CHAPTER 8

Fostering the Autonomy of Legal Reasoning Through Legal Realism

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Abstract This chapter explains why the dominant pattern of disciplinary interaction between law and economics has fostered a general trend of reducing legal reasoning to economic reasoning. After describing the pattern of interaction between both disciplines through the example of property rights (Sect. 8.2) and linking it to the debate on reductionism in philosophy of science (Sect. 8.3), the chapter proposes a strategy for salvaging the autonomy of legal reasoning by increasing reflexivity through a version of legal realism inspired by the work of Otto Neurath (Sect. 8.4).

Keywords Neoclassical economics • Formalism realism • Otto Neurath • Logical positivism • Reflexivity • Interdisciplinarity • Law and economics • Reductionism • Legal reasoning

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8.1 Introduction

The pattern of disciplinary interaction between law and economics is such that, as a response to the "expansive" and "reductionist" program of economists, legal theorists are forced to flesh out the normative considerations expressed in the systematic features that guide legal reasoning in the different branches of law. This trend is unstable, due to the defensive character of the legal theorists' argumentative strategy. Legal theorists' only answer to the advances of the economists is to try to refute them by proposing features of law and legal reasoning that cannot be reduced to economic terms. In this sense, the debate regarding disciplinary boundaries is closely related to a long-standing dispute in philosophy of science between reductionists and anti-reductionists. The reductionist argument is that theories of one discipline can be replaced, without losing any relevant knowledge, by the theories of another discipline. Conversely, anti-reductionists denounce that valuable insights are sacrificed in the process.

Alas, it is always possible to assert the insufficiency of legal scholars' anti-reductionist strategy by showing that the allegedly irreducible features are, after all, reducible to economic terms, or, alternatively, are irrelevant or pathologic. Whatever answer the economists choose, their claim to epistemic authority over legal phenomena can continue to increase as each attempt at carving out a safe space for autonomous legal reasoning is overcome. As this trend continues, it permeates the institutional organization of disciplines and eventually legal institutions.

The question for those interested in salvaging the autonomy of legal reasoning is how to alter this structural pattern of disciplinary interaction. This requires sustainable balance of epistemic authority between legal theory and economics that would have the benefit of increasing reflexivity in both disciplines. This chapter proposes a strategy for attaining this goal: rehabilitating legal realism. The aim should be to undermine economics' claims to superior accuracy regarding predictions and causal explanation. This requires legal theory to go beyond conceptual analysis, which would only mark the beginning of the enquiry rather than its end. In this sense, a rebalancing of epistemic authority between law and economics entails a rehabilitation of legal realism.

8.2 The Bundle Theory of Rights and the Interaction of Law and Economics

The economic analysis of law purports to show the expected effects of legal arrangements. The underlying idea is that economists' predictions can be empirically tested by anyone. Thus, their epistemic authority (allegedly) relies on the accuracy of the predictions, instead of the dominance of arcane technical language or ethical principles (as would be the case with legal scholars, lawyers and judges).

The approach's appeal is that the disciplines would compete for providing the best explanations for any given set of phenomena. This view sees disciplinary boundaries as monopoly-generating obstacles to knowledge: they are the result of what Bentham called the "sinister interests of Judge & Co" (Atria 2016, pp. 63–65), what is now called rent-seeking behavior by self-appointed and self-reproducing elites (Leeson 2019).

To regard current disciplinary boundaries as the "proper" domain of each discipline entails a positive judgment about the efficacy of the current organization of scientific disciplines. To put it bluntly, it involves a conservative attitude towards the status quo. Thus, regarding disciplinary boundaries as defining the proper domain of each discipline places the burden of proof on those who would have the current disciplinary boundaries altered or eliminated.[1] The opposite assessment is behind efforts to justify the erosion of disciplinary boundaries: the failure to do so entails a wasted opportunity. They are obstacles to knowledge and a necessary evil at best.

Thus, the case for an economic analysis of legal phenomena can be justified by the epistemic gains to be obtained by eroding disciplinary boundaries, so that no single approach should have a monopoly over a field. Contrariwise, the opposition to this approach can be justified by arguing that there are epistemic gains to be obtained by keeping disciplinary boundaries in place.

