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FOUR CONCEPTUALIZATIONS OF THE RELATIONS OF
LAW TO ECONOMICS
(TRIBULATIONS OF A POSITIVIST SOCIAL SCIENCE)

*Pierre Schlag**

TABLE OF CONTENTS

INTRODUCTION	2357
I. FRANK KNIGHT.....	2358
II. RONALD COASE	2362
III. RICHARD POSNER	2366
IV. CASS SUNSTEIN	2369
CONCLUSION.....	2371

INTRODUCTION

Here, I offer some quick sketches of the ways in which a few economic thinkers (Frank Knight, Ronald Coase, Richard Posner, and Cass Sunstein) have negotiated a bedeviling tension in the relation of economics to law, state, and the social. This is neither history nor genealogy nor anything close. The point is simply to juxtapose their various approaches so as to map out a few of the more important strategies for negotiating an enduring and bedeviling tension.

What tension? Begin with the recognition that the activities of actual economic actors in the fields of production, exchange and consumption are shaped by numerous factors (law, politics, institutional practices, socially-induced preferences and more). What is economic analysis to do with this recognition? On the one hand, inasmuch as economic analysis is concerned with the activity of actual economic actors, these factors (law, politics, etc.) cannot be summarily excluded from the analysis. And yet, at the same time, these factors (law, politics, etc.) are not subject to determination by any known economic laws and thus exceed the explanatory capacities of the model. The unpalatable choice,

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to put it starkly, is either to include these foreign and literally undisciplined factors in the analysis (because they matter) but then watch economics devolve from a systematic knowledge into an interpretive art form or, in the alternative, to exclude these foreign matters (because they just muck things up) and then leave undetermined whether, when, and how the economic theorizing applies to actual behavior in competitive markets.

As stated, neither choice is terribly attractive, and the challenge has been to find a more appealing and justifiable way to negotiate this dilemma. It may be, of course, that the challenge is simply too great and turns out to be insuperable. Even if that turns out to be the case, we may nonetheless learn something here about the ways in which failures manifest themselves as the various approaches attempt to deal, self-consciously or not, with this tension.

For law and economics, as opposed to economics *tout court*, this tension has been particularly salient. Why? Because law and economics finds its subject matter, its analytical techniques, and its marching orders on both sides of the divide. Negotiating the tension has thus been unavoidable. Approaching the various approaches to law and economics from the vantage of this tension (the vexing prospect that what must be included in the analysis must also be excluded) can be elucidating, not only because the particular vulnerabilities of each approach become readily apparent (in high relief, as it were), but because one can grasp that these same vulnerabilities are structural in character—intrinsic to the approach in question and not severable.

Indeed, all strategies examined here create their own difficulties—as they variously recognize something that limits their epistemic status *qua* knowledge (Knight) or include something that they cannot possibly manage (Coase) or exclude something that they, on their own terms, need to examine and address (Posner) or achieve all three at once (Sunstein).

The tension described here is played out against the background of only four thinkers. My guess is that the problem offered here is portable and might well be useful in thinking about other economic approaches to law.

I. FRANK KNIGHT

We begin with Frank Knight, the famous Chicago school economist, even though his work antedated law and economics (“L&E”) work by several decades. There are several reasons to look at Knight’s work. First, Knight had a particularly lucid (even if not entirely satisfying) understanding and response to the tension articulated at the beginning

of this paper. Second, Knight was already dealing with the kinds of intellectual problems under the heading of “the state” that later law and economics thinkers would treat under the heading of “law.” Third (and not altogether trivial), Knight had a profound influence on Ronald Coase. Moreover, the latter’s work becomes richer once seen through the lens of Knight’s contributions.

In 1924 Frank Knight published an article portentously called, *Fallacies in the Interpretation of Social Cost*.¹ As the title reveals, the article was very much a precursor of Ronald Coase’s famous article, *The Problem of Social Cost*, published in 1960.² Like Coase’s later article, Frank Knight goes after Pigou and Pigovian taxes—albeit not in the context of *conflicting* activities as Coase does (e.g. cattle ranching and farming) but rather in the context of *competitive* activities within a single industry (e.g. road transportation).

In the 1924 article, Knight addresses Pigou’s concern that free competition left unregulated will produce overinvestment in the superior activity. Knight’s criticism of Pigou takes place on the terrain of a hypothetical developed by Pigou. In this hypothetical Pigou asks his readers to consider two roads: one which is well paved but narrow (and can only tolerate so many trucks) and one which is poorly graded but is broad and wide (and can tolerate, for all practical purposes, no end of trucks). Pigou argues that if truckers are left alone by the market to choose which road to go on, truckers will take the narrow paved road to such an extent that the advantage thereof (it’s paved) will be reduced down to zero. There will be no advantage to either road. Pigou then suggests that a small tax applied to the use of the paved and narrow road would improve things. It would create less congestion on the paved road (thus augmenting the value of that road to truckers) while having no effect on the use of the wide road (because a small amount of additional traffic would not measurably increase congestion).

Knight deftly undercuts the Pigovian argument by noting that, if indeed there is an advantage to the narrow paved road, then the owner of that road would be charging a fee for its use (one that would be the equivalent of the optimal Pigovian tax). In other words, Pigovian taxes can improve on the free market here only in virtue of Pigou’s misperception of “the facts of real economic situations.”³ The problem according to Knight is that Pigou has forgotten that under a regime of competition the road would be owned by someone (as opposed to no one) who would be already charging a fee for its use. Knight then goes on to join the implications of this argument with conceptions of opportunity cost

1 F.H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582 (1924).

2 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

3 Knight, *Some Fallacies*, *supra* note 1, at 586.

and comparative advantage, to criticize protective trade measures (a subject which comprises the bulk of his article).

And then follows what is, in some sense, an extraordinary concluding passage. It is quoted at length below, but it is well worth reading. Apart from a few period-specific literary flourishes, it could well have been written by a left or liberal critic of contemporary L&E:

That free enterprise is not a perfectly ideal system of social organization is a proposition not to be gainsaid, and nothing is further from the aims of the present writer than to set up the contention that it is. But in his opinion the weaknesses and failures of the system lie outside the field of the mechanics of exchange under the theoretical conditions of perfect competition . . . Human beings are not "individuals" to begin with . . . The values of life are not, in the main, reducible to satisfactions obtained from the consumption of exchangeable goods and services. Such desires as people have for goods and services are not their own in any original sense, but are the product of social influence of innumerable kinds and of every moral grade, largely manufactured by the competitive system itself. The productive capacities in their own persons and in owned external things which form the ultimate stock in trade of the human being are derived from an uncertain mixture of conscientious effort, inheritance, pure luck, and outright force and fraud. He cannot be well or truly informed regarding the markets for the productive power he possesses, and the information which he gets has a way of coming to him after the time when it would be of use. The business organizations which are the directing divinities of the system are but groups of ignorant and frail beings like the individuals with whom they deal. (In the perfectly ideal order of theory the problem of management would be non-existent!) The system as a whole is dependent upon an outside organization, an authoritarian state, made up also of ignorant and frail human beings, to provide a setting in which it can operate at all. Besides watching over the dependent and non-contracting, the state must define and protect property rights, enforce contract and prevent non-contractual (compulsory) transactions, maintain a circulating medium, and most especially prevent that collusion and monopoly, the antithesis of competition, into which competitive relations constantly tend to gravitate. *It is in the field indicated by this summary list of postulates, rather than in that of the mechanics of exchange relations, that we must work out the ultimate critique of free enterprise.*⁴

⁴ *Id.* at 605-06 (emphasis added).

Here Knight effectively recognizes the limitations of economics as a science.⁵ In asking for a “critique of free enterprise,” he recognizes that economics *qua* science is dependent upon a host of factors (e.g. states, the social formation of preferences, etc.) that exceed its grasp.⁶ His solution is to acknowledge this dependency—recognizing all the while the limitations of this solution.⁷

Given this perspective on the relation of economics to state, law, and the social, it is no surprise that Knight sees a perennial problem in economic theorizing—“namely that the assumptions diverge in essential respects from the facts of real economic situations.”⁸ And equally, it is no surprise that much of his own work aims at pointing out the discordance between the economic theorizing and the behavior of actual eco-

⁵ Knight’s view of the relation of economics to the state, the law and the social (and so on) is strikingly different from the conceptual architecture of modern rational choice L&E.

Instead of the rational choice L&E view of the rational utility maximizer as an undetermined chooser . . .

Knight recognizes that human beings are not even integrated individuals to begin with.

