Law and Economics

Author(s): Robert Lekachman

Source: *Journal of Economic Issues*, Jun. - Sep., 1970, Vol. 4, No. 2/3 (Jun. - Sep., 1970), pp. 25-39

Published by: Taylor & Francis, Ltd.

Stable URL: https://www.jstor.org/stable/4224041

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LAW AND ECONOMICS

Robert Lekachman

What follows is an exceedingly tentative series of meditations upon a single, somewhat general theme – the appropriate connections between economic analysis and the institutions of law. Since the time of John R. Commons, even institutionalists have devoted relatively little attention to this topic. Lawyers are usually wary of economics, a rival mystery, and for their part mainstream economists who, if queried, might cheerfully concede that statute and common law are intricately interwoven with producer and consumer choices, nevertheless take for granted as portions of the social context the formal and informal legalities which hedge resource allocation, factor payments, and income distribution. When the focus of analysis is short run, the temptations of *ceteris paribus* are all the greater, and they are likely to be decisive if something approximating perfect competition is assumed.

Notoriously economists are fascinated by, if not fixated upon free markets, regardless of the mounting evidence that such markets are exceedingly rare. Competition allows of so many elegant simplifications. Thus as Ronald Coase demonstrated in a classic article[1], under conditions of perfect competition, the market brings into equality private and social costs. For Coase it followed that legal attempts to impose upon cattle growers the costs of the damages which their herds inflicted upon crops or to assess pulp mill operators for the consequences of chemical pollution of streams, could amount to little more than futile exercises in empty rhetoric. For whatever the legislators or the courts say, the ultimate composition of output will be much the same whether the ostensible burden is placed upon the producers so that their cost curves are shifted or upon the customers whose demand curves will be displaced. In either case prices are raised and some or all of the new costs are thereby registered.

Professor of Economics, State University of New York (Stony Brook). Former Fellow in Law and Economics, Harvard Law School.

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The conclusion applies equally well to the currently fashionable movement to impose strict liability upon the manufacturers of processed foods, pharmaceuticals, cigarettes, and automobiles. Under competitive conditions at least, the real costs of these goods to their purchasers will not drop simply because new legal rules are fashioned and applied. If sellers must disgorge lavish damage settlements or substantial insurance premiums to guard against such liabilities, their variable costs will rise and the market will once more be cleared at higher equilibrium prices. In the absence of strict liability, consumers might insure themselves against injury or accident from defective or dangerous products. Strict liability comprehends in the seller's price similar insurance costs, assumed in the first but not the last instance by the seller.[2]

Of course real life markets are in varying degree imperfectly competitive. It is truly the devoted labor of many businessmen to increase the degree of imperfection which shelters them from the rigors of excessive rivalry. Accordingly, the simplifying implications of competitive theory extend, if at all, only with disabling qualifications to the occupants of sheltered market situations. For present purposes, it is enough to observe that where monopoly, oligopoly, or some other competition-limiting context surrounds commodity or factor markets, then the law matters and efforts to change it will be rational from the several standpoints of producers, public officials, and consumers. What legislatures and judges declare to be the respective liabilities of landlords and tenants, welfare administrators and welfare claimants, lenders and borrowers, oil companies and oil users, and land developers and land occupants, has a lasting impact upon the social use of resources, the mobility of labor, and the size distribution of income. Law shapes the search for profit. Equally the search for profit takes the form of attempts to amend or repeal statutes or judicial doctrines which are perceived as hindrances to greater profit.

I fear that the four examples (out of a very large universe) that I shall offer in amplification of these remarks will be as unquantified as what has preceded them. Let me then without further preamble proceed briefly to consider selected aspects of credit arrangements, tenant-landlord law, income maintenance, and retail sales.

