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Economics and Jurisprudence

W. H. Timlin

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ECONOMICS AND JURISPRUDENCE

A lecture delivered by the late Justice Wm. H. Timlin of the Wisconsin Supreme Court to the students of Marquette University College of Law.

JUSTICE W. H. TIMLIN
of the Wisconsin Supreme Court

An article, entitled "Economics from a Legal Standpoint," in the *American Law Review*,¹ discusses somewhat superficially the lack of coöperation between the lawyer and the economist in the solution of present problems, and the author ventures the opinion that: "Relief from this situation might be secured by having our economists become lawyers and our lawyers economists." But he regards this as hopeless because of the fact that a complete mastery of either science is now out of the question. *Economics and Jurisprudence*² is the title of a little book found in the Law Library at Madison and is, I believe, the only book on this topic in that great law library. Here again the discussion is very vague and general, instances and illustrations are lacking, and it is not made certain what the writer included within either term, economics or jurisprudence. In the *Criminal Law Maga-*

¹ 42 Am. L. R. 379; ² Address by H. C. Adams Pamph.

zine,² there is an essay by Frances Wharton, entitled "Political Economy and Criminal Law," showing the attitude of contemporary English judges toward Adam Smith's work on political economy. This is well worth reading.

At the November, 1878, meeting of the New York State Bar Association,³ Mr. W. M. Ivins, of Brooklyn, read an essay upon jurisprudence and political economy, which also will repay perusal, and in which he briefly outlines the objects and limits of political economy, the object and limits of jurisprudence, and discusses the relations between law and political economy and asserts that no English writer, economist or jurist, has done anything systematic in this field. He does not, however, distinguish between jurisprudence and law, nor between economics and political economy, nor consider separately the viewpoint of the legislator, the judge and the lawyer. Heron's *History of Jurisprudence* contains much that is entertaining and instructive upon this subject. The economists and jurists of continental Europe have given this matter more attention, as Bodin, Rivet, and Bechaud, in France, Von Mohl, Dankwardt, and Endemann, in Germany, and Vico and Romagnosi in Italy. Economists generally seem to be more sanguine of the utility to the lawyer of economic studies than the lawyers are, but the former usually fail to distinguish the function of the legislator from that of the judge, or the duties of the judge from those of the lawyer, and their discussions upon the relation of economics to law are often too vague and general to be of much practical use. The great value of economic knowledge to the legislator is obvious and has been long recognized. Those of us who cannot read Greek can get the oldest expressions of opinion on the relation of political economy to legislation from *Newman's Politics of Aristotle*, and the relation of political economy to legislation is recognized and discussed more or less in Sidgwick, Seligman, Jevons, Ely, Carey and other writers on economics, and also in several chapters of Adam Smith's *Wealth of Nations*, particularly the chapter on the expense of justice, that on taxation, and that on the expense of public works for facilitating commerce. Special examination and discussion of economics in its relation to legislation and jurisprudence will be found in Jevons' book on *The State in Its Relation to Labor*, Adams on *The Relation of the State to Industrial Action*, Farrer on *The State in Its Relation*

² Law Pamph., vol. 1. ³ 3 Crim. Law Mag. 1.

