's own and thus provide material for new and perhaps deeper interpretations. It may indicate ways in which one's normative commitments may be pursued more fruitfully. It may even reveal that the conflicts among one's normative views and those held by others are less fundamental than is initially apparent. But such possibilities can never be revealed if one refuses to look. Perhaps those skeptical of positivism might consider the

possibility of what John Rawls has called a "reflective equilibrium."<sup>74</sup> One starts, necessarily, with a normative perspective. One sees what one can see from that perspective, and such observations may create dissonance, but dissonance is not to be feared; it may feed back, changing one's perspective, allowing new insights to be perceived, which themselves feed back. Eventually, one may come to reach a state where perspective and observations are in harmony — or at least, one may come to live with the dissonance.

How could this be operationalized in practice? Lawyers committed to normative reform — or to revolution, for that matter — could view themselves as playing the part of both lawyer and client, of agent and principal. In the role of agent, they could use economics, or whatever other social science tools they wished, to identify the choices available to them. Then, in the role of principal, they could make the choice according to whatever values they cared ultimately to espouse.

Opponents of positivism will raise an objection to this suggestion: the act of playing any instrumental role, whether as economist, policy analyst, or consulting lawyer, could spill over and influence one's own goals and preferences in the role of client. One legitimately might not want to become the sort of person who studies scarcity might incentives all the time, or to take on the values that arise from such a life plan. But that is not what is really at stake; what is at stake is whether one will become the kind of person who studies scarcity, incentives, and other economic issues some of the time — whether one allows oneself the perspective of agent as well as principal. Taking both perspectives might still have an effect on one's goals, but this limited effect might well be a good thing. It is not clear, after all, why one should give dispositive weight to normative values that cannot survive scrutiny of the methods necessary to achieve them in practice. Separating positive from normative analysis at least provides such scrutiny.

#### CONCLUSIONS

The difference between law and economics is in large part a cultural clash. The two professions are trying to do different things, and they have different professional identities and aspirations and different ways of talking. One of the most important of these cultural differences has to do with the relative importance the two disciplines attach to normative discourse. Economists are unified in their commitment to positivism and to the idea that one can proceed usefully while putting nor-

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74. See JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971) (defining and defending the concept).

mative issues to one side, and lawyers are not. Economists' commitment to positivism, however, is not really justified on the grounds they sometimes assert — as a matter of correct epistemology or philosophy of science. Economic positivism is justified instead on pragmatic grounds, as a way of defining and promoting professional discourse within the discipline.

To bridge the cultural and methodological gap between law and economics on this issue, two things need to happen. First, economists need to recognize that their reasons for being positivists are pragmatic rather than metaphysical or epistemological, and they must examine and explicitly defend their methodology. They should not make the mistake of assuming that what are good pragmatic reasons for them are necessarily good pragmatic reasons for lawyers. Richard Posner has taken this tack in some of his more recent writings, in which he justifies the use of economics, among other analytical methods, in explicitly pragmatic terms.<sup>75</sup> Second, lawyers need to understand that there are some sensible reasons for economists to be positivists, and that some, if not all, of those reasons could be sensible reasons for them as well. Whether one accepts positivism or not, however, critics of law and economics should at least recognize that many of the familiar arguments in favor of legal positivism can help explain why economists think it reasonable to talk as they do.

In my view, lawyers have as much reason to be positivists as economists do, because lawyers have much professional work to do that is usefully distinguishable from general moral argument. Being a positivist, or a proponent of using economics in law, does not have to mean that one abjures moral choice. Rather, it can mean that one better recognizes moral choice for what it is. This, in the end, was Hart's ultimate justification for being a legal positivist:

Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another. . . . This is surely untrue and there is an insincerity in any formulation of our problem which allows us to de-

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75. See, e.g., POSNER, *supra* note 50; Posner, *supra* note 53.



scribe the treatment of the dilemma as if it were the disposition of the ordinary case.<sup>76</sup>

In ethics as well as in economics, the choices are often dismal, and there is rarely such a thing as a free lunch. It is still possible, however, to apprise oneself of the alternatives, and to choose wisely and well.

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76. Hart, *supra* note 11, at 619-20.