CONSUMER CREDIT

In its pristine version, the holder in due course doctrine declares that even though a credit transaction may be tainted by fraud, an

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innocent purchaser of the credit instrument, who has not himself participated in the fraudulent underlying transaction has a clear, legally sound claim upon the unfortunate debtor. One well-known scholar has expressed his dissatisfaction with the situation in these scathing words:[3]

> If a poor woman wants a washing machine, and thinks she can pay for it in installments, and it is delivered, and it turns out to be seriously defective and inoperable, then the general law says she does not have to pay for it. This is obviously just, and obviously inconvenient to the seller. The history of contract law in the field of consumer transactions is a horrible history of devices – some of them successful – to make the woman pay for the worthless washing machine. She may, for example, be required to sign a 'negotiable' promissory note, which is speedily endorsed to a finance company. Unless she is a very unusual poverty-bracket housewife, she does not know what 'negotiable' means, 'You have to pay even though the machine is no good.' . . . .
>
> Now judges are often compassionate men, and are almost never sympathetic to delinquent vendors or to finance companies. So, in a hard-fought lawsuit, the housewife may sometimes be relieved from so harsh a bargain. But how small an achievement that is, in the face of poverty! If the system succeeds, if it works at its imaginative best, it simply thwarts one overreaching unconscionability, and sets the finance company's lawyers to working on the next one.

In a summarizing phrase, the defense of fraud halts with the original seller. Who, the lawyer seems to say, can really blame a finance company, much less the bank which finances it?

Presumably or at least possibly the legal doctrine promotes the flow of commercial capital into ghetto retailing and ghetto lending. For market analysts there is an argument readily available to the effect that shoddy goods and extortionate credit terms are better, in the eyes of their consumers, than neither goods nor credit. There are some additional considerations that serve to complicate so complacent a conclusion. Two of them are critical. In the first place, the anguished screams which emanate from the throats of sellers and lenders any time alteration of lender-in-due-course interpretations is seriously proposed[4] strongly hints the existence of monopoly profits somewhere in the system of slum merchandising. Those who fatten upon such profits might well, under legal pressure, furnish services as profuse, but higher in quality and lower in cost than present legal permissiveness now makes feasible. Something still pleasanter might occur. Supplied with an incentive to do so, the more respectable financial institutions which now shelter behind convenient legal interpretations, might take to the policing of the gamier practices of the merchants whom they now tacitly support in their evil ways. As

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usual the law does a good deal more than define the channels within which resources flow. Law also shapes the institutions which operate upon the important economic actors.

Without legislative mandate, some courts in some jurisdictions have moved against holder in due course applications. After all these years, the bolder jurists have found it possible to attach diminishing weight to the beauties of unlimited negotiability and increasing importance to the unconscionability of the more outrageous transactions and the extreme helplessness of some economic factors. One of the giants of the state bench, Justice Francis of the New Jersey Supreme Court, drew upon his own landmark decision in *Hennigsen vs. Bloomfield Motors* to apply some consumer common sense to contemporary markets:[5]

> In consumer goods transactions there is almost always a substantial differential in bargaining power between the seller and his financer, on the one side, and the householder on the other. That difference exists because generally there is a substantial inequality of economic resources between them, and of course, that balance in the great mass of cases favors the seller and gives him and his financer the power to shape the exchange to their advantage. . . .Mass marketing in consumer goods, as in many other commercial activities has produced standardized financing contracts. . . .As a result there is no real arms length bargaining between the creditor (seller-financer) and the consumer. . . .[6]

According to Francis, the appropriate moral was this:

> . . .consumer goods and their concurrent financing arrangements should be construed most strictly against the seller who imposed the contract on the buyer, and against the finance company which participated in the transaction, directly or indirectly, or was aware of the seller's consumer goods sales and installment operation.[7]

Judicial enlightenment is always welcome, but in the absence of legislative support, consumers will still need private lawyers to enforce rights of which they are seldom aware by legal maneuvers whose cost protects sellers and lenders and thus militates against successful remedy.

LANDLORDS AND TENANTS

Nowhere else have law and legal fiction had more powerful impacts upon a critically important economic relationship than in the traditional warfare between landlord and tenant. As anyone who can bear to read his lease must be aware, the law is on the side of the

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owners. Here is a by no means completely outdated 1906 expression of the state of the law, by the author of a leading treatise on *Landlord and Tenant:*[8]

> The rule that there is no implied warranty of fitness applies in a case where the subject-matter of the lease is a dwelling house. The lessor does not undertake that it is fitted for the use for which it is let, or for any purpose, or that it will remain in a tenantable condition. This involves both the right of the landlord to collect rent and his freedom from liability for injuries caused by defects in the premises. If there has been no misrepresentation or fraud, the landlord is entitled to his rent, although the premises turn out to be useless. Moreover, the landlord is not liable for damage caused by defects in the premises unless he is guilty of laying a trap or of maintaining a nuisance.