In the case of law and economics, one of the prime sites of interaction (and conflict) is property rights theory, where the disciplinary boundaries are thinner and the economists have made the most substantive contributions to legal theory. Thus, property rights theory provides an excellent

[1] It could be argued that this attitude is prevalent among philosophers of science: in their zeal to explain why science has been successful, they easily slip into assuming it has been as successful as it can be.

vantage point to investigate the pattern of disciplinary interaction of law and economics.

In this section, it will be argued that the theoretical assumptions built into the bundle theory of rights generate a strong theoretical bias toward using economics to study legal phenomena.[2] Consequently, its widespread adoption has entailed an encroachment of economics within domains that have been traditionally considered within the competence of jurisprudence. As a result, the autonomy of legal reasoning has been questioned. Legal theorists who oppose this trend argue—as their anti-reductionist counterparts in philosophy of science—that this has an epistemic cost: some normative considerations that are embedded in legal categories cannot be accounted for by economics. As the dominance of economics over law increases, these normative features are kept out of sight, until eventually they are no longer recognized as features of legal institutions.

As a result of Coase's overwhelming influence, the bundle theory of rights became a key element of the conceptual framework of contemporary mainstream law and economics (Merrill and Smith 2001). The bundle theory of rights has fostered a view stating that to any valuable attribute of an asset corresponds a use-right. Each of these use-rights can be held as property by an agent. Thus, they can also be traded through contracts. Furthermore, since all allocations of use-rights have economic effects (i.e. they entail distributional effects in wealth) (Commons 1924), there are no conceptual boundaries outside of which the framework of economics cannot be applied.

In sum, for legal scholars and economists using the bundle theory of rights, "property consists of nothing more than the authoritative list of permitted uses of a resource—posted, as it were, by the State for each object of scarcity" (Merrill and Smith 2001, p. 366). They assume as a theoretical framework a formalized market in which agents trade through the price system. Since all allocations of legal entitlements have economic effects, all of them are susceptible to economic analysis. This also means that every entitlement is in principle susceptible to being the object of a market transaction. Under this view, nothing remains outside the scope of economic expertise.

Another way in which the bundle theory of rights generates a bias toward the use of economics is that the content of a Hohfeldian claim-right is indeterminate without a conception of what counts as an

[2] Smith (2019) reaches the same conclusion via a different, but related, argument.

interference. What counts as an interference with an action cannot be discovered only by describing the action protected by the claim-right. This is because what counts as an interference depends on how interference is defined and not on the definition of the action which is the subject of that interference. The definition of an action leaves undetermined which of the alternative definitions of what counts as an interference should determine the content of the duty correlative to a claim right. Thus, a criterion for choosing such a notion is necessary for the bundle theory of rights to be operative. Such a criterion is provided by the notion of externality, that is, any event produced by an agent that alters another agent's cost structure in performing an action (Buchanan and Stubblebine 1962). In turn, the idea that externalities should be incorporated in the cost structure of those who generate them constitutes the benchmark under which the determination of Hohfeldian claim-rights can be evaluated: if rights are determined in this way and transaction costs are reduced, the resulting allocation of rights will approach efficiency (Mathis and Shannon 2009, chapter 4).

To sum up, the bundle theory of rights generates a bias toward the use of economics to explain legal institutions in at least two senses: first, all legal phenomena can be analyzed by using economics, since the allocation of legal entitlements always has economic consequences and all legal entitlements can be conceptualized as tradable assets. Second, the bundle theory of rights is not complete without a theory of interference, which is exactly what the notion of externality provides.

Consequently, as the use of the bundle theory of rights becomes more ubiquitous among legal scholars, the expertise of economists becomes increasingly necessary for understanding law.