Instead of the view that portrays seeing human satisfaction as a function of the consumption of exchangeable goods . . .

Knight rejects this view outright.

Instead of the characterization of preferences as exogenous and given . . .

Knight acknowledges that desires are the product of social influence . . . in fact, largely manufactured by the competitive system itself.

Instead of the supposition that individual production is to be ascribed to individual effort and as system of reward and punishment . . .

[In Knight] we have the recognition that they are derived from a mixture of conscientious effort, inheritance, pure luck, and outright force and fraud.

Instead of a nearly unqualified belief in the free market . . .

Knight explicitly recognizes the crucial importance of the state in constructing, enabling, protecting, supervising, and enforcing that free market in ways that are anything but free—are indeed in Knight’s own term “authoritarian.”

Now, as a cautionary note, Knight was never able to *integrate* these insights into a refurbished model of economics. One wonders, and that’s precisely my point in this essay, whether such an integration would be possible without transforming economics into something that really doesn’t look much like economics to us. Why would this be? Because part of what makes economics seem like economics as opposed to sociology or anthropology are the *aesthetics* of its structure—its deployment of physics and mechanics in particular as the model for relations of production, exchange, consumption. For elaboration, see PHILIP MIROWSKI, *MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS, PHYSICS AS NATURE’S ECONOMICS* (1991). None of this, of course, is offered here as an argument that such an integration should be avoided or that welfare economics should simply continue unmodified. Far from it. See Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1693–1700 (1989). On the contrary, my view is that L&E depends upon *certain epistemics* (which it has neither recognized nor problematized) and that these epistemics in turn depend upon *certain aesthetics* of law and social life (which have also gone unrecognized and unproblematized).

⁶ FRANK H. KNIGHT, *THE ECONOMIC ORGANIZATION* 9 (1933).

⁷ FRANK H. KNIGHT, *ON THE HISTORY AND METHOD OF ECONOMICS: SELECTED ESSAYS* 172–75 (1956).

⁸ Knight, *Some Fallacies*, *supra* note 1, at 586.

conomic actors. What Knight wants—and says in so many words—is to bring “the lurking assumptions” of economic theory “into the realm of the explicit” and to contrast them with “the conditions under which competitive dealing are actually carried on.”⁹ This is a theme we will re-encounter with Coase.

In light of all this, Knight offers a duly chastened, indeed suitably modest, view of the reach of economics.¹⁰ But, of course, as wise or appealing as Knight’s epistemic restraint might be, his research agenda remains inchoate. And the telling point—one that is easier to articulate from our particular vantage (or lack of vantage)—is that it is not clear at all how economics might be economics (as opposed to something else) without in some way excluding and ignoring precisely the thorny issues described in that long quote above.

One wonders whether Knight’s faith in economics truly survives scrutiny. Indeed, if economics *qua* science ultimately rests on matters beyond its control—and what’s more if these matters themselves are crucial to the selection of policies or organizational systems (as Knight insists upon)—then just what is the status of economics *qua* science? To put it differently, one wonders here whether, in recognizing the matters that undergird the science of economics (the state, law, the social), Knight has not gone too far for the well-being of his own discipline. To put it differently still: His recognition of the social factors that influence economic activity seem to render his own solution (namely, recognizing the limitations and dependencies of economics) too mild for the nature of the problem he has uncovered. These questions become all the more pointed when one considers Knight’s broad scale attacks on social science positivism,¹¹ turning the text instead to . . .

II. RONALD COASE

Ronald Coase, the Nobel Prize winner in economics, is most famous among legal thinkers for his article *The Problem of Social Cost* and the so-called “Coase theorem.” The article, frequently cited in law journals, is mostly dry and patient—written with the understated confidence of someone who knows that with sufficient care and enough time, others will come around and realize that he is right. Nonetheless, there are passages that match Frank Knight for literary flair and theoretical prescience. Ironically, these theoretical passages are generally ignored by the L&E people.

⁹ KNIGHT, ON THE HISTORY AND METHOD OF ECONOMICS, *supra* note 7.

¹⁰ *Id.* at 171–75. At the same time, in his later years, he also despairs of the inability of the populace to take what economics offers seriously. *Id.* at 254.

¹¹ *Id.* at 171–78, 227–47.

Now one might well expect that from Knight to Coase, there would be a certain closing of the economic horizons and a certain rigidification of the internal structures of the discipline. One might expect that, but one would be wrong. Coase's *The Problem of Social Cost* is more a reprise rather than a reduction of the economic world described by Knight.¹²

Both Knight and Coase evince some sort of preference towards market solutions (and that is evident from their writings) but not unqualifiedly so.¹³ I would call their articulated preference for the market or free enterprise a species of voluntarism—a position undeniably affirmed, but one which is not necessitated and which does not even clearly follow from their own analyses. Indeed, both of them clearly recognize certain intertwinements between state and market sufficiently powerful to undermine their own faith in or preference for the market.

For his part, Coase, in *The Problem of Social Cost*, affirmed that the market is not always the most efficient solution:

[T]here is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency

All solutions have costs and there is no reason to suppose that government regulation is called for simply because the problem is not well handled by the market or the firm It is my belief that economists, and policy-makers generally, have tended to overestimate the advantages which come from governmental regulation. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This, it seems to me, has to come from a detailed investigation of the actual results of handling the problem in different ways. But it would be unfortunate if this investigation were undertaken with the aid of a faulty economic analysis. The aim of this article is to indicate what the economic approach to the problem should be.¹⁴

This passage could well have been written by Knight. Interestingly, Coase never specifies the value criteria through which we might decide when the firm, the market, or the government might be the better option. At this point in the text, the value criteria are left unstated and unspecified, and remain so throughout the article—until we get to one

¹² They both attack the argument for Pigovian taxes, but the attacks are extremely similar and in both cases rather measured.

¹³ For an extended exploration of Coase's actual economic thought relative to his purported preference for markets (as well as Coase's migration from socialism to neo-liberalism) see David Campbell & Matthias Klaes, *The Principle of Institutional Direction: Coase's Regulatory Critique of Intervention*, 29 CAMBRIDGE J. ECON. 263 (2005); Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919.

¹⁴ Coase, *supra* note 2, at 18–19.

of those passages relatively seldom cited. Here it is, on the penultimate page of *The Problem of Social Cost*, where Coase prescribes the proper mode of analysis:

It would seem desirable . . . when dealing with questions of economic policy . . . to compare the total product yielded by alternative social arrangements. In this article, the analysis has been confined, as is usual in this part of economics, to comparisons of the value of production, as measured by the market. But it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in *all spheres of life* should be taken into account. As Frank H. Knight has so often emphasized, problems of welfare economics must ultimately *dissolve* into a study of aesthetics and morals.¹⁵

The first italics ("*all spheres of life*") suggest that there is more to wise policy choices than simply economics. The second italics ("*dissolve*") seem to go even further, suggesting that economics must itself be reformed to embrace the study of aesthetics and morals. But this, of course, Coase like Knight has not done. And in one sense this is not a surprise because the task is such a tall order: One would need economics to include extraneous factors which it has not yet submitted to its own laws. But such inclusion, of course, would disrupt the model.

We are not far from Knight, but neither are we exactly in the same place: Coase has staked out a slightly different position on the relation of economics to law. And this becomes evident in the last part of his article, where Coase urges that welfare economists begin thinking about factors of production as legal rights (or to emend slightly, legal entitlements).¹⁶ The virtue of doing so is that once one understands that a factor of production is a legal entitlement, one also understands, first, that once conceived as a legal entitlement one cannot just do anything one desires with a factor of production (Wesley Hohfeld helps here¹⁷), and second, that the exercise of an entitlement means the ability to inflict harm (or costs) on others (Robert Hale helps here¹⁸). In other words, if one thinks about factors of production as legal entitlements then one can appreciate the importance of selecting among a variety of different social arrangements and doing so from the perspective of *the total effect*.¹⁹

¹⁵ *Id.* at 43 (emphases added).

¹⁶ *Id.* at 44.

¹⁷ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

¹⁸ Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

¹⁹ This is a point that Coase makes explicitly. See *supra* note 15 and accompanying text.

This reconceptualization of factors of production as entitlements is a radical extension of the reach of welfare economics. Why? Because it would require welfare economists (Coase's originally intended audience) to understand what I will call "the mechanics of law"—the various options for creating different kinds of legal regimes. Thus, for instance, in terms of risk control, they would have to understand the wide variety of legal possibilities in terms of criminal prohibition, civil regulation, licensing, certification, clearance reviews, impact studies, and civil liability options (and their various permutations). Did Coase really mean to say this? That is perhaps an unanswerable question. But it seems to be an implication of his argument. And certainly he acknowledged as much on the occasion of his acceptance of the Nobel Prize:

If we move from a regime of zero transaction costs to one of positive transaction costs, what becomes immediately clear is the crucial importance of the legal system in this new world. I explained in *The Problem of Social Cost* that what are traded on the market are not, as is often supposed by economists, physical entities but the rights to perform certain actions and the rights which individuals possess are established by the legal system Because of this, the rights which individuals possess, with their duties and privileges, will be, to a large extent what the law determines. As a result the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it.²⁰

What then in the end does Coase have to say about how to correctly perform such an analysis? It comes down to this:

[W]e have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.²¹

This is as humorous as it is true. It is humorous because it asks for so much and offers so little in the way of help as to how to get it. Indeed, one is at pains to find any concrete prescriptive suggestions in *The Problem of Social Cost*—save the negative ones about how *not* to frame and how *not* to analyze these problems.²² This is not meant as criticism. (We

²⁰ Ronald Coase, *The Institutional Structure of Production*, Lecture Before the Nobel Prize Foundation (Dec. 9, 1991), available at http://www.nobelprize.org/nobel_prizes/economics/laureates/1991/coase-lecture.html (last visited Apr. 12, 2012).

²¹ Coase, *supra* note 2, at 44.

²² But surely, one might protest, it is possible to try to reduce transaction costs or to try to imagine what would have happened in a zero transaction cost world as a guide for the real one. Yes, perhaps so. But the first suggestion is not Coase's. In fact, it is (most?) often deployed in an anti-Coasean way—that is, without regard for the *total effect*. The first idea (to try to reduce

don't have a cure for the common cold either, but I would not take that as a criticism of the medical profession.) So no, it's not meant as criticism. It is, however, offered as a manifestation of and a problematic response to the bedeviling tension mentioned at the outset.

So what is the net effect, then, of introducing law to economics? It is to render economics somewhat indeterminate for the reasons stated above: We simply have no practical method to determine how to gauge the relative value produced by different social/legal arrangements. We do not have a method and, in general, we do not have the data. We also do not have the theory save the unimpeachable, but still dauntingly vague, suggestion that we should have regard for the total effect.

How did we get here? It was Coase. This is what happens when you let in foreign matter (here, law) into your field (economics) without having any dominion over the foreign matter. It makes things very complicated and it greatly restricts the positive guidance you can offer. Hence, the skeptical and negative tenor of Coase's article.

III. RICHARD POSNER

Judge Posner ascribes the inception of law and economics to the works of Ronald Coase, Guido Calabresi, and Gary Becker.²³ Unlike Coase, whose main interest was economics, it's fair to say that Judge Posner's main interest was law. Influenced by Becker, Posner deliberately sought to harness economics for use in law. His extremely influential book, *Economic Analysis of Law* (currently in its ninth edition), is organized in terms of legal categories which are then analyzed in terms of economic tools and categories.

Certain simplifying assumptions are made. These involve (relative to Knight and Coase) a severe reductionism that effectuates an uncompromising exclusion of soft variables. The reductions:

The human individual is identified with the rational utility maximizer ("RUM").

Value is reduced to willingness to pay ("WTP").

The inevitable forced transfers that comprise much of positive law are submitted to Kaldor-Hicks efficiency or cost benefit analysis ("CBA").

Preferences are deemed exogenous.

The market is viewed as weightless in the fashioning of preferences.

transaction costs in a given market) might well lead to a loss of production elsewhere. As for the second idea, it is precisely the sort of theoretical exercise Coase argued against.

²³ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 20-31 (8th ed. 2007).

Interpersonal comparisons of utility are excluded.²⁴

These reductions and exclusions are striking when viewed in comparison to the work of Knight or Coase. We have in Posner's work a markedly different approach—far more reductive, far more exclusionary. This tendency is already evident in the ascetic character of the axioms listed above. But in point of fact the reductiveness and exclusionary tendencies go further.

This is not always evident to legal thinkers who read the book in the manner in which it is organized—according to legal categories and doctrines (e.g. negligence). Viewed in legal terms the work appears highly variegated (as highly variegated as law), and it is. But if one reads the book in terms of economic categories and tools (e.g. transaction costs) the analysis is much more spare—virtually minimalist.

This became evident to me when, sometime in the last century, I had the occasion to go through the book—this was the third edition—and reorganize it in terms of economic categories and prescriptions. I did this for the first 150 or so substantive pages. It turns out that reorganized in economic categories (rather than legal ones), what we have is an ultra-minimalism—a kind of Mondrian jurisprudence. Indeed, reorganizing the book in economic, rather than legal, categories (again, just the first 150 pages), it became apparent that the vast bulk of the economic analysis as applied to everything from consequential damages to eminent domain was performed by a very small set of economic injunctions to:²⁵

rationalize government forbearance from supplanting pricing markets and enjoining courts to cease from disaffirming bargained-for terms among private parties;²⁶

rationalize the law's distribution and delimitation of initial entitlements on the grounds that they are given to the highest valued user;

rationalize legal rules on the grounds that they approximate the agreements that the (relevant) parties would have reached had they been able to bargain in the absence of transaction costs; and

rationalize legal rules on the grounds that they minimize the transaction costs that the parties will have to encounter.

In a sense this is not surprising. The well-noted insistence on theoretical elegance by economic theory corresponds to this minimalism. Whatever the virtues of minimalism in the graphic arts, the application of a minimalist model to social and economic life will create problems.

²⁴ A good starting point for the critical evaluation of rational choice theory is the work of MICHAEL TAYLOR, *RATIONALITY AND THE IDEOLOGY OF DISCONNECTION* (2006).

²⁵ See Schlag, *An Appreciative Comment*, *supra* note 13, at 937–38 nn. 65–68.

²⁶ I mean “rationalize” in both the Weberian and psychoanalytic senses.

There will be structural instabilities that will affect the application of the model. Here are some of the more salient ones:

1. What is the conceptualization of transaction cost (viewed jurisprudentially as well as economically)? How (and by what criteria) does one know whether a cost is to be ascribed to a particular productive activity as distinguished from the system of social coordination in which that activity happens?
2. What products and markets are at stake—and how does one define a particular market when (as is often the case in legal regimes) there is no actual market happening?
3. Who counts as the relevant parties?
4. What is WTP when there is no registered market transactions and no obvious substitute markets to use as a reference points? (Contingent valuation studies are not a plausible answer.)

L&E has no epistemic criteria and no method to resolve these questions. At times recourse is made to any combination of the following: empirical determination, common sense, legal categories, social functionalism, and ad hoc conceptualization. Not surprisingly, a great deal of economic analysis is then beset by indeterminacies of a transparently political character easily exploited in the work of others:

	Laissez Faire/Libertarianism	Liberal Welfarism
Favored technique	Find or declare low transaction costs/ Create private property rights	Find or declare high transaction costs/Use Kaldor-Hicks
Parties	Deny third party effects as much as possible	Multiply third effects as much as possible
Product markets	Limit definition of markets to extant commodities and commodifiable goods	Extend definition of markets to intangibles, values, moralisms, relational interests, etc.
Source of market definition	Refer to the formal Law/ law in the books	Refer to law in action/Social sphere
Commons	Eliminate/Reduce	Ambivalent
Anti-commons	Deny	Affirm

Why all these indeterminacies? In part they are the result of opting to exclude many aspects of social life, behavior and desiderata from the model at the outset. This is what the minimalism of Posner's L&E predictably yields: The model takes so much distance (by way of abstraction) from actual human life and it so identifies human life to its own axioms (by way of reduction) that the model lacks the conceptual space to lay out epistemic criteria that would direct or mediate its application.²⁷

Instead, Posner's model has supplanted (and effectively excluded) the possibility of epistemic criteria and mediation at the outset. How so? By establishing, at the outset, certain unqualified identifications—to wit, the individual = the RUM; value = WTP; optimization = maximum satisficing of want satisfaction. Any potential conceptual space here to question whether the individual is acting as a RUM, whether WTP really represents value, whether optimization is really maximum satisficing has been ruled out *ab initio*. This means, to belabor the point a little bit, that there is no conceptual room left for any mediating epistemic principles between the individual, value, optimization, on the one hand and their respective others, the RUM, WTP, and maximum satisficing, on the other. Meanwhile, the injunction to take preferences as given (as if they were data) without any sort of reliable guidance as to how these may be discerned or aggregated (where there are no registered market transactions) effectively leaves the relation of the economic model to the actual economic behavior of human beings undetermined—unknown and quite possibly unknowable.

Nonetheless, knowledge or not, the work of application must be performed. And if for reasons of the *ab initio* conceptualization it cannot be done through the expression of an explicit method or epistemic criteria, then it must be done through a kind of (legal?) voluntarism. It is difficult to imagine any other option. Indeed, it's hard to see how one would reach results other than by the activation of desires extraneous to economic theory and reasoning.

IV. SUNSTEIN

Cass Sunstein is a representative personification of a genre of economic thought that has gained great significance over the past fifteen years or so. With the advent of behavioral economics and the deliberate effort to improve on the choices of the RUM through regulatory action,

²⁷ As a structural matter, no model can successfully direct its own application in all instances. But it would be a non sequitur to conclude that therefore all models are equally successful or equally failed in their efforts to guide application.

we get a cross or a hybrid between the traditions of Knight/Coase and the tradition of Posner.

On the one hand, Sunstein's behavioral economics announces itself as an attempt to deal with individuals as they actually behave in the social sphere. Indeed, he writes in his book, *Behavioral Law and Economics*, that this is "the first book to analyze law by looking at how people actually behave."²⁸ This (if one can put aside the grandstanding) reminds us of the theoretical efforts of Knight and Coase.

On the other hand, Sunstein's approach is cognitive and psychological in character and thus, for all its insistence on the importance of heuristic biases and cognitive errors, it remains focused on assessing the behavior and choices and desiderata of the liberal individual subject. It does not go very far in acknowledging the social character of preference formation, the effects of the market on social construction, or the importance of class or social groups in the construction and maintenance of law and world. Methodological individualism remains in the driver's seat. And the market remains the default position.

Sunstein's behavioralism is thus a targeted qualification of Chicago L&E. In one sense, this qualification is huge because the plurality of heuristic biases and cognitive errors significantly undermines the deductive or quasi-deductive extrapolations from preferences ascribed to the RUM.²⁹ (This has not been lost on Posner who clearly realizes the corrosive implications of behavioral economics for his approach.³⁰) But, in a different sense, the qualification is quite modest because it preserves and insulates the economic model from broader-scale anthropological or sociological accounts.

It is also, as others have pointed out, theoretically bereft (with no specification of its applicable domain, the limits of its scope, or indeed, any substantial articulation of the theory of self or welfare or want).³¹ So it is a curious hybrid. On the one hand, it forges a straightforward but extremely narrow access to a plurality of psychological/cognitive realizations (even as it lacks the epistemic criteria to decide when they are applicable), and yet at the same time it retains an allegiance to economic theory as a kind of default (even as it permits the not inconsiderable number of psychological/cognitive realizations to serve as overrides). Thus, in terms of the bedeviling tension described at the outset of this brief essay, behavioral law and economics embraces select aspects of both sides while also letting each negate the other: The market trumps the psychological/cognitive realizations because the market is the de-

²⁸ BEHAVIORIAL LAW AND ECONOMICS, at i (Cass R. Sunstein ed., 2000).

²⁹ Judge Posner clearly sees this effect. POSNER, *supra* note 23.

³⁰ *Id.*

³¹ Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577 (1998).

fault, while the psychological/cognitive realizations trump the market because there are so many of them and at least one will nearly always apply.

In the end, then, it is rather hard to see what implications this behavioral economics yields. In the fusion it strives to effectuate, it forsakes the theoretical elegance of economics and yet it only goes a small distance in recognizing the patterns of actual human behavior. It is, to be somewhat unkind, incomplete on the levels of both theory and empiricism.

CONCLUSION

Viewed from the perspective of the tension articulated at the beginning of this Paper, all these approaches fall short. In a sense this is not surprising. The tension articulated at the beginning of this essay poses one hell of a challenge. In fact, quite likely an impossible challenge. Still, impossible though it may be, it's not an unfair challenge. Indeed, any positivist social science must encounter, address and resolve the tension articulated if it insists on claiming the epistemic mantle of knowledge. Why? Because this demand is nothing more than a modest request that a positivist social science specify its domain (its boundaries, depth, objects of inquiry, etc.) and that it offer some reason to believe that its claimed intellectual dominion over this domain does not turn upon extraneous considerations that escape its control. That's one of the requirements of the project. Pretty hard to achieve. Probably not going to happen soon.