Does the tenant have *any* rights beyond peaceful enjoyment of the premises and freedom from landlord traps and nuisances? Not, it emerges, unless he has specifically contracted for them in his lease. As the treatise writer went on to say:[9]

> When a tenant inspects premises, he takes the risk of their condition, and he cannot complain because the landlord did not disclose defects. . . .If the tenant desires to hold his landlord responsible for the security of the leased premises, he should have a convenant to that effect incorporated in the lease.

In this legal arena as in installment credit, time and rising standards of equity have combined somewhat to mitigate the law's ancient severities. Although it remains generally true that "Legal defenses to an eviction action are usually limited to lack of notice of the proceeding, failure to demand rent, or overcharge.[10] Code enforcement does sometimes coerce landlords into undesigned repairs and the courts occasionally apply the doctrine of constructive eviction to especially outrageous instances of landlord neglect and tenant victimization.

New York State and New York City have gone further. Section 2040 of the State penal code allows tenants to apply directly for a criminal summons and serve it themselves upon landlords who fail to provide essential services. The New York City rent control statute permits tenants to apply for rent reductions when maintenance is inadequate. Both New York City and Chicago authorize municipal authorities to make repairs and assess landlords for their costs or, alternatively, to appoint receivers and place liens upon landlord assets for the expenditures upon the structures that receivers make.

This is something but not very much. Tenants fear both the legal process and the reprisals of their landlords, in both instances with good reason. Few jurisdictions emulate New York and none,

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New York included, devote many resources to implementing such remedies as their laws provide. Neither common law nor statute yet approximates the nonlawyer's commonsense solution: simply join the landlord's obligations to supply safe and wholesome premises with the tenant's obligation to preserve them unharmed and pay his contractually stipulated rent. In contrast to present law, the covenants ought to be conditional upon mutual performance. No doubt current law has promoted a somewhat larger flow of resources into rental housing construction, although the shortages are more noticeable than the supplies. Possibly current legal interpretation has increased the average return from rental housing investment. It is equally true that the legal rules have discouraged the higher standards of construction, maintenance, and service that larger landlord burdens might have generated. For one glaringly obvious consequence of present law is an inadequate incentive to builders and renters to construct soundly and preserve carefully. Far better to maximize short-run property exploitation and seek quick sales and capital gains.

The impact of revised landlord-tenant law, accompanied by substantially altered property tax rules, upon the quantity of resources to be committed to property markets, is uncertain. What is indisputable is that these markets would differ in shape if the legal environment were transformed in the ways that I have sketched. No wonder that here as elsewhere prudent seekers of profit might find it sensible to devote more resources to lobbying than to property improvement.

WELFARE

Income maintenance for the poor affects both the distribution of income by size and the quality of the labor market. Since 1964 what appears to be a major conceptual shift in the rules governing such public disbursements has occurred. Until very recently indeed the American rationale of public welfare could be said to be founded upon the antecedents of Elizabethan poor law and the public morality of disapproval of the needy and the unsuccessful epitomized by the English New Poor Law of 1834. Victorian morality, alive and well in 1970, divided the needy into the deserving and undeserving. The deserving poor got help and the undeserving got tracts and lectures. The workhouses of 19th century England were quite deliberately designed to breathe an oppressiveness quite enough to drive away all but the most desperate.[11] Lurking in the

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background was ever the yearning to keep expenditures and taxes down so that respectable citizens would not be compelled to limit their own pleasures in the service of the profligate poor.

In a word public assistance was a gratuity. When it was given, it amounted to an act of grace. When it was reduced or withdrawn, the victim had no more right to complain than a Calvinist not selected for salvation by a stern but eternally just deity. The gratuity notion dies hard: it is fiscally and morally too convenient readily to expire. Only four years ago when a group of welfare mothers brought suit against the Washington, D.C. welfare administration[12] alleging "harsh, oppressive, illegal and humiliating methods in making their investigations", Judge Holtzoff in the course of rejecting their claim, remarked,

> Payments of relief funds are grants and gratuities. Their disbursement does not constitute payment of legal obligations that the government owes. Being absolutely discretionary, there is no judicial review of the manner in which that discretion is exercised.