The appeal of the mainstream law and economics view on the bundle theory of rights is that, by treating all existing things as usable resources, it puts into focus how agents use things to achieve different ends. It also privileges a view under which it is the agents' prerogative to dispose and use these things as they see fit. It does this in a straightforward fashion, focusing on the costs and benefits their use imposes on agents. It is this last feature that, according to its critics, constitutes its main shortcoming: this approach ignores (indeed, it must ignore) noninstrumental normative considerations that (as they claim) are embedded in legal categories: for example, notions such as wrongdoing and duty or the distinction between a sanction and a tax (Smith 2011). For economists, such noninstrumental normative considerations are at best superficial and unnecessary accoutrements to legal reasoning and at worse irrational distortions. On the

contrary, thinking like a lawyer entails understanding legal categories and the normative consequences that derive from them. Thus, legal reasoning is reasoning through these categories. If one dismisses them, one has moved beyond the realm of law (Schauer 2009).

8.3 Reductionism and Anti-reductionism in Law and Economics

As shown in the previous section, the debate regarding what should be the relationship between law and economics has been carried out in terms of the question regarding the validity of legal categories vis-à-vis economic explanation. As was briefly mentioned in the introduction, this debate is analogous to a long-standing debate in philosophy of science: between reductionism and anti-reductionism. Finding a way out of this debate requires reframing it in a way that fleshes out clearly what is at stake in each position. This will be done via a distinction from legal philosophy, that is the distinction between the internal and the external point of view.

Nowadays, following the work of HLA Hart, contemporary analytical anglophone legal theory has tended to stress the importance of what he called the internal point of view. Thus, it is generally acknowledged that law can only be grasped from the standpoint of the agents involved in legal practice.

In the context of a still very much Hart-dominated legal culture, the attractiveness of having an external point of view to study legal systems (i.e. that the categories of legal reasoning are "reducible" to the concepts of another discipline such as economics) must be stated explicitly. One can only question the underlying or tacit assumptions that guide legal reasoning within a discipline by resorting to the external point of view provided by other disciplines. A way to do so is resorting to social sciences. Contraposing the empirical findings of the social sciences to the systematic reconstructions of legal reasoning prevents legal scholarship from cloaking the way in which law works, which results from taking at face value the internal point of view.

This set of oppositions (i.e. reductionism/anti-reductionism) correlates to opposite attitudes toward disciplinary boundaries: while anti-reductionists believe that something is lost by eroding disciplinary boundaries, reductionists believe that the conceptual frameworks that constitute

disciplinary boundaries are obstacles for attaining knowledge. Likewise, as disciplinary boundaries are eroded, the internal point of view becomes less relevant for describing legal phenomena.

Furthermore, if one can only reason from within law's internal conceptual framework, its validity can never be questioned, beyond failures in the internal coherence of the system or mistakes in logical deduction (Gellner 1968). In this sense, the appeal of the external point of view is the promise of overcoming the categories of legal language, which (according to the critics)[3] muddle our thinking by diverting our attention from the real-world consequences of the allocation of resources to a formalized, technical language, impervious to what may come by a steadfast allegiance to age-old categories, which are at best an accidental historical vestige of past times. In other words, "[i]n comparison to traditional legal theory, Law and Economics is reductionist. Reductionism educates lawyers by scrapping unnecessary distinctions, which lawyers are prone to make" (Hylton 2019, p. 6).

These same features have been identified as the reasons why such an approach to legal phenomena should be rejected. Just like their anti-reductionist counterparts in philosophy of science, those who want to defend the autonomy of legal reasoning by stressing the necessity of the internal point of view argue that economic explanations disregard the noninstrumental normative considerations embedded in legal categories by reducing legal phenomena to their economic effects. For this reason, they reject economic explanations. They also argue that economic explanations disregard what legal institutions mean to the agents that engage with them (Zipursky 2006). The most extreme variety of this argument has been put forward by legal formalists (Grey 1999; Pildes 1999; F. Schauer 1988; Weinrib 2010). Insofar as legal formalists have made the most forceful defense of legal categories, it is worthwhile dwelling a little longer in the formalism debate in private law theory.

As noted, the debate between formalist and economic analysis of law in private law theory is a debate about the status of conceptual analysis within legal theory.

"The debate between the corrective justice theorists and the economists raises a more purely jurisprudential question about what legal theories must do to be acceptable. For while economists are boasting about their ability *to explain away* the plaintiff-driven nature of tort law in a

[3] See Gómez Pomar (2020).

reductive manner, corrective justice theorists are stating that *a theory that merely explains away structural features of the law in a reductive manner is for that very reason inadequate"* (Zipursky 2000, p. 458) [italics in the original].

