Legal reasoning, antitrust policy and the social "science" of economics

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Introduction

There is an area some eight to ten miles off Astoria, Oregon, called "The Bar," where the fresh water of the Columbia River meets the salt water of the Pacific Ocean. It is a place of turbulent, shifting currents and choppy waters where moving sand bars trap even the most experienced sailors. Like sailing "The Bar," crossing intellectual disciplines is often not the simple blend of one glass of water with another, but the turbid mixture of one substance and force with another. In the clash of law with the "Chicago" or Neo-Classical School of Economics there is turbulence because the assumptions (moral and factual) and the methodology or reasoning process of the one do not conform with those of the other. Like the mindless mixing of salt water and fresh, the unthinking blend of law and social sciences can contaminate the rhetoric and methodology of both disci-

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plines, and the resulting turbulence can obscure rather than advance our understanding of reality and search for the truth.

It will be my thesis that neoclassical thought is incompatible with the reality facing antitrust, the substantive goals of antitrust policy, and the demands of legal reasoning and the institutional constraints placed upon it. While law is dependent upon a number of disciplines (including economics) for insights and for understanding the reality that the rules are intended to regulate, the current attempt to make one school of economic thought the exclusive means for determining the relevance, meaning and application of both the rules and the facts of legal disputes is a serious mistake.

There is a deeper statement underlying my criticism. It is an epistemological statement rejecting the claim that the only knowable source of standards for legal decision making is one that can be objectively verified by testing pursuant to a model that purports to quantify reality objectively—whether it be a political, economic, social, legal or other fixed model of the *is* to determine the *ought*. Scientific models—from Newton's laws of gravity to phrenology to economic models—are, like all broad aesthetic statements, premised upon assumptions; moral or *ought* assumptions that define what will and what will not be permitted to be "reality" for purposes of the analysis and what will and what will not be permitted to be the values given weight in the analysis. An empirical investigation unaware of its own assumptions and values is neither empirical nor an investigation. It is an exercise in confirming one's fixed and unchallengeable ideological beliefs.

The criticism I make and the epistemological conclusion I reach are the same as that Plato made and reached in *The Allegory of the Cave*:

> [T]he prison house is the world of sight, the light of the fire is the sun, and you will not misapprehend me if you interpret the journey upwards to be the ascent of the soul into the intellectual world according to my poor belief. . . . [M]y opinion is that in the world of knowledge the idea of good appears last of all, and is seen only with an effort; and when seen, is also inferred to be the universal author of all things beautiful and right, parent of light and of the lord of light in this visible world, and the immediate source of reason

> and truth in the intellectual; and that this is the power upon which he who would act rationally either in public or private life must have his eye fixed.

Neoclassical analysis of the reality confronted by antitrust disputes misstates the idea of the good to be pursued (the normative purposes of the law) and wanders about in a cave of a seeming reality of its own construct, chasing misleading shadows generated by the false sun (normative assumptions) of its own creation.

Part of the problem is caused by the tendency of the legal process to resist a liberation of its thinking from reified rules and rigid concepts applied mechanically without regard for the values and history that underly the law, and that change reality and generate new insights into old problems. Lawyers and judges develop vested interests characterized by minds fixed in known rules ordering a known reality. It is easier and less threatening to apply the known than to reexamine assumptions and the comfortable reality we arrogantly think we know. The connotation and denotation of concepts underlying the language of law are, however, obliterated by the mindless mechanical application of rules to an unseen but changing reality. Because of this, law and legal analysis are for the intellectually arrogant; persons convinced that only they and their reified views possess truth, beauty and justice. Within the sun and the shadows of the artificial cave of their creation, they are intolerant of insights behind their particular sun. Legal disputes and their involvement with the *is* in light of the *ought* should, however, constantly remind us of what we are about while illuminating what we are becoming in the context of what we have been.

The proponents of neoclassical thought view economics as a "science" in the 19th-century meaning of that term; a science producing unyielding and eternal truths and fixed assumptions for measuring reality.[1] They assume that models can produce quantifiable data for reduction to "truth" through the "neutral"

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[1] A similar movement in political science, based on the advocacy of Leo Strauss, has been made the basis of the conservative political appeal to "original intent." It is premised on the belief that there are

tools of language, mathematics, statistics and simplistic deductive logic.[2] For some economists and other social scientists, political science, economics, psychology, and sociology became hard "sciences" through the seemingly objective methodology of mathe-

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eternal and unchanging "truths" that can be discovered from the careful reading of selected original documents by great thinkers divorced from the history and circumstances in which they wrote. As in the fundamentalist religious movement, behaviorism and relativism are rejected in the name of pursuing eternal truths from original texts and divorced from their historical, economic, psychological or sociological background. Despite modern insights in language theory, words and the concepts they generate are treated as fixed and immutable. It is "a philosophical conservatism of a special kind," a philosophy based on faith that is no longer philosophy. *See* Wood, *The Fundamentalists and the Constitution*, N.Y. REVIEW OF BOOKS 33 (Feb. 18, 1988).

2 *See* M. FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3 (1966); R. BORK, THE ANTITRUST PARADOX 120 (1978). The model's assumptions determine what will be allowed to be the relevant facts and values for purposes of the analysis of the dispute. Thus, the "facts" of the dispute and the values that guide the decision making always conform to the model's assumptions, because values and facts not in conformity with the assumptions of the model are excluded from consideration in the process of decision making. Professor Mason, in criticizing such an antiempirical approach, has observed: "Deception occurs because the pure theories of this framework are consistently misapplied in the interpretation of concrete reality. . . . [A]ccordingly, so-called empiricists have sought to verify their own hypotheses and to demolish contrary views by selection and manipulation of data that cannot accomplish either purpose. Such performances have been characterized as 'blatantly ascientific' . . . and an 'abandonment of empirical science for a numerology similar to astrology.' " Mason, *Some Negative Thoughts on Friedman's Positive Economics*, 3 J. POST-KEYNESIAN ECON. 235, 244 (1980-81).

