A CRITIQUE OF H.H. LIEBHAFSKY'S 'LAW AND ECONOMICS FROM DIFFERENT PERSPECTIVES'

Abhinav Viswanath, SASTRA University

ABSTRACT

This paper critically analyses H.H. Liebhafsky's *Law and Economics from Different Perspectives*, which explores the philosophical foundations underlying the relationship between law and economics. Liebhafsky argues that conceptions of law and its interaction with economic principles are not neutral or universal, but are shaped by deeper theoretical commitments. The paper examines two primary approaches identified by Liebhafsky: the "First Principle" method and the "historical, functional, and evolutionary" perspective. The First Principle approach is characterized by deductive reasoning from a foundational norm or value, as seen in the works of thinkers such as Blackstone, Bentham, and Posner. These theorists attempt to construct coherent systems of law based on concepts such as natural law, utilitarianism, or economic efficiency. However, Liebhafsky critiques this approach for its reliance on abstract assumptions that may fail to capture the complexities of real-world legal and economic interactions. In particular, Posner's theory of wealth maximization is examined as an example of reducing legal reasoning to economic logic. In contrast, the historical and evolutionary perspective, reflected in the works of Oliver Wendell Holmes Jr. and John R. Commons, views law as a dynamic institution shaped by social experience, economic conditions, and institutional development. This approach emphasizes adaptability and rejects the idea of law as a fixed system derived from immutable principles. The paper argues that neither approach provides a complete understanding of the law–economics relationship. While deductive models offer theoretical clarity, they risk oversimplification, whereas evolutionary models capture complexity but lack normative certainty. Ultimately, the study concludes that a comprehensive understanding of law and economics requires a pluralistic framework that integrates both theoretical reasoning and empirical reality, recognizing the limitations of single-perspective analysis.

Keywords: Law and Economics, First-Principle Theory, Evolutionary Jurisprudence, Wealth Maximization, Legal Philosophy

INTRODUCTION

The relationship between law and economics has long been a subject of intellectual inquiry, with scholars attempting to explain how legal rules influence economic behaviour and, conversely, how economic principles shape legal institutions. In his work *Law and Economics from Different Perspectives*, H.H. Liebhafsky offers a critical examination of this relationship by arguing that one's understanding of law and economics is fundamentally shaped by underlying philosophical assumptions. Rather than presenting a singular theory, Liebhafsky highlights the plurality of approaches through which law and economics can be interpreted, thereby exposing the limitations of any one-dimensional framework. At the core of Liebhafsky's analysis is a distinction between two broad approaches: the "First Principle" method and the "historical, functional, and evolutionary" perspective. The First Principle approach is grounded in deductive reasoning, where legal and economic conclusions are derived from a foundational assumption or normative starting point. This method is exemplified in the works of thinkers such as Sir William Blackstone, Jeremy Bentham, and Richard Posner, each of whom constructs a theory of law based on a central guiding principle—be it natural law, utilitarianism, or economic efficiency. Liebhafsky critically observes that such approaches, while intellectually coherent, often rely on abstract assumptions that may not adequately reflect the complexities of real-world legal and economic interactions.

In contrast, the historical, functional, and evolutionary perspective emphasizes the dynamic and adaptive nature of law. Drawing on the ideas of jurists such as Oliver Wendell Holmes Jr. and institutional economists like John R. Commons, this approach views law not as a fixed system derived from abstract principles, but as a product of social experience, economic conditions, and institutional development. Law, in this sense, evolves over time in response to changing societal needs, rather than being dictated by rigid theoretical constructs. Liebhafsky's central contribution lies in his critique of attempts to reduce law to purely economic reasoning, particularly in the context of Posner's wealth maximization theory. He argues that such reductionism overlooks the broader social, historical, and ethical dimensions of law. By juxtaposing deductive and evolutionary approaches, Liebhafsky challenges the reader to reconsider the foundations of legal analysis and to recognize the inherent complexity in the relationship between law and economics. This paper builds upon Liebhafsky's framework to explore the competing perspectives within law and economics, assessing their strengths, limitations, and implications for contemporary legal thought. It seeks to demonstrate that the

interaction between law and economics cannot be fully understood through a single theoretical lens, but requires a nuanced and multidimensional approach that accounts for both abstract reasoning and lived experience.

In this article, the author H.H Liebhafsky has tried to state that the conception one has of law, economics and the relationship between the same is a reflection of their philosophical outlook. In general, two basic conceptions have been dealt with in this paper- those based on 'First Principle' and those based on historical, functional, and evolutionary conceptions.

