

ECONOMICS AND THE 'NONSENSE' OF LAW: THE CASE OF THE CHICAGO

ANTITRUST REVOLUTION

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Foucault argues in his lectures on neo-liberalism, “the idea of an economic-judicial science is strictly impossible and what is more it has never in fact been constituted” (Foucault, 2008: 282). In Foucault’s analysis, the science of economics sits in adversarial tension with the creation and execution of law, indeed the former often exists for the purpose of exposing the latter’s nonsensical nature, in a manner analogous to the positivist critique of philosophy:

The economic critique the neo-liberals try to apply to governmental policy is also a filtering of every action by the public authorities in terms of contradiction, lack of consistency and nonsense.

(Foucault, 2008: 246).

Where liberalism sought to rationalise sovereignty as a condition of the economy, the jump made by neo-liberalism was to bring sovereignty within the scientific purview of economics. By analysing law using the price theory handed down by neo-classical economics, and periodically holding it up to ridicule, the Chicago School’s Law and Economics tradition perfectly expresses Foucault’s point. The ‘Chicago Revolution’ in American antitrust policy is considered by many to be the greatest accomplishment of

Chicago Law and Economics, achieved to a large extent through a usurping of legal by economic epistemology. In this article, I intend to trace the pre-history and history of this 'revolution', highlighting the points at which the charge of 'nonsense' is levelled at legal discourse by Chicago economists. To do this, I draw on a combination of Law and Economics texts, documents produced by US antitrust agencies and scholars, and transcripts of roundtable discussions with prominent actors in this history.

Antitrust policy necessarily sits at the interface of legal and economic expertise. In using law to stipulate and delimit the freedoms of market actors, it automatically invites the question of whether it is motivated by the legal-normative imperative of justice or the economic-utilitarian imperative of efficiency. The achievement of the Law and Economics school was to convince judges and lawyers, not to mention other economists, that competition policy should be exclusively concerned with the goal of maximising efficiency. This exclusive emphasis on efficiency is now known in the US as the 'rule of reason' approach or latterly in the European Commission as the 'effects-based' approach (Carlton & Salinger, 2007). A wide variety of normative-legal considerations were eliminated in the process, some of which were entangled with formal economic theories regarding what constitutes competition. Until the mid-1970s, American antitrust policy had been used to pursue various political and moral goals, from defence of small businesses, to ensuring public accountability of cartels and monopolies, to redistributing wealth, to attacking organised crime. These were all abandoned in less than a decade, as the Chicago definition of efficiency was recognised as the only coherent objective.

The outcome of this transformation is a virtually unchallenged authority for neo-classical economic logic in the decision-making procedures of US antitrust authorities and the

courts. To explore how this came about, this article focuses on three areas of transformation in which the overall neo-classical enterprise was ascendant. Firstly, there was the emergence of the Law and Economics movement in the University of Chicago in the 1930s, which gathered pace during the 1950s and 60s. Secondly, there was a change in the understanding of economic competition amongst University of Chicago economists from the 1940s onwards, due largely to the impact of Law and Economics ideas, Ronald Coase's in particular. And finally, there was the adoption of this Chicago paradigm by the US antitrust authorities, beginning in the Supreme Court in the mid-1970s, and entering the Federal Trade Commission (FTC) and Department of Justice (DOJ) antitrust division in the early 1980s.

The emergence of Law and Economics

From its emergence in the 1860s and 70s, neo-classical economics always had the potential to explore areas of human behaviour beyond the limits of the market (Caporaso & Levine, 1992; Hausman, 1992). Neo-classical economics, often referred to by Chicago economists as 'price theory', is founded on a core assumption that, faced with a range of comparable options, individuals will rationally select the one that pays them the greatest utility, over and above its cost. The virtue of the market price mechanism is that it makes explicit and socialises this calculative psychology, but economists are free to apply price theory where they choose, regardless of whether market prices are actually at work. As Ronald Coase, viewed as the founding father of the Law and Economics movement, put it, "economists have no subject matter" (Coase, 1988: 3). Richard Posner, the leading contemporary figure in Chicago Law and Economics, offers a more pragmatist spin on the definition of economics:

About the best one can say is that there is an open-ended set of concepts... most of which are derived from a common set of assumptions about individual behaviour and can be used to make predictions about social behaviour; and that when used in sufficient density these concepts make a work of scholarship "economic" regardless of its subject matter or its author's degree.

(Posner, 2000a: 4)

From the time when Coase's career began in the 1930s to the present day, this willingness to take neo-classical economics into areas it had previously never been is a hallmark of the Chicago School (Fine 1998, 2000, 2002). The Law and Economics movement is one of the earliest manifestations of this controversial project.

Posner has suggested that Jeremy Bentham should be credited for first applying economic calculus to the state (Kitch, 1983). However in the University of Chicago itself, the movement owes its origins to something of an accident. In the 1930s, the University set about establishing a law program for students who didn't have BAs in law, which required adding an additional year of study into the program. As part of this additional year, students were also required to learn economics. In 1939, Henry Simons, a maverick free market economist and author of the provocatively anti-Keynesian *A Positive Program for Laissez-faire* (1934), was appointed head of this new law school. In the collective memory of the Chicago School, the economics department of the 1930s was politically far to the left of what was to follow and the law school turned out to offer an enclave of nascent anti-Keynesian, free market ideas (Kitch, 1983). While Simons himself was a controversial figure, and was mainly interested in macroeconomics, the fact that there was an economist in charge of the law school proved critical. In particular, he appointed Aaron Director to teach the economics course, who would later be invited

to participate in the law department's decisive antitrust class alongside Edward Levi. Simons hoped to set up an 'institute of political economy', and in 1945 sought to persuade Friedrich Hayek to move to Chicago to run it, only to then commit suicide the following year (Van Overtveldt, 2007). Following Simons' death, Director took charge of the law school, and was finally able to hire Hayek in 1950 at a time when he was still considered too unorthodox to be hired by Chicago's economics department. *The Journal of Law and Economics* was founded in 1958, under the joint editorship of Director and Levi, and was to become a key platform for Chicago thinking about the state. In 1963, Coase made a switch to the law school and took over the *Journal*. The division between the two departments subsequently remained very porous, with prominent Chicago micro-economists such as George Stigler and Gary Becker dedicating a portion of their teaching time to courses in law.

To borrow Posner's typology, the Law and Economics movement has had two main strands (Posner, 1981). Firstly, it has studied law that specifically relates to the economy, such as antitrust, tax or trade law. Secondly, it has used economics to study law in non-market contexts such as marriage and crime, as demonstrated in the work of Becker. Law and Economics scholars consider their greatest political successes to be in the first of these, with the revolution in antitrust their greatest victory. Yet in epistemological, methodological and stylistic terms, the distinction is non-existent. Whether the law relates to 'the economy' or to 'society', Chicago School thinkers have confidently adhered to the same methodological principles, precisely because they are sceptical of the economy-society distinction in the first place.

Coase provided the methodological inspiration for the Law and Economics movement with the introduction of 'transaction cost economics', based on the critical notion that

information is not free. Rather than simply study a world of embodied people circulating material objects and money, Coase recognised that communication and social coordination also create costs in the economy. As McLoskey puts it, “he is extending the wholly silent economics of [Alfred] Marshall... to the faculty of speech” (McCloskey, 1985: 96). The study of transaction costs sought to explain why different varieties of economic organisation come into being and survive, based on the original neo-classical and utilitarian assumption that an individual will only select a certain option if it is the most efficient one available. In his famous 1937 essay, ‘The Nature of the Firm’, Coase argued that up to a certain point, hierarchical structures such as firms are more efficient than exchange-based structures such as markets, because the former reduce the inherent uncertainty and instability of the latter (Coase, 1988). The question is not whether markets or hierarchies are more efficient, but which overall ecology of markets *and* hierarchies is most efficient. At a certain point, it becomes more efficient to trade and compete than it is does to give managerial orders; if the firm grows beyond this point, it becomes inefficient. By the same token, a market could become too fragmented, and transaction costs rise to an inefficient level. But working out where each point lies is not something that can be divined from economic theory, but something that requires careful empirical analysis. This empirical application of price theory to the study of economic structures has since become known as the study of Industrial Organisation.

Coases’s legacy was a remarkably self-confident economic empiricism. The commitment to applied price theory was so strong, that Coase and his followers claimed to renounce all ontological or *a priori* claims about individuals, economy and society. The core uniting assumption, that individuals act rationally to maximise utility, was safely bracketed within the bounds of methodology, and never allowed to become inflated to the status of ontology. In line with Posner’s earlier definition of economics, to assume this

psychological model was simply a precondition of being an economist. The consequence of this ontological abstinence was that Chicago school economists ceased to privilege markets, at least not in any *a priori* or normative sense. Being indifferent to the distinction between 'economy' and 'society', Chicago price theory does not view markets as any 'more economic' than, say, a family. Moreover, given that child-rearing is still voluntarily done in families, it can be assumed that markets would in fact be less efficient in performing this social function.

After Coase's reformation of neo-classical economics, *even the price mechanism must be answerable to price theory*. As Foucault observes of Chicago economics, "it is no longer the analysis of the historical logic of processes; it is the analysis of the internal rationality, the strategic programming of individuals' activity" (Foucault, 2008: 223). By coupling methodological dogmatism with ontological agnosticism, Coase is able to explain why it is that the economy sometimes does and sometimes doesn't adhere to the liberal, free market model. In a later, more influential paper, 'The Problem of Social Cost', Coase developed his thinking as a direct attack on Arthur Pigou and the British tradition of welfare economics (Coase, 1960). It is from welfare economics that the notion of 'externalities' as a 'market failure' arises, those situations where markets are unable to function because the price mechanism fails to capture cost accurately. If a producer charges a given amount for a product, but is failing to account for the pollution they are creating, then the price of their product is not an accurate reflection of the cost. Some form of regulation or third party intervention is required to support accurate price formation. For Coase, however, this represents excessive commitment to the price *mechanism*, and insufficient faith in price *theory*. Proper use of price theory would factor in the cost of intervening to deal with the market failure, and the (in all likelihood) greater aggregate efficiency of simply allowing the parties to continue to act in a self-interested,

utility maximising fashion. Pollution and a faulty price mechanism may be a more efficient outcome than costly intervention and a functioning price mechanism. If agents are acting in a certain fashion, this is usually a sign that it is efficient.

This is a conservative, potentially even tautologous perspective on the economy. The applied price theorist looks at society as it happens to be, assumes a level of rational utility maximisation on the part of all individuals involved, and then works out why the status quo constitutes an efficient outcome. Intentions and strategies are imputed in a post hoc fashion, regardless of whether they were conscious or explicit in advance. A prevalent theme in Chicago School discourse is that unconscious intentions may be more rational than conscious ones, which would later result in a period of antagonism between economists and lawyers in antitrust policy. As Becker puts it:

The economic approach does not assume that decision units are necessarily conscious of their efforts to maximise or can verbalise or otherwise describe in an informative way reasons for the systematic patterns in their behaviour.

(Becker, 1986: 7)

Just as unconscious intentions and strategies may actually turn out to be inadvertently efficient on closer inspection, so conscious intentions and strategies may turn out to be inadvertently *inefficient*. The rationality of each actor is never in question, but where their actions involve plans with wide-ranging consequences, the presumption of efficiency no longer holds. It holds that public policy-makers are acting to maximise utility, but only for themselves and, indirectly, those who grant them power and money. What is most likely to undermine the efficiency of the status quo is therefore the intervention of those who presume to be able to improve on it. This is a claim that resonates with Hayek's critique

of state planning, where the faith in public policy programs is dismissed as not only inefficient, but illiberal (Hayek, 1944). The virtue of markets is that they bring conscious and unconscious calculation into some form of alignment. Bureaucracy is awash with prices, but they are implicit and unconscious, whereas the beauty of the market is that it “lays the cards face up on the table” (Stigler, 1975: 36). There is ultimately no ontological difference between the state and the market, only a phenomenological one, namely that the latter makes its costs publicly apparent.

In one respect, Law and Economics is simply the extension of transaction cost economics to the study of law and regulation. The intention is to create a more complete assessment of costs, which includes that which economics had previously excluded on the grounds that it was ‘non-economic’. Posner gives a standard Chicago response when he says “the basic function of law in an economic or wealth-maximisation perspective is to alter incentives”, but this goes for nearly anything that the applied price theorist chooses to study (Posner, 1981: 75). Is there nothing about the normativity of norms that makes law a specific object of economic study? Three things in particular are worth noting.

Firstly, there are occasional hints that the market itself does possess a normative dimension. Some of the best indications of the normative dimension of micro-economics come from Posner’s writings. On a point of principle, he states that he does “not see any sharp distinction between economic liberty on the one hand and personal or political liberties on the other” (Posner, 2000b: 181). More significantly, he implies that market exchanges offer a uniquely liberal means of maximising utility. Where Benthamite utilitarianism potentially undermines liberty on the basis that centralised experts have privileged knowledge, the market only maximises utility through freedom. As he puts it:

If one considers consent an ethically attractive basis for permitting changes in the allocation of resources on grounds unrelated to the fact that a consensual transaction is likely to increase the happiness of at least the immediate parties, one will be led... to an ethical defence of market transaction that is unrelated to their promotion of efficiency.

(Posner, 1981: 90)

This argument is made possible by the tautologous nature of the neo-classical psychological paradigm. It is assumed that if individuals choose to act in a certain way, that this must *de jure* be the rational utility-maximising choice. It follows that the status quo is efficient, save where some party exercises wide-ranging powers to transform it. 'Efficiency' therefore becomes little other than an empirical term for 'freedom', and 'freedom' an *a priori* term for 'efficiency'.

Secondly, there is a recognition that stable, publicly-recognised rules contribute to efficiency by reducing transaction costs. In the absence of law, economic (and non-economic) interaction would become extremely costly, because there would be no shared rules of conduct (Fligstein, 2001). 'Knightian uncertainty', emanating from what Harrison White describes as "the forward-looking character of the economic process itself", means that there are efficiency gains to be made from stabilising interventions that produce predictable interactions (White, 2002: 8). Somewhat paradoxically, law maximises utility precisely because it does not intend to: a wholly Benthamite society, in which laws were constantly manipulated according to utilitarian ends would be *less efficient* than the conservative proposition, that existing rules be sustained over time. As Posner puts it "if the content of a law becomes known only after the occurrence of the

events it applies to, the existence of the law can have no effect on the conduct of the parties subject to it” (Posner, 1981: 75). Law’s function is to endure, and thereby to reduce transaction costs. One of Posner’s central arguments in this regard is that common law is efficient, having arisen in an almost accidental, ad hoc manner over time. Federal law, however, can be inefficient, in its desire to reform society around particular political ends. Once again, the unconscious agenda is more efficient than the conscious one.

Thirdly, and following on from the point just made, Law and Economics adopts a somewhat ambiguous position on sovereignty. The temptation might be to view the application of price theory to the state as evidence of entirely immanent, neoliberal governmentality, proof that “there is no sovereign in economics” (Foucault, 2008: 283). If law is simply a means of altering incentives, then it possesses no normative quality, let alone transcendence. As Foucault observes of Becker’s work on crime, “law enforcement is the set of instruments of action which, on the market for crime, opposes a negative demand to the supply of crime” (Foucault, 2008: 255). Law is simply one of various Benthamite economic technologies. Yet the pragmatism of Chicago School thinking cuts both ways. ‘Price’, ‘supply’ and ‘demand’ are not ontological categories, but metaphors to be played with by the intrepid price theorist. At no point does Becker argue that the ‘marriage market’ *is* a market, but he is curious to know what happens if you treat it *like* a market (McCloskey, 1985). Ben Fine argues that, for Chicago economists, “as much as possible should be explained by as little as possible”, which might well register as a compliment for those such as Becker (Fine, 1998: 59). The heterogeneity of social objects implicitly remains very much in tact, while it is the social sciences themselves that undergo a radical homogenisation.

One might argue, therefore, that it is not the subsumption of law within the economy that the Law and Economics movement seeks, but a subsumption of legal expertise within economic expertise. The battle is a self-consciously epistemological and discursive one, although how successfully this remains bracketed from ontology is ambiguous. As Stigler put it:

The difference between a discipline that seeks to explain economic life (and, indeed, all rational behaviour) and a discipline that seeks to achieve justice in regulating all aspects of human behaviour is profound. This difference means that, basically, the economist and the lawyer live in different worlds and speak different languages.

(Stigler, 1992: 463)

The purpose of Law and Economics is to bring the foreign 'world' and alien 'language' within those of economics. Meanwhile, although this is never stated, there is an imputation that state sovereignty remains intact, for otherwise it could not be empirically assessed and economically re-framed. It is precisely the fear of the sovereign state that makes it an urgent target for neo-classical analysis. At the same time, it is precisely the sovereignty of the law that makes it a potential source of efficiency gains, where used appropriately to create artificial stability.

From legality to efficiency

Confronted by the Roosevelt New Deal era of corporatism, Simons' *A Positive Programme for Laissez-Faire* had argued for a far more aggressive regime of antitrust enforcement, that would either break up the largest monopolies or take them into public

ownership. Simons recommended that the FTC become the most powerful arm of government to ensure that the market was protected from big business, unions and government, who appeared to Simons to have reached a stable, cooperative arrangement in which market competition was deliberately limited. The major figures of the Chicago School, including Director, Levi and Milton Friedman, were equally preoccupied with the problem of attacking monopoly during the early years of the School's Free Market Study of 1946-52 (Van Horn, 2009). To advocate an aggressive antitrust regime seemed the natural position for free market liberals to adopt; Stigler continued to advocate a policy of industrial de-concentration through the 1950s and early 1960s, and most leading Chicago economists followed suit (Muris, 2003; Schmalensee, 2007).

In this respect, Chicago neo-liberalism initially bore a close resemblance to the Austro-German neo-liberalism proposed by Hayek, Eucken and Böhm. Within the 'ordo-liberal' policy programme of Eucken, Böhm and the Freiburg School, it was the responsibility of the state to use the law to uphold the essential *form* of economic competition (Gerber, 1994, 1998; GrosseKettler, 1996; Nörr, 1996). According to Eucken's neo-Kantian theory, it was essential that a strong, interventionist state was present to protect the *a priori* conditions of free economic interaction, rooted in an 'economic constitution'. The Freiburg School's influence was marked in the years following World War Two, as evidenced in Germany in the 1948 ban on price controls and the 1949 constitution, then subsequently in the presence of competition clauses in the Treaty of Rome. Hayek, who maintained strong associations with the Freiburg School, advanced a policy programme that, in its hostility to expert utilitarian planning, corresponded closely to this. The design and rigorous enforcement of a competition framework should be the sole form of state planning in a neo-liberal society, and should be wilfully oblivious to its empirical effects

(Hayek, 1944: 43). Hayekian and ordo-liberal defences of competition were at least as normative as they were economic, and often solely normative (Hayek, 1944: 38; Gerber, 1994: 36). That said, the primary fear underlying the ordo-liberal programme was that of economic power in the market, rather than, as for Hayek, excessive technocratic planning by the state.

Following his switch to Chicago, Hayek became increasingly suspicious of the use of public law to uphold competition, and in this respect represents something of a bridge between the Austro-German and the later Chicago School. For by the mid-1970s, the Chicago School was at the forefront of a campaign to greatly *reduce* the remit and activity of antitrust authorities. Seminal texts in this regard were Posner's *Antitrust Law* (1976) and Robert Bork's *The Antitrust Paradox* (1978), which experts later recognised as decisive influences over the direction taken by antitrust authorities in the 1980s (FTC, 2003: 50). Far from the legal formalism of the Freiburg School, these texts argued for a wholesale rethinking of antitrust enforcement around the utilitarian goal of efficiency-maximisation, and the elimination of political and normative dimensions from antitrust policy. This section seeks to map how this intellectual shift took place within the Chicago School.

There is evidence that, through the late 1940s, Aaron Director had been growing increasingly suspicious of his colleagues' faith in antitrust law as the guarantor of competition, and in 1951 entirely renounced the position of Simons and the ordo-liberals (Van Horn, 2009). A decisive historical moment in the development of the Chicago paradigm of antitrust thinking came when he was invited by Levi to collaborate on teaching the Chicago law school's antitrust course in the late 1940s and early 50s. Foucault's insight that neo-liberalism involves exposing the "contradiction, lack of

consistency and nonsense” in its opponents’ arguments is explicitly vindicated here. Levi would present the class with a legalistic defence of antitrust as the necessary condition of a competitive marketplace. Director would then set about dismantling this legal argument using applied price theory, but in terms that were easily understood by the assembled law students. As one attendee later reminisced, “for four days Ed would do this, and for one day each week Aaron Director would tell us that everything that Levi had told us the preceding four days was nonsense” (Kitch, 1983: 183). The important thing to note about Director’s intervention in the law school was that he started to change the minds not just of economists who had previously ceded to the expertise of lawyers, but of lawyers themselves. The communicability of Law and Economics to lawyers was always a highly important element in its programme. Posner, a professional lawyer, noted that this skill went right back to Coase, and the question of making *sense* reappears once more:

[Coase] has what to a lawyer is quite important, an unusually lucid and simple style of writing... When I read it, having no knowledge of economics at all, it seemed to me to make perfectly good sense. The fact that it was very well and clearly written enabled him to communicate with me in a way that most economists could not.

(Kitch, 1983: 226)

This issue of how successfully an economic argument can be communicated to a lawyer remains a test of its merit within industrial organisation economics and antitrust authorities. Getting economic arguments to perform effectively in court is now in fact the main concern of antitrust authorities, which requires achieving sophistication and clarity

at the same time (Muris, 2003). It was the intuitive simplicity of the Chicago approach that was central to its efficacy.

One of the long-standing mantras of antitrust authorities is that their function is to 'defend competition not competitors' – being small and vulnerable does not grant a business the right to legal protection. Although the Supreme Court paid lip service to this idea in the 1950s, in practice antitrust enforcement acted to penalise firms for competing too vigorously against their competitors (Amato, 1997). Inasmuch as economics was employed at all during this period, it was the economics of Joe Bain, the Harvard economist who led the 'Structure Conduct Performance' paradigm of antitrust thinking (Bain, 1956; Williamson, 2003). Far from Coases's sceptical empiricism, Bain's approach proposed formal notions of how competitive markets behave, then attributed any deviations from this model to the presence of monopoly, market closure or excessive industry concentration. Moreover, markets that were effectively competitive could still be criticised on the basis that they possessed latent *structural* potential to reduce future competition (Bain, 1956). In line with the market failure paradigm of welfare economics, this rested on an idealist epistemology in which the market possessed an essential form which was efficient, and which needed protecting by the state. The decisive claim made by economists working within the Structure Conduct Performance paradigm was that high profits signified the presence of monopoly or excessive concentration, meaning that firms faced an incentive to keep their profits down or else risk an antitrust investigation. As Chicago economists were at pains to point out, this meant that firms that were highly attractive to consumers or effective at cutting costs could be punished, once this led to their profits increasing.

Within the various pieces of legislation that make up the US antitrust and consumer protection regime, there is scope to penalise a wide range of economic actions. The Sherman Act (1890) had originally focused on illegalising restraints on trade as committed by the large railroad trusts towards small businesses (Thorelli, 1955). The Robinson-Patman Act (1936) focuses specifically on preventing businesses from selling the same product to different consumers at different prices. The Clayton Act (1914), which created the FTC, adds further powers to regulate mergers and protect consumers. During the 1950s and 60s, US antitrust policy was used aggressively to block horizontal mergers (between competitors) and vertical mergers (between supplier and purchaser); bust cartels and price-fixing; break up monopolies and excessively concentrated industries; block product bundling (sale of multiple products as a package) and tying (where a product in one market is sold in combination with a product in another market); prevent exclusionary practices (acting to prevent competitors from entering a market); protect small businesses from aggressive competitive behaviour such as predatory pricing. Dominated by lawyers and law enforcement experts, the entire emphasis of antitrust authorities was upon taking firms to court and defeating them, with economists there to provide assistance (Williamson, 2003). The use of ridicule to attack this apparent hostility towards industry was a popular tactic in the teaching rooms of Chicago. Coase is quoted as having joked that he was sick of teaching antitrust, because “when the prices went up the judges said it was monopoly, when the prices went down, they said it was predatory pricing, and when they stayed the same, they said it was tacit collusion” (Kitch, 1983: 193). The implication of ‘nonsense’ appears once more.

The Chicago School approach, as it developed between Director’s move to the law school in 1946 and the Posner and Bork books of 1976-78, challenged the status quo in

a number of areas.¹ Some of these were on the intra-economic grounds that Bain's structural account of efficiency was erroneous. But the more critical ones were on the extra-economic grounds that existing antitrust enforcement was damaging efficiency by smuggling too many normative and political elements in to the market. The attack on the foundations of legal common sense would be more important than that on economic orthodoxy.

The starting point for the Chicago critique was that the sole goal of antitrust policy should be economic efficiency, but understood in the precise sense intended by Coase, namely with transaction costs included. This means including the costs associated with market exchanges, contracts, legal resolutions and of course government interventions. There can be no *a priori* commitment to any one economic structure, as the question of efficiency is a matter for careful empirical analysis and not something that can be specified as a stable formal-legal category. It follows from this that certain types of competitive, market behaviour might potentially be inefficient, and non-competitive behaviour be efficient. As Posner puts it:

To the extent that efficiency is the goal of antitrust enforcement, there is no justification for carrying enforcement into areas where competition is less efficient than monopoly because the costs of monopoly pricing are outweighed by the economies of centralising production in one or a very few firms.

(Posner, 2002: 2)

¹ As Van Horn argues (2009) the Antitrust Project of 1953-57 was especially significant in constructing a distinct Chicago approach to competition. It included contributions from Director, Levi (who latterly converted to Director's perspective) and Bork.

While the approach of the 1950s and 60s, economically validated by Bain, viewed monopoly as intrinsically inefficient, the applied price theorists of Chicago set about creating an empirical case for why monopoly could indeed be efficient. For instance, the monopoly may in fact be an *outcome* of higher efficiency, in that very efficient firms will inevitably oust inefficient ones, at least in the short to medium-term. Or it may be the result of Schumpeterian innovation, in which a risk-taking firm creates a wholly new market. Where it is neither of these things, a monopoly has every incentive to pursue efficiency, to off-set the risk of being undercut by some future competitor. In all these respects, where the Bain paradigm viewed high levels of profit and market share with suspicion, the Chicago critique stressed “the obvious fact that more efficient methods of doing business are as valuable to the public as they are to businessmen” (Bork, 1978: 4). Yet this ‘obvious fact’ was seemingly lost on the lawyers and established economists of the time.

Where Bain and others had a concept of competition, which was then converted into practice using policy, the Chicago School really had no preconceived notion of what competitive behaviour looked like, or indeed what the market ought to look like. The faintly tautologous assumption referred to earlier – that if an action was freely selected, it is probably efficient – extended to the realm of antitrust also. The default perspective was that if a business selected a certain course of action, it is best considered to be an efficient one. The definition of competitive (or anti-competitive behaviour) is derived by working backwards from efficiency, defined as the maximisation of consumer welfare. As Bork puts it:

“Competition” for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.

(Bork, 1978: 51)

Perversely, this comes to include all sorts of actions that previously would have been considered entirely anti-competitive. Thanks to the insights of transaction cost economics, departures from the market and limitations placed upon freedom are no longer viewed as intrinsically inefficient. Just as the existence of corporate hierarchies can be (and typically is) efficient, so acts of dominance in and around the marketplace can be performed in an efficient, consumer welfare-maximising way.

Quite aside from the economic coherence of the Structure Conduct Performance paradigm, however, a large amount of the Chicago scholars’ motivation to alter antitrust policy was due to the extra-economic perception that antitrust had been polluted with too many extraneous, non-economic issues. There was a widespread perception that the courts and enforcement agencies were using antitrust to pursue a range of political and moral goals, thinly shrouded in an argument about market imperfections. In particular, the suspicion that large businesses were being punished for success – often success won through higher levels of efficiency – was widely shared amongst the conservative economists of the Chicago School. Today there are few antitrust experts willing to deny that the authorities and the courts had become somewhat confused as to what precisely they were seeking to achieve, allowing a range of values, criteria and strategies to become entangled in antitrust enforcement. This particular campaign to represent neoliberalism’s targets as nonsensical has now been won. A sense that antitrust had become a force to attack efficient firms, on behalf of whomever the judge or lawyer might

feel needed defending (be it competitor, consumer, the public, organised labour or whatever), was prevalent by the time that Posner and Bork wrote their seminal books. Growing fears about the ability of American firms to compete internationally against Japanese rivals strengthened concerns about the behaviour of antitrust authorities (Miller, 1989).

In terms of policy recommendations, the central tenets of the paradigm being proposed by the Chicago School were as follows. Firstly, vertical merger investigations should be all but abandoned. There could be no harm to competition resulting from vertical integration of firms, and considerable internal efficiencies were feasible. Secondly, there should be a far more agnostic view taken of restrictive practices, such as bundling, tying, cooperative agreements between competitors and collusion. Once transaction costs are accounted for, market exchanges between atomised actors can no longer be assumed as the most efficient model; innovative, non-market or quasi-market forms of industrial organisation should be investigated in a non-judgemental way. In all likelihood, they are efficient, or they wouldn't happen. Thirdly, monopolistic practices should no longer be viewed as necessarily anti-competitive, as already discussed. Fourthly, the Robinson-Patman Act should be repealed, to allow for greater freedom in pricing practices (to the frustration of many Chicago economists, the Act still stands). Perhaps most important of all, the Chicago approach pushes the burden of proof towards the state, such that firms are no longer so pressured to demonstrate efficiencies, but the antitrust authority is under a far heavier requirement to demonstrate *inefficiencies*.

The Chicago Revolution

Whatever the economic merits of Bain's structure conduct performance paradigm or the normative merits of using antitrust in pursuit of moral and political ends, there was

widespread agreement in the American antitrust community that the goals of the policy had become opaque by the mid-1970s. The Chicago School itself still adhered to a counter-cultural, anti-Keynesian identity, which pitted itself against everything in Washington, and there seemed very little indication that its ideas were about to shift from the margins to the status quo as rapidly as they did. Ronald Reagan's election in 1980 was the catalyst for the most dramatic changes in the FTC and DOJ antitrust division. Reagan appointed William Baxter as Attorney General, who would set about re-establishing US antitrust policy upon principles of Chicago industrial organisation economics. Baxter's 1982 Merger Guidelines were the most prominent indication that antitrust had become dedicated exclusively to efficiency maximisation (Miller, 1989).

Beneath the surface of public political changes, however, were two longer-running transitions. The first of these involved a gradual shift in the relative powers of economists versus lawyers within the FTC and DOJ antitrust division. The second involved the declining credibility of antitrust prosecutors in the courts. These transitions were coterminous with developments that were still taking place in Chicago Law and Economics, suggesting that a potentially sympathetic audience was already in place by the time that Posner's and Bork's books were published in the late 1970s.

The FTC's economic expertise has always been collected in a single department, the Bureau of Economics, which potentially possesses considerable autonomy. Its economic studies of particular industries are intended for audiences beyond the FTC, and it can be commissioned by Congress to investigate issues further. Early on, economists actually outnumbered lawyers within the FTC, but this was reversed over the course of the 1920s (Mueller, 2004). The absence of a clear economic rationale to the decision-making of the FTC through the 1950s and 60s was an indication of a weakened position for the Bureau

of Economics within the institution during this period. In 1954, 14 of the Bureau of Economics' 27 economists were transferred to legal Bureaus where they would be brought under the authority of legal staff (Mueller, 2004). Attempts to bolster economic expertise during the mid-1950s proved fruitless, and one major downsizing of the FTC in 1955 reduced the size of the Bureau of Economics even further (FTC, 2003).

As far as antitrust experts are concerned, the key tension between economists and lawyers tends to be represented by both camps as follows. Economists are deemed to have no professional interest in taking cases to court, nor in seeing cases won if they do get to court. Lawyers, meanwhile, advance their careers by doing both of these things. This is partly a professional stereotyping, but one which antitrust experts accept as containing a degree of truth. Inasmuch as they analyse the efficiency or otherwise of certain courses of action, economists have no vocational commitment to intervention, whereas the goal of the government antitrust lawyer is to take a set of facts, and identify the piece of evidence that demonstrates an antitrust violation (Baye, 2007). Very often, economic evidence is insufficiently strong to support a case, leaving lawyers with the choice of either dropping the case or looking for non-economic evidence. Lawyers have traditionally sought out 'hot documents', evidence that demonstrates a deliberate intent to reduce competition; economists, as already discussed, look beyond conscious intentions. The period during which US antitrust policy was least economically governed was unsurprisingly one in which lawyers showed scant interest in the analysis provided by economists. A flippant FTC maxim of the early 1960s was "one incriminating letter in the files is worth the testimony of ten economists" – focus on explicit intentions of actors, and don't worry about the net effects of their behaviour (FTC, 2003). Lawyers at this time believed, correctly, that they could persuade judges to penalise firms, simply by pointing

to how large and profitable they had become (or were seeking to become in the case of mergers), regardless of efficiency criteria.

The relative authority of economists within the FTC, the DOJ, and in the courtroom, began to grow from the early 1960s onwards. In 1961, the position of the Director of the Bureau of Economics was strengthened, so that he or she could act as an independent advisor to FTC Commissioners, thereby bi-passing the legal community. In the same year, the 14 economists who had been removed from the Bureau of Economics were returned. The Director of the Bureau of Economics started to recruit heavily during the early mid-1960s, and by 1963 there were already 45 economists in the FTC (Mueller, 2004). In order to increase the chances of recruiting academic economists, the FTC permitted its economists to be accredited publicly for their work from this period onwards. The production of economic studies began to increase again: where only 14 economic studies were done between 1961-65, 48 were done between 1966-70 (FTC, 2003). One economist working in the FTC over this period remembers that “by the end of the decade, the economists were becoming much more involved in making recommendations, and the lawyers were listening to us” (FTC, 2003: 38).

At this stage, the growing authority of economists remained within the dominant paradigm, which was still that of Bain’s Structure Conduct Performance theory. The growing authority of economists within the FTC and the DOJ during the 1960s was not in itself sufficient to introduce Chicago Law and Economics thinking. While economics made a revival, the orthodoxy of the 1950s was unchallenged well into the 1970s. It should be viewed as no coincidence, therefore, that the two figures who would do most to shake this orthodoxy were not economists at all, but economically literate lawyers, namely Posner and Bork. Being distant from the orthodox economic establishments of

the FTC and Harvard University (where the Structure Conduct Performance theorists were clustered), but enamoured with the still-unorthodox Law and Economics of Chicago, Bain had never been an influence over them in the first place.

From the mid-1970s onwards, the opinions of judges began to lean towards the Chicago School approach, as they struggled to make sense of the arguments of the FTC and the DOJ. The Structure Conduct Performance paradigm was entangled in too many extra-economic normative criteria to stand up in the courtroom. The Supreme Court cited both Bork and Posner for the first time in its 1977 GTE Sylvania ruling (Miller, 1989). The oppositional nature of antitrust – that one side of an argument wins, and the other loses – means that courts can undoubtedly act as quite dramatic catalysts for a change in legal and economic orthodoxy. If one type of argument starts to fail in court, and another starts to win, then the antitrust authorities and the legal community will rapidly update their approach. An indication of things to come came with ‘General Dynamics’ case in 1974, in which the Supreme Court ruled against the FTC’s claim that the coal-mining industry was becoming excessively concentrated, on the basis that concentration was not inefficient *per se*. By the late 1970s, failures of this sort were frequent for antitrust authorities, as litigants discovered that more than half of antitrust prosecutions were being overturned on appeal (Miller, 1989).

From 1981 onwards, the balance of power between economists and lawyers within US antitrust swung appreciably away from the latter. In the American DOJ, the ratio of economists to lawyers moved from around one in twelve in 1981 to one in eight in 2000 (Posner, 2002). But this sort of figure indicates a reduction in the legal capacity of the state as much as an advance in its economic capacity; the entire scope for antitrust intervention was shrunk as a result of the Chicago revolution. Professional tensions

arose, as economists gained the confidence to represent the law's 'senselessness'. This is remembered by an FTC economist as follows:

The Bureau of Economics went from being "loved" by the lawyers and supporting litigation to being the unpopular quality control enforcers who would say in a very vigorous way, wait a minute, here are the reasons why this may not make sense.

(FTC, 2003: 97)

In comparison, the growing number of economists in US antitrust authorities was not a source of great antagonism through the 1970s, as the economic paradigm they were working within was still largely compatible with the legal intuition that monopolisation and vertical integration were anti-competitive. The Chicago paradigm undoes this logic, and thereby challenges the epistemological authority of legal expertise. We saw earlier how Law and Economics scholars like to suggest that explicit, conscious strategies can be less efficient than implicit, unconscious strategies. To some extent this asks lawyers to make a leap of faith regarding what counts as 'evidence', and activities which *appear* anti-competitive are suddenly declared efficient and valid.

There were subsequently various fluctuations in the interpretation and application of the Chicago approach, and the isolation of economic analysis from political forces can never be absolute. Most notably, there was the rise of the 'post-Chicago synthesis' in the 1990s, in which lessons from both Harvard and Chicago were applied, at a time when the Clinton administration was seeking to expand the scope of antitrust enforcement marginally (Baker, 1989; Cucinotta, Pardolesi, Van den Bergh, 2002). The notion of 'market failure', which Coase had dismissed, was revived as a basis for state intervention, though without disturbing the emphasis on empirical efficiency effects. The

European Commission's DG Competition gradually adopted the central tenets of the Chicago paradigm, starting with its merger guidelines in the 1990s and establishing a Chief Economist's Team in 2003, modelled on the FTC's Bureau of Economics and staffed by twenty PhD-level industrial organisation economists (Roeller & Buiges, 2005). The FTC claimed some credit for having exported the economics-led model of antitrust (FTC, 2003). And yet a sense that DG Competition is still too preoccupied with the principle of attacking market power, a legacy of its ordo-liberal roots, and not solely focused on efficiency, continues to trouble Chicago scholars and US antitrust experts. The cases brought against Microsoft are particularly emblematic of the controversies that survive following the Chicago revolution. The DOJ launched its case in the US under a Democratic administration in 1998, but swiftly dropped it in 2001 following the change of government. Meanwhile, DG Competition won its own case against Microsoft, between 2003-07.

Conclusion: neo-liberalism as 'common sense'

The 'Chicago Revolution' was not simply a Kuhnian revolution within economic orthodoxy, but a strategic project of professional colonisation. Simons's appointment to run the Chicago Law School presaged this, albeit with little deliberate intent to colonise legal thinking. From there on, however, lawyers were encouraged to view their own discipline as polluted with nonsense, and to view price theory as the means of cleansing it. The rhetorical skills of Coase and Director proved critical in making the case for efficiency as the only 'obvious' basis for determining the implementation of law. The fact that conservative lawyers could not only grasp this logic, but develop it as a critique of the state was a testimony to its simplicity. Once price theory is accepted as common

sense, state actions that seek to improve on the decision-making of individuals come to appear ridiculous.

If, as Foucault says, neo-liberalism involves “filtering every action by the public authorities in terms of contradiction, lack of consistency and nonsense”, the case of the Chicago Revolution may indicate something more broadly about neo-liberalism. What was it about the expertise of lawyers that needed ‘filtering’ in this way? The battle exists between two rival epistemologies. The lawyer, at least as represented by the Chicago economist, adheres to a formalist understanding of social and economic life, which is bedevilled by illusory *a priori* entities. The legal account of the economy rests on a quasi-idealist understanding of what constitutes ‘competition’ or a ‘market’, which empirical economic instances never quite conform to. This could also be said of the ordo-liberal account. Where deviations from the ideal grow too large, then some form of anti-competitive, anti-market activity can be presumed. The remaining question is then how to demonstrate that this was a conscious choice on the part of the violators. The causality at work derives from the freedom and conscious intentions of economic actors, which can be imputed empirically through the evidence presented in the courtroom.

The epistemology of Chicago Law and Economics exposes these illusions. The only *a priori* is the economic method itself, which has the effect of privileging solely efficiency. Rational choice is assumed as a methodological principle, and not as a transcendental basis for normativity or as a relevant causal factor. The knowledge that is provided by the economist is not necessarily shared in any way by the actors that are being studied, a point Friedman was keen to stress (Friedman, 1953). Perhaps the most surprising implication of this approach is that it offers a partial *challenge* to the primacy and permanence of markets, not a defence (Coase, 1993). Markets offer the benefit of laying

“the cards face up on the table”, and creating a shared world inhabited by economist and economic actor in common. But beyond this phenomenological quality, the *empirical* merits of markets are an open question, in a way that they were not for the antitrust lawyers of the 1950s and 60s.

There is one final aspect of the neo-liberal ‘filtering’ that the Law and Economics movement illuminates. Central to the expert identity of the Chicago Law and Economics movement is a sense of its own iconoclasm and lost cause. Society and states continue to produce more nonsense than neo-liberals are able to deal with. They are a minority, fighting a discursive battle against the unthinking metaphysics of rival experts and sovereign bodies. The Chicago Revolution in antitrust looks like a dramatic victory, yet it only occurred because at key moments its protagonists were prepared to make seemingly hopeless criticisms of legal orthodoxy. The mentality is of the intellectual émigré, operating in a foreign discipline to disrupt its certainties, but also to invite and perhaps relish hostility. In one infamous evening at Director’s house in 1960, Coase himself had to suffer the attacks of 20 colleagues as he presented his dismissal of ‘externalities’ theory, before converting them to his thinking (Kitch, 1983; Van Overtveldt, 2007). With victories achieved, Chicago Law and Economics scholars divert their attention to the next target of hopeless nonsense, in which experts set about ordering the world with no recourse to common sense. If norms, sovereignty and ideals of justice were ever eliminated, then the work of Chicago Law and Economics would be done. It is because they show no signs of vanishing that it is a permanent losing battle.

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