Thus, if the only concern of antitrust policy is with allocative efficiency, only that reality concerning price and output will be "facts" for purpose of the analysis. In addition, those "facts" permitted to be "facts" will be interpreted in light of the assumptions of the model. For an example of such a rigid and antiempirical form of reasoning, *see* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also* Flynn, *An Antitrust Allegory*, 38 HASTINGS L.J. 517 (1987).

matics, abandoning "soft" humanism.[3] Similar afflictions stultified American law a century ago with the rise of legal positivism and the belief that law could be reduced to fixed rules

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[3] It has been observed: "No small part of the attraction of an excessive reliance upon economic theorizing is the assertion by some that economics is a *science* capable of producing "truth" like the supposed truths of physics, chemistry or astronomy. There is the paradox that just as science was coming to the realization that its models did not necessarily produce eternal and unchanging truths, and indeed were incapable of doing so, the discipline of economics was becoming captured by an outmoded concept of the nature of scientific knowledge. For descriptions of the evolution in the nature of scientific reasoning, *see* J. CONANT, MODERN SCIENCE AND MODERN MAN (1953); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); A. WHITEHEAD, MODES OF THOUGHT (1958); A. WHITEHEAD, THE FUNCTION OF REASON (1957). For a critical analysis of the claim that economics is a "science," *see* Rosenberg, *If Economics Isn't Science, What Is It?*, 14 PHIL. FORUM 296, 311 (1983): "[W]e should view it as a branch of mathematics, one devoted to examining the formal properties of a set of assumptions about the transitivity of abstract relations: axioms that implicitly define a technical notion of "rationality," just as geometry examines the formal properties of abstract points and lines."

Although many lawyers superficially familiar with economics and some economists appear to be captured by the neoclassical model, and spend their days in manipulating its abstractions without much attention paid to its underlying normative assumptions or reality and competing theories for evaluating reality, there is a growing recognition that the discipline is in intellectual difficulty, if not disrepute, because of its divorce from the reality it claims to deal with. *See* T. BALOUGH, THE IRRELEVANCE OF CONVENTIONAL ECONOMICS (1982); M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975); Kaldor, *The Irrelevance of Equilibrium Economics*, in FURTHER ESSAYS ON ECONOMIC THEORY 176 (1978); A. KARMACK, ECONOMICS AND THE REAL WORLD (1983); I. KIRZNER, COMPETITION AND ENTREPRENEURSHIP (1973); Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 SW. U.L. REV. 335 (1981); Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 U.C.L.A. L. REV. 1309 (1986); Kuttner, *The Poverty of Economics*, THE ATLANTIC MONTHLY 74 (Feb. 1985); Leontief, *Why Economics Needs Input-Output Analysis* (interview), CHALLENGE, March–April 1985, at 27; Rowe, *The Decline of Economics and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984); Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFFAIRS 317 (1977)." Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence*

capable of mechanical and repetitious application divorced from the deeper moral values that law reflects and the evolutions in reality and our understanding of it. It is an affliction that law has been recovering from for the last 50 years but may have to suffer once again, in light of the Reagan administration's appointment of economic ideologues to the federal courts. If the discipline of economics is currently suffering a similar affliction generally,[4] it could be one of the great intellectual tragedies of the 20th century. We are all in need of creative and insightful economic thinking linked to the moral values underlying our culture and capable of viewing reality without the rose-colored glasses of a fixed model dictating our understanding of that reality.

The tragedy may begin to be minimized by changing the category of economics from a "social science" back to a subdivision of moral philosophy—where Adam Smith began[5]—and by adopting a more humble and skeptical attitude with regard to the

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of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, 62 N.Y.U. L. REV. 1125, 1130 n. 18 (1987) [hereinafter cited as *Legal Reasoning*].

4 "Books on technical economics are no longer even superficially accessible to lay-people; and young economists overvalue a narrow, and occasionally silly, ingenuity of technique. But the main cost is not so often noticed. It is that during their conversion to a mathematical way of talking the economists adopted a crusading faith, a set of philosophical doctrines, that makes them prone now to fanaticism and intolerance. The faith consists of scientism, behaviorism, operationalism, positive economics and other quantifying enthusiasms of the 1930s. In the way of crusading faiths, these doctrines have hardened into ceremony, and now support many nuns, bishops, and cathedrals." D. MCCLOSKEY, THE RHETORIC OF ECONOMICS 4 (1985).

5 Adam Smith, a professor of moral philosophy, viewed economic analysis as concerned with only one aspect of the activity of individuals in society and believed that controls were required over the self-regarding activities of individuals. Among the controls over self-interest that Smith recognized as necessary were rules of justice and morality, which must be known and observed by members of the social group. *See* Skinner, *Introduction* to A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Mod. Lib. ed. 1970).

dependability of the 19th-century methodologies of science relied upon without abandoning their use altogether. Indeed, one might even hope that economists, judges and lawyers afflicted by 19th-century positivism might begin to see themselves as engaged in a calling requiring them to practice their craft on the higher plane of being an art: the art of moral philosophy. The use of moral philosophy in economics should produce insights into the human condition through inductive and deductive reasoning about the economy and through an awareness of the normative assumptions underlying the analysis and the insights of history, political science, psychology and sociology. I hope to show all this by a brief examination of the current controversy concerning the so-called "law and economics" movement as applied to antitrust policy, and to do so in a manner that will leave my head attached to my body in roughly the same manner to which I have become accustomed by the time I take my leave of this debate.

Substance and form

I have only two problems with neoclassical economic thought, particularly the Chicago School version, as applied in the antitrust and economic regulatory field: one is its substance, and the other is its form—or methodology. I shall deal summarily with the first problem and devote more attention to the second.

On the substantive side, it is clear that the Congressional goals for antitrust policy were and continue to be far broader than the narrow and technical concept of "efficiency" dictated by the factual assumptions and normative values underlying neoclassical price theory. Every competent and objective study of the legislative history of the antitrust laws indicates that they were passed with a series of qualitative political, social and economic goals or values in mind to guide their implementation.[6] The overall goal is

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[6] Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 249 (1985): "The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency." *See also* W. LETWIN, LAW AND ECONOMIC POLICY: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1966); H. THORELLI, THE FED-

that a "competitive process," not the quantitative concept of "competition," be the rule of trade for big and small. More particularly, this has been suggested:

> There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor.[7]

ERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION: (1954); Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. DAVIS L. REV. 487 (1983); Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Flynn, *The Use of Economic Models, If Any, in Antitrust Litigation*, 12 SW. U.L. REV. 381 (1980); FOX, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1982); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. REV. 65 (1982); Limbaugh, *Historic Origins of Antitrust Legislation*, 18 MO. L. REV. 215 (1953); May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Symposium, *The Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

[7] FOX, *supra* note 6, at 1152. The most comprehensive and detached study of the legislative history and climate of the time was done by a Swedish scholar with degrees in law, economics and political science, HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION (1955). Professor Thorelli's book is the classic in the field, and a careful reading of it, even with the tunnel vision imposed by a fixed belief in some alternative vision of what should have been, belies the assertion that the Congresses that adopted the major antitrust laws had as the sole goal the legislative enshrinement of the neoclassical concepts of "efficiency" or "consumer welfare." In his chapter in THE ANTITRUST PARADOX surveying the intentions of Congress, Judge Bork does not cite Thorelli's classic study nor any of the other major studies of the legislative history of the antitrust laws. Nor is it mentioned in the bibliography of primary or secondary sources to the book.