- **FIRST PRINCIPLE**

"First Principles" may be either of the a priori (prior to any experience) type, or they may be based on "intellectual experiment" or "intelligent introspection" (meaning by these words "casual empiricism"). Those who seek the certainty of "necessary truths" use purely deductive reasoning from such a "First Principle" to establish the validity of that "necessary truth" by demonstrating its consistency with the "First Principle" assumed at the outset. Liebhafsky uses Sir William Blackstone's *Commentaries* as an example of the deductive, intellectual and intelligent conception of law that was mystical and mechanical in nature. He explains how Blackstone defined law, fixed principles, Natural law, Divine law, Divine goodness, Law of nature, Revealed divine law and Foundation of human law. These were quoted by the author for two reasons. The first is for the readers to judge for themselves what the moral majority calls 'Constitutional Reforms'. The second reason being that how in Richard Posner's view, judges ought to use the concept of wealth maximisation as a basic ethical concept in deciding cases is really a mere restatement of Blackstone's views. This view focuses on how an individual should pursue one's own true happiness and satisfaction.

Richard Posner has however disregarded Blackstone's perception of Natural law and argued that the divine utterance (or 'Oracle' as Blackstone had described it) was merely an apt metaphor. Blackstone viewed law as a set of customs of immemorial antiquity, which the Norman conquerors had submerged. Posner too stated that the English Common law has its roots in customs. John R. Commons also explained that the theory of property rights has customary roots. Over course of time and with the help of precedents, universal rules were laid down as general customs to give rise to the English common law.

Jeremy Bentham, a student of Sir William Blackstone also disregarded the perception of

Natural law and substituted it with the concept of 'Hedonism' which Richard Posner has used frequently as 'Utilitarianism' and "Benthamism'. The philosopher used this principle and deduced the greatest happiness of the greatest number principle. Wesley C. Mitchell used the hedonic principle that Bentham had used for various concepts of jurisprudence including economics, political science, psychology, sociology etc and applied the pecuniary logic of hedonism using money.

Richard Posner believed that the concept of economic efficiency was not to conceived as merely applied utilitarianism. It was both a moral as well as a scientific concept. Posner described economic efficiency and wealth maximisation as an ethical concept. Posner's statement that the market price of a good is its value to the marginal purchaser, is a statement that the utility of the good to the marginal purchaser is equal to that of its price multiplied by the marginal utility of money. Posner's concept of wealth thus involves Bentham's method of reducing qualitatively unlike pleasures and pains to a common denominator and so putting figures on felicity to which Mitchell called attention. It is thus clear that Posner's economic analysis of law is the 'First Principle' that Liebhafsky initially expressed. Posner's further assertion that economics is not merely applied utilitarianism suffers from his lack of attention to Marshall's work and his failure to refute the evidence and demonstrations in Mitchell's es-says, combined with his eagerness to make a case for a laissez-faire system of political economy. Hence, he has been caught in the dilemma of embracing Bentham's hedonism while rejecting Bentham's utilitarianism, which he has perceived to include Bentham's activities as a reformer. Posner played the role of an economist as well as an advocate who used formal deduction to arrive at the inference of justice, through the wealth maximisation approach for a capitalistic conception of justice.

Apart from the likes of Mitchel, Bentham and Posner; various other contemporary philosophers have also used the First Principle conception of law to deduce the concept.

1. Hans Kelsen and H.L.A Hart

Both Kelsen and Hart were legal positivists who had the view that ethical principles had nothing to do with the law and that it was a matter of legal sociology. Law is a process of deductive reasoning in their opinion (Grundnorms for Kelsen and Secondary rules in the case of Hart). Thus, both philosophers use either Grundnorms or Secondary rules as an authoritative way of disposing doubts as to the existence of subsidiary (primary) rules for settling disputes.

Posner's point of view involves substituting his concept of 'wealth maximization' for Kelsen's Grundnorm or Hart's secondary rules. In their philosophies, law is reduced to a matter of deductive reasoning alone, a conception of law in a purely formal sense. sociologists. Both seek to escape from making any value judgments concerning the First Principle.

2. Charles Fried

Fried propounded a different perspective to the logical analysis of law based upon a varying First Principle. Having regarded the increase in popularity of legal rights in the field of law and economics dissatisfactory, Charles Fried rejected both Bentham's Hedonic principle and Posner's Economic analysis of Rights. Fried based his First Principle upon the respect for persons which is quite assertively a Kantian perspective. Moreover, according to Fried, "we choose our goods, but if what we choose is to have value as a good, the entity doing the choosing must also have value and the process of choice must be such that what comes out of it has value." He also differentiated positive and negative rights of an individual.

3. Ronald Dworkin

Ronald Dworkin too, like Charles Fried criticises Richard Posner's Economic analysis of law. He rejected the view that wealth is a value or that it can even be considered as a social value. Even though Dworkin tries to deduce law through a priori means, he is a believer of the natural school of law. Therefore, his First Principle is that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice. Dworkin tries to mix legal positivism and the normative branch in order to infer the necessary truth of the law. He distinguishes between Principles and Policies; where the former is a proposition describing rights while the latter is a proposition that describes goals. Collective goals such as economic efficiency encourage trade-offs. Equity involving the redistribution of income may also be a collective goal and is therefore not an absolute goal. However, Dworkin's First Principle of Equal concern and respect is an absolute goal. Dworkin suggests that Posner's economic analysis is thus a mere policy looking for description of goals rather than rights. He states that even though the judges are not aware of the economic value, the evidence suggests otherwise. However, Liebhafsky in this article states that Dworkin himself produces no such evidence for the same. Dworkin assumes that Posner's theory is as much a consequence as a cause of theory of rights and is in fact a disguised

theory of rights. Dworkin in fact, goes on to distinguish between moral right and legal right. Thus, he blurs the line from the First Principle and views of Oliver Wendell Holmes from an evolutionary perspective.

The various philosophers have different perspectives of legal and economic philosophies on First Principles and thus, are able to define justice according to their First Principle. So also, was J.B. Clark able to state that his purpose in producing the marginal productivity theory of income distribution was to show "that the distribution of in- come of society was controlled by a natural law, and that if this law worked without friction, it would give to every agent of production the amount of wealth it creates."

This First Principle approach is not the only method to study the problems. Thorstein Veblen would have characterised all these philosophies as pre-Darwinian because in such theories a sequence is treated as an unfolding of a certain prime cause in which is contained implicitly all that presents in an explicit form. The other approach that Liebhafsky has discussed in this article is the Historical, Functional and Evolutionary process.

- **HISTORICAL, FUNCTIONAL AND EVOLUTIONARY CONCEPTIONS**

1. **Oliver Wendell Holmes Jr.**

Justice Holmes has used the historical conception of law as he was influenced by F.K Savigny, the founder of the historical school of though and various metaphysical works. He rejected the Kantian view of *a priori* that Dworkin and Fried agreed upon. He states that the evolution of law is based on experience and not logic alone. Holmes's evolutionary conception of law is strictly comparable to Veblen's assertion that an evolutionary economic theory must be a theory of a process of cultural growth as deter- mined by economic interest, a theory of a cumulative sequence of economic institutions stated in terms of the process itself.

Judge Posner has sought to label Holmes a 'Social Darwinism' and has added, 'Social Darwinism' is sometimes used as a synonym for laissez-faire capitalism, but it has a broader meaning in Holmes's thought, as the idea that the Darwinian model of struggle resulting in the survival of the fittest provides an apt description of human society. In addition, Judge Posner ignored altogether Holmes's pointed remark in his dissent in *Lochner*, "The Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics."

Holmes's faith in freedom of inquiry, his unwillingness to accept the Supreme Court's doctrine of judicial superiority, which involved substituting its judgment for that of state legislatures with regard to matters of economic regulation in the name of 'Substantive due process', and his evolutionary theory of law, are all directly traceable to his association with members of the Metaphysical Club at Harvard during his youth.

Liberalism as a method of intelligence, prior to being a method of action, as a method of experimentation based on insight into both social desires and actual conditions escapes the dilemma. It signifies the adoption of the scientific habit of mind in application to social affairs. The fact that Justice Holmes has made the application and done so knowingly and deliberately, as a judge, and in restriction to legal issues, does not affect the value of his work as a pattern of the 'liberal' mind in action. His opinions in the *Lochner* case as well as the *Abrams* case are an excellent example of the 'liberal minds in action' that Liebhafsky had spoken about.

In fact, Liebhafsky has left it for the reader to decide whether Holmes's language represents Posner's capitalistic form of justice or whether it represents Pierce's concept of fixing belief experimentally by means of scientific method. The article then proceeds to explain Holmes's dissent in the case of *Lochner v. State of New York*. Liebhafsky throws insights on this case by touching up the *Munn* case as well. Through a detailed analysis of the *Lochner* dissent by Holmes, Liebhafsky has inferred that Holmes was prepared to support and defend the right of a legislature to experiment with economic and social policy even though in certain cases such as the *Lochner* case in particular, he disagreed with the legislation.

Even after Holmes's retirement, the Supreme Court followed his principles which were established during his dissent. An example used in this article was the *Nebbia* case. The *Nebbia* decision is still law today. It is based on an assumption that legislatures reflect the wishes of the electorate. And so, the Court has continued to exercise judicial superiority in the area of civil liberties in an attempt to ensure that the conditions assumed in its adoption of a policy of legislative superiority in the area of economic regulation will somehow be attained.

Judge Posner had noted that there is a movement afoot (among scholars and economists, not as yet among judges) to make the majority opinion in Lochner the centrepiece of a new jurisprudence, and he had identified this movement as an example of the unprecedented political polarization of legal scholarship today. Holmes's dissents were, of course, not the result of his political views. They were a result of his scientific, evolutionary philosophy of

law. Insofar as the judicial process is concerned, *Nebbia* limits the role of an economist to that of serving as an expert witness on the behalf of one side or the other, and it leaves him free to try to influence the legislative and executive branches and to urge them to adopt the particular political- economic policies he advocates. That is, *Nebbia* leaves courts free to accept or ignore whatever opinions economists happen, from time to time, to express.

2. **John R. Commons-**

Commons was a reformer who sought to "save capitalism" and, in the course of drafting his many reform proposals for legislative enactment, he found that he had to study court decisions if the new laws he proposed were to be held constitutional by the court. Thus, in the opinion of the author, Commons understood the role of an economist better than most, having acquired that understanding as a matter of practical experience.

Commons, like Holmes, recognized judicial legislation as a source of evolutionary change in law. He relied heavily upon the histories of English law of W.S. Holdsworth and F.W. Maitland to explain that, along with the development of the common law in the case of land tenure, the common law judges were at the same time laying the legal foundations of capitalism by destroying the private jurisdictions of the guilds and their private courts and building up a common law of the price bargain.

Henry C. Adams's Presidential address to the American Economic Association entitled 'Economics and Jurisprudence' contained an argument that economists should play a role in overcoming the current social unrest by devoting themselves to the creation of a property right of laborers in their jobs, although he admitted that he, himself, was unable to specify such a right.

Commons stated that he had been introduced to the problem of the relation between law and economics by Professor Richard T. Ely. Ely seems to have identified property with economics and held to a general welfare theory of property, which he neatly summarized by writing Property exists because it promotes the general welfare and by the general welfare its development is directed. Some idea such as this also seems to underlie Commons's long discussion of Public Purpose, as well as his own frequent association of the word property with economics. Commons's discussion of what he called 'due purpose' in law is really a discussion of the concept of substantive due process and suffers from his failure to pay attention to Justice

Holmes's dissents in these cases, as well as from the fact that it was written before the decision in *Nebbia*. Commons's search for a concept of 'Reasonable Value' was not a search for what is sometimes referred to as 'a' or 'the' theory of value, although he failed to make that point clear. He stated that the Institutional Economic theory consisting of an orthodox microeconomic analysis of transaction costs based on Ronald Coase's works could not provide a solution to the problems posed by Commons. He not only wanted to make the transaction, the ultimate unit of economic analysis but also wanted to include a study of the working rules, especially those embodied in law, in economics.

However, he pointed to the most serious shortcoming in his own effort to merge law, economics, and ethics into a unified discipline based on logical analysis alone when he wrote: "A logical scheme of this kind is valuable as a compass or method of analysis and contrast, but of itself it is not only open to the criticism of Justice Holmes as to the 'illusion of certainty' but that illusion gives rise to metaphysical 'entities' and 'subordinates' conceived as existing apart from and independent of the behaviour of officials."

CONCLUSION-

In conclusion, the author has stated that Judge Richard A. Posner's views are an unsatisfactory apologetic for establishment of a laissez-faire system of political economy, consistent with the views of Milton Friedman, F. A. Hayek, and the current 'Chicago School of Political Economists' generally. In addition, Posner has sought to provide historical respectability for his position by identifying it with the eighteenth century mystical Natural Law philosophy of Sir William Blackstone and the hedonistic utilitarianism of Jeremy Bentham. In doing so, Judge Posner has completely ignored the devastating criticisms of this conception of economics provided by Wesley C. Mitchell. In addition to this, Judge Posner had sought to make the law subservient to his own particular conception of laissez-faire economics, and he had sought unsuccessfully to drape his point of view in the respectability of the mantle of Justice Oliver Wen-dell Holmes Jr. by misidentifying the latter as a "Social Darwinist."

The principal opponents of Judge Posner's position, Charles Fried and Ronald Dworkin, have produced conceptions of law avowedly based upon Kant's *a priori* doctrines concerning 'freedom of the will' and 'absolute rights of individuals', and such static theories do not provide

a realistic alternative conception of law. Lastly, the historical, evolutionary, and functional conception of law found in the journal articles, in many dissenting opinions, and in a few opinions written by Justice Oliver Wendell Holmes does not provide an alternative to the Posnerian and other static conceptions of law in the opinion of H.H Liebhafsy.