As Zipursky lucidly notes, what for economists entails a relevant theoretical goal, for formalist legal theorists is the approach's main shortcoming. Formalists argue that economic analysis cannot accommodate the kind of reasoning that characterizes private law adjudication or its structural and procedural features (i.e. its bilateral structure of litigation) (Weinrib 2012). Likewise, with regards to the concept of rights, it has been argued that the bundle theory of rights (which underlies Neoclassical Law and Economics) cannot address the *in rem* character of property rights, that is the fact that one holds them against all other agents. Thus, it distorts central aspects of ownership, as it exists in Western legal systems (Penner 1995, 1997). The epitome of such a reductive perspective is Calabresi and Melamed's (1972) work on the economic analysis of property and liability rules in terms of entitlements. Critics argue that such an approach conflates the categories of property, contract and tort (Merrill and Smith 2001, pp. 379–383), and thus cannot account for the different normative values embedded in each of these institutions.

The economists' obvious response is to note that these normative values are not doing any work in legal reasoning, that is, they are of no help when trying to describe the content or predict the outcome of legal decisions. Consequently, if the formalists' anti-reductionist argument is to work, those additional normative considerations, which are supposedly irreducible, must be stated expressly, thus allowing the enquiry to continue. Otherwise, the anti-reductionist argument would boil down to assuming what it is supposed to demonstrate. This way, as legal theorists flesh out those (supposedly irreducible) features, economists can try to offer an account of them. For example, regarding the objection that economic analysis of law cannot accommodate the bilateral structure of private law adjudication, Kornhauser (2017) notes that even if efficiency-based accounts of private law don't consider the bilateral structure of private law as essential, they can account for its emergency and persistence.

The resulting trend is that, as economists put forward the hypothesis that legal reasoning can be reduced to economic reasoning or economic explanations, legal theorists can only try to refute the hypothesis by proposing a specific case of irreducibility. Economists can always answer the anti-reductionist argument, either on the grounds that (a) the additional

normative considerations are intelligible in economic terms (i.e. are reducible) or (b) they are irrelevant to explain the subject matter, or (c) they are pathologic, exceptional or undesirable. In any case, economics' epistemic claim to explain legal phenomena remains untouched. Since the anti-reductionist strategy is inherently defensive, the best one can expect of it is to delay the encroachment of economics, but because of its very nature it can never stop it. Insofar as there is truth to the charges of economics' imperialism (Fine 2000, 2002; Lazear 2000; Mäki 2009; Nik-Khah and Van Horn 2012), it is a consequence of the strategy that legal theorists have taken to respond to the economists' challenge.

A positive aspect of this is that as the debate between anti-reductionist legal theorists and reductionist economists unfolds, new insights are obtained by the fleshing out of the normative considerations that are expressed in legal arrangements, while economists continue to apply their framework to each of these features. Unfortunately, this trend can only be maintained as long as legal theorists can continue their efforts. As economists manage to explain more aspects of law, the balance between law and economics grows increasingly unstable. The reason is simple: as the epistemic authority of economics grows, the epistemic authority of law dwindles.

Eventually, this change in the rationality aspect of disciplines affects the way in which the disciplines are practically organized, in terms of academic journals, curriculum reforms, postgraduate courses, research grants and so on (Landes and Posner 1993; Duxbury 2001). It is easy to see how these developments will eventually affect law at the institutional level: administrative officers, judges and legislators get educated under the new approach and the cumulative effect of their professional activity will be to make law resemble more and more the image of law they learned during their training. Most importantly, those who see it in their interest to support these developments will strive to do so (e.g. Teles 2008). For all the mentioned reasons, the character of legal academia matters and it can influence the development of legal systems. This is why legal education has been a contested domain from which to influence society and affect long-term legal change.

