PROLOGUE

THE STRUCTURE OF AMERICAN LEGAL-ECONOMIC THEORY

■ Legal theory provides the intellectual underpinning for law. It is the constellation of ideas that shape our conception of law: how it should be formed, the purposes of its deployment, and its meaning. Legal theory has often been taken to be a scientific enterprise (and thus "objective"). However, the philosophy and practice of science and its relationship to legal theory have scarcely been discussed. Indeed, the term "science" is often deployed in legal theory with little discussion regarding its meaning.

This work focuses on economic theory as the discipline at the confluence of science, philosophy, and American legal theory. This is a study on "legal-economic" theory. While intellectual forces that shaped legal-economic theory have undoubtedly affected legal theory generally (if only in a need to respond to the claims of legal-economic theory), the quest for objectivity and scientific pretensions has been particularly manifest in legal-economic theory.

The principal function of legal-economic theory is to explicate the interplay of the legal system and the economic order. Its implications are wide. Our beliefs regarding legal-economic theory have a lot to say about our economic system, particularly the distribution of wealth. Economic theory has been a crucial foundation for policy arguments laid out by legal theorists. Indeed, many arguments claiming that legal-economic theory is an objective enterprise reflect arguments concerning economic theory and its scientific status. Moreover, those debates mirror more general scientific and philosophical debates.

Objectivity in legal theory implies the existence of non-contro-

versial, consensus-based norms that determine law and can be articulated by neutral observers, be they jurists or theorists. While the belief that law is a scientific enterprise has not been widely shared in legal academe since the Second World War (with the notable exception of some powerful voices in the law and neoclassical economics movement, commonly referred to as "law and economics"), "objectivity" as a rallying cry still has much currency. The claim to scientific status is a powerful argument for objectivity, but it is not a necessary one. Objectivity can be juxtaposed to an avowedly political conception of legal theory (and by extension adjudication), because the foundations for legal prescriptions are by their very nature controversial. The idea that legal theory is political (nonobjective) does not necessarily mean that adjudication imposes no constraints on judging. There are "rules of the road." The claim is that neither the rules (often based on legal theory) nor their interpretation is non-controversial.

American law, particularly the common (or judge-made) law, has always relied on claims of "objectivity" (nonpolitical adjudication). This is necessary because the common law is for the most part handed down by judges who are subject to limited democratic accountability, if any. In the battle over which intellectual impulses should guide common law construction based on claims to objectivity, American legal-economic theorists (principally élite judges and legal academics) have been engaging in a pitched battle to maintain law's legitimacy while promoting their preferred economic vision. Historically, the most powerful weapon in this battle, and the one most frequently called upon by legal-economic theorists, has been science rhetoric. Thus, the debates concerning legal-economic theory reflect a dominant strand in western intellectual thought—scientism (privileging knowledge forms deemed scientific).

Examining legal-economic theory sheds light not only on American law but on more general debates as well. Science, and more particularly the idea that scientific modes of inquiry reign supreme, plays a crucial role in shaping western collective thought. Science has not necessarily had a direct influence on legal theory. However, since American legal-economic theory is part of, and is influenced by, our collective thought, conceptions of science profoundly affect legal-economic theory even if the force is only manifested indirectly. It is important to appreciate not only the role that scientism has historically played in American legal-economic theory but how scientific developments have influenced the definition of what may

legitimately be claimed to fall under the rubric of science. While scientism has largely remained unabated as a dominant ideology since the seventeenth century, there have of course been significant developments in science. Shifts in American legal-economic theory have been influenced by the impact that scientific developments have had on the philosophical implications of science and on how scientism is deployed.

My focus is on private common law and most particularly accident (tort) law in America. Accident law makes up a large part of the social ordering placed in the hands of judges. In addition, it has been the subject of much popular and political debate. Recent media coverage of such topics as a "$2.7 million" lawsuit for hot coffee spilled at a McDonald's, medical malpractice, and conservative efforts to "reform" the tort system all illustrate the importance of, and interest in, accident law. The reason for the intense contestation is that accident law is deeply interrelated with the distribution of wealth in America. Tort law forces us to wrestle over issues of fundamental justice, such as under what circumstances someone who unintentionally harms another should be made to pay compensation for the related injuries.