Although some works of the historian Richard Hofstadter are cited by Bork, Hofstadter's conclusion about the Congressional goals for antitrust policy found in THE PARANOID STYLE IN AMERICAN POLITICS AND

The suggestion that these qualitative values are unknowable, too vague, or in mutual conflict and are therefore incapable of providing guidance for the law, and that only the quantitative guidance provided by Chicago School economic modeling can provide knowable standards for decision, is one I find unfathomable. It is a quaint return, dressed in the garments of scientism, to the disastrous legal positivism of the last century.[8] The legal process is constantly confronted with reconciling competing and conflicting moral values underlying its rules in light of the specific realities of individual disputes, role definitions, and the consequences of the decision. Indeed, this function is central to the legal process, and the art with which it is carried out distinguishes

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OTHER ESSAYS 199–200 (1965) is not cited: "The goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to need protection."

[8] The claim is often made that the neoclassical model is morally neutral and can be mechanically applied without invoking the decision maker's own moral values. By its assumptions, of course, the model is making a choice of what facts and what values ought to be deemed relevant to the analysis. See note 3, *supra*. For a classic criticism of such a rigid form of logical positivism, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). As Cohen observed elsewhere: "An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held. There are few judges, psychologists, or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral ideals to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise." F. COHEN, THE ETHICAL BASIS OF LEGAL CRITICISM 3 (1959). *See also* Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUDIES 335 (1980). *See also* D. MCCLOSKEY, *supra* note 4.

the great jurists from the mediocre. There is a further and implicit suggestion by those who maintain that judges should simply mechanically implement the dictates of neoclassical economic theorizing: that an administration not noted for its slavish adherence to the laws and policies adopted by Congress should be free to redefine unilaterally the goals of antitrust policy through judicial appointments and enforcement policy to satisfy its own ideology of what the law should be or to meet the needs of its political constituency. It is a peculiar form of "law and order" in a constitutional democracy premised on a separation of legislative and executive power and by an administration claiming to be committed to "judicial restraint" and "original intent."

No one can read the legislative history of the Clayton Act, for example, and reach the conclusion that the purpose of that statute was solely to control mergers jeopardizing economic "efficiency" as that technical concept is defined by neoclassical theorizing. The Supreme Court's reading of the legislative history of the statute in *Brown Shoe Co. v. United States*[9] and its finding that the Act was designed to stop economic concentration in its incipiency for a variety of economic, political and social reasons is an accurate one, and it is one ignored in the current administration of the statute by the Antitrust Division of the Department of Justice and the Federal Trade Commission. Indeed, political and social concerns with economic concentration—concerns considered well founded by anyone familiar with the histories of the 18th, 19th and 20th centuries—were predominant in the debates over the adoption of the Clayton and F.T.C. Acts. The claim that decision making under the Clayton Act should concern itself only with the "truths" produced by the artificial modeling of one brand of economic theorizing is both inconsistent with the legislative purpose behind the statute and the general responsibility of the courts to effectuate the broader social, political and economic

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[9] 370 U.S. 294, 311-23 (1962). The legislative history of Section 7 of the Act, including amendments, is surveyed in D. MARTIN, MERGERS AND THE CLAYTON ACT (1950). *See also* L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 205-20 (6th ed. 1983), describing the legal, social, political and economic history of the statute and amendments to it.

objectives mandated for the statute by Congress.[10] The emphasis upon the model's predicted short-term and artificially constructed consequences of particular conduct deprives antitrust policy of its moral roots, of the capacity to evolve through history and experience, of new insights into reality[11] and of the awareness of the long-term consequences of the decisions made. The same critique can be made of the exclusive use of the neoclassical model to define the meaning and purpose of the other major antitrust laws. It is clear that Congress intended and still intends that the antitrust laws be administered in light of a broad range of social, political and economic objectives and not just in the narrow and misleading shadows cast in the artificial cave constructed by neoclassical theorizing by the false sun illuminating the cave.

From a substantive point of view, therefore, I do not think there is much to debate, except the meaning and application of these broad values in specific cases or whether these values should be abandoned or changed to others by Congress. If the issue is whether Congress should change the law, then those sworn to enforce the law should be addressing their views to Congress rather than changing the law by administrative nonaction. Instead of debating that issue, however, I would like to spend some time looking at the methodology followed by the advocates of the Chicago School view; a methodology that has resulted in the repeal of effective enforcement of the antitrust laws by the Reagan administration and by many of that administration's appointees to the courts.

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10 *See* note 9, *supra*.

11 For example, modern insights into the behavior of managers of large firms that now dominate the economy are inconsistent with the factual assumptions of neoclassical thought. *See* M. GREEN & J. BERRY, THE CHALLENGE OF HIDDEN PROFITS: REDUCING CORPORATE BUREAUCRACY AND WASTE (1985); Liebenstein, *Microeconomics and X-efficiency the Theory: If There Is No Crisis, There Ought to Be*, in THE CRISIS IN ECONOMIC THEORY 97 (D. Bell & I. Kristol eds. 1981); S. MAITAL, MINDS, MARKETS AND MONEY (1982).

Neoclassical economic methodology and the demands of legal reasoning

The methodology relied upon by the Reagan administration and Chicago School proponents of the application of neoclassical economic theory to antitrust enforcement is that of a simplistic form of deductive logic. A syllogism is established, whose major premise forecloses consideration of the normative and factual issues that legal analysis and the antitrust laws require to be investigated by those charged with enforcing and administering the law. A minor premise consisting of only those "facts" the major premise permits to be "facts" is then put forward without regard to the facts of the dispute and the circumstances of the case before the court.[12] The only conclusion permitted by the

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[12] Elsewhere, I have suggested: "Little attention is paid today to a profound lesson the legal realists gave us—the significance of the difficult process by which it is determined what "facts" are relevant to a dispute, what those "facts" mean and how those "facts" operate in the application of the rules to the dispute. Legal realists were fact skeptics as well as rule skeptics, noting the close interrelationship between determining the relevance, meaning and application of the rules to the determination of the relevance, meaning and application of the facts. *See* J. FRANK, COURTS ON TRIAL 316-25 (1950); Cook, *"Facts" and "Statements of Fact"*, 4 U. CHI. L. REV. 233 (1936); Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950); Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEXAS L. REV. 127 (1932). *Cf.*, Leff, *Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