A momentous (and traditional) corollary of this attitude is the welfare administrator's asserted right to supervise the morals and conduct of his clients. In a 1960 case,[13] the Supreme Court showed itself to be willing to deprive a former Communist of accrued social security benefits on the sole ground of his unpleasant past politics. Some years earlier a New York court[14] upheld the Commissioner of Public Welfare of Seneca County in that official's denial of old age assistance to an elderly pensioner who persisted in his attempt to "sleep under an old barn, in a nest of rags to which he had to crawl upon his hands and knees.[15] This abode he stubbornly preferred to the Commissioner's offer of "suitable living quarters and an increase in pension sufficient to enable him to maintain a so-called civilized standard of living." As the Court defined the relevant issue,

> Appellant. . .argues that he has a right to live as he pleases while being supported by public charity. One would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense.[16]

Mr. Wilkie was presumably a premature individualist, eager to do his own thing. Most pensioners, no doubt, would have embraced the Commissioner's respectable proposition.

In our day the issue has been particularly acute in southern jurisdictions where ancient racial prejudices intensify the usual disposition to regulate the conduct of the poor. Until the Supreme

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Court landmark decision in *King vs. Smith,*[17] Alabama in company with a number of other jurisdictions claimed the power as of right to deny benefits for which welfare mothers were otherwise eligible if they were engaged in extramarital sexual relations, after the fashion of their betters. The thrust of the substitute father rule was to formalize the ancient maxim, one morality for the rich, another for the poor.

At this writing yet to be decided by the Supreme Court is a New York case which hinges upon the frequently asserted right of welfare investigators or caseworkers to gain entry, uninvited and unauthorized by warrant, to the homes of their clients. The large and general question is this: To remain or become eligible for public aid, must a citizen barter away the normal constitutional protections against illegal search and entry? On this key issue, the law moves, if exceedingly slowly. Until the Supreme Court decided otherwise last year in the celebrated case of *Shapiro vs. Thompson,*[18] welfare recipients were in effect compelled to choose between their constitutionally protected rights to travel and an adequate level of financial support. State after state had erected residency requirements as a frontier protection against migrating indigents.

Also pending before the appellate courts are numerous cases which concern the rights of welfare recipients to receive fair hearings *before* financial assistance is suspended or curtailed, and adequate explanations of proposed welfare actions. As this desperately hasty sketch of the complex welfare situation implies, the courts appear to be moving slowly, waveringly, incompletely, and possibly inconclusively away from gratuity notions of public aid, toward the idea of minimum subsistence as a "right."[19]

One might observe parenthetically that President Nixon's welfare proposals admirably embody the ambiguity of present public attitudes. On the one hand, the program takes a first step (if at terribly ungenerous financial levels) toward a guarantee of income as a right to individuals made eligible primarily by their position in the income distribution. On the other, it vigorously affirms the older opinion that an individual who receives public assistance owes something in return to the community which supports him. In the present statutory scheme, the quid pro quo is acceptance of either job training or "suitable employment", as defined by public officials rather than program beneficiaries.

If in the longer run the shift toward income maintenance as a right accelerates, its impact upon the incomes, status, and work attitudes of the poor are likely to be considerable. Here I pause only for some preliminary considerations. Whatever the scale of public

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assistance may be, once it is defined as right rather than gratuity, a larger proportion of the eligible population will seek payments than now is the case. Currently shame and fear of oppressive bureaucratic interference inhibit many persons from seeking the help to which they are legally entitled. Moreover, the possessor of rights will press far more vigorously for their enforcement than can be anticipated of the timid and ill-informed constituents of public charity. The most militant of the welfare groups is significantly titled the Welfare Rights Organization.

For many the overriding question is one of incentive. Will the poor, once assured of subsistence, relax and breed children? Much emotion and precious little information surround this vexed topic. Shortly we may know a little more as the consequence of an important social science experiment involving since the middle of 1968 575 working poor families in New Jersey and Pennsylvania and an additional control group of 635 families.[20] The early results so far as they can be depended upon strongly imply that the poor are more likely to model themselves upon the teachings of John Calvin than those of Norman Douglas.

