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Raimo Siltala

Law, Truth, and Reason

A Treatise on Legal Argumentation

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Chapter 5
Philosophical Pragmatism: Law, Judged in Light of Its Social Effects

5.1 "What, In Short, is the Truth's Cash Value in Experiential Terms?"

Philosophical pragmatism is a distinctively American phenomenon as to its origin and subsequent influence. It saw daylight in the writings of Charles S. Peirce (1839–1914), William James (1842–1910), and John Dewey (1859–1952), while Georg Herbert Mead (1863–1931) is often mentioned as the fourth representative of original pragmatism.[1] In addition, Justice Oliver Wendell Holmes, Jr. (1841–1935) may be counted as one of the early pragmatists.[2]

Still, pragmatism is not, and has never been, an internally uniform school of philosophy or intellectual movement. Rather, it consists of a set of overlapping philosophical positions that more or less share certain characteristics, as might be depicted by the term *family resemblance* by Ludwig Wittgenstein. Within the pragmatist movement, there are significant differences as to the definition of the subject matter and methodology to be adopted in philosophical research.

Of the founding figures of philosophical pragmatism, Peirce emphasized the essentially scientific characteristics of pragmatism, James its psychological tenets, and Dewey its inherent links to the idea of Western democracy.[3] What is common to all the pragmatists, though, is the idea that all human knowledge is *fallibilistic* to the effect that all true beliefs can be exposed to the trial of potential falsification in light of contrary evidence, and *instrumental* to the effect that all true ideas

[1] Scheffler, *Four Pragmatists. A Critical Introduction to Peirce, James, Mead, and Dewey*, p. 149 et seq.

[2] Holmes' oracle-like assertions on the law bear the impact of pragmatism. Cf.: "The life of the law has not been logic: it has been experience." Holmes, "The Common Law", p. 237; "General propositions do not decide concrete cases." Holmes, in *Lochner v. New York*, 198 U.S. 45 (1905), in Posner, ed., *The Essential Holmes*, p. 306; "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . .", Holmes, "Southern Pacific Co. v. Jensen", 244 U.S. 205 (1917), as cited in Posner, ed., *The Essential Holmes,* p. 230.

[3] As Nicholas Rescher put it: "Peirce's pragmatism is scientifically élitist, James' is psychologically personalistic, Dewey's is democratically populist." Rescher, "Pragmatism", p. 712.

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are tied up with the successful pursuance of certain human goals and objectives. Moreover, the two qualities of knowledge, i.e. being *contextual* and *workable*, have been associated with legal pragmatism.[4]

Pragmatism puts emphasis on the *utility*, *usefulness*, *successfulness*, *effectiveness*, and *verifiability* of the true ideas, no matter whether they be part of a scientific theory or just commonsensical beliefs with the help of which we structure and manage our daily life. A pragmatist point of view on the world rejects any references to some "metaphysical" or idealistic doctrines beyond the reach of human senses or the realm of the empirical. What is essential in judging the truth of some particular idea or belief is the collected, cumulated set of common experience that has been gathered of its proper functioning in the course of our daily action, no matter whether the context of judgment is a scientific theory, a philosophical stance, or just commonplace human knowledge and action. Thus, the criteria put forth by pragmatism can be applied to a variety of beliefs or ideas in the field of practical reason, like the appraisal of the good, the right, and the just in moral philosophy; the judgment of what is beautiful or aesthetically impressive in art and aesthetics; or what is legally right, acceptable, or equitable in the context of law and legal argumentation.

According to the pragmatists, there is no need for the epistemic and semantic prerequisites of an isomorphism-aligned picture theory of language and the world. Nor is there any conceptual space for the seminal preconditions of the coherence theory of truth, knowledge and legal construction, defined as internal textual coherence among the observation sentences and the theoretical sentences that make up a scientific theory or a set of sentences on how to construct and read the law. To the philosophical pragmatist, knowledge, meaning, and truth are essentially *instrumentalist* notions that are inextricably interwoven with human action, the social practices, and the successful attainment of various kinds of human endeavours: *truth is what works*.[5] Yet, in the context of law the notion of *what works* may prove to be hard to determine, because of the inherently contested character of law and because there usually is no consensus as to the values to be pursued through legal means.

Though Charles S. Peirce had tackled the issues of philosophical pragmatism as early as in the 1870s, it was William James who made pragmatist ideas widely known at the beginning of the twentieth century. *Pragmaticism*, in turn, is a neologism introduced by Peirce. With it Peirce wanted to distance his ideas from the ones presented by William James who, as Peirce saw it, had distorted the scientific grounds of pragmatism. While Peirce underlined the essentially *objective* tenets of pragmatism, James put an emphasis on the more *subjective* character of human

[4]Lind, "Pragmatist Philosophy of Law", pp. 678–679: fallibilism and the growth of knowledge, contextualism, instrumentalism, workability.