The significance and difficulty of determining what the "facts" are and the interrelationship of that process to the determination of what the "rules" are have been noted by modern economists. *See* Leontief, *Why Economics Needs Input-Output Analysis* (interview), CHALLENGE, March-April 1985, at 27: "[E]conomics is getting too far removed from observation. Observation must be the origin of the idea. Then there must be an interplay between observation and theory. . . . Academic economists in our day have generally not been subject to the harsh discipline of systematic fact finding." *See also* A. KAMARCK, ECONOMICS AND THE REAL WORLD 6 (1983): "Econometric models that assume accuracy and precision beyond the margins set by reality have no practical usefulness (other than as games, teaching aids or as kinds of finger exercises) and bear the same relationship to economics and economic policy as scientific fiction has to science—that is, they may require a good deal

model of Rules × Facts = Decision is then mechanically derived by the decision maker. The rigid deductive logic followed displaces the complex inductive and deductive logic required in legal analysis, where the facts determine which rules are relevant, what those rules mean, and how they should apply; while the rules determine which facts are relevant, what they mean, and how they contribute to the consequences that "ought" to be mandated. Inductive logic, the facts of the dispute, and insights from relevant disciplines play a significant role in determining which rules are relevant and in pouring meaning into the rules found relevant. Inductive logic and the rules found relevant also play a significant role in defining which facts are relevant to the major premise and what weight they should have in the minor premise. One breaks into this otherwise closed system by understanding the moral objectives underlying the area of law involved and its interrelationship with other areas of law and the social sciences, the history and experience that caused those values to be captured in law by Congress, and the factual and institutional framework in which those moral values are given effect.

The analytical process of neoclassical thought goes through none of these steps. It begins with a series of abstract and unexamined factual and normative assumptions and definitions about the affairs of the real world. Although the language used in neoclassical thought has a praiseworthy meaning in popular thought, one should be forewarned that the central concepts are technical definitions with specific meanings and consequences not

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of imagination and pseudo-scientific calculation but are of no help in coping with the real world."

Scientific reasoning, when carried out at its highest and most constructive level, must also deal with the difficult process of determining what the facts are, what they mean and how they work in the circumstances under investigation in light of the theories found relevant, and vice versa. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2nd ed. 1970)." Flynn, *Legal Approach to Market Dominance: Assessing Market Power in Antitrust Cases*, Conference on Current Issues in Telephone Regulation: Dominance and Cost Allocation in Interexchange Markets (Center for Legal and Regulatory Studies, Graduate School of Business, The University of Texas, 1987).

related to the more amorphous and general popular meaning of the terms. Indeed, often the technical meaning of a term is used interchangeably with other technical meanings, and sometimes is even used in its more general popular sense. A central concept of the model is the neoclassical concept of "efficiency." The neoclassical concept of "efficiency"[13] is a narrow and technical concept derived from a series of assumptions about a model of an unreal world of perfect competition[14] and a tautological definition

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[13] Posner defines "efficiency" as "exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized." R. POSNER, ECONOMIC ANALYSIS OF LAW 4 (1972). The concept is further broken into various types of "efficiency." Bork maintains there are two types of efficiency of concern—allocative efficiency and productive efficiency: "Allocative efficiency, as used here, refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their output most. Productive efficiency refers to the effective use of resources by a particular firm. The idea of effective use, as we shall see, encompasses much more than mere technical or plant-level efficiency." R. BORK, *supra* note 2, at 91 (1978).

[14] A leading Keynesian, the late Joan Robinson, observed: "It is not legitimate to say: Let us first assume perfect competition, and bring in the complications later; for an economy in which textbook-perfect competition was possible would be different from our own in important respects; we do not know what contradictions we may be letting ourselves in for by assuming it. Indeed, it usually has to be buttressed by a range of further assumptions, such as: the plant is perfectly durable, there is no interest on working capital, and so forth. Very drastic assumptions are useful to hack out a new path, but it hardly seems worthwhile making them in order to stroll up a well-trodden blind alley." J. ROBINSON, 4 COLLECTED ECONOMIC PAPERS 134 (1973).

This process of simplifying rules for deductive application to facts in the name of a scientific approach was called "mechanical jurisprudence" by Pound: "I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of today, theories are instruments, not answers to enigmas, in which we can rest." Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608 (1908).

of "rational" individual and collective conduct.[15] It has been observed:[16]

> "[T]he model is premised upon a seemingly innocuous premise, but the premise is not empirically or politically verified and is asserted without reference to other disciplines which have studied human behavior.[17] That premise is that individuals are rational maximizers of their ends in life and that the observer can tell what people want

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[15] Law has long suffered from a similar commitment to fixed rules and tautological reasoning. Dean Leon Green long ago observed: "No natural or social science has found its secrets in words and phrases and neither will the science of law. There are no such things as words so plain that they are not to be interpreted. There are no premises to be found so certain that nothing more than an irrefutable logic is required. . . . A process which assumes the very ends it is employed to discover will in the end betray its futility. . . . The attempt has been made and is still made to make language do the service of judging itself. There can be no such substitution. Words are the machinery by which the power of thought is handled, but if there is no such power put into them the words are lifeless. In the administration of law, both the judge who surrenders this power to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill. . . . There is no warrant for the fear that a fluid language and adjustable rules are undependable. We have never had any other sort, although we have lost much by not recognizing that fact. The point is we have looked to the wrong source for dependability. We have sought it through a technic of language instead of a technic of judging. We rather trust the machinery than its engineers." Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1018-19 (1928).

[16] *Legal Reasoning*, *supra* note 3, at 1132.

[17] In his review of Posner's ECONOMIC ANALYSIS OF LAW, Arthur Leff asked: "Can one actually, now, write 400 pages about human desire without adverting to Freud, his followers, or even his enemies?" Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VIRGINIA L. REV. 451, 474 (1974). Professor Leff made similar observations about the disciplines of sociology, anthropology, psychology, and law and how they too are virtually ignored in establishing first premises in neoclassical thought of the type Bork, Easterbrook and Posner advocate.

and how much they want by observing how much they are willing to pay for it.[18]

It has also been suggested that "law and economics advocates further claim that economists have no concern for the wisdom or morality of choices made by businessmen and consumers, that theirs is but an accounting function of toting up the choices made."[19] It should be noted that the definition of what is "rational" is circular, since rational is whatever is chosen and whatever is chosen is rational—a definition that underlies a philosophy of extreme utilitarianism and can be made the basis for a philosophy of radical libertarianism.[20] Why the discipline of

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[18] For an exhaustive examination of the underlying assumption of "rationality" in light of several disciplines and empirical studies, *see* Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 U.C.L.A. L. Rev. 1309 (1986). Professor Harrison concludes his impressive analysis of the rationality assumption underlying the "law and economics" movement with this observation: "It has become a particularly virulent form of crabgrass that too many measure by the ground it covers rather than by any real nurturing it provides. Before we abandon the legal field to economics, we had better measure more carefully the fertile thought of other disciplines." *Id.* at 1363.

The assumption of "rationality" is transferred to "institutions Adam Smith never dreamed of," so that corporations and the other complex collectives of modern life can also be assumed to be acting rationally at all times or "as if" they were acting rationally. Errors in judgment as to how to maximize by individuals or collectives are presumably disciplined by the assumed existence of other rational maximizers operating in an assumed perfectly competitive market. For criticisms of the assumptions, *see* Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. Rev. 335, 348 (1981). *See also* Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. Pa. L. Rev. 1076 (1979); Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 Nw. U. L. Rev. 4 (1960).