to Trade, Brentano on *The Relation of Labor to the Law of Today*, Hoffman on *The Sphere of the State*, Stimson on *Labor in Its Relation to Law*, and doubtless elsewhere. The relation between political economy and legislation affecting the finances of the state is indeed so obvious and necessary that every person of good sense, although he never opened a book on political economy, and knows nothing of it as a science, is, nevertheless, influenced by its rules and principles in giving or withholding assent to such legislation. In such case he gives or withholds his assent to legislation affecting the finances of the state upon *a priori* reasoning, or upon grounds of personal experience, or upon knowledge otherwise acquired, identical with the proper knowledge of, or deductions from, the recognized tenets of political economy. He may be often wrong, as economists are; he would be better fitted for his task were he a more learned and competent economist, but so far as he is able to observe and understand these economic phenomena he is necessarily guided by them because the nature of the questions under consideration suggest just such inquiries and invite just such comparisons. But the viewpoint of the interpreter of law and also that of the student of law is very different from that of the legislator and the relation of economics to law in their fields of labor less obvious. The first difficulty inheres in the fact that for the purpose of study and investigation the great body of the law has never been successfully analyzed or classified except with reference to the objects acted upon or regulated. Such was the method of the institutes of Justinian and of Hale and of Blackstone, and of others who have made the attempt; covering substantially the following classification, but not in this exact order: (1) The laws relating to institutions, such as establish and define the creation and powers of courts, legislatures, executive and administrative officers, municipalities and their officers so far as they are governmental agencies, and other like institutions together constituting the state. (2) The law of persons, such as status, citizenship, domestic relations, marriage and divorce, relation of guardian and ward, and includes generally those laws which affect the distinctions between men and the relations which exist between them. (3) Laws which relate to property or things. (4) Laws relating to obligations, contractual or imposed by law independent of contract. (5) The law of pleading and procedure regulating actions and defenses. (6) The criminal law or the

law of public wrongs having for its object the prevention and punishment of crime.

This classification does not follow with exactness that of the Institutes or that of Blackstone with reference to the number of subdivisions, or the topics grouped in a particular subdivision, but does substantially conform to their general plan and to the revised statutes of Wisconsin and also to those similar statutes of most of the states of the union in classifying laws with reference to the object acted upon or regulated. The same general plan is found in the Code Napoleon and in the new German Civil Code of January 1, 1900. On this plan of classifying laws according to the object affected or regulated all our commentaries and text-books on the law and all our legal encyclopaedias are written, merely carrying this general plan into more minute subdivisions. Such, for example, are *Parsons on Contracts*, *Black on Judgments*, *Cooley on Torts*, *Daniel on Negotiable Instruments*, *Washburn on Real Property*, and so on. It will be readily seen that this scheme of analysis and classification does not adapt itself very readily to any investigation of the relation of economics to existing law. This mode of classification applied to other sciences has been denounced as one justified only by weakness of understanding, but it is probably the only practical plan with respect to law. In the study of the law we are, therefore, examining a body of existing rules classified with reference to the objects affected or acted upon by such rules, and the method of study is usually inductive, historical or analytical, while in economics we observe certain facts and tendencies, certain ever present or constantly recurring phenomena, ascertain their causes and deduce therefrom certain rules which we call laws. "The economic facts (laws?) we find existing are the result of causes between which and them the connection is constant and invariable. It is then the constant relations exhibited in economic phenomena that we have in view when we speak of the laws of the phenomena of wealth and in the exposition of those laws consists the science of political economy (economics?). It is to be remembered that economic laws are tendencies, not actual descriptions of any given conditions in this or that place."⁴ In the one case we think of law as a command to which persons and things must conform; in the other as the cause of conformity. Methods of investigation and study are deductive, as in philosophy or

⁴ Mills Political Economy by Laughlin, 176.

mathematics, where we begin with axiomatic premises and carry on therefrom a process of reasoning unaided by any outside or collateral tests and so arrive at or seek to arrive at the truth; or the method may be inductive as where we begin with the observation of particulars, noting their similarity and consonance and finally derive or attempt to derive therefrom the cause and the law or rule governing the existence and concurrence of their phenomena. Sciences are called positive or exact when induction and deduction alternate in their presentation and examination. Deduction is the principal mode of study of social economics, although not the sole method. Induction is the principal method in law, although not the sole method. Still another obstacle rests in the ordinary weakness of economists as lawyers and that of lawyers as economists. Without pretending to any special distinction in either branch of knowledge I will attempt to trace historically and analytically in part the relation of social or natural economics to existing law.

For the purpose of this discussion let us distinguish between legislation, jurisprudence and law, and consider only the latter as indicating that vast body of existing rules declared, maintained or enforced by a sovereign state. Let us further narrow the discussion by considering economics to be capable of division into political economy and natural or social economy; the former treating of the finances and property of the state and indeed all of the fiscal or the trade relations of the state with persons or with other states, including taxation, coinage, currency, tariffs and the expenses of administering government; and the latter as treating of the production, exchange and distribution of wealth by those persons so engaged. This science, says Jevons, "rests upon a few notions of an apparently simple character. Utility, wealth, value, commodity, labor, land, capital, are the elements of the subject and whoever has a thorough comprehension of their nature must possess or be soon able to acquire a knowledge of the whole science." Having thus eliminated political economy as above defined, and also having eliminated economic science generally so far as the same relates to proposed legislation and also in its relation to the broad term jurisprudence, we will be able to examine more accurately the relation of social economics to existing law. The utility of this further investigation will consist in its aid to the understanding of the law. For the reason of the law is the life of the law; and he who best understands the causes and reasons of legal rules will, other things being

equal, best understand the law. Notwithstanding that economic laws are few and simple and the body of legal rules vast and complicated, they have the same origin or starting point. For the bases of economics and the origin and bases of law are human desires, some natural, imperious and all controlling, as the desire to exist or the desire for food and other necessities of existence; others secondary, as the desire for comfort, for art or ornamentation, and still others acquired, as the desire for certain luxuries. Customs conform to desires for the sufficient reason that they are voluntary regulations. Customs grow into law by legislative enactment or judicial recognition, and thus desires become rights, the masterful and paramount desires first, and the subordinate desires later. "Legal history is really a handmaid to economic history ; legal development is inexplicable apart from economic forces. The economic fact in this sense is the cause, the legal situation is the result." ⁵ The economic cause precedes the custom and produces it, precedes the law and causes it, except in those comparatively few instances where neither the custom nor the law relates to the creation, production, enjoyment or distribution of wealth within the economic significance of these terms. But great and controlling as economic considerations, rules and principles are in the formation of law, it would be exaggeration to claim that they alone ultimately determine the form and character of the legal rule. In the infancy of the law economic influences, while fairly discernable, are comparatively weak and are deflected and modified by religious influences or tribal or national customs not economic, or it may be by superstitions, but the economic cause is never wholly overcome and is always a factor in the production of legal rules.

Since the earliest days up to and at the present time religions, ethics, customs, prejudices, climatic and geographical conditions, and to a less, but wholly exaggerated extent, racial traits enter largely into the making and somewhat into the interpretation of laws. It would be erroneous to say the law is in any age instigated solely by economic considerations. Systems of law are always relative to the epoch of history at which they appear and therefore in a commercial and industrial age economic considerations are usually paramount in the formation and in the interpretation of laws. Ethical considerations generally enter more largely into the interpretation and application of laws than into their enact-

⁵ Seligman Principles of Pol. Economy, pp. 31, 32.

ment or origin, but this is a variable factor and what the judge might consider ethical in an immature social condition or in a religious, military or chivalric age might not be so considered in a commercial and industrial age and vice versa. Nor is the completed law always the product of intelligent design on the part of the people or the law makers of any epoch. It is in some of its manifestations like language, the sub-conscious product of human intelligence, human sentiment and human desires. "It cannot be derived solely from interest as by Epicurus, from fear as by Hobbes, or from necessity as by Machiavelli and Spinoza."⁶ "However hostile or masterful the interests and passions of individuals, classes and nations may seem to be in regard to it, they are in fact but the instruments by which it builds up its empire." The completed law is not always the result of conscious or deliberate intention on the part of the people or on the part of the law makers. Laws made for one purpose often come to subserve a wholly different purpose. Witness the fourteenth amendment to the federal constitution and the English statute of uses (Washburn on R. P., ch. 56). The dominant cause of this curious phase of law will be referred to later.

But, notwithstanding the existing law is the product of many factors, we may, with advantage to ourselves, trace historically the force and effect thereon of social economics, that most potent and persistent of all its factors. Even a superficial examination of the earliest laws, such as Deuteronomy or the laws of the Saxon invaders of Britain, discloses that the first and paramount idea of the youth of law is the repression of violence and disorder and the institution or regulation of religion and the privileges of the priesthood. This last feature is in itself, to the mere statesman, but an effective mode of maintaining order and suppressing violence or crime. In Deuteronomy, for illustration, persons guilty of murder are to be given over to the wrath of the kinsmen of the victim, but cities of refuge are established to which one guilty of involuntary homicide may fly and so escape from the kinsmen. Adultery and rape are forbidden, false witnesses are punished, all executions are participated in by the whole tribe, the witness against the guilty person striking the first blow. The shrewdness of this last in its tendency to prevent factional subdivision and internecine strife is noteworthy. Idolatry, which is also treason in a theocracy, is to be punished by death. The

⁶ Blackwood's Philos. Classics.

domestic relations are regulated; trial by judges recognized as existing; an appeal from the decision of local judges to be heard by the priests of the Levitical race and the judge at some appointed place; the existence of the right of property is recognized as a matter of course; not thought necessary to be established or created by law, but existing anterior to and independent of the law; and the regulations respecting weights and measures also show that some sort of trade or exchange existed. This law approves thrift, but commands liberality, provides against too great accumulations of wealth by periodical partial distribution, recognizes slavery as existing by provisions relating to manumission and is wholly adapted to a tribe of herdsmen and farmers. Priests and Levites should not have wealth, but should receive from the people annual tithes or dues; and to modernize the expression, multimillionaires, or those having a plurality of wives are not eligible to the highest office. An awful curse is launched against those who will not hear the voice of the Lord and keep and observe these laws. "The dooms of King Ethelbert established in the days of Augustine,"⁷ as the earliest Saxon laws are entitled, first provide for the property and privileges of the bishops and clergy and then declare a series of fines or compensation to the kinsmen of the murdered or to the wounded person for homicides and wounds reading something like a modern accident insurance policy. "If an ear be struck off let bot be made with twelve shillings. If an eye be struck out let bot be made with fifty shillings; if a thumb be struck off, twenty shillings; if the thumb nail be off let bot be made with three shillings." Like bot was to be made for rape, adultery or kidnapping. The right of property is also recognized as existing anterior to and independent of law because no statute expressly creates it or regulates it. Contracts and obligations are known, as where this law says: "If a man buy a maiden with cattle let the bargain stand if it be without guile. But if there be guile let him bring her home again and let his property be restored to him." Trade there was, or there would have been no shillings. Without laws relating to contract there could have been no trade. But from what indirect and slight expressions in the written laws are we obliged to infer this! But it is certain that these important matters on which the food supply and indeed the life of the nation depended were not without regulation. The words of all early written law are preg-

⁷ *Germans and Development of the Laws of England.* Stearns.

nant with recognition of an underlying unwritten economic system then in force. And system presupposes order and rule. The dooms of King Ine of the West Saxons, the laws of Kings Alfred, Ethelred and Canute are similar; recognizing property, contract, slavery and status as existing conditions, not creating but slightly regulating them. The regulation and establishment of religion with the rights of the priesthood and the restrictions of violence and disorder constitute the main body of such laws. "The dooms of King Alfred" begin by Alfred and his witan enacting the ten commandments which were given to Moses, and in other respects borrow from the Jewish law. If one sold his daughter to servitude she should not be treated as other female slaves, in that he ought not sell her away among a strange folk. This king was evidently a person of some sagacity, and I select this quaint piece of good counsel which legislators and judges of the supreme court might well abide: "I, then, Alfred the king, gathered these together and commanded many of those to be written which our forefathers held (those which to me seemed good) and many of these which seemed to me not good I rejected them by the counsel of my witan, and in other wise commended them to be holden; for I durst not venture to set down in writing much of my own for it was unknown to me what of it would please those who should come after us."

It is particularly noticeable that the right to hold property, to make contracts or to engage in trade is not attempted to be conferred by law, but recognized as conditions existing prior to the law. "Thou shalt not steal" as clearly recognizes the right of property existing prior to this early law as does the commandment, "Thou shalt not covet thy neighbor's goods." Whence did the owner or possessor derive the right to have against him who steals; and what law made those goods "thy neighbor's goods?" The fragments which have come down to us from the twelve tables of the Roman Law have these same general features, but the religious element is not so paramount and property and trade regulations somewhat more pronounced. This word "property" is used popularly to designate the object or thing owned, but in the law the word means the right of the owner to this object. "Property is the right of any person to possess, use, enjoy and dispose of a thing."⁸ As we have seen, in the earliest laws we find no mandate that one shall have a right to possess, use, enjoy

⁸ Andrews' American Law, sec. 59.

or dispose of the objects of wealth which he has created by his industry or captured by his prowess. This, I believe, is because the right of property began as a natural right asserted by the possessor or possessors and maintained by his or their strength and skill, as the eagle or the lion defends his right to his prey or the bee to its store of honey, the savage to the possession of his weapons, or the child to that of his toys. In this sense the right of property is a natural right and antecedent to all law. Custom, the forerunner of primitive law, must have shaped itself into crude rules respecting what should constitute a first claim or taking, and the interest of the community must have enforced with some regularity the observance of such rules.

I can remember distinctly that among the frontier settlers in Wisconsin, if a hunter shot a deer and wounded him, and the deer ran away, pursued by the hunter, but leaving no trail of blood, another hunter meeting this fleeing deer, might shoot it, and it was his property; but if after the first shot the deer left a trail of blood, the first hunter was entitled to follow that deer and take it from any other hunter who might have met and killed the fleeing deer. I remember the discussions upon this custom and the care with which it was observed, and yet the only sanction that I know of for the custom was public opinion, which would justify and uphold the quarrel of the hunter so entitled to the deer. So that even at the primitive stage of statute making represented by the laws of the Jews or the Saxons above referred to, the right of property had become at least an established custom, and laws preventive of tumult and disorder with some regulations of what was considered abuses of the right of property in cases peculiarly liable to abuse, as in the case of property in slaves, was all the written law that was considered necessary. In these early stages of law economic influences are fairly discernible in the laws relating to property contract and trade, which rights rest strictly upon economic bases whether the property was the spoil of battle, the reward of labor or the proceeds of purchase or inheritance. Whether from policy or from mere casual omission the written law contains certain recognition and but slight regulation of trade or industry. But I believe there was a reason for this. In its beginning the written law is restrictive only. "Thou shalt not," is often its language; always its spirit. In items and in mass it is written from the viewpoint that the persons subject to the law may follow their desires and inclinations except in those particulars forbidden by the law. This left economic