[5]Cf. James, "Pragmatism's Conception of Truth", p. 148: "We must find a theory that will *work*; and that means something extremely difficult; for our theory must mediate between all previous truths and certain new experiences. It must derange common sense and previous belief as little as possible, and it must lead to some sensible terminus or other that can be verified exactly. To "work" means both these things; and the squeeze is so tight that there is little loose play for any theory." (Italics in original.)

knowledge, in the sense of a societal belief upon which successful human action can be based.[6]

In 1907, William James outlined the pragmatist idea of truth by placing an equation between the truth of an idea or belief and the prerequisites of its verifiability in experiential terms[7]:

> Pragmatism, on the other hand, asks its usual question. "Grant an idea or belief to be true," it says, "what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash value in experiential terms?" – The moment pragmatism asks this question, it sees the answer: *True ideas are those that we can validate, corroborate and verify. False ideas are those that we can not.* That is the practical difference it makes to us to have true ideas; that, therefore, is the meaning of truth, for it is all that truth is known as.

Moreover, James held that the truth of an idea or belief and its *usefulness* are in all significant respects equal[8]:

> You can say of [a true idea] then either that "it is useful because it is true" or that "it is true because it is useful." Both these phrases mean exactly the same thing, namely, that here is an idea that gets fulfilled and can be verified.

At the back of James' conception of truth, there are the basic ideas of pragmatism, as presented by Charles S. Peirce as early as the 1870s:

> In order to ascertain the meaning of an intellectual conception we should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception.

The truth of a scientific or any other conception is defined by the concrete effects it will have on the course of human life: *what concrete difference will its being true make in any one's actual life?* As a consequence, the validity of a scientific idea is defined as equal with its *usefulness*, *success*, or *utility* both in structuring prior historical evidence and in predicting future human experience. What all the tenets of pragmatism have in common is the idea of *usefulness* of the true beliefs in the service of human action, no matter whether we are dealing with scientific theory and explanation, the more mundane tasks of everyday life, the virtues and vices of human conduct, or the issues of how to construct and read the law in a reasoned manner.

The success of a scientific conception or theory can be rephrased as its *testability*, *corroborativeness*, or *verifiability* in light of the criteria adopted in the community, such as the pertinent scientific community with respect to assertions produced by the natural sciences or the human and/or social sciences, and the legal community vis-à-vis the method and outcomes of legal reasoning. Truth, when defined as the usefulness or functioning of a scientific theory or some everyday conception, may be

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[6] Rescher, "Pragmatism", p. 710.

[7] James, "Pragmatism's Conception of Truth", p. 142. (Italics in original.)

[8] James, "Pragmatism's Conception of Truth", p. 143.

combined with the consensus theory of truth and Chaïm Perelman's idea of the new rhetoric that underscores the role of the scientific or other community in judging the truth of an assertion. The later versions of a pragmatist theory of truth have in fact evolved into the direction of the consensus theory of truth.[9] Conceptions that have gained wide approval in the community have proven their usefulness as grounds for scientific explanation and everyday action, too.

Charles S. Peirce, one of the founders of modern semiotics and a key figure in the evolvement of scientific logic, approached the issues of truth and knowledge by seeking to define the criteria placed on *scientific method*. Peirce, firstly, rejected as unscientific the *method of tenacity* where a scholar stubbornly adheres to his initial beliefs and prejudices, closing his eyes at the face of any contrary evidence. Secondly, he argued that the *method of authority* does not satisfy the criteria of a scientific method, since there are no guarantees of the infallibility of the claimed authority, whether of religious, legal, or other kind. Thirdly, Peirce rejected the a priori *method* as suggested by Descartes' famous inference *cogito, ergo sum*, since it is based on the acclaimed access of human reason to the items of absolutely certain knowledge. According to Peirce, the stagnated state of philosophical metaphysics and the tough resistance of several of its age-old problems against the very best efforts of philosophical problem-solving bears witness to the inherent weaknesses of such an a priori method. Besides, many initially self-evident or a priori truths have been proven false later on.[10]

Having rejected as non-scientific the method of tenacity, the method of authority, and the a priori method, Peirce outlines the notion of a scientific method by means of the following four tenets[11]:

> (a) the properties of the subject of investigation are independent from the opinions held by the researcher; (b) scientific knowledge is brought into effect in the mutual interaction between the researcher and the subject of investigation; (c) science cannot be based on dogmas, faith, revelation, authority, or intuition but the source and criteria of knowledge in science are in the last resort grounded on experience had of the very subject of investigation; (d) it is possible to gain valid knowledge of the subject of investigation, and the scientific community can reach an agreement as to the quality of such knowledge.

Truth is the outcome of the relation that exists between a scientist and a set of empirical observations. Because being open to public disposition and critique, scientific knowledge is in the long run *self-corrective*: any mistakes made in the course of scientific investigation will ultimately tend to become corrected by the scientific community, once more and more accurate empirical evidence is provided of the subject matter of investigation.[12] It is therefore possible, at least in principle, to ultimately reach a consensus on the validity of some particular belief or item of knowledge.

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[9] Rescher, "Pragmatism", p. 710.

[10] Peirce, *Pragmatism and Pragmaticism*, pp. 233–242.

[11] Peirce, *Pragmatism and Pragmaticism*, pp. 242–244; Niiniluoto, *Johdatus tieteenfilosofiaan. Käsitteen- ja teorianmuodostus*, p. 83.

[12] Niiniluoto, *Johdatus tieteenfilosofiaan. Käsitteen- ja teorianmuodostus*, pp. 83–84.

Peirce's idea of knowledge is *fallibilistic*: each intellectual stance or belief can be challenged and, possibly, proven erroneous by some novel experiential evidence. There are no self-evident truths whose validity would be wholly immune to, or effectively resistant to, scientific testing. For Peirce, truth is an *absolute* quality attached to an idea or belief. In a situation where all the conceivable empirical evidence concerning some phenomenon has been gathered, the conceptions held by the scientific community will *converge*, ultimately leading to a reasoned consensus in it. The scientific community and the criteria of verifiability adopted in it gain a key role in how the set of true beliefs and conceptions is to be defined.

Of the founders of American pragmatist movement in philosophy, John Dewey strongly underscored the psychological and testable properties of knowledge. He introduced the novel term *warranted assertability* as the justifiability or verifiability of certain belief or conception. Dewey regarded scientific knowledge and laws as no more than *working hypotheses* that need to be tested by empirical evidence. Therefore, scientific reasoning is "a logic relative to consequences rather than to antecedents, a logic of prediction of probabilities rather than one of deduction of certainties."[13] At the back lies Dewey's instrumentalist notion of human knowledge, which makes it possible to predict the course of future events and, in more general terms, to accomplish various kinds of human activities.

Similarly, for William James truth is not some static, constant, or eternal property of a belief or conception *sub specie aeternitatis*. Rather, it is "something that happens" to an idea when it is (empirically) verified. For James, truth is a verb rather than a noun, as Morris Dickstein has insightfully pointed out.[14]

A pragmatic conception of science and knowledge matches well with Thomas S. Kuhn's seminal idea of the dynamics of change in a scientific community, as presented in his breakthrough work, *The Structure of Scientific Revolutions*. For Kuhn, science is an essentially *collective* enterprise, based on the commonly held beliefs in the scientific community. Moreover, scientific knowledge is *fallibilistic* so that it is subject to be falsified when encountered with strong enough empirical evidence to the contrary effect.[15] According to Peirce and Kuhn, it is the *scientific community* that has the final say on what will count as science proper, as judged in light of the testability, verifiability, or utility of the theory or some individual assertion, and what will fail such a test. The *scientific community* may be defined as the group of individuals who have a university degree in and/or have gained expertise knowledge in, say, theoretical physics, chemistry, medicine, mathematics, or law. There is no higher religious or political authority or a scientific "court of

[13] As cited in Mendell, "Dewey, John (1859–1952)", p. 204.

[14] "The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process, the process, namely, of its verifying itself, its veri-*fication*. Its validity is the process of its valid-*ation*." James, "Pragmatism's Conception of Truth", p. 142 (all italics and formattings in original). – Cf. Dickstein, "Introduction: Pragmatism Then and Now", p. 7: "James insists that truth or meaning is a process, an action leading to a pay-off, a verb rather than a noun."

[15] Kuhn, *The Structure of Scientific Revolutions*.

appeal" that could settle some scientific issue by declaring what is to be held as true vis-à-vis some contested issue at hand.[16]

Modern philosophical pragmatism is represented by for instance Richard Rorty, Thomas C. Gray, Richard Posner, and Stanley Fish.[17]

5.2 The Lure of Pragmatism and the Law

The urge for pragmatism has had several implications for the study of law. For the first, Justice Holmes and the young Karl Llewellyn forcefully argued for the *prediction theory of law*, to the effect that the law be defined by reference to foreseeing the future course of legal decisions at the courts and other officials. As Llewellyn put it[18]:

> This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.* (. . .) It will be [the judges'] *action* and the available means of influencing their action or of arranging your affairs with reference to their action which make up the "law" you have to study. And *rules*, in all of this, are important to you so far as they help you see or predict what judges will do or so far as they help you get judges do something. That is their importance. That is all their importance, except as pretty playthings.

Yet, even Llewellyn admitted that it is in light of the legal rules of the legal system concerned that the prediction of future court decisions and any efforts of influencing them are possible. Even before Llewellyn, Justice Holmes had insisted on looking upon the law from the point of view of the "bad man" who is only interested in forecasting the likely legal consequences to be inflicted upon him, if he breaks the law[19]:

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[16]The Catholic Church had such a privileged position as a kind of court of last instance concerning scientific truth at the beginning of the modern era. Giordano Bruno was burnt as a heretic on the square of the *Campo dei Fieri* in Rome in 1600. Galileo Galilei (1564–1642), after having been threatened with the instruments of the Inquisition, had to deny his heretical doctrine to the effect that that the earth revolves around its axis and around the sun, while allegedly muttering to himself: "E pur si muove." (And yet it [the earth] moves, i.e. revolves around the sun.) – In the Soviet Union of the Stalinist era, even scientific truths were approved or disapproved by the Communist Party. Any scientific theories that were deemed ideologically suspect were declared false. On the other hand, the biologist Lysenko's erroneous doctrine concerning the inheritance of some acquired properties was declared to be valid science by the Communist Party because of ideological reasons.

[17]Dickstein, ed., *The Revival of Pragmatism*. Cf. Rorty, *Consequences of Pragmatism. (Essays: 1972–1980)*; Fish, *Doing What Comes Naturally. Change, Rhetorics, and the Practice of Theory in Literary and Legal Studies*.

[18]Llewellyn, *The Bramble Bush*, pp. 3, 5. (Italics in original.) – Later on, Llewellyn tried to distance himself from the sternness of that stance, now claiming that: "They are, however, unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth." Llewellyn, *The Bramble Bush*, p. X.

[19]Holmes, "The Path of the Law", pp. 460–461. (Italics added.)

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the *bad man* we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact*, and nothing more pretentious, *are what I mean by the law*.

Still, even for Holmes the effected decisions by the courts and other officials served as a pertinent source of law or, as he put it, *sibylline leaves* from which a legal scholar could make predictions as to the course of law at the courts and other officials.[20]

Holmes' cynical figure of the bad man, only interested in the consequences likely to be inflicted upon him if he chooses not to observe the law, is – perhaps a bit surprisingly – lurking even in the background premises of Aulis Aarnio's and Aleksander Peczenik's theory of legal argumentation which in other respects leans on very different philosophical premises. According to Aarnio and Peczenik, the binding character of law is in the last resort based on the *sanctions* that are likely to be inflicted upon a stubborn, dissenting judge who refuses to comply with the legal norms entailed in legislation and other strongly binding sources of law. As a consequence, a charge for misconduct in office may be inflicted upon a judge who stubbornly refuses to comply with the mandatory sources of law, such as the constitution, legislation, and customary law (in Finland).[21]

The place reserved for the bad man, or the potential law-breaker, in Holmes' cynical prediction theory of law is now occupied by the obstinate, dissenting judge whose idea of the rule of recognition to a significant degree deviates from the one adopted by his peers and the legal profession at large.[22] As to the weakly binding sources of law, such as the *travaux préparatoires* and precedents, an unofficial sanction may entail professional reproach from the other judges and lawyers, according to Aarnio.

For the second, legal pragmatism entails the idea that the merits and dismerits of a legal decision are to be judged primarily, if not even exclusively, by the social

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[20] "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. – The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for 600 years, and now increasing annually by hundreds. In these sibyllian leaves are gathered the scattered prophesies of the past upon which the axe will fall. These are what properly have been called the oracles of the law." Holmes, "The Path of the Law", p. 457.

[21] Aarnio, *The Rational as Reasonable*, pp. 89–90; Aarnio, *Laintulkinnan teoria*, p. 220; Peczenik, *Vad är rätt?* p. 214. – As to the binding character of customary law, there is even a statutory stipulation to that effect in the Finnish Act of Judicial Procedure.

[22] The prominent role of legal sanctions is of course one of the key characteristics in John Austin's and Hans Kelsen's analytical legal positivism, as well.

consequences thereby brought into effect. Walter Wheeler Cook's reflection on the judge's method of interpretation in 1927 gives a good account thereof[23]:

> The logical situation confronting the judge in a new case being what it is, it is obvious that he must legislate, whether he will or no. By this is meant that since he is free so far as compelling logical reasons are concerned to choose which way to decide the case, his choice will turn out upon analysis to be based upon considerations of social or economic policy. An intelligent choice can be made only by estimating as far as this is possible the consequences of a decision one way or the other. To do this, however, the judge will need to know two things: (1) *what social consequences or results are to be aimed at*; and (2) *how a decision one way or other will affect the attainment of those results*. This knowledge he will as a rule not have; to acquire it he will need to call upon the other social sciences, such as economics. (. . .) Underlying any scientific study of the law, it is submitted, will lie one fundamental postulate, viz., that human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable.

Cook argues for an *instrumentalist* and *consequentialist* notion of law where the social consequences of law are the primary criterion in legal decision-making. The truth or, rather, the justifiability, usefulness, equity, or warranted character of sentences on how to construct and read the law can thus be evaluated in light of the economic, social, or other consequences brought into effect by law in society. The impact of a thoroughly consequentialist analysis of law and society endorsed by Cook boils down to the two questions italicized in the text extract above: (1) what social consequences or results are to be aimed at; and (2) how a decision one way or other will affect the attainment of those social goals.

For the third, Cook's view of a judge leans on an idea of future legal science that was presented by O. W. Holmes at the end of the nineteenth century[24]:

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is *the man of statistics* and *the master of economics*. (. . .) I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made.

Holmes' insight on the profile of the future lawyer to a great extent anticipates the emergence of the empirical human and social sciences in the twentieth century, with coverage of a variety of the fields of social research, such as economic analysis of

[23] Cook, "Scientific Method and the Law", p. 249. (Italics added.) – Cook emphasizes how it is not a judge's task to find some pre-existing, concealed meanings in the legal rules in force but, instead, to give them a meaning content for the case at hand. Cook, "Scientific Method and the Law", pp. 248–249: "His [the judge's] task is not to find the preexisting but previously hidden meanings of the terms in these rules; it is to give them a meaning." Cf. similarly in Makkonen, *Zur Problematik der juridischen Entscheidung*, pp. 111, 118.