[19] *Legal Reasoning*, *supra* note 3, at 1133.

[20] The late Arthur Leff, commenting upon Richard Posner's unquestioned use of the neoclassical concept of "rational" in Economic Analysis of Law, observed: "Thus what people do is good, and its goodness can be determined by looking at what it is they do. In place of the more arbitrary normative "goods" of Formalism, *and* in place of the more complicated "goods" of Realism, stands the simple definition-

economics "ought" to adopt such a circular and meaningless definition of *rational* and measure the choices made only in terms of what people are willing to pay for their choices is not explained by advocates of the Chicago School. Speculation about the "ought" underlying these definitions might include a moral preference in favor of socially unimpeded individual freedom and materialism without reference to the complexities of how one goes about adjusting those values to the apparent need to have an organized society, lest individual freedom be sacrificed to anarchy.[21] Or speculation might suggest that we as a society ought to revive a 19th-century absolutist view of property and

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ally circular "value" of Posner's book. If human desire itself becomes normative (in the sense that it cannot be criticized), and if human desire is made definitionally identical with certain human acts, then those human acts are also beyond criticism in normative or efficiency terms; everyone is doing as best as he can exactly what he set out to do which, by definition, is "good" for him. In those terms it is not at all surprising that economic analyses have considerable power in predicting how people in fact behave." Leff, *supra* note 17, at 480.

Such a reasoning process not only divorces the analysis from normative criticism by detaching the model from such concerns, it also affects what ought to be considered "facts" and the legal meaning and significance of that which is determined to be a "fact." If the only thing that counts is giving vent to individual choice without regard for the morality of the choices made, then the moral significance of particular choices is irrelevant in the utilitarian pursuit of satisfying the greatest good (greed) for the greatest number.

[21] Lon Fuller has observed that in all areas of human action formal arrangements in the form of collaborative social arrangements are necessary to make choice effective. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955). "[I]f society seriously left a man alone, and thrust none of its facilities on him, he would starve to death." Fuller, *Freedom as a Problem of Allocating Choice*, 112 PROC. AM. PHIL. SOCIETY 101, 103 (1968). It is, of course, a primary purpose of law to order choice in society. At best, it is a tautology to rely on a policy of unfettered choice to determine the circumstances in which choice ought to be fettered. At worst, it is a form of shell game capable of entrapping the logically unsophisticated.

contract rights and the unrealistic view of reality that accompanied them,[22] despite a modern reality dictating other-

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[22] Both property and contract rights are, of course, creations of society and its legal system as part of the process by which the values of individualism and community are implemented in light of the realities confronting that society and its underlying moral ideals. As such, it is a means to the underlying end of law to reconcile peacefully the competing demands of individualism and community. *See* C. MACPHERSON, *Property as Means or End*, in THE RISE AND FALL OF ECONOMIC JUSTICE 86 (1987); *Cohen, Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987). Property is not a concept describing rights *in* things, but is a functional concept recognized by a legal system and describing the relationship between individuals with respect to interests where the legal system will enforce a right to exclude others. *See* Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871 (1986). Similarly, the concept of "contract" is a functional one recognizing a relational interest founded on consent where the authority of the community will be brought to bear to enforce a consensual agreement and defining the circumstances in which this is the case. *See* Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). "[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction." *See also* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 586 (1933).

Antitrust policy should be viewed as it originally was in the Addyston Pipe & Steel case, *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), as part of the fundamental laws defining the scope of property and contract rights, rather than as a bothersome limitation upon the unfettered right to invoke the community's law to exercise such rights. If this approach were followed, the long-term public interest, wealth distribution and bargaining power could not be ignored in the determination of what contract and property rights ought to be, because each would have a significant impact in understanding what can take place under the circumstances in accord with the assumptions and values underlying property and contract law. Moreover, preexisting legal choices protecting property or contract rights influence current legal choices and future ones. *See* E. Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE: 18, 37 (D. Kairys ed. 1982).

(*Footnote continues on following page*)

wise.[23] Or it might reflect a choice to favor the political agenda of extreme libertarianism[24] despite the absence of any debate among "rational maximizers" in the political process as to whether that type of anarchy is the basic political value we wish to rely upon to govern economic rights and relationships in society—if one could believe there could be a society guided by such a theory.[25] The simple fact is that we are never told what objective is behind the adoption of a simplistic and circular definition or rationale to determine what the law ought to mean. Perhaps the objective is to allow this system of analysis to have the appearance of being a closed system of analysis like geometry, capable of always producing truth and being beyond normative criticism, so long as

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(*Footnote continued from previous page*)

Some of the advocates of a "law and economics" approach view property rights as a form of preexisting natural law right enshrined in the Constitution. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). This view is debated, strenuously, in Symposium on Richard Epstein's *Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986). The jurisprudential assumptions underlying Epstein's formalism are noted in Radin, *The Consequences of Conceptualism*, 41 MIAMI L. REV. 239 (1986), and the political consequences are noted in Sunstein, *Two Faces of Liberalism*, 41 MIAMI L. REV. 245 (1986). *See also* Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFFAIRS 1 (1976).

[23] *See, e.g.*, G. GILMORE, THE DEATH OF CONTRACT (1975); P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); C. MACPHERSON, *supra* note 22; Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[24] *See, e.g.*, McChesney, *Law's Honor Lost: The Plight of Antitrust*, 31 ANTITRUST BULL. 359 (1986).

[25] *See* Fuller, *supra* note 21, *Freedom as a Problem of Allocating Choice*; Scanlon, *supra* note 22. *See also* the debate between Professor West and Judge Posner reflecting different basic assumptions about human nature and the consequences of those different assumptions in the pages of the HARVARD LAW REVIEW. West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

one does not examine its closed system of reasoning and the assumptions upon which the definition of *rational* is based.[26]

Moreover, the definition excludes from consideration everything that cannot be materialistically quantified by the measure of payment the definition permits (willingness to pay), and it excludes from consideration the inaction of those unable to express their choices because they lack the things of "value" (as defined by the model) to exchange for the choices they wish to make.[27] Other forms of efficiencies, like innovation and production efficiencies, are ignored by the calculus. For example, no attempt is made by followers of this approach in the evaluation of mergers under the Clayton Act to determine whether a merger, particularly a raid financed by junk bonds, is detrimental to these other forms of efficiencies. The price paid is all that counts, even if the merger's sole objective is to maximize the speculative stock market profits of the raider and part of the price paid is realized from the assets of the firm raided by breaking up and selling off an ongoing enterprise to pay loans financing the raid. A hidden "ought" assumption is being made when the unexplained assumption is used to define and measure the choices observed in terms of willingness to pay (without regard for the factual circumstances, the existing distribution of wealth, and the ability to pay).[28] That assumption is that materialism and self-gratification are the only factors motivating human conduct and that they are the only factors that the legal system ought to value. There is a multiplicity of explanations for human behavior

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26 *See* Leff, *supra* note 17; Harrison, *supra* note 18; Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AMERICAN U.L. REV. 939 (1985); Rosenberg, *supra* note 3, at 296.

27 *See* Leff, *supra* note 17, at 478. *See also* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUDIES 191 (1980); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUDIES 227 (1980); Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUDIES 243 (1980).

28 *See* Kronman, *supra* note 27; Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 940 (1980).

available from other disciplines that make a considered study of human behavior and motivation and the consequences of curbing or not curbing some forms of behavior, instead of beginning with a tautological definition of the problem the proponent of this form of reasoning is called upon to study.[29]

There is a deeper problem yet with this circular definition of *rational* and the circular reasoning process it represents,[30] a problem that justifies labeling the economic concept of *rational* "pseudo-rational" from a legal viewpoint. "A major factor influencing any calculus of choice is the existing legal system governing the society in which the individual is making the choices being measured."[31] For example, the choice to satisfy

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29 *See* Harrison, *supra* note 18. The meaning and implications of "rationality" have been continual issues in philosophy ever since the Stoics and are issues undergoing extensive and dynamic study in a number of disciplines today. *See* N. GARVER & P. HARE (eds.), NATURALISM AND RATIONALITY (1986); Slote, *Moderation, Rationality and Virtue*, 7 TANNER LECTURES ON HUMAN VALUES 53 (S. McMurrin ed. 1986). The "law and economics" movement, with its frozen definition of rationality, appears oblivious to developments in the ongoing debate and investigation of human rationality in other disciplines.

30 Not to mention the static nature of the model and the underlying difficulties in dealing with the realities of power, time, causation and the limitations of language in assessing the reality of what is being investigated. See J. HICKS, CAUSALITY IN ECONOMICS (1979); D. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1985); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust*, 31 ST. LOUIS L.J. 349 (1987); *Legal Reasoning*, *supra* note 3, at 1132.

31 *Legal Reasoning*, *supra* note 3, at 1134. It has been observed: "The law and economics model is the model of free, value-enhancing exchange, yet . . . market exchanges are in fact a function of the legal order; the terms of so-called free bargains (and, taken collectively, the supposedly objective market prices) are determined by the legally protected right to withhold what is owned. Exchange "value" (and "costs") is a function of that right so that the rationale of exchange is ultimately as circular and self-referencing as the rationale for legal rights. The legitimacy of every exchange calculus depends upon the legitimacy of prior legal decisions; it neither establishes that legitimacy nor evades the problem of legitimacy by a purported ahistorical objectivity. . . . The exchange calculus cannot be divorced from the ques-

one's sexual cravings by the act of rape should take account of legal penalties for the act of rape. But if the underlying definition of rationality and the method by which it is to be measured are to be used to define what the law "ought" to proscribe and ought not to proscribe, without reference to any normative judgments about the choices made, one is caught in the circle of using the definition of pseudo-rationality to determine one of the major factors defining the cost of making the choice—the legal consequences of doing so.[32] When deductive logic is then used

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tion of distribution, since exchange is a function of the existing distribution of legal entitlement, and every new legal decision (including those that rigorously apply the law and economics approach) will inevitably affect subsequent distribution and, in turn, affect subsequent exchanges, costs, values, etc." E. Mensch, *supra* note 22. *See also* Samuels, *Normative Premises in Regulatory Theory*, 1 J. POST-KEYNESIAN ECON. 100, 106 (1978) ("With no unique optimal use of resources and opportunities independent of rights identification and assignment, the legal system must select the result to be pursued: *the definition of the efficient solution is both the object and the subject of the legal system*.").

There are, of course, numerous empirical objections derived from the insights of other disciplines that call into question the reality and utility of the definition in real life. *See* Harrison, *supra* note 18; Curran, *supra* note 30.

[32] Use of Chicago School reasoning assumes the existence of a legal system, an existing distribution of wealth entitled to legal protection, and the enforcement of the contract and property rights of those with power or in the position of holding the things the model values. "[M]odern economists assume that someone else, presumably the lawyers, has already taken care of the problem of 'externalities'—whether costs or benefits—by providing for their assignment or appropriation by the state's enforcement of particular private property rules. Likewise, someone else has already taken care of the problems of excluding fraudulent transactions and/or transactions under duress from the universe of perfect competitors. . . . The choice to develop conservative background rules was not one in favor of efficient markets and against egalitarian regulation; it was one for a particularly inegalitarian common law agenda and against a more egalitarian one. . . . [L]aw plays the same apparently minor and clear cut, but in reality major and obscure role in neoclassical as in classical economics. As before, it reenforces the status quo through an ideological/apologetic message. In classical economics,

to avoid questioning the well hidden underlying normative assumptions being made, it is not difficult to understand how some advocates of using the model to determine what the law *ought* to proscribe and to permit can conclude that we as a society *ought* to permit the selling of babies,[33] *ought* to permit individuals to sell themselves into slavery,[34] *ought* to punish poor rapists by criminal sanctions and wealthy ones by tort sanctions,[35] and *ought* to be concerned only with enforcing the property and contract rights of those to whom the law gives property and contract rights—and consequently bargaining power—in assessing the legality of the market restraints they impose.[36] The complexities of reality and the difficult intellectual task of reconciling conflicting moral views in sorting through the legitimate demands of individualism and the legitimate demands of community within a system of divided governmental powers functioning under a written constitution all disappear when one bows down blindly to the inevitable dictates of the model. Unfortunately, a society cannot be governed by processes like those governing the mindless operations of a computer, condemned to carry out its

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the role of law was to make it plausible that income shares were equivalent to labor inputs, and that unregulated exchange made all parties better off than they could otherwise be. In neoclassical economics the notion of a determinate background legal regime of property and contract makes it plausible that we can choose between efficient market and egalitarian or equitable regulatory solutions. It doesn't wash in either case." Kennedy, *supra* note 26, at 939, 961, 966-67.

33 *See* R. POSNER, ECONOMIC ANALYSIS OF LAW, § 5.4 (2d ed. 1977); Landes & Posner, *The Economics of the Baby Shortage*, 7 J. OF LEGAL STUDIES 323 (1978).

34 R. POSNER, THE ECONOMICS OF JUSTICE 86 (1981); R. POSNER & A. KRONMAN, THE ECONOMICS OF CONTRACT LAW 256-60 (1979); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1448 (1986).

35 *See* Flynn, *supra* note 2.

36 Flynn, *The "Is" and the "Ought" of Vertical Market Restraints After* Monsanto v. Spray Rite Service Corp., 71 CORNELL L. REV. 1095 (1986).

functions in a reality determined by its fixed logic, predefined program, and controlled input.

From this circular definition of pseudo-rationality is derived the neoclassical definition of *efficiency*, a definition premised upon the unstated normative assumptions underlying the definition of rationality: "Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay."[37] This definition is further subdivided into definitions for the concepts of "allocative efficiency" and "productive efficiency." Judge Bork has defined them as follows: "Allocative efficiency, as used here, refers to the placement of resources in the economy, the question of whether resources are employed in tasks where consumers value their input most. Productive efficiency refers to the effective use of resources by particular firms."[38] And, Bork asserts, "The whole task of antitrust can be summed up as the effort to improve allocative efficiency *without* impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[39] While the distinction may be useful for abstract theorizing, and the values represented by these technical definitions of efficiency are worthy of consideration, the distinction falls to pieces when confronted with the complexities of reality and the normative question underlying all antitrust litigation: what ought to be the scope of the state-created property and contract rights of the proponent of the restraint in light of the social, political and economic normative goals for antitrust policy set forth by the lawgiver (Congress)? The methodology of logical positivism causes one to answer this question by ignoring it in one's major premise and by ignoring the reality of the dispute being analyzed. Although logical, it is hardly a rational form of decision making. It is a simplistic form

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[37] R. Posner, *supra* note 13. *See generally* Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485 (1980) for an examination of some of the complexities of the concept.

[38] R. Bork, *supra* note 2, at 91.

[39] Bork, *ibid.*

of deductive reasoning reaffirming the theological postulates underlying the model without regard for the reality under investigation or the moral ends of the law in question and the moral consequences those ends dictate.

Moving up the inverted pyramid of tightly interwoven definitions and assumptions,[40] "consumer welfare," in turn, as defined by neoclassical price theory,[41] means "behavior whose net effect

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[40] The image of "economic analysis" being an inverted pyramid, with its point based on unrealistic definitions and the quicksand of unproven and sometimes false assumptions of fact, is made more graphic in light of the central question addressed by Professor Harrison, *supra* note 18, at 1362: "Can the underlying assumptions of economics support the huge normative weight that the discipline is asked to bear in its application to law?" Harrison's exhaustive study indicates that the answer is clearly "No."

By overstating the relevance of economic analysis to reality and law, the proponents of the movement run the serious risk that a rejection of the model and its deductive use in law will result in a rejection of the exclusive value underlying the model—individual human freedom and the narrow efficiency value it purports to foster. Just as the excessive use of the model in legal analysis has resulted in ignoring other values relevant to the determination of what the facts and rules "ought" to be for purposes of the analysis of a field of law like antitrust policy, adoption of a counter-model or the return to an excessively loose legal realism in rejecting the law and economics model runs the risk of ignoring or undervaluing the norm of individual human freedom, the allocative efficiency value, and the insights of empirically based economic analysis. The task confronting antitrust policy is to come up with reasonably stable standards and a methodology for analysis capable of accounting for all the values that "ought" to be considered, all the facts relevant to an evaluation of those values, and all the institutional constraints upon the context in which the antitrust laws are implemented.

[41] Itself a rather complex series of two-dimensional assumptions (supply and demand measured once again on the assumption of value defined and measured solely by willingness to pay) bottomed on the rationality and efficiency assumptions. The conditions for its existence (perfect competition) are so unrealistic as to call into question any use of the model in the intensely pragmatic world of the legal analysis of actual disputes, let alone in economic theorizing. *See* Flynn, *supra* note 18; Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984); Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 VA. L. REV. 1083 (1951).

is output restricting and hence detrimental"—detrimental in terms of the normative and factual assumptions underlying neoclassical price theory and in light of the strict deductive logic employed by the theory to determine which values will be permitted to be considered and which facts are "facts" for purposes of the analysis.

The analysis is attractive because of its underlying and exclusive concern with maximizing human freedom and its emphasis upon the value of allocative efficiency.[42] "The analysis is also seductive, not the least for its clever use of language with a laudable popular meaning ("rational," "efficiency," "consumer welfare") to describe what are normatively loaded and technical concepts which can only be understood in light of the tautological definitions and hidden normative assumptions underlying the model."[43] The analysis is also seductive because of its rigid use of deductive logic and the self-proclaimed aura of being a science in the sense of a system of thought capable of producing objective truth without reference to other disciplines, requirements of the legal process like the division of judge and jury functions, the moral goals of the law involved, and the normative consequences of the choices made. Further, "the analysis taps into the simplistic fear of discretion afflicting logical positivists by claiming that reliance upon the model in the legal analysis of antitrust disputes ends the risk of the 'irrationality' of discretion."[44] Discretion is

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[42] "For all his claims to non-normativity, it is obvious that there is at least one value *qua* value that directs and informs Posner's whole analysis. God (and history) knows it's one that does him credit: individual human freedom. . . . As normatives go, freedom is a good, and there's no reason for anyone to be embarrassed by its espousal." Leff, *supra* note 17, at 477. What *is* embarrassing is the advocacy of the value to the exclusion of all other values and reality, except perhaps in a revival meeting of extreme libertarians.

[43] *Legal Reasoning*, *supra* note 3, at 1135.

[44] *Ibid*. Judge Bork is perhaps the clearest and most sophisticated exponent of the necessity (value) of courts following a positivistic approach in antitrust analysis, although he does not address the troubling jurisprudential question of whether it is possible. "The need of the

considered irrational, rather than inescapable, because discretion undermines a knowable analytical framework to control the arbitrary exercise of judicial power that would otherwise impinge upon the unstated normative libertarian ideological values of absolute property and contract rights or upon the utilitarian objective of maximizing short-term majority desires and providing the point upon which the entire inverted pyramid rests. From the viewpoint of developing a sensible role for antitrust policy in defining the scope of legally enforceable property and contract rights in light of contemporary reality and historical experience, the goals of antitrust policy and constraints upon the legal process, reliance upon the mechanical and deductive application of the model results in the abolition of the antitrust laws.[45] From

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law generally is for the systematic development of normative models of judicial behavior, models which, while they cannot attain, will at least distantly approach the rigor of the descriptive models of basic economic theory. Until we have such models, criticism of the courts for having the wrong goals will generally be empty, the mere assertion of a different set of personal preferences. That is a deplorable condition, since it means that we lack valid, objective standards for evaluating and controlling judicial performance. In such circumstance, we cannot attain a "rule of law." . . . Whether one looks at the texts of the antitrust statutes, the legislative intent behind them, or the requirements of proper judicial behavior, therefore, the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws. Only that goal is consistent with congressional intent, and, equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law. . . . There is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare [as defined by the model]. To abandon economic theory is to abandon the possibility of a rational antitrust law." R. Bork, *supra* note 2, at 72, 89, 117.

In commenting on a similar philosophy of positivism underlying Posner's Economic Analysis of Law, Arthur Leff observed: "All you have ended up doing is substituting for the arbitrariness of ethics the impossibilities of epistemology." Leff, *supra* note 17, at 456.

[45] Dewey, book review: *Antitrust and Economic Theory: An Uneasy Friendship* (review of R. Bork, The Antitrust Paradox: A Policy at War With Itself), 87 Yale L.J. 1516, 1518 (1978): "The truth is that a rigorous and consistent application to the issues of antitrust of a price theory that ignores externalities and assumes free entry and exit of

the viewpoint of modern jurisprudence and a reflective and empirically based discipline of economics, this covert rebirth of rigid positivism[46] is as startling as it is intellectually indefensible.[47] From the viewpoint of the complex nature of legal reasoning, reliance upon this methodology of naive positivism in the academy and by the courts in this day and age is inexplicable.[48] From

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firms can have only one result: the demonstration that any interference with freedom of contract will reduce consumer welfare." *See also* Flynn, *supra* note 2.

[46] *See* Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 285 (1979) (describing his form of economic analysis of law as a methodology for describing what "is" as opposed to a normative approach attempting to define what law "ought" to be). In legal analysis, the "is" cannot be divorced from the "ought." *See* Flynn, *supra* note 36.

[47] *See* Baker, *supra* note 28; Harrison, *supra* note 18; Leff, *supra* note 17; Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEGAL EDUCATION 274 (1983); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307 (1979); Miller, *Economic Analysis of Legal Method and Law: The Danger in Valueless Values*, 21 GONZAGA L. REV. 425 (1986). *See also* Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1140-47 (1982); Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138 (1984).

[48] A similar development took place in the last century with regard to decisions interpreting the Commerce Clause and the invention of "substantive due process" by judges committed to the ideology of *laissez faire*. Pound described that period as follows, a description equally applicable to many judicial opinions today: "[W]hen in the last quarter of the nineteenth century our courts were called upon with increasing frequency to pass on the validity of social legislation, in the transition from pioneer, rural, agricultural America to the urban, industrialized America of today, they turned to an idealized picture of the economic order with which they were familiar, the principles of which had been set forth by the classical political economists. They pictured an ideal society in which there was a maximum of abstract individual self-assertion. This was "liberty" as secured in the Fourteenth Amendment. Hence all limitations upon abstract free self-assertion were presumably arbitrary. Such legislation sought vainly to turn back the current of legal progress in its steady flow from status to contract, and hence was not

the viewpoint of faithfully enforcing the laws that government officials have sworn to uphold and defend, reliance upon this methodology of logical positivism and the values underlying the model results in a denial of their oath of office.

Conclusion

Two conclusions should *not* be drawn from all that I have said and all that could be said about the present exclusive reliance upon neoclassical economic theorizing in legal analysis in general and in the enforcement and interpretation of the antitrust laws in particular. The first incorrect conclusion would be that I am suggesting there is no role for insights from the social sciences—particularly economics—in legal analysis generally and in antitrust analysis in particular. Both the meaning and application of law and our understanding of reality are dependent upon insights from other disciplines, as is an appreciation for the subtleties of legal reasoning and the moral obligations of law. There is a desperate need for creative and constructive social science research aware of its own assumptions and the normative values underlying the law and the institutional constraints upon the law's administration. The values of allocative, productive and innovative efficiencies are clearly concerns of relevance to the administration and interpretation of the antitrust laws. They are, however, factors that must be evaluated in the light of history, experience, modern realities, the realities of particular cases and the complex of other normative goals Congress has mandated for the antitrust laws. In the antitrust field we need to study the impact of institutional size upon individuality, invention and creativity; the impact of exalting individual greed upon the long-

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due process of law. With such a picture of the social order and the end of the law before it as the basis of its conclusion, more than one court disclaimed against legislation forbidding the payment of wages in orders on a company store as subversive of the abstract liberty of the workman, reducing him to the position of the infant, the lunatic, and the felon, and arbitrarily setting up a status of laborer in a world which had moved to a regime of contract." Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 653-54 (1923).

term interests of community; the effect of mergers on local communities, the labor force, economic concentration, political and social liberty and the long-term evolution of specific industries; case studies on the effects of pricing practices within the context of specific industries; studies of the effect of specific industry structure on pricing, innovation and political power; the emergence of an interdependent world economy; motivational studies of management and the behavior of firms from other nations; and on and on. What we do *not* need are further ideological tracts detached from reality and the Congressional goals for antitrust policy; tracts useful only for confirming the moral and political presuppositions of the theologians writing the tract.

The second conclusion that should *not* be drawn from what I have said is that law and the legal analysis of antitrust policy are an open-ended and meaningless exercise destined to reflect the whim of the person making the analysis. There are boundaries to the scope of the law's relevance, meaning and application in the interpretation and enforcement of the antitrust laws. They are to be found in the language used in the law, its history, the facts to which it is expected to be applied, the role definitions of those expected to apply it, and—most importantly—the underlying normative values (including but not limited to economic values) that the law is expected to foster and implement. Elsewhere I have identified a knowable and workable framework for the analysis of antitrust policy and disputes.[49] It is one that relies upon the insights of a number of the social sciences—including a more reflective and skeptical form of economic analysis—one not ensnared in the trap of tautological and meaningless definitions and unrealistic and unexamined moral and factual assumptions. It is one that relies upon devices of legal analysis like evidentiary presumptions and shifting burdens of proof to enable the analysis to take account of the reality unique to the dispute under

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49 *See generally* Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593 (1980); Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1 (1981); *Legal Reasoning*, *supra* note 3; Flynn, *supra* notes 35 & 36.

investigation, while also blending skillfully the complex of normative goals underlying the law and unavoidably impacted by the controversy. And it is one capable of taking account of the social, political and economic goals of antitrust policy—the goals Congress mandated antitrust policy account for in the administration and enforcement of the law.

Some of the proponents of an exclusive reliance upon neoclassical theory to dictate antitrust policy would undoubtedly characterize what I advocate as a form of poetry; poetry in the sense of sentimental or meaningless guidelines incapable of surviving analytical rigor or of providing consistent application. Every legal decision, however, is unavoidably a moral decision; an "ought" determination in light of our understanding of the "is"—and vice versa. For those of us of Irish descent and concerned with the nature of legal reasoning and the underlying moral content of law and related disciplines like economics, it is a fine compliment to label as poetry what we understand intellectual inquiry to be—the exploration of the "good" behind the shadows in Plato's cave and the sun that creates them, if you like. For us, poetry is truth dwelling in beauty.