

EDITORIAL

The present number of the *QJAE* features the proceedings of a symposium held on March 29-30, 2001 at the Mises Institute. The theme “Austrian Law and Economics: The Contributions of Reinach and Rothbard” brought together economists, jurists, and philosophers. The purpose of the meeting was to explore the relationships between law and economics from an Austrian perspective.

It is not controversial that economics deals with the impact of the law on human behavior and on the working of the economy at large. Yet there are disagreements among economists as far as the scope of economic analysis is concerned. Austrian economists do not believe that economics can be a substitute for legal studies and jurisprudence. It is therefore natural for them to engage in a division of labor with jurists and other specialists. The purpose of the 2001 symposium was to explore the affinities between the Austrian approach to economic analysis and Adolf Reinach's legal realism.¹ Such affinities seemed to exist as far as epistemological and methodological questions were concerned.

First, there is a common realist epistemology. The Austrians contend that there are economic laws that cannot be verified or refuted by reference to observed data; that such laws also determine the impact of positive law and jurisdiction on the economy; and that the description of these laws is the business of a priori economic theory. Similarly, Reinach holds that there are legal objects and laws that exist and can be studied independent of positive legal codes.

Second, there is a common praxeological method of analysis. The Austrians hold that economic science deals with human action rather than with the objects of human action, such as quantities of goods and services. Similarly, Reinachian legal analysis stresses the study of social acts—particular speech acts—to explain rights and obligations.

This seemed to be enough common ground as a starting point. At the symposium Walter Block provided a general comparison between Reinachian legal apriorism and Murray Rothbard's natural-law ethics. Hans-Hermann Hoppe and Stephan Kinsella examined in particular how the Reinachian theory of causation in criminal law could be squared with Austro-libertarian precepts. Guido Hülsmann argued that economic

¹Adolf Bernard Philipp Reinach (1883-1917) was a pioneer of modern realist philosophy. A student of Ernst Beling, Theodor Lipps, and Edmund Husserl, he eventually lectured at the University of Göttingen and produced several great students himself such as Dietrich von Hildebrand and Edith Stein. His most important works have recently been republished by Karl Schumann and Barry Smith under the title *Gesammelte Werke*. His *magnum opus* has been translated by J.F. Crosby and published in English under the title “The A Priori Foundations of the Civil Law.” One of his other important essays, “On the Concept of Causality in the Current Criminal Code,” has been translated into English by Berit Brogaard, but not yet published. On Reinach see Kevin Mulligan (1987) and Barry Smith (1990).

policy analysis had specific a priori “foundations,” just as in the Reinachian analysis of the civil law. And Larry Sechrest defended the thesis that praxeology not only is the methodology of both economic and legal analysis; but that in both fields it leads to the same practical results.

After the symposium, two additional papers were commissioned for the present volume. Leo Zaibert applies legal realism to the analysis of the State, and Laurent Carnis delivers a critique of Gary Becker’s influential approach to the economic analysis of crime. Apart from the latter paper, no attempt was made to critically engage the mainstream (Chicago-inspired) literature on law and economics.² The essential reason for this neglect was that Walter Block and others had already articulated decisive Austrian criticisms of that literature in previous publications.³ It therefore seemed to be more important to move on developing the Austrian approach rather than hammering more nails into old coffins.

At this point, however, it might be useful for us to add a few considerations on the history of economic thought, in order to put the respective contributions of the Chicago School and the Austrian School into proper context.

First of all and most importantly, we should stress that economists have *always* dealt with the impact of the law on human behavior and on the working of the economy at large. Roughly speaking until the end of the nineteenth century, the main purpose of economics was to come to grips with that impact.⁴ This in turn implied a certain prevalence of comparative methods. After all, to assess the impact of judges, legislators, and governments on the economy requires a comparison of this impact with the *status quo ante*; or, as some economists pointed out, it requires a comparison of this impact with what would have happened if judges, legislators, and governments had made other choices.

Things changed at the turn of the nineteenth to the twentieth century, when “perfect competition” analysis set out on its long and triumphant path. Among economic theoreticians it now became increasingly fashionable to neglect the study of the real world and to focus instead on the study of *models* of the real world. These models were generally based on the assumption that the market participants enjoyed perfect foresight of the future. The macroeconomic result was called perfect competition (Machovec 1995). Thus the sharpest minds no longer studied the ontology of goods, but the properties of perfect competition models. These new occupations also came to reflect on the comparative methods that could not be quite avoided when dealing with questions of public policy. Here the new economists set out to change the terms of the comparison. Whereas their forebears had compared real choice alternatives, the new economists started comparing the real world to their brainchild of a perfect competition economy.

Not surprisingly, the real world did not at all look like the model. It featured unemployment and crises; a bewildering variety of prices for similar products rather than just one price; great profits on the one hand, and bankruptcies and misery on

²Paradigmatic works of this literature are Ronald Coase (1990); Harold Demsetz (1988); and Richard Posner (1981).

³See Block (1977, 1994, 1995, 2000). See also, North (1992) and Cordato (1992) and the papers published after our symposium, North (2002) and Hoppe (2004).

⁴See Bouckaert and Geest (2000). In the Germanies, economics was part of the *Polizeiwissenschaften* and the *Staatswissenschaften* (translates into “police science” and “government science”).

the other hand. The model looked elegant, orderly, and just. The real world looked shabby, chaotic, and like a caricature of justice. Economists with sympathies for the free market made feeble excuses for this aesthetic disaster, mumbling something about frictions. But the friends of government control did not hesitate to exploit the rhetorical implications of the new method of analysis. If competition was “perfect” only if it worked as depicted in the model, then real-world competition never worked quite well. Deviations of the real world from the model thus provided a *prima facie* justification for political interventionism.

When this scheme of reasoning was put into the service of more and more extreme political agendas, resistance arose within the perfect competition camp. It was the historical role of Ronald Coase and his followers to articulate a crucial criticism of the political activism that seemed to follow from perfect competition analysis. They stressed that public policy itself is not costless, but entails more or less considerable costs. The government is not a *deus ex machina*; it consumes resources that otherwise would be available for the economy. It was therefore possible that its intervention would do more harm than good. Its intervention might consume more than it produces. Hence, it was illegitimate to just hold the banner of perfect competition into the face of the real economy and then jump to the conclusion that more government intervention was needed to bring the shabby real world into line with the model. Rather, each proposed intervention (be it through legislation or through the judicial process) had to be assessed on its own merits. In some cases, the intervention should be done, because the resulting benefits would exceed the costs. In other cases, there should be no intervention because its costs would exceed the benefits.⁵ Of course, this selfless pondering of each case on its own merits required juridical habits of mind. The Coasians therefore recommended that judges and the common law should play a primordial role in the “efficient” allocation of property rights.

Thus the Coasians brought the comparison of choice alternatives back into the limelight of public-policy analysis. Their eternal merit was to resuscitate an insight that had fallen into oblivion among their perfect competition colleagues: government does not draw its resources from out of space, but from the economy. But the Coasian counter-revolution was incomplete because it did not abandon the hypothesis that subjective value is quantifiable and lends itself to social computations.⁶ This wrong hypothesis vitiates all of Coase’s practical precepts. It is not true that one can arithmetically compute the preference scales of different individuals. It is therefore not true that the maximization of social value (the minimization of social cost) can guide legislative or juridical decisions. From this it follows that it is not true that each case has to be pondered on its own merits. And thus it is not true that judges should be particularly qualified to administer expropriations.

The advantage of the Austrians is that they were never burdened by the conceptual heritage from which Coase and his followers had to free themselves. Present-day Austrians can build on grounds that are not infected by notions of perfect equilibrium

⁵From a political point of view, these proposals seemed to be very reasonable indeed. The Coasians occupied a moderate middle ground, advocating expropriations in some cases and opposing such expropriations in other cases. These political implications have made the Coasian approach emotionally acceptable for many economists and legal scholars.

⁶Sima (2004) shows that the Coasians at times misperceived the extent of their originality; several of their valid contributions had been anticipated by Murray Rothbard.

and quantifiable subjective value. They can build on works by great predecessors such as Böhm-Bawerk, Mises, Hayek, and Rothbard, who have explored the impact of the law on the economy in various fruitful ways. But this heritage entails the responsibility to actually enter the construction site and to repair, extend, and embellish the existing buildings from roof to cave. The following pages are a beginning.

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