[24] Holmes, "The Path of the Law", pp. 469, 474. (Italics added.)

law, legal statistics and the mathematics of social risk analysis, legal anthropology, and legal psychology.[25]

As I see it, Holmes' bold prophecy has proven both true and false at the same time, viz. true in the sense that the diversified perspective of the human and social sciences on law has gained significant ground amongst the scientific community; but false in that such a social scientific view law has not been able to replace the traditional task of the "black-letter law" in legal doctrine. As I see it, it will never succeed in ousting it from the family of legal research, either. Each of the various branches of the human and social sciences with focus on the legal phenomena has a specific research interest and "intellectual toolbox" of its own.[26] Legal doctrine (*Rechtsdogmatik*) or technical legal analysis as a study on how to construct and read the law vis-à-vis some either actual or merely hypothetical fact-constellation in society has a legitimate research interest that finds ample support in society, and there are no hints in the modern (or postmodern) society that might disqualify the said core task of legal doctrine in the foreseeable future. Seeking to give a reasoned answer to the seminal question of legal doctrinal analysis, i.e. *how should a given fact-constellation x be legally judged?,* will remain the core task for legal science in future, as well.

Finally, a pragmatist view on law is characterized by the *contextual* criteria for legal decision-making. It therefore strikes a far better chord with legal principles and other context-sensitive, openly value-laden standards of law than with legal rules, valid by force of their formal source of origin and – at least if Hans Kelsen's stern quest for methodological purity is approved – totally blind to the social consequences thereby brought into effect. Legal pragmatism is in essence *anti-formalist*, and formalism is a typical of legal rules, not of legal principles.[27] In contrast to what has been argued by the representatives of legal formalism, legal argumentation can never take place in a social or ideological void, detached from the constitutive value premises operative in the various legal instruments.

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[25] Naturally, the emergence of the empirical social sciences in the field of law did not take place overnight or without dead ends in search for a working conception of enquiry. Cf. Schlegel, *American Legal Realism and Empirical Social Science*, where an account is given of the early pathfinders of modern empiricist social sciences.

[26] Here, I will not wish to enter the discussion on whether the human and social sciences count as "genuine" science in the strict sense of the term. Certainly they do not, if by "science" is meant a commitment to an empiricist and/or experiential methodology and a research interest aligned with the explanation and prediction of the phenomena. The human and social sciences have a different agenda, and they, too, qualify as scientific inquiry, if – and only if – the commitments that constitute the matrix of scientific research, i.e. the *ontological*, *epistemological*, *methodological*, *logico-conceptual* and *axiological* premises of inquiry, are duly satisfied in them. Cf. Siltala, *Oikeustieteen tieteenteoria*, passim.

[27] On legal formalism, see e.g. Summers, "Form and Substance in Legal Reasoning"; Summers, "The Formal Character of Law"; Summers, "Theory, Formality and Practical Legal Criticism"; Summers, "How Law is Formal and Why it Matters"; Cf. Siltala, *A Theory of Precedent*, pp. 41–63, where a parallel reading is given of Robert S. Summers' idea of legal formalism and Ronald Dworkin's idea of legal principles, and the claim of the affinity of the two doctrines is argued for.

The urge for realism in jurisprudence may yet be of a somewhat older origin than what the standard learning has it, dating its birth in the writings by Holmes, Pound and sociological jurisprudence at the beginning of the twentieth century. Recently Brian Z. Tamanaha has convincingly argued that the legal realists of the 1920s and 1930s were not the precursors or forerunners of the realist trend in the legal studies but, rather, the "end tail" or culmination point of a tradition that goes back in time for at least a century.[28] Still, the thrust of the realist and pragmatist trend in jurisprudence has found its strongest manifestation in the modern economic analysis of law since the 1960s.

5.3 "These Doctrines Form a System for Inducing People to Behave Efficiently. . ."

Modern *economic analysis* of law is centred at the University of Chicago. Its starting point was R. H. Coase's essay "The Problem of Social Cost" in 1960. In it, Coase tackled the issue of the *external effects* of legal regulation. He argued that in a situation where the transaction costs are zero and where there is no external regulation that would have a distorting effect on the decision-making situation, scarce resources would be allocated in a manner that is most efficient.[29]

A year later, in 1961, Guido Calabresi published the highly influential essay, "Some Thoughts on Risk Distribution and the Law of Torts".[30] That article plus the author's later subsequent writings on law and economics, such as *The Costs of Accidents* in 1970 and "Property Rules, Liability Rules, and Inalienability: One View from the Cathedral", co-authored by Calabresi and A. Douglas Melamed, in 1972, looked upon the law of property and tort from the point of view of economic analysis of law. The authors introduced a set of concepts like *economic efficiency* and *distributional goals* that were, at least in the legal context, novel. In "Prices and Sanctions", Robert Cooter drew a parallel between the legal sanctions and the economic prices set on a certain type of behaviour.[31] The first edition of Richard A. Posner's influential book, *Economic Analysis of Law*, saw the daylight in 1973. In it, Posner gives a concise view of law seen from the point of view of economics.

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[28] Tamanaha, *Beyond the Formalist-Realist Divide*, p. 107: "Viewed in this longer frame, it appears more accurate to situate the "legal realist" at the *tail end* of about a half-century of a continuous steam of candid realism about law and judging. (. . .) What especially stands out about expressions of skeptical realism is the similarity of the arguments across time. Rantoul in 1836, Hammond in 1881, the legal realists in the 1920s and 1930s, and Critical Legal Studies in the 1970s and 1980s (and others along the way) all argued in interchangeable terms that judges have the freedom to decide cases in accordance with their political views and to cover these decisions with legal justifications."

[29] Coase, "The Problem of Social Cost".

[30] Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts". – On the birth of the economic analysis of law, Posner, *Economic Analysis of Law*, pp. 23–24.

[31] Cooter, "Prices and Sanctions".

What all variants of the economic analysis of law have in common is the weight placed on *economic* criteria as the prime reference of legal analysis, no matter whether specified in line with the *Chicago School of Economics*, as in Posner's voluminous writings on various topics of law and economics; the more legally tinted view of *neo-institutionalism*, as suggested by Douglas C. North; the *public choice theory* with emphasis on resource allocation on the public sector; or some other alternative centred on economic issues. As a consequence, the key concepts of analysis are given in terms of economic efficiency and the optimality of the allocation of scarce resources in society, both in legislation and in jurisdiction.

According to Posner's thesis, the legal rules, principles, and doctrines that make up the American common law to a significant degree follow an inherent logic that can be rephrased in economic terms, i.e. the pursuit of economic efficiency. Posner argues for the inherent economic logic of the common law[32]:

> The common law is to most lawyers a collection of disparate fields, each with its own history, vocabulary, and bewildering profusion of rules and doctrines; indeed, each field may itself seem a collection of only tenuously related doctrines. Yet we have seen that the law of property (including intellectual property), of contracts and commercial law, of restitution and unjust enrichment, of criminal and family law, and of admiralty law *all can be restated in economic terms* that explain the principal doctrines, both substantive and remedial, in the fields of (largely) judge-made law. *These doctrines form a system for inducing people to behave efficiently*, not only in explicit markets but across the whole range of social interactions. In settings in which the cost of voluntary transactions is low, common law doctrines create incentives for people to channel their transactions through the market (whether implicit – the marriage market for example – or explicit). They do this by creating property rights (broadly defined) and protecting them through remedies designed to prevent coerced transfers – remedies such as injunctions, restitution, punitive damages, and criminal punishment. In settings in which the cost of allocating resources by voluntary transactions is prohibitively high, making the market an infeasible method of allocating resources, the common law prices behavior in such a way as to mimic the market.

Posner's claim of the implicit economic logic of the common law can be read in a descriptive or a normative sense. According to a *descriptive* account of the issue, the evolvement of American common law is based on premises that have had the effect of enhancing economic efficiency and the goal of wealth maximization in society.[33] According to the parallel *normative* claim, that is how things ought to be, as well: economic efficiency and the criteria that foster economic prosperity ought to guide the course of the American law in future, too.[34] In the context of legislation and other institutional legal source material, that gives effect to the conception that the economic consequences of law should have priority over other kinds of considerations in the construction and reading of law.[35]

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[32] Posner, *Economic Analysis of Law*, pp. 249–250. (Italics added.)

[33] Posner, *Economic Analysis of Law*, pp. 249–250.

[34] On a similarly *descriptive/prescriptive* reading of Posner's pragmatism, cf. Tamanaha, *Law as a Means to an End*, pp. 118–119.

[35] On the notion of *legisprudentia*, or jurisprudential analysis of the process of legislation, cf. Wintgens, "Creation and Application of Law from A Legisprudential Perspective. Some Observations on the Point of View of the Judge and the Legislator".

Posner points out that his thesis on the implicit logic of common law, to the effect of striving for optimal cost efficiency in society through judicial decisions, cannot be taken as an all-embracing model that would categorically rule out the impact of any alternative readings of the common law. Instead, it is at the most an *approximation* of the laws of social reality within the common law where the ideals of economic rationality are complied with more or less imperfectly only. The reason why the decision-making process of the judge or other official may deviate from the ideal of economic efficiency is mostly due to the *conventional* patterns of decision-making adopted by the judiciary, and to the in-built resistance against any profound changes in the legal tradition. Still, Posner argues that the economic point of view will provide the best explanation for the court decisions and the decisions given by other law-applying officials.[36]

But if the non-contested fact that the "law in action", as enforced by the courts of justice and other law-applying officials, tends to lag behind the ever-changing social and economic conditions in society were for a moment set aside, and the evolving story of the common law were be read in light of a more-or-less all-encompassing economic rationality, the economic explanation of law and society can be stretched like an elastic rubber band to cover all legal issues that may surface, no matter how close or how far they are situated from the economic base of society. Any empirical counter-evidence to Posner's thesis will leave his final conclusions untouched, since the no-more-than approximate nature of his claim will always leave room for any such exceptions. As a consequence, Posner's thesis of the implicit economic logic of the common law is a non-refutable *postulate* of legal analysis, and not an initial hypothesis that could be empirically corroborated and possibly refuted in the course of the study.

5.4 "Why Efficiency?" and "Is Wealth a Value?" – A Critical Evaluation of the Economic Analysis of Law, with Brief Comments on the Marxist Theory of Law

In Europe, jurisprudential discourse on an economic analysis of law has for the most part been focused on the relatively general and theoretical issues of law, such as *de*

[36]Posner, *Economic Analysis of Law*, pp. 252–253: "Despite all of the above, not every common law doctrine has an economic rationale. (…) Some of the discrepancies between law and economics may be the result of simply of lags explicable in economic terms, the phenomenon economists call "path dependence". Because the law for good economic reasons places heavy weight on continuity, law tends to lag behind changing social and economic conditions. Nevertheless, economic efficiency does not provide a complete positive theory of the common law. But it does provide a uniform vocabulary and conceptual scheme to aid in making the common law understandable as a coherent whole, and thus to balance the heavily particularistic emphasis of traditional legal education and reasoning." – The term "logico-conceptual toolbox" is mine, but the idea is Posner's.

lege ferenda analysis of future legislation.[37] The critique of bypassing or forgetting the institutional frame of legal adjudication even applies to the proficient Italian scholar Ugo Mattei and his highly challenging *Comparative Law and Economics* in 1997. Despite his whole-hearted commitment to the basic theses of American legal realist movement, Mattei still ignores the impact of any institutional constraints placed upon a judge or other law-applying official when he analyses the subject matter by the novel combination of comparative law and economics.[38]

Pragmatism-aligned legal consequentialism gives precedence to the social effects of law, and especially the economic consequences of law have a key position there. The *institutional* sources of law, along with the legal rules and legal principles that can be derived from them by means of legal reasoning, now have to recede, giving room for a more straightforward appraisal of the economic effects of legislation and judicial adjudication. In the branches of law that have an inherent bond with the issues of trade and commerce, marketing, financing and monetary transactions, economic effects of law are, so to say, built in the very subject matter of legal regulation. Therefore, the economic consequences of law may gain significantly more normative, binding force in such fields of law than what the standard doctrine of the sources of law, like the one by Aarnio and Peczenik, would allow. For Aarnio and Peczenik, the economic effects of law are ranked as merely permissive arguments in the legal discretion of the judge.

There are limits to what can be attained by use of the intellectual tools provided by the economic analysis of law, though. As Posner himself admits, economics-based argumentation cannot be extended to become an all-inclusive legal reason, without at the same time cutting off the judge's discretion from the institutional premises of law, such as the constitution, statutes, precedents, and the *travaux préparatoires* at the back of legislation, if any. The exceptions to the extent of economic analysis in law that Posner was willing to concede to were due to the collective thought patterns prevalent among the judiciary and the inherent resistance of the legal tradition toward external change. Yet, restrictions on the use of economic arguments in the context of law could more plausibly be justified by reference to the institutional sources of law and the entailed value premises that comprise a diversity of social values besides those of economic kind.

Thus, the greater than merely permissive impact of economics-based arguments in law is restricted to the branches of law that have an inherent connection to the

[37] A notable exception to the absence of a judicial perspective within the law and economics movement is of course Justice Richard Posner whose argumentation is deeply rooted in the soil of the judge-made *common law* tradition in the United States. Posner, *Economic Analysis of Law*, pp. 249–250.

[38] Mattei, *Comparative Law and Economics*, pp. 69–146 and esp. pp. 101–121, where the author deals with the sources of law of legislation under the subtitle *The Competitive Relationship among Sources of Law* and makes use of the seminal texts of such heavy-weight American legal realists as Jerome Frank and John Chipman Gray but, at the same time, ignores the judge's or other official's view as to the law. In addition, with the term "sources of law" Mattei refers to the source material that is available to the legislator, while established linguistic usage relates the said notion rather to a judge's or other legal official's view as to the constitutive premises of law.

economic structures and economic activities, such as the production of goods and services, finance, insurance, marketing, and trade and commerce in general. The stance advocated by Posner and his followers in the law and economic movement is far better suited to the analysis of the law of property and transactions than any other branches of law. When applied to the law of the European Union and the respective national regulation of the EU Member States on issues that have to do with the regulation of internal market, commercial law, the law of investment, banking, financial instruments, transferable bonds and securities, and economic transactions, the *intellectual toolbox* provided by the economic analysis of law will yield far more reasonable results than in the field of marriage, adoption, euthanasia, care for the children, the elderly and the handicapped, human rights law, and social security issues in general. In the latter, other value considerations than those of purely economic or financial kind are given priority.

Similarly, in scientific research, literature, music, and other arts and crafts, the economic aspect is usually not the only or the primary driving force for human motivation. Reduction of such human endeavour to the economics of financing, production and (sometimes) transaction of cultural artefacts would hardly meet with the professional vocation and self-understanding of the artists or scientists themselves.

Economic analysis of law has a somewhat ambivalent relation to the Marxist conception of law and society. Like law and economics, the Marxist notion is focused on the relation that prevails between the law and economy, and the institutional structures and forces of production have a major role in both. What distinguishes the two from each other has to do with a very different conception of the "metaphysics" of society, in the sense of the relation that prevails between the law and economy in society. For a Marxist scholar, the deep-structure level *economic* phenomena determine the shape and course of the surface-structure level *ideological* phenomena in society. In the economic analysis of law, in turn, the institutional modes of legal regulation and judicial decision-making are taken to be constitutive as to the institutional structures of economy, or any other institutional structures for that matter.[39] The Marxist theory of law and society entails a thoroughly *metaphysical* doctrine of

[39]On the forces and relations of production in society and on the capital as the "transcendental-logical" subject in society, endowed with an inherent capacity of autonomous self-production, cf. Hänninen, *Aika, paikka, politiikka*. – Hänninen's Marxist reading of Georg Lukács' theory of society, to the effect of discerning the three levels of society, each with a distinctive kind of subjects in it: (a) individual subjects with individually ascribable intentions, (b) collective subjects with a distinct class-consciousness, and (c) the capital as the "transcendental-logical" subject that observes the laws of its own self-reproduction in society, provided the original inspiration for Kaarlo Tuori's three-layered model of law and society. In Tuori's *Critical Legal Positivism*, the Marxist frame of analysis is to some extent downgraded, making room to a more openly positivist account to the law, now outlined with reference to Hans Kelsen's and H. L. A. Hart's theories of law. Yet, contrary to what the author argues, Tuori's idea of the multi-levelled structure of law, where the deeper levels of law are able to resist any abrupt efforts towards legal change on part of the legislator and the courts of justice, cannot be reconciled with a truly *positivist* notion of law, as advocated by Kelsen, Hart, and the other main representatives of analytical legal positivism. – I will consider the issue at more depth in Section 6.5. The Unresolvable Dilemma of Kaarlo Tuori's Critical Legal Positivism.

the relations that are thought to prevail between the law, economy, and society, and a lot depends on how in more specific terms such metaphysics is conceived. The economic analysis of law, in turn, is committed to a highly *instrumentalist* notion of the law, economy, and society, leaning on the liberalist tradition in social philosophy and a pragmatist idea of social engineering.

Politically, the economic analysis of law and a Marxist conception of law and society are at the two opposite ends of the line. A Marxist notion of law and society defines the notions of social justice in terms of a leftist ideology and the interests of the working class; while an economic analysis of law most often underscores the adverse political ideology of economic efficiency, market rationality, free competition, and the most efficient allocation of the scarce resources in society. However, there is no inherent obstacle to utilizing the outcomes gained by an economic analysis of law for the benefit of, say, moderate welfare social politics and social law for the attainment of optimal (re)allocation of scarce material resources and risk positions in society, in line with the Scandinavian welfare state model in this respect.

The core issue of law and economics still remains unanswered: *why* should the enhancement of economic prosperity, enrichment, and economic efficiency be given decisive priority over other values in society? The set of values acknowledged in legislation and other institutional sources of law may quite drastically differ from the ones preferred by those involved in economic transactions. In the intellectual debate with Richard Posner and Guido Calabresi, Ronald Dworkin (re)phrased the issue in the titles of his two articles as "Why Efficiency?" and "Is Wealth a Value?"[40] Dworkin's answer was firmly in the negative: the pursuit of economic prosperity and economic welfare as such do not qualify as an adequate value basis for the law and society, and a striving for economic efficiency cannot deplace the protection of the inalienable rights of individuals.

Dworkin's own idea of social justice through law is based on the primacy of *arguments of principle* that safeguard the rights of individuals in society over *arguments of policy* that promote some collective goals of, say, the welfare state. According to Dworkin, rights of individuals and arguments of principle "trump" over collective goals and arguments of policy.[41] Still, the question why *social justice* is given the status of a trump in the judge's legal decision-making, while *economic justice* is not given such a standing, is left unanswered by Dworkin. The locked-up priority order in-between the two is a *postulate* in Dworkin's theory of law, and not an argument with sufficient backing, to the detriment of the values of a welfare state or libertanianism alike.

In "Why Efficiency?", Dworkin approvingly cites John Rawls' ingenious idea of the *original position* with the help of which Rawls outlined the preconditions for

[40]Dworkin, "Is Wealth a Value?"; Dworkin, "Why Efficiency?". – Both articles are reprinted in Dworkin's *A Matter of Principle*. In the former, Dworkin evaluates Richard Posner's classic account of the issue in *Economic Analysis of Law*; and in the latter, he estimates Guido Calabresi's similarly influential work *The Costs of Accidents*.

[41]Dworkin, "Hard Cases", pp. 82–84; Dworkin, "A Reply to Critics", pp. 364–366; Dworkin, *Law's Empire*, passim.

individual liberty and social equality in the social contract. Here, I will not enter the discussion on Rawls' influential theory or its relation to Dworkin's notion of law.[42] Still, Dworkin's idea of law as integrity, unlike Posner's or Calabresi's economic analysis of law, makes room for the *institutional* sources of law and the rules and principles of law extracted from them. Though not without inherent dilemmas of its own, Dworkin's coherentist approach better guarantees the *legality* and *rationality* of the outcome of legal deliberation.

[42]Dworkin, "Why Efficiency?", p 279. – On Rawls' methodology as a model for Dworkin, cf. Dworkin, *Justice in Robes*, pp. 241–261. When visiting my post-graduate seminar (in Finland) in May 2008 and asked about the relation of his theory of law vis-à-vis John Rawls' theory of social justice, Dworkin admitted that there are no doubt similarities in the *methodology*, though not in content, in Rawls' seminal idea of a deliberative equilibrium and his own idea of legal deliberation in terms of the law as integrity.