There is another way in which this pattern of disciplinary interaction reinforces the application of economics to the study of law. Mainstream economics tends to affirm the contingency of legal arrangements and the lack of any immanent rationality of law, while simultaneously portraying law as the result of a slow, piecemeal adaptation of the legal system to economic circumstances: a process of law working itself efficient. In this,

mainstream economists agree with legal formalists insofar as the latter believe that legal categories are the result of a process of piecemeal evolution (Stein 2009). In this sense, mainstream Law and Economics supports the conservative bias of legal formalism by arguing that the goal of economics is to describe legal systems and not to prescribe how they ought to be (this strategy is captured by the distinction between positive and normative economics). The result is that legal arrangements have no immanent rationality, while at the same time any attempted reform would entail an illegitimate encroachment of real-world considerations into law, thus menacing the autonomy of legal rationality which purports to preserve the integrity of legal categories, which are the result of a slow process of evolution (see, for example, Hayek 1958).

For these reasons, the anti-reductionist strategy must be abandoned. Salvaging the autonomy of legal reasoning requires a balance of epistemic authority between legal theory and economics. This, in turn, requires increasing reflexivity in both disciplines. By reflexivity we mean here the activity of making explicit and questioning the underlying assumptions that guide reasoning within each discipline.

As defenders of economic analysis of law argue, it is the capacity of this approach to issue testable predictions that fosters the discipline's epistemic authority (Calabresi 2016). Here lies the key for the strategy that legal theorists should follow: they should move from the defensive anti-reductionist strategy to an offensive debunking strategy. Instead of just identifying (allegedly) irreducible features of law, which end up defining economics' expansionist agenda, legal theory should focus on undermining economics' claims to superior accuracy regarding predictions and causal explanation. This, of course, entails providing alternative methods for these tasks. In this sense, legal theory should go beyond conceptual analysis. Conceptual analysis, in this approach, would be necessary insofar as it helps to issue better predictions and explanations: it would be the beginning of the enquiry, not its end.

The predictions and explanations that current economic theory showcases constitute the minimum benchmark that legal theories should strive to attain.[4] Insofar as legal theory can adopt economics' epistemic goals

[4] It is important to notice that this is not a thesis about how judges should rule legal cases. This is a separate issue, which depends, first, on the place that consequentialist reasoning has within legal reasoning and, second, on whether economic analysis represents the best model of consequentialist reasoning. Neither of these questions is addressed by the argument

and not the other way around, the epistemic balance between both disciplines can be restored. In this sense, legal theory should uncover economics' blind spots and shortcomings. This will require legal theorists to probe other disciplines for the theoretical insights that will allow for improved empirical results, as well as better explanations. At the same time, social scientists who are concerned with issuing accurate predictions must adopt an approach that allows them to make sense of the legal categories that guide legal reasoning.

All of this requires a rehabilitation of Legal Realism. The general outline of such a project, based on Otto Neurath's non-foundationalist and non-reductive version of logical empiricism (Reisch 1994), is offered in the following section.

8.4 Fostering the Autonomy of Legal Reasoning Through Legal Realism

As Jeremy Waldron (2000) has noted, legal realism bears the signs of logical empiricism's influence. This is no coincidence, since the anti-metaphysical stance of logical empiricism was common to both Scandinavian and American strands of legal realism, despite the other differences one might find between the two varieties (Alexander 2002; Bjarup 2005; Pihlajamäki 2004; Spaak 2017). For both varieties of realism, the integration between philosophy and social sciences was geared toward radical reformist impulses and a commitment with deepening democratic control of the legal institutions underlying the economic system. This goal was also shared by the left wing of the Vienna Circle (Sigmund 2017).

For Otto Neurath, one of the most interesting and prolific members of the Vienna Circle (Cat 2018), the integration of different disciplines was the ultimate aspiration of science. This required all the disciplines to develop their respective conceptual frameworks in such a way that the statements in one discipline could be connected and combined to the statements made in the others so that increasingly more accurate predictions could be made. Neurath's point was that each discipline was geared toward the production of theories, which in turn were developed to increase the predictive power of the disciplines. He reasoned that the fact

offered here. On consequence-based arguments in the context of legally bounded decision-making, see Cserne (2020).

that each discipline had developed different conceptual schemes hindered the integration of their results. Thus, even scholars within the same branch of science can be talking about the same phenomenon and it would not be clear whether they agree or not on its explanation (Neurath 1983b, pp. 172–173).