The principal legal-economic theories explored in this historical account are classical legal thought, legal realism, law and neoclassical economics, and critical legal studies. These legal-economic theories are linked respectively to classical economics, institutional economics, neoclassical economics, and Keynesian or socialist economics in economic theory; to formalism, pragmatism, the analytic turn, and neopragmatism or postmodernism in philosophy; and to Newtonian physics, Darwin's theory of evolution, Einstein's theories of relativity, and quantum mechanics in science. The scientific discoveries are unique because they have far-reaching philosophical implications. They pose a basic question about the universe and our makeup that presses the bounds between science and philosophy: Is our physical world deterministic (capable of being discussed in certain or absolute terms) or probabilistic (destined to at least have pockets where uncertainty reigns)? In sum, the vision conjured up by Newton and Einstein is deterministic, while that of Darwinism and quantum mechanics is probabilistic. The implications are so broad that it is often not clear whether scientists in these areas are doing science, philosophy, or both. The theories have forced intellectuals in a wide array of fields to fundamentally reconsider deep-seated (but often unspoken) beliefs about the way the

world works. My concern is principally over philosophical interpretations, because they carry larger social significance. However, to truly understand the motivations and shifts in philosophical trends it is necessary to keep track of scientific discovery.

This work encompasses American and European intellectual history. The ideas are presented at a level that is accessible to the general reader while doing justice to complexities. Therefore, this historical account of science, philosophy, economics, and legal theory is selective, the criterion being a connection to legal-economic theory and its evolution. In particular, the focus regarding the various legal theories discussed is on strands within those theories that are most relevant to legal-economic theory. While the discussion is segmented by epochs demarcating distinct intellectual climates, there is often significant chronological overlap between movements. Therefore, the periodization should be taken as a convenient heuristic as opposed to a rigid demarcation. A concerted effort has been made to place ideas in social context where relevant. However, this is not a social history. The social milieu is discussed when relevant in crystallizing theoretical connections.

This history is not linear, chronicling inevitable advance, or linear progression, in legal-economic science. A central thesis is that the "quest for objectivity" in legal-economic theory might more aptly be described as the "praxis of objectivity." Multiple forces play roles in constructing legal-economic theory, including its history, culture, and ideology. That legal-economic theory is shaped by many factors, particularly ideology, has been to a great extent masked under "cover of science."

Legal-economic theory, because of its direct intervention into our social ordering, is qualitatively distinct from basic science. In this regard, my skepticism regarding the quest for objectivity in legal-economic theory should not be viewed as an indictment of science qua science. However, the need to call upon science to meet cultural aspirations will be chronicled, because it is crucial to understanding scientism as a tool for sustaining objectivity claims in legal-economic theory.

Legal-economic theory has historically been enthralled by scientism. By cloaking legal-economic theory (an enterprise that is shot through with wealth distribution politics) in science, theorists act to legitimate their preferred political-economic systems. This is scientism's ideological role. Philosophical theories seeking to mimic the sciences play a crucial part

because they provide a link between scientific discovery and the larger culture (which also is enthralled by scientism). Modern American legal-economic theory reflects this infatuation.

In the end, the hope is that by looking back on American legal-economic theory and the infatuation with scientism, we may more fruitfully reflect on what American legal theory generally looks like in our current (postmodern) times. This final reflection is a contemporary commentary, marking (please excuse the phrase) the "end of," or perhaps a pause in, our quest for objectivity based on scientific pretensions. If so, in the future legal-economic theory will be undertaken as an exercise in practical politics and intellectual dialogue rather than an approach to reaching apolitical universal truth. Commentary on "contemporary events" risks lacking temporal perspective. In this regard, the discussion might be best classified as informed speculation.

Chapter 1 lays out the seventeenth-century scientific views that shaped the modern consciousness. Scientific certitude arose in the seventeenth century as an intellectual counterpoint to Renaissance skepticism. It planted the seeds for modernity. Two distinct visions of the scientific enterprise arose from this period—Francis Bacon's empirical inductivism and René Descartes's hypothetical deductivism. However, it was Sir Isaac Newton's grand achievement in physics, blending Baconian and Cartesian methods to construct an elegant mathematical model of the universe, that laid the foundation for science's preeminence in modernity. The goal is to survey the intellectual landscape, particularly the bent toward scientism, that would shape debates in American legal-economic theory from its inception until well into the twentieth century.

American legal-economic theory was initially informed by scientific debates. Classical legal theorists, from the Republic's inception and continuing into the post–Civil War era, made claims that the common law was objective and that judges were not engaged in politics. A large part of their appeal was that common law judges remained true to a deductive (formalist) methodology, deriving legal rules from certain a priori principles (natural laws). This outlook was viewed as conforming to scientific dictates, and thence at least approximating scientific certitude. As such, it was argued that law was an objective enterprise. A bedrock principle was individual liberty to own and use property (the foundation of classical economics), highlighting the interplay between economic theory and law.

This initial fusing of legal and economic theory had inevitable political consequences. The existing distribution of wealth was legitimized and future inequalities legally sanctioned.

The classical position was initially challenged philosophically by legal positivists who questioned classical claims to scientific validity. This philosophical challenge was fused with a call for redistributing wealth (contra classical laissez-faire dictates) under the utilitarian banner. Importantly, the challenge did not call scientism into question but claimed to be more scientific. While this interchange between classicals and positivists largely took place in Great Britain, it would cast a large shadow over American legal-economic theory.

Chapter 2 discusses how American legal theorists after the Civil War began to question formalist foundations and classical claims to certitude, marking the first rupture in American legal-economic theory. This interrogation did not take place in a vacuum. In fact, American intellectual thought generally, exemplified in philosophical pragmatism, assailed formalism. The scientific impulse for this criticism was Darwin's theory of evolution, which questioned whether a priori principles and certitude were attainable. The critique was centered on a competing claim to objectivity. The true path to scientific objectivity lay in empirical-inductive methodology and explicit recognition that knowledge acquisition is a probabilistic enterprise. Again, scientism remained in place as a centerpiece. In the early twentieth century legal realists began arguing that classical formalism was a disguise for laissez-faire ideology. Institutional economists leveled a similar critique against classical economics, proposing that there should be more government intervention in the economy in an effort to redistribute wealth from the "haves" to the "have-nots" (echoing the utilitarian position). Like arguments were made by the legal realists in pushing for judicial intervention to assist economically marginalized groups.

Chapter 3 chronicles the shift in American legal-economic theory after the Second World War. Much like the prior rupture in American legal-economic theory, this too reflected larger trends. Early in the twentieth century Newtonian physics was displaced by Einstein's relativity theories and mathematical physics reasserted supremacy over evolutionary biology and its inductivist impulses: determinism again trumped probabilism. In philosophy, pragmatism was displaced by analytic philosophy. Neoclassical economics replaced institutional economics in microeconomic theory,

and Keynesian economics established its dominion in the macroeconomic sphere. In legal-economic theory, law and neoclassical economics displaced legal realism. Again, the shift was based on a claim to objectivity—only this time the argument was that the previous era's indeterminism should be replaced by a new formalism and its corresponding exactness. Also echoing prior displacements, there was an argument that legal realism was more about the redistribution of wealth than about science: the work of well-meaning, but theoretically unsophisticated, progressives pushing their personal political agenda in an inappropriate arena (common law courts). This political agenda would be supplanted by the "objective" goal of maximizing wealth. Law and neoclassical economics represents an attempt to reconstitute a formalist structure and advocates (in significant part) a political posture harkening back to the classical era. While in many ways law and neoclassical economics proponents were outside the mainstream (in terms of their small numbers in the legal academy and the political conservatism of some of the more prominent among them), they exerted tremendous force both within law schools and elsewhere because of their claim to scientific superiority (amid the continued influence of scientism) and an increasingly pro-market political environment outside of academe. Their dominance was particularly manifest in legal-economic theory.

Chapter 4 addresses contemporary American legal-economic theory at a time when certitude and scientism have come under heavy assault. Physicists have developed quantum theory and are now peering into an indeterminate subatomic world, exposing the limits of the quest for certainty. Analytic philosophy's scientific pretensions have been heavily criticized as neopragmatist and postmodern waves have swept through academe. Scientism seems to be on the wane. In American legal-economic theory, critical legal studies theorists have leveled analogous criticisms against the alliance of law and neoclassical economics. The argument put forth by those in the critical legal studies movement is that law and legal-economic theory are by their very nature political (as defined earlier), and cannot avoid implicating the distribution of wealth and its political consequences. For the first time in the history of American legal-economic theory, we face the specter of theory that does not claim scientific objectivity. This explains why debates concerning legal-economic theory seem particularly heated. The distribution of wealth cannot be submerged within science. The policy

terrain for the debate over distributional concerns is shaped by a Keynesian economic order that fuses laissez-faire ideology with the practical imperatives of government intervention.

The Epilogue is in many ways speculative in nature. It discusses trends in the philosophy of science and philosophy, and how they might shape legal theory in the future. Today all claims to scientific truth (as a universal, totalizing concept), whether in the "hard" sciences or the social sciences, are called into question. This is reflected in legal academe. Multiple perspectives inform contemporary American legal thought, ranging from law and neoclassical economics, socioeconomics, law and religion, critical legal studies, critical race theory, feminist theory, and queer theory—to provide only a partial list. This perspectivist approach is reflected in philosophy as well. The increasing pluralism in American legal theory (including legal-economic theory) raises the question whether a genuine dialogue can take place among legal theorists.