Families received 50 to 125 per cent of the $3,300 poverty line (as of the beginning of the experiment) for families of four. If they chose to supplement the guarantee by their own earnings, these earnings were subject to a "tax" as low as 30 per cent and as high as 70 per cent. The control group were paid a mere $10 monthly for filling out the questionnaires. Contrary to both popular prejudice and standard economic assumptions, the experimental families proved themselves more attached to paid work than did the control group. While 53 per cent of the experimental unit earned *more* after the guarantee than before it, only 42 per cent of the control group similarly improved their situation. And although 29 per cent of the experimental families experienced earnings declines, the slightly larger percentage of 31 incurred such losses. If the experiment demonstrated anything (and if its results are confirmed by later and fuller evidence) it is that cash gifts encourage additional effort. Possibly, as one of the project's economists surmised, the poor get as "hooked" on income as respectable members of the middle class.

CAVEAT EMPTOR TO CAVEAT VENDOR?

Our final stop is in Ralph Nader country. Here we approach one of any changing society's central issues, the manner in which law balances enterprise and innovation against traditional processes and

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vested interests. It is a comforting truism that in the course of rewarding their inventors and merchandisers, new products and processes potentially at least benefit the community at large. To the extent that this pleasant coincidence of interest holds true, no unnecessary legal barriers should be erected against entrepreneurial effort. Unhappily innovation in a crowded universe does more than damage the custodians of ancient interests. The probability daily increases that entrepreneurial rearrangement of the environment will inflict sometimes unanticipated injuries upon consumers, workers, and other businessmen, not to mention the damage done to scenic prospects, rustic meadows, running brooks, drinkable water, and complex ecological systems.

In this jostling of interests are comprehended a host of issues.[21] I shall examine only one, the topic usually termed products liability. When should the user of a product or an innocent bystander be entitled to recover damages for injuries or losses caused by a product? And from whom? Must the victim prove actual negligence upon the part of producer or distributor? Must the negligence inflict actual physical injury or will mental anguish, economic loss, or even substantial inconvenience suffice to support claims for reimbursement? When the processor or the seller loses a lawsuit, who ultimately bears the cost of the judgment? This sampling of possible queries may be enough to explain why over the years the law of tort and the law of contract have afforded comfortable livelihoods to hordes of lawyers.

On this occasion I need say no more than that decisional law in the last decade has significantly extended the scope of enterprise liability. As one authority phrased it, "Arrival of the era of strict liability was no longer in doubt after the year 1963."[22] What difference do the new ground rules make? A little legal history bears upon the response. In the middle of the 19th century the American law of recovery for personal injury was heavily influenced by a leading English case, *Winterbotham vs. Wright,* which denied the claim against his employer of an injured coach driver, on the ground of absence of privity. The contractor's duty to operate a safe vehicle was owed to the postmaster general who hired him, not to the coachmen. As the rule was adapted to American circumstances, recovery for personal injury was possible only if the injured party were in a direct contractual relation with the author of his grievance.

Slowly a series of court constructed exceptions eroded the rule and widened the protections available to purchasers, users, and even bystanders. Sometimes the analysis proceeded in tort, sometimes in contract, and frequently the argument was a muddle of the

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two theories, depending upon whether negligence or breach of warranty struck attorneys as the more plausible ground of advocacy.[23] The first break in the old pattern occurred in 1852 when a New York court extended the liability for injury caused by an incorrect prescription beyond the pharmacist to the suppliers who had mislabeled the jars. The departure from strict rules of privity was judicially defended by the special dangers to human life. Newly presented with the shiny conceptual tool of "inherently dangerous" products, the courts intricately and inconsistently wrestled with defective scaffolds (*Devlin vs. Smith,* 89 N Y 470), exploding coffee urns (*Statler vs. Ray Mfg. Co.*, 95 N Y 478, 480), bursting steam boilers (*Losee vs. Clute,* 51 N Y 494), aerated water (*Torgeson vs. Schultz,* 192 N Y 156), and malfunctioning elevators (*Kahner vs. Otis Elevator Co.,* 96 App Div 169, 89 NYS 185).