At the same time, issuing predictions about real-world phenomena requires the integration of knowledge of different branches of science. No real-life event is dependent exclusively on the laws of one definite discipline. Thus, predicting phenomena requires connecting or integrating the statements from different disciplines with each other (Neurath 1983a, p. 59).

At the same time, he argued that the different branches of science can be connected in multiple ways, with different goals in mind. Thus, the model for the totality of knowledge is a succession of overlapping "encyclopedias" or frameworks for the integration of scientific disciplines. This goal of organizing science was carried out in practice by Neurath within his project for an "Encyclopedia of Unified Science", inspired by the Encyclopédie of Diderot and D'Alembert. But unlike its predecessor, Neurath's "Encyclopedia of Unified Science" was assumed to be a provisional and historically bounded project, each iteration striving for more precision and systematization of all the available knowledge.

In this sense, Neurath was skeptical about disciplinary boundaries while at the same time renouncing to the idea that all the different disciplines could be reduced to a foundational metascience.

Likewise, for the rehabilitated version of legal realism proposed here, the sense of disciplinary unity behind this strategy for the division of intellectual labor is integration, as opposed to reduction (Fuller 2013). The point is not to reduce legal language to the language of economics; rather, the goal is to organize both disciplines to achieve the best possible picture of reality.

A good example of how such an approach could work can be taken from the recent scholarship regarding the fair use doctrine in copyright law. Professor Wendy Gordon proposed in a very influential article[5] that fair use should be available when the defendant can prove that high transaction costs preclude licensing and that the use serves an identifiable public benefit. The goal of Gordon's article was to illustrate how the courts

[5] The article was cited twice by the US Supreme Court in two major cases restricting fair use: *Sony v. Universal* (1984) and in the majority of *Harper & Row v. Nation Enterprises* (1985).

and Congress have employed fair use to permit uncompensated transfers that are socially desirable but not capable of effectuation through the market. The market approach will provide a guide both to ascertain where the public interest might lie in a given case and to identify those occasions on which a court may appropriately substitute its evaluation of the public interest for its usual refusal to second-guess the copyright owner (Gordon 1982, p. 1601).

In this sense, Gordon's article falls squarely within the reductionist program that has been commented on so far. In the following years, legal commentators questioned the usefulness of this "market-centered" approach to fair use, precisely on the grounds that it was not able to account for the considerations the courts actually used in adjudicating fair use cases—in particular, whether that use was transformative or not (Netanel 2011, pp. 734–736). This entailed that the transaction cost approach to fair use had to be complemented or corrected to better describe the judicial practice regarding the fair use doctrine. This task required making explicit normative considerations that were tacitly guiding legal reasoning. Of course, nothing guarantees that these seemingly extra-economic normative considerations cannot be reduced to the language of economics, but that requires crafting an economic model that can issue better predictions than the picture of law which includes noneconomic normative considerations.

Thus, the version of legal realism proposed here does not regard legal theory as merely a chapter of the social sciences, but grounds the former's autonomy in the fact that its conceptual scheme cannot be fully eliminated and, furthermore, it is necessary for accurate prediction.[6] Thus, by focusing on how legal science strives to make explicit tacit background assumptions underlying explicit law and issuing the best possible predictions regarding the working of law, this version of legal realism is concerned with how to integrate different "nodes" of the network of human knowledge. Inspired by Neurath's project, the possible interactions between the different disciplines which aim at explaining law can only advance insofar as their concepts can be translated across them, or a mutual language is developed by their respective practitioners.

[6] Of course, legal scholarship is not only about issuing better predictions; it also includes conceptual analysis, critique, justification, systematization, explanation and so forth. The point is rather that issuing better predictions is essential for law to keep its autonomy vis-à-vis the social sciences.

The goal is to achieve a language that is intelligible to practitioners of all the relevant disciplines and the normative aspiration is to acquire ever-increasing intelligibility across disciplines. Just like humanity, the task proposed here is strictly endless and ever-changing.

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