relations and customs largely unaffected by the written law. The more ample effect of economic rules or principles in the formation and interpretation of law belongs to a later stage of legal development in which the social fabric and the state are organized upon an industrial plan. Property which the law regards as the right to a thing, social economics looks upon as the thing itself and considers the word synonymous with goods or wealth, as the product of labor, or the joint product of labor and capital, belonging to the producer thereof because he produced it. Trade or exchange, both law and economics regard as an indispensable element of the enjoyment, use and distribution of wealth, contract as an indispensable feature of production, use and distribution. Social economy considers and classifies not men or things, but functions, in the production and distribution of wealth. Therefore it says there are producers and consumers of wealth, although every man is a consumer and nearly every man is in some degree a producer. It ascertains that there are the functions of labor, capital and management, carriage and storage, sale and exchange, in the production and distribution of wealth, recognizing that the same person at the same time or in succession may perform one or two or all of these functions. It recognizes that men labor for rewards and that capital is the accumulated or stored up product of former labor, that management, merchandising, the exercise of skill, trade, and transportation, are each a species of labor and that without assured reward certainly and permanently secured by law, all production beyond what was necessary to satisfy present craving or present and immediately pressing necessities would cease, as has sometimes happened in periods of anarchy, which are, if long continued, always associated with or followed by famine. The legal rules which the law calls property, therefore, secure labor in the possession of the reward of labor. It was necessary and fundamental that the law should recognize and uphold the right of property in order that this economic condition, essential to human welfare, should exist or continue. If one could not be assured by law of a right to the reward of his industry or to the profit of his capital he must hold it with the strong hand or abandon all further industrial effort and prey upon others as the lawless preyed upon him. But because human foresight and human wisdom is imperfect there must always be some imperfections in the law. In order to give effect to the paramount legal concept of peace and order instead of battle and violence it is necessary that to a considerable extent

those who have acquired possession of the objects of wealth, such as lands and goods or the means of purchasing them, should be secure, after a lapse of time, against violent or fraudulent dis-possession, no matter how these lands and goods were in the first instance acquired. It would be utterly impossible to make any other orderly regulations, and any other plan would only result in inviting and stimulating that violence and disorder which the law was invented to suppress. There are many examples of this following wars and confiscations. Accordingly at the next stage of legal development the concept of property will be found paramount and comprehensive and second only to the prevention of disorder and violence.

Bascom says:⁹ "Property rights have always gained a defense in advance of personal rights. Personal rights have been treated in the outset as a branch of property rights. An injury to a person was redressed by a fine and the family or the community was conceived as having a kind of ownership in the lives and strength of its members. The property conception as itself more definite has been used to give definiteness to personal rights." In this way the right of one man to the labor of another without consent of the latter, but founded upon status, was the foundation of the world-wide legal relation of master and slave, and the law regarded the right of the master to the slave and his labor as property, contenting itself with imposing duties upon the master with respect to the sale, treatment or manumission of his slave. Fichte observes that the right to administer laws, to decide causes, to collect taxes, or to govern a territory was once considered property, inheritable and devisable and capable of transmission by sale or consent. So the early law recognized the power and jurisdiction of a king as a sort of property right. Wives and daughters were property, the daughter, but not the wife, an object of barter or sale, and even within our own times the wrong done to a father by seduction of his daughter can only be redressed by an action for loss of her services, and the same view gave the husband an action for alienation of the affections of his wife because he had a property right to her services, but denied to the wife any redress for a similar wrong upon her because she had no such property right. The present tendency of the law is to enlarge and vindicate personal rights and to preserve property rights, but to limit them within their proper bounds.

⁹ Bascom on Sociology 151.

Where economic conditions are static or normal, we find the law in a like condition. Changes are few and come about slowly by legislation or by the gradual extension of the law through judicial decisions to conform to customs based for the most part upon economic conveniences and desires. But economic science is not always and perhaps not often in advance of law. It is the economic fact that precedes and produces the law, not the science of economics as understood or promulgated at the time by those learned in that science. When economic science was understood and defined by the so-called mercantile school of economists as the science of exchanges or the science of the distribution of wealth, the thoughts of the more advanced and intelligent judges and lawyers also took this color. They believed like the then existing school of economists, that everything that facilitated trade and exchange with foreign nations and enabled one country to sell abroad in large proportion and purchase little made greatly for increase in national wealth and consequently for individual prosperity. The effect of this school of thought on the law was to facilitate the adoption into the law of the customs of merchants which thereafter remained part of the law and to induce the passage of absurd laws prohibiting the purchase of goods abroad or the sending of money out of the country, which were thereafter abandoned.

(Concluded in next issue.)