As time past, it became harder and harder to determine what was and what was not an inherently dangerous product. The landmark decision which engendered at least temporary rationality was Justice Cardozo's celebrated 1916 clarification in *McPherson vs. Buick* (Court of Appeal, N Y, 1916. 217 N Y 382, 111 N E 1050). The facts were these. A driver suffered injury when the Buick that he was non-negligently operating crashed because its wooden wheels disintegrated. Cardozo swept away Buick's defense of lack of privity. Whatever older law held, it was under contemporary circumstances nonsense to accept Buick's claim that the vehicle was destined for the Buick dealer when that worthy's *raison d'etre* was getting rid as rapidly and profitably as possible of the factory's products. With equal impatience, Cardozo swept away the increasingly whimsical distinctions between products alleged to be inherently dangerous and products not accorded that distinction. In their place and as a single rule of future liability for all sellers, he enunciated this proposition:

> We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.[24]

As the law measures time, other jurisdictions quite rapidly followed Cardozo's lead.

But for all its novel clarity, the effect of the new rule was limited. For one thing it was not clear whether the suppliers of defective components were also liable. More significant as a limitation upon the chances of recovery, plaintiffs still had to prove negligence. Two of the last decade's leading cases serve to measure the distance traveled since *McPherson.* Negligence as the prerequisite

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to recovery has been swept away and sellers have had imposed upon them the responsibility of supplying products which in their normal uses will injure neither consumers nor spectators.

Greenman vs. Yuba Products Inc.[25] exemplifies the new situation. In this case a plaintiff sought damages for injuries inflicted upon him by a flying piece of wood hurled at him by a power tool called a Shopsmith. In the words of the Court which concurred in the plaintiff's claim,

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.[26]

The second case, *Goldberg vs. Kollsman Instrument Corporation*[27] reached similar results in more tragic circumstances. Here the plaintiff was a mother, the administratrix of her deceased daughter's estate. The daughter was killed in the crash near LaGuardia Airport of an American Airlines plane. Defendants included American Airlines as owner and operator of the aircraft, Lockheed as assembler, and Kollsman as manufacturer of the defective altimeter which apparently precipitated the catastrophe. Chief Judge Desmond of the New York Court of Appeals found a breach of implied warranties of merchantibility and fitness. The decision was somewhat odd in that it focused on financial responsibility rather than strict liability. Kollsman and American Airlines were absolved but Lockheed was held liable in the following terms:[28]

> . . . the costs of injuries resulting from defective products should be borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves. . . .However, for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.

If Professor Keeton's forecast is proven accurate, strict liability will soon be extended to each commercial link in the manufacturing and distributing chain.

For economists as usual the fascinating questions concern the shifting of the financial burdens. Will these be passed forward in full to consumers, partially borne by manufacturers, or pushed backward to earlier suppliers? Even if the costs are passed onwards to the

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customers, may not consumers benefits from new pressures upon suppliers for better design, more careful inspection, and more scrupulous attention to the legal risks of defective products?

CONCLUSION

As a legal amateur, I may well have swum out beyond my depth into stormy doctrinal waters. At best I can claim no more than the most preliminary exploration of a few of the places where law impinges upon economic activity. I continue to be amazed at how little systematic investigation of this frontier has been undertaken by economists and I hope brethren better equipped than I am in modern quantitative methods will do something to fill the need. The job is far from easy. Once the economist shucks off the simplicities of competitive models and endeavors to cope with the lush vegetation of oligopoly and monopoly it is hard to know how the legal liabilities will be shifted, factor incomes affected, and human incentives reshuffled.

A rather different second moral asserts itself. Law is a battlefield. Upon it the economic actors wage campaigns which, if not as feasibly summarized in maximizing formulae as economists might prefer, all the same powerfully influence success and failure as economists and accountants measures these conditions. Subtle shifts in the interpretation of the Uniform Commercial Code, technical amendments to the state banking statutes, minor variances in zoning ordinances: these and their numerous analogues are the consequences of intense efforts by financially interested parties. A change in a zoning ordinance is often worth more in potential financial reward than a conscientious attempt to improve operating efficiency. A complaisant legal interpretation may yield a return superior to that obtainable from product or process improvement.

Economists concerned to comprehend the actual development of their society's institutions neglect the shaping influence of law at considerable cost to the realism and generality of their researchs. As a distinguished economic historian has recently put it:[29]

> To get at both the course of American economic growth (as measured by real per capita GNP and the capital/output ratio) and development (improving social and political attitudes and commitment and a more equitable allocation of national product), one must throw a wider net. The climate of opinion

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(which rejected or accepted entrepreneurship and its leadership); social and political moods and postures; stability or conflict in class relations; the presence or absence of mobility in society; law and the law courts; the impact of labor radicalism; and political decision making (again with rejection or acceptance) – these singly or severally have played a large, perhaps the larger, role in retarding or encouraging growth and in holding back or advancing development.

FOOTNOTES

[1]See Coase, Ronald, "The Problem of Social Cost", *Journal of Law and Economics,* 3 (1961).

[2]The conclusion admits of qualification. If producers can insure more cheaply than consumers, fewer resources will purchase the same quantity of protection and there will be an efficiency argument for strict liability.

[3]See Charles L. Black Jr., "Some Notes on Law Schools in the Present Day", *Yale Law Journal,* Vol. 79, No. 3 (Jan/70), p. 503.

[4]In an election year (1970) Attorney General Lefkowitz of New York State has proposed revisions of lender liabilities to defenses of fraud in underlying transactions.

[5]See Unico vs. Owen, Supreme Court of New Jersey, 1967, 50 N J 101, 232 A.2d 405. Included in Dodyk et al., *Law and Poverty,* West Publishing Company, St. Paul, Minn., 1969, pp. 880-890.

[6]Dodyk, *op cit,* p. 884.

[7]Dodyk, p. 885.

[8]Quoted in Dodyk, p. 582.

[9]Ibid

[10]Dodyk, p. 577.

[11]Dickens' Oliver Twist was of course an inmate of a New Poor Law workhouse.

[12]Smith vs. Board of Commissioners of the District of Columbia. U.S. District Court, D.C., 1966. 259 F. Supp. 423. Cited in Dodyk, pp. 10-11.

[13]Flemming vs. Nestor, Supreme Court of the United States, 1960. 363 U.S. 603, 80 S Ct 1367, L Ed 2d 1435.

[14]Wilkie vs. O'Connor, Supreme Court, Appellate Division, Fourth Department, 1941. 216 App Div 373, 25 NYS 2d 617.

[15]Dodyk, p. 169.

[16]See Dodyk, pp. 169-170.

[17]See Dodyk, pp. 30-44. Alabama defined a "father-substitute" in the following terms: "An able-bodied man, married or single, is considered a substitute father of *all* the children of the applicant/recipient mother living in her home, whether they are his or not, if: (1) if lives in the home with the child's natural or adoptive mother for the purpose of cohabitation; or (2) though not living in the home regularly, he visits frequently for the purpose of cohabiting with the child's natural or adoptive mother; or (3) he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere." (Dodyk, p. 121).

[18]Dodyk, pp. 59-93.

[19]The classic exposition of the new standard is Charles Reich's "The New Property", *Yale Law Journal,* Vol. 73, No. 5 (April/1964), pp. 733-787.

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[20]See the OEO mimeographed release, *Preliminary Results of the New Jersey Graduated Work Incentive Experiment.* An accurate summary appears in *Business Week,* Feb. 23, 1970, pp. 80-82.

[21]To the layman it is startling to discover that one of the consequences of the Santa Barbara oil spill is a series of tort claims aggregating some billions of dollars. A tort, a novice might innocently imagine, is what one careless driver does to another.

[22]Robert E. Keeton, *Venturing to Do Justice,* Harvard, 1969, p. 101.

[23]A convenient summary of the law's evolution is to be found in Berman & Greiner, *The Nature and Function of Law* (2d edition), Foundation Press, 1966, pp. 381-472.

[24]Ibid, p. 424.

[25]59 Cal. 2d 57, 377 P.2d 897, Cal Rptr 697 (1963)

[26]See Keeton, *op cit,* p. 102.

[27]12 N Y 2d, 432, 437, 191 N E 2d 81, 83.

[28]Ibid, p. 104.

[29]Louis M. Hacker, *The Course of American Economic Growth and Development,* Wiley, 1970, p. xiv.

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