Scientific Imperialism

Exploring the Boundaries of Interdisciplinarity

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5 Scientific imperialism or merely boundary crossing?

Economists, lawyers, and the Coase theorem at the dawn of the economic analysis of law

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Introduction

Economics features prominently in discussions of "scientific imperialism," and with good reason. Two of the most prominent examples of it, economic analysis of law and the economic approach to politics (the latter often referred to as public choice analysis), have long and transformative histories, and there are few corners of the humanities and social sciences untouched by economic analysis. Critics of the imperialistic turn in general (e.g., Dupré 1994, 2001) and of economics imperialism in particular (e.g., Fine 1999, 2002; Fine and Milonakis 2009) conjure up visions of colonizing economists attempting to impose their visions of scientific methodology and of a society organized on market principles on fields of inquiry ill-served by either, all the while ignoring the fact that one discipline cannot "impose" its methods on another and thus that someone must be buying what the economists are selling. Economist cheerleaders (Stigler 1984; Lazear 2000) only feed the fires, and even less overtly messianic scholars, such as Gary Becker (1976), emphasize that the economic approach to human behavior has almost boundless application. It is difficult to deny that economics offers an easy target for critics of scientific imperialism as well as wonderful case studies in its origins and development.

To this point, however, relatively little effort has been devoted to historicizing the development of economics imperialism and to relate this history to more recent work in the philosophy of science on the nature of scientific imperialism.[2] This is surprising for a number of reasons, not least of which is that we would expect that those discussing scientific imperialism would devote significant attention to how these so-called imperialistic movements developed – that is, ground their philosophy of science in historical context. This would seem to be a necessary step on the path to the development of accurate philosophical categories and the application of those categories or labels in a way that accurately describes or reflects the history of science. This chapter attempts to move the discussion forward through the examination of an illuminating early moment in the history of the economic analysis of law.

In 1966, the American Economic Association (AEA) and the Association of American Law Schools (AALS) established an ad hoc Joint Committee of professors to explore the prospects for increased interaction between lawyers and economists. The committee was the brainchild of Henry Manne, a George Washington University law professor who had been trained at the University of Chicago and was actively engaged in bringing economic analysis to bear on corporations law. The story of the Joint Committee's origins, trajectory, and eventual demise is itself of historical interest – in no small part because of its relationship to the conquest aspect of "scientific imperialism" – but that story will not be pursued here.[3] Instead, this chapter focuses on the one major activity undertaken by this committee: a 1969 conference centering on the question of whether products liability law could be usefully informed by the application of economic analysis to it.

This conference took place when the economic analysis of law was very much in its infancy. Guido Calabresi's development of an economic analysis of accident law was attracting a good deal of attention,[4] and Ronald Coase's application of economic reasoning to legal issues in "The Problem of Social Cost" (1960) was also getting a small amount of play in the legal literature – in no small part due to Calabresi's use of it.[5] Becker (1968) had only recently published his economic analysis of criminal law, and Richard Posner's wide-ranging treatise, *Economic Analysis of Law* (1973), was still several years in the future. The products liability conference brought together a group of economists and legal scholars, from a variety of perspectives or schools of thought, to assess the utility of an economic approach to the subject and, by extension, the possibilities of a more broad-based application of economic analysis to legal thinking.

From the perspective of the present, the economic analysis of law is considered one of the most – if not *the* most – successful examples of "economics imperialism," where "successful" is defined to mean having developed a significant long-term place in the literature. Legal scholarship is now replete with economic analysis, and it is the rare law student who does not encounter the economic approach to the subject on multiple fronts during her legal education. "Law and Economics" is a recognized field within the discipline of economics,[6] with economists regularly engaged in analyzing the impact of legal rules via both theoretical modeling exercises and the application of econometric techniques. However, the modern economic analysis of law was barely a blip on the radar in the late 1960s,[7] and the workshop organized by the AALS-AEA Joint Committee thus provides an interesting, albeit small-scale case study in how those at the forefront of suggesting possibilities of the application of economics to the law went about the task of arguing their case, and of how legal scholars and other economists reacted to this effort.

As we shall see, this conference can be regarded as something of a microcosm of the early reactions to that which goes by the name, "economics imperialism." Economists were by no means of like mind on the utility of such efforts, nor were legal scholars. At least as important, though, is the fact that this episode, and other data from the period, show that the development of the economic analysis of law is far more nuanced than the "economists as colonizers" imperialism stories suggest. Legal scholars were importing every bit as much as economists were exporting, and they were making use of economic analysis in traditionally "non-economic" areas of law well before economists began their own forays.[8] While Mäki (2013, 335), for one, would label this an instance, at least in part, of "internally" driven imperialism, substantial questions remain as to whether the term "imperialism" works as an appropriate label for this slice of intellectual history.[9]

1 Roland McKean and the marketing of economics to lawyers

Products liability was selected as the topic for the Committee's initial effort because it was, as Henry Manne and Gerald Meier put it in their "Foreword" to the published proceedings of the conference, "[a] legal area which had not been the subject of extensive economic analysis" (Manne and Meier 1970, 1). This statement is certainly accurate if, by "economic analysis," one means "analysis undertaken by an economist." The fact is, however, that the second half of the 1960s saw a not insignificant number of articles – authored by legal scholars – that discussed issues of products liability from the perspective of economics. The application of economics here was motivated in part by the related analysis of accidents and accident law by Guido Calabresi (1961, 1965a), and by Walter Blum and Harry Kalven (1964), in the first half of the decade. However, for those concerned about the trend toward strict manufacturer liability for harm or, worse, that a social security-type system should be set up to manage accident compensation claims, this literature would have been of little comfort. Those whose economics disposed them to favor a market process which let the chips fall where they may, so to speak, would have problems with the literature extant.

The conference itself had an almost missionary rationale to it – a perception that meshes nicely with traditional imperialist narratives save for the crucial fact that this entire effort was instigated by a legal scholar. As Manne and Meier noted in their "Foreword" to the symposium, the hope of the organizers and the Joint Committee was that "economists might become more aware of current intellectual problems faced by lawyers and that lawyers might become more aware of the contributions that the discipline of economics could make to solving these problems" (Manne and Meier 1970, 1). To accomplish this, the Committee asked an economist to prepare a lengthy monograph on how economic reasoning could inform the understanding of issues in products liability law, with the particular goal that the paper provide "a critique of the implicit and explicit economic content of the more important legal literature" in this area (Manne and Meier 1970, 1).

Given that this was a *joint committee* of the AEA and the AALS, and that the committee was the brainchild of a legal scholar (albeit one with strong economics inclinations), it is significant that this initial effort – the monograph writing – was not envisioned as an *interdisciplinary collaboration* between economists and lawyers. While the monograph author was free to consult with whomever he wished, the Committee was explicit in its view that "a collaborative effort was not indicated" because "the desired critical flavor might thereby be lost" (Joint Committee of the American Economic Association and the Association of American Law Schools 1967, 717). The interdisciplinary nature of the venture would commence only after the monograph had been completed, through appraisals by the four selected commentators – two economists and two legal scholars – and general discussion among the invited conference participants. The goal, clearly, was to show how economic analysis could enhance, and potentially supplant traditional methods of, legal reasoning.[10]

Finding an author for the products liability monograph proved to be difficult, as Manne's entreaties were turned down by several individuals at the top of his list. The Committee finally settled on University of Virginia economist Roland McKean. McKean had been educated at the University of Chicago, worked as a research economist at the RAND Corporation from 1951–1963, and held a professorship in economics at the University of California, Los Angeles (UCLA) before moving on to the University of Virginia in 1968. His earliest research focused on monetary theory and policy, but his operations research work at RAND quickly gave rise to a research agenda focused on the efficiency of alternative allocation systems, with defense economics and public economics being the primary areas at which this work was targeted. McKean had done no work in the economic analysis of law prior to penning his essay on products liability, but his attempts to bring economic principles to bear on governmental budgeting processes may provide some explanation for his willingness to probe the implications of applying economic analysis to the law. Having no legal background, it is perhaps no surprise that McKean's acknowledgments included thanks to several law school professors at Harvard and one at UCLA for background information and suggestions related to his paper.

That McKean prepared his monograph with one eye toward the law and another toward economics is apparent from the start, as he pointed out in his introduction that "[i]n choosing among alternative products liability arrangements, one must consider the effects of these arrangements (1) on fairness or equity, and (2) on the behavior of various persons affected and hence on resource allocation" (McKean 1970, 3). In spite of law's long-standing emphasis on a conception of justice defined against a background of fairness, McKean argued that "*[m]ost thoughtful persons* will also be concerned with the ways in which behavior and hence resource allocation are affected" by the laws, or lack thereof, relevant to the situation (ibid., 4, emphasis added).

McKean's stated goal was to survey the products liability literature with a view to ascertaining "the economic implications of products liability law to determine whether these implications are being discussed critically and carefully" (McKean 1970, 4). One of his chief concerns was what he considered the methodological weakness of much of the legal and policy literature, with insufficient sensitivity shown to the extent to which scholars and others "are emphasizing tested hypotheses about the consequences of alternative actions and the extent to which they are utilizing their individual judgements about untested propositions" (ibid., 4). McKean was very much of the mind that economic analysis could provide clarification on these fronts and, in doing so, greatly solidify the basis of legal analysis (ibid., 5) – in essence, put it on a more scientific footing (ibid., 40). His goal, however, was not to identify "optimal policies," but to lay out the consequences – derived from economic reasoning – of different legal arrangements and to assess the extent to which these consequences had been recognized in the literature. This perspective was motivated in part by the view that the economist had little or nothing to say about fairness, but even more by McKean's sense that concepts such as fairness and equity, and of the appropriate trade-offs between them, are necessarily ambiguous (ibid., 5).

McKean devoted the first part of his analysis of products liability to an overview of its case history. This history will not concern us here other than to note three points. First, McKean was convinced that competitive forces had been and continued to be a significant check on the sale of defective products (McKean 1970, 7–8). Second, he saw the laws governing products liability through the previous century as reflecting efficient adaptation of law to the circumstances of the case and the moment in time (ibid., 7–8), a position hinted at by Coase (1960) and soon after to be more fully developed by Richard Posner and others. Third, he did not view the recent trend toward producer liability for product-related injuries as representing a particularly large break with the past or as a cause for great concern (McKean 1970, 22).

1.1 The toolkit: economics for the legal scholar

McKean next turned his attention to the future and the analysis of the economic implications of alternative systems of products liability being proposed in the legal literature. However, being aware of his audience, McKean began his discussion by providing an elementary economics tutorial – laying out, in essence, the basic elements of a toolkit for legal-economic analysis. McKean identified four concepts that he considered to be crucial elements of such a toolkit, two for positive (or descriptive) analysis and two for normative (or prescriptive) analysis:

> To understand the economic implications of alternative policies, one has to have clearly in mind the notions of cost and comparative advantage; and to see how much and how little economics can guide one regarding policy, it is important to understand what is meant by "economic efficiency" and "Pareto optimality."
>
> (McKean 1970, 25)

He then proceeded to discuss these concepts and their application, utilizing a simplified world consisting of three producers and two commodities. While much of this discussion is unremarkable and thus will not concern us here,[11] the efficiency discussion is another matter, for it was directed squarely to the Coase theorem and as such is illustrative of the important place that Coase's result played in the development of an economic analysis of law, as well as (as we shall see) in McKean's own subsequent analysis in this article.

1.1.1 The benefits of voluntary exchange

McKean's working definition of "economic efficiency" was that of a set of points at which it is impossible to expand the output of one good without reducing the output of the other (McKean 1970, 27). At such a point, all goods are being produced according to the dictates of comparative advantage. McKean pointed out that the presence of inefficiency implies that there is scope for a deal that is advantageous to both parties and shifts the production of each good to the agent(s) having a comparative advantage in that activity (ibid., 28). McKean suggested that such an exchange "*will occur*" if the gains exceed the transaction costs, and thus that an efficient outcome will obtain. Moreover, he said, if the transaction costs associated with the exchange process are greater than the gains, we can assume that the outcome, though in one sense inefficient, "may be the most efficient *attainable* solution" (ibid., 28–29, emphases added). A system of voluntary exchange, then, will lead to an outcome that satisfies the dictates of Pareto optimality. While the government *may* be able to provide a lower-cost resolution of the problem, McKean noted, we cannot be confident of this because "one cannot be sure what the costs of the action are" and the government's actions are "almost certain to involve compulsion for some persons" (who are losers by the deal) (ibid., 29).

For McKean, the key link between the concept of efficiency and products liability came via the negotiation result that Ronald Coase had demonstrated in his analysis of alternative liability assignments in "The Problem of Social Cost" (1960) – a result that George Stigler (1966, 113) had subsequently labeled the "Coase theorem." McKean stated the result this way:

> If there were zero transaction costs, and if people eschewed the use of coercion or interference with voluntary exchanges, it would not matter, as far as resource allocation is concerned, how the legal rights or liabilities were initially assigned, that is, whether the purchaser or the manufacturer was liable for injuries and damages.
>
> (McKean 1970, 30)

Though the Coase theorem tells us that efficiency is guaranteed in a world of zero transaction costs, McKean was not willing simply to lay the Coase theorem onto the real world and pronounce the outcomes efficient. "[It] should be stressed," he said, "that [the theorem's] assumptions are *fairly heroic*" (ibid., 31, emphasis added). However, he contended, this did not make Coase's result non-useful, for it offered the ability to "*simplify and think about products liability*" (ibid., 31, emphasis added). Coase's negotiation result, for McKean, was "a point of departure," but his position was that "it pays … to understand the oversimplified situation before trying to make judgments about the more complex ones" (ibid., 31) – a standard defense of the use of abstraction in economic analysis, made to an audience that might naturally recoil at such abstraction, given the practical bent of so much of legal analysis.

Nor, said McKean, are these insights regarding the workings of the voluntary exchange process confined to the realm of "products," as traditionally defined. He pointed out that risk bearing and injury prevention, central to products liability, are "outputs" that can be (and often are) exchanged in the marketplace. The issue, from an efficiency perspective, is one of placing risk and the injury prevention activities on the party who has a comparative advantage in dealing with them, and the Coase theorem, he said, tells us that, if transaction costs are zero, voluntary exchange in the marketplace will do precisely that, just as it does for, say, wheat (McKean 1970, 36).

Though McKean characterized Coase's negotiation result as a point of departure, he did not consider it empirically empty. Citing the case of injuries from automobile accidents, McKean argued that transaction costs might be low enough to allow the appropriate combination of automobile safety features and driver precaution to emerge through the marketplace. The precise characteristics of this (efficient) outcome would depend upon the public's willingness to pay for safety features (or the amount that they would accept in payment to undertake precaution) and their level of risk aversion. The parties have an incentive to negotiate the placement of damage prevention with that party who has the comparative advantage in producing it, though he allowed that the magnitude of transaction costs "may vary greatly" in these different situations. Because transaction costs are not always zero and in fact may be "large" in certain instances, the appropriate (efficient) assignment of liability "is not completely clear" (ibid., 34).

1.1.2 Questioning efficiency

Having shown that, in a frictionless world, efficient negotiated solutions will emerge as a matter of course and that the costs associated with such negotiations in the real world may leave us in an inefficient position – one that may or may not be amenable to an efficiency-enhancing intervention by government – McKean turned to the larger normative question of whether "economic efficiency" or "Pareto optimality" are, as he put it, "good," and thus appropriate objectives for law. In doing so, he identified four issues which suggested to him that there may not be widespread agreement on making efficiency concerns "the supreme objective" of law (McKean 1970, 36).

First, he said, the meaning of "economic efficiency" is not given or even obvious. It could be measured in a static sense, or it could take account of long-run factors of various sorts, including changes in technology and information availability, and pursuing either long-run or short-run efficiency considerations could very well come at the expense of the other. Second, there may not be broad-based agreement that the set of Pareto optimal points are the *best* points or outcomes – the ones that society should pursue. Third, efficiency as characterized in a Coasean negotiation/Pareto optimality context privileges the process of voluntary exchange as against other forms of decision-making, such as majority rule, and a particular measure of output rather than some other "output" goal, such as social stability, that society may prefer. Finally, individuals may prefer inefficient outcomes that are more, or potentially more, beneficial to themselves because such outcomes afford a less costly road to achieving additional benefits, such as wealth for themselves (McKean 1970, 36–38).

McKean sensed that it was distributional concerns – fairness or equity – that lay behind the move by courts toward strict liability. However, those who advocated the "deep pockets" approach, he said, appeared to minimize the impact of other consequences, such as those on the efficiency front, relative to placing liability on the party with the greatest ability to pay, often reasoning that the manufacturer can spread these costs over the general public as part of the cost of doing business (McKean 1970, 39).[12] Though McKean was very much in favor of an increased focus on efficiency as against its perceived neglect by legal scholars, he was not arguing – at least explicitly – that efficiency is the only appropriate goal for law or even the most important one, nor for a sort of disciplinary imperialism that would have economic considerations completely *supplant* the traditional normative concerns of law. However, he also emphasized that though the economist's efficiency analysis "at best yields indecisive clues" regarding the appropriate course for policy decisions, this did not imply that economics should be "discarded casually" as an aid to reasoning about the impacts of policies. Indeed, the natural sciences can do no better, contended McKean (1970, 40, quoting Blum and Kalven 1965, 65). However, like economics, he continued, they can and do provide information for policymakers that can assist in the determination of the most appropriate course of action, even though "they cannot tell us *what ought to be done*" (McKean 1970, 40, emphasis added).

1.1.3 The most basic of all laws: demand

The tool that McKean urged upon law as the centerpiece of legal impact analysis was perhaps the most basic of all of the economist's tools: the law of demand. The problem, he asserted, is that "[n]on-economists often doubt this proposition" (McKean 1970, 40), effectively assuming that people often do not respond to variations in prices. When it comes to dangerous products, McKean said, the law of demand doubters argue that the risk to life and limb is a sufficient deterrent – that monetary penalties would not increase the amount of precaution taken.[13] He granted that the deterrent effect would indeed be zero if the risk at issue was a "100 percent probability of death or serious injury," but that, he insisted, is not generally the level of risk in question (ibid., 40). What is really at stake in most products liability situations, he pointed out, are modifications in behavior that have a small impact on the probability of injury or death. Nor, he said, are these types of trade-offs in any way unique: individuals make them constantly in their everyday lives – whether crossing busy streets at dusk, driving in rainy weather, or accepting a job that entails a slightly greater risk of injury or death in return for a higher wage. "Only heroes or suicides," he said, "take actions that involve extremely high probabilities of death or serious injury, but all of us trade modest increases in those probabilities for modest savings or rewards" (ibid., 55).

Given this, legal rules that add a financial penalty to this risk factor could, in fact, have a significant effect on the expected costs that individuals associate with risky behaviors and so make a noticeable impact on the level of precaution taken against accidents and injury (McKean 1970, 41). While there may be some question regarding the sensitivity (or elasticity) of the behavioral response to the change in price, the inverse relationship between price and quantity demanded is "one of the few *tested propositions* we have" (ibid., 42, emphasis added) and, for McKean, was perhaps the brightest symbol of what economics could add to law to set straight the legal reasoning process. It was also the "basic tool" that he would use in tracing the implications, or consequences, of alternative products liability schemes (ibid., 41).

The critic of the economic approach, McKean reasoned, might object that if fairness or equity is all that is relevant, there is no point in being able to trace these behavioral consequences. However, McKean did not see matters this way. The consequences revealed by the law of demand and other economic concepts matter, he said, because even though "few persons" consider economic efficiency to be "their overriding objective or criterion," people do care about efficiency in some basic (as opposed to technical economic) sense – we "have enough to gain" from it "to keep it in mind as one of our important objectives" (McKean 1970, 42). The fact that people *actually do* pay attention to efficiency, then, means that it is important to have an analytical system – such as that offered by economics – which reveals the likely consequences of alternative courses of action (ibid., 42).

1.2 Applying the tools: the economics of products liability alternatives

Having laid the theoretical groundwork for making an economic analysis of products liability law, McKean turned his attention to the question of what economics could add to the evaluation of various possible assignments of liability for product-related harms.

1.2.1 Caveat emptor

Given the recent emphasis on strict liability in the literature and case law, it is interesting that McKean chose to begin his own analysis with a discussion of its near antithesis, "complete *caveat emptor*" – making customers liable for losses that occur when using a product. Such a system, he argued, would generate an efficient allocation of resources in a world of zero transaction costs,[14] in that each product, including safety, would be produced by those having a comparative advantage in that activity: "Purchasers of products would hire producers to reduce product hazards and 'bribe themselves' to exercise care as long as these actions paid" (McKean 1970, 43). An identical logic was applied to third parties – e.g., innocent bystanders – who might be harmed as a result of the use of the product. For McKean, all of this was clearly revealed by the Coase theorem's logic.

McKean was well aware that this conclusion relied upon the "fairly heroic" assumption of zero transaction costs, but he was of the mind that customer liability will make "certain transaction costs ... relatively low." McKean's reasoning was that "established market relationships" for products facilitate the ability of consumers to register their preferences for safety features, safety information, and the like in the marketplace via their willingness to pay for these things. Drawing on his lesson regarding the law of demand and the associated propensity to substitute in response to price changes, McKean argued that if consumer preferences on the safety front are frustrated in the marketplace, one of two things will happen. Some, when faced with the choice between greater risk at a lower price and less risk at a higher price, will choose the former, while others will substitute alternative products or versions of the same product produced by other sellers. The marketplace, for its part, will generate a response to this expression of preferences. Producers who lose through this process, meanwhile, will respond by increasing safety quality or adjusting prices (McKean 1970, 44–45). While none of this eliminates injuries from or disappointments with products, the end result is that the registration of preferences through the market and the availability of alternatives in a competitive system gives consumers what they want, in the sense of the package of "outputs" – including risk and injury prevention – that they prefer to purchase.

McKean recognized, however, that this outcome can only be achieved in the presence of a sufficiently competitive market and, in light of this, was very explicit in allowing that none of this promises a panacea. *Caveat emptor*, he said, offers "some consequences that many persons would regard as desirable, but it will not by any means yield a tidy economy free of misery and possible inefficiency" (McKean 1970, 47). The question, then, was how these possible imperfections stacked up against various systems of producer liability.

1.2.2 Producer liability

As McKean noted at several points in his analysis, producer liability would be as efficient as *caveat emptor* if transaction costs were zero, per the Coase theorem, but the reality of transaction costs suggested the likelihood of significantly greater inefficiencies under a producer liability system[15] – cost-related inefficiencies overlooked in the legal literature but made crystal clear, he believed, by economic analysis.

Seller liability with fault and privity of contract – the system that had long governed products liability – created a more complex web of issues, McKean argued, than that found under *caveat emptor*. The incentive for consumers to exercise precaution or strike cost-reducing bargains with producers would be higher than under strict liability, though less than under *caveat emptor*, and the demonstration of fault is itself a costly process (McKean 1970, 48). A system of seller liability with fault would also have the effect of inducing most buyers and sellers to carry liability insurance, but insurance companies will then increasingly resort to litigation to protect their interests, which further increases transaction costs relative to *caveat emptor* (ibid., 49). Continued movement in the direction of producer liability would only serve to "intensify" the issues, McKean reasoned, with absolute producer liability – where fault is irrelevant (a rule that McKean labeled "rather extreme"; ibid., 50)[16] – offering something approaching the worst of all possible worlds.[17] Economic analysis, he said, suggests that:

> one might expect more court cases and court costs, greater difficulties in bribing purchasers to be careful, more efforts to publish warnings and instructions (perhaps disclaimers, if they still gave producers some shelter), a greater tendency to produce safer products, a smaller range of product choice for poor consumers, and a partially offsetting tendency to neglect safety because of the more extensive use of liability insurance.
>
> (ibid., 50)

Goods prices would rise due to the higher accident prevention costs incurred by manufacturers. Litigation costs would also be higher than under *caveat emptor* because of the need to properly establish the extent of injuries (which would otherwise be overstated by victims) (ibid., 51). The crux of the problem, McKean argued, is that under producer liability there will be a dramatic increase in those instances in which accident prevention is not undertaken by the party having the comparative advantage in undertaking such activities (ibid., 51).[18]

None of this, for McKean, *demonstrated* that *caveat emptor* is the proper course of action. The problem, in his opinion, was that the discussion in the legal literature had largely ignored these very real efficiency-related consequences – consequences that were plainly revealed by the application of economic logic. One may legitimately prefer a compensation without fault or social insurance plan, he said, but economic analysis reveals that a free lunch is not to be expected: "When considering a change that would bring gains, one cannot neglect the costs or disadvantages against which the gains must be weighed" (McKean 1970, 56).

1.3 Legal reasoning, from the perspective of economics

Though McKean's assessment of alternative products liability options had not overtly passed judgment on their relative efficacies, it is difficult to come away from his discussion feeling other than that he believed that *caveat emptor* had much to recommend it, in efficiency terms. As this perspective put him very much at odds with recent legal trends, it comes as no surprise to find McKean suggesting that, with only a few exceptions, the implications of alternative legal rules were not "being discussed critically" or "with much precision and care" (McKean 1970, 56) – the implication being, of course, that economic analysis offered a road to greater precision.

Perhaps the "most striking" feature of the legal literature, for McKean, was that "equity or fairness" were emphasized, "almost to the exclusion of any other considerations" (McKean 1970, 56). Indeed, in many cases, he said, the writers seemed concerned with little more than which party deserves our sympathy (ibid., 58). While admitting that his impressions might be idiosyncratic, his evaluation was that those writing in the legal literature seemed to be "thinking uncritically in the same sense that the six blind men were being uncritical in the old poem about feeling the elephant" (ibid., 56).[19] McKean again took pains to emphasize that he did not consider fairness unimportant; his point was simply that "one should at least ask himself whether or not there are other relevant considerations in designing products liability policy" – touch other parts of the elephant, so to speak – including, at a minimum, thinking about the link between the distribution of wealth and the amount of wealth to be distributed (the latter of which, of course, goes to efficiency) (ibid., 57). If these commentators truly believed that there are no efficiency-related implications associated with the positions they were advocating, they should be explicit about saying so in order that others might assess the validity of their claims (ibid., 57).

However, even if fairness is all that matters, McKean continued, an important role for economic analysis remains in terms of assessing the quality of the analysis and the validity of the positions taken. Economic analysis, he asserted, reveals that fairness-related judgments are neither simple nor obvious (McKean 1970, 56). For example, he said, while fairness considerations may dictate compensation to consumers or third parties, the effect of such a rule may be a reduced selection of products for consumers, including the inability to buy a lower-quality product and assume additional risk of injury in return for a lower price – something that would hit the poor particularly hard. Fairness for victims, then, may come at the expense of fairness to the poor. Though he considered fairness issues both "important" and worthy of debate, McKean was convinced that it would be "more helpful" if the discussions were undertaken with "increased caution and accuracy" – toward which end the application of economic reasoning had much to offer (ibid., 59).

Though McKean was troubled by the lack of attention to considerations that economists would identify as important, he was equally bothered by the quality of the economic analysis employed when such issues *were* treated in the products liability literature. Too often, he said, "the generalizations are too broad or the inferences that are drawn are not warranted." At times, claims are made which are factually incorrect. In other instances, authors "make strong assertions" regarding economic effects "where there is little evidence or even where there are tested hypotheses that (until refuted) cut in the opposite direction" (McKean 1970, 60). Finally, said McKean, the literature is replete with statements that speak to the costs associated with one course of action but neglect to examine the costs associated with the alternative course of action (ibid., 61). Thus, we find claims that consumers cannot influence producer behavior, that consumers could not possibly prefer to trade off quality for price, that no company would go out of business because of increased tort liability, and that the failure to exercise precaution increases accident-related costs (ignoring the fact that the precaution itself may have a greater cost-increasing effect) (ibid., 59–61). Bad economics, in short, was a recipe for bad law.

All of this being said, McKean did not consider the legal literature a complete wasteland so far as economic considerations were concerned. As he noted in the concluding paragraph of his article,

> the products liability literature contains quite a few analyses which do recognize considerations other than equity (such as economic effects), the inherent difficulties of agreeing on what is equitable, the significance of permitting or of interfering with individual choice, the relevance of the law of demand and deterrence, and the possible impacts of products liability laws on total costs and output. A few writers have even drawn on the Coase theorem, recognizing that with zero transaction costs and voluntary exchange the assignment of liability would make no difference to resource allocation, but also recognizing that in the real world the implications of liability assignment are often complex and uncertain.
>
> (McKean 1970, 62–63)[20]

Yet, he clearly did not consider this the heart of the products liability literature, nor did he believe that the trends in the legal discussion were moving the field in the direction implied by solid economic analysis. In sum, there was much to be gained, in McKean's mind, from bringing the economic methods and perspective to bear on the law.

2 The responses

With McKean having made his case for what economic analysis could add to the subject of products liability, the floor passed to the four scholars enlisted to provide commentaries on his efforts. Two economists, James Buchanan and Robert Dorfman, and two law professors, Guido Calabresi and Grant Gilmore, had been enlisted – each a scholar of significant stature in his field. Though at this stage we have no evidence to shed light on why or how these four particular respondents were selected, both an examination of their respective backgrounds and a reading of the comments on McKean's analysis suggest that one of the economists and one of the lawyers were chosen because they would be expected to be at least somewhat sympathetic to McKean's economic approach and the application of it, and that the other respondents were selected because they could be counted on to provide more critical commentary. That, at least, is how things turned out, as the reactions illustrated the challenges of getting economists and lawyers to buy into the application of economic reasoning – or at least that of the type McKean was selling – to the law.

2.1 Buchanan and the defense of caveat emptor

Buchanan, like McKean, had been educated at the University of Chicago, and he had also published a number of articles dealing with externalities over the course of the 1960s. As such, he was well versed in the externality-related logic – including the Coase theorem – that had a bearing on tort law generally and products liability in particular. Perhaps even more than McKean, Buchanan was convinced of the benefits of voluntary exchange within a market context and of an economic analysis that made voluntary exchange processes a foundational element of the conceptual framework. Indeed, he made no bones about the prejudices with which he approached the problem:

> As an economist who studies market processes, disciplinary prejudice alone suggests to me that departures from caveat emptor should be carefully scrutinized and accepted only after specific argument accompanied by convincing evidence. As an individualist, who places a high value on freedom of exchange, any limitations on the exchange process, either directly or indirectly, arouse my initial skepticism.
>
> (Buchanan 1970, 72)

That he applied to his comment the title, "In Defense of Caveat Emptor," then, should not be an occasion for surprise. His "defense," though, was more in the way of a critique of producer liability than a direct defense of *caveat emptor.*

To illustrate how economic reasoning makes a strong case against producer liability, Buchanan instanced a market for coal, where the coal is available in two qualities – the only difference being that a lump of the low-quality coal has a higher probability of exploding and possibly causing severe damage to persons and property than a lump of the high-quality coal. A move to impose liability on producers here, Buchanan noted, would increase the price of both low- and high-quality coal, but the former much more, in order to account for the high associated liability costs. Consumers thus would be prevented from purchasing lower-quality coal at a much lower price that reflects a willingness to assume the relevant risks (Buchanan 1970, 66). Where McKean had hedged his bets somewhat on the normative front, Buchanan did no such thing. The effects of a move to make producers liable for damages, he said, "are clear and unambiguous." This policy "can be condemned" on both efficiency and equity grounds, the latter because the burden of the law will be "concentrated on the poor" (ibid., 67). Buchanan, then, had used economic analysis to turn the legal profession's equity argument on its head – a result, he believed, of the legal profession's tendency to assume that increases in product quality could be achieved without cost (ibid., 72).[21]

Buchanan, like McKean, was a die-hard proponent of the Coase theorem's utility – in fact, even more so, being of the mind that equally efficient results should obtain even in the presence of transaction costs.[22] If so, then producer liability should be equivalent to *caveat emptor*, at least on the face of it. This presented Buchanan with something of a conundrum and led him to reject McKean's position that the theorem was a useful point of entry into products liability issues. The problem, he said, is that "[t]o be fully applicable, the Coase theorem requires the assumption that there be no prohibitions on any mutually advantageous exchanges that may be made as between potential buyers and potential sellers." Strict manufacturer liability, though, has the effect of imposing such a prohibition because those who would prefer to purchase low-quality products are "effectively … prevented from 'buying risk'," meaning that the law itself effectively forecloses the exchanges that allow the Coase theorem to work its magic (ibid., 69).

Buchanan was not, however, willing totally to write off the possible beneficial effects of producer liability. A "plausible case can be made," for example, if the accidents resulting from the product impact third parties (Buchanan 1970, 70). However, he continued, this does not imply that a blanket move toward producer liability is justified. Rather, "[a] discriminating approach is required," one that examines the issues "on a product-by-product basis, *taking into account the relevant economic criteria*" (ibid., 71, emphasis added). The problem, he said, is that this puts the economic approach into a bit of conflict with the legal one. "The law, as the law, tends to be general in applicability. If it is not, it ceases to be law in a certain sense." However, the economics involved here, he said, "varies from product to product." The issue, then, is one of how to achieve an appropriate balance in light of this tension. His conclusion? "Commence with some prejudice for caveat emptor and be sophisticated in the application of departures from this principle" (ibid., 73).

2.2 Calabresi's alternative economic analysis of law

Like Buchanan, Yale Law Professor Guido Calabresi, who had been developing an economics-infused approach to accident law for more than a decade, could be expected to be favorably disposed to McKean's position, though not completely so. For while Calabresi was trained in economics and relied heavily on it in his own work, his economics did not lead him to McKean's conclusions.[23] Calabresi, writing with his student, Kenneth Bass III, had "very little argument with" McKean's basic framework of analysis, which, as he noted, "closely parallels" aspects of the analysis set out in his own work – including the grounding of the theory in the Coase theorem,[24] an insight that Calabresi regarded as "crucial" and deserving of "constant attention" (Calabresi and Bass 1970, 77).

However, one of the reasons why the idea is so important, Calabresi said, is the reality of transaction costs which makes it "imperative" that liability be placed upon the party that would bear the costs if the negotiation process contemplated by the theorem were actually feasible – that is, the least-cost avoider (Calabresi and Bass 1970, 77). McKean, he argued, had missed the mark in his conclusions as to who has this "comparative advantage in safety" (ibid., 78). From where Calabresi stood, McKean's analysis of alternative liability systems suffered from the same "overgeneralization and … insufficient analysis" that McKean had ascribed to those lawyers whose analysis he had found wanting (ibid., 78–79):

> On the one hand, he takes a view from the mountain top and talks as if all product liability situations were the same in terms of the comparative

> advantage of users and sellers in producing safety. On the other hand, he becomes immersed in the trees and talks as if the party on whom the law initially puts the burden of an accident is the party who will ultimately bear the burden and hence will be the party who will make the decisions for or against a safer but potentially more expensive alternative.
>
> (Calabresi and Bass 1970, 79)

"The usual case," Calabresi countered, "is quite different" (Calabresi and Bass 1970, 79), and he went on to examine three situations – transfusion hepatitis, cosmetics reactions, and drug allergies – that pointed to very different liability rules based on the least-cost avoider criterion. Moreover, he said, "to the extent general conclusions about products liability are useful, economic theory indicates that consumers do not in practice have a comparative advantage in safety" (ibid., 88).

Though Calabresi disagreed strongly with the lessons that McKean drew from his economics, he was equally adamant that economics had much to offer to legal reasoning – a position that should come as no surprise given that Calabresi had spent more than a decade attempting to ground an approach to accident law in economic logic and to persuade other legal scholars to follow his lead. Lawyers and legislators alike, he said,

> are, in fact, making such choices quite unintelligently all the time in accident law. We are making choices without even asking the right questions, as is indicated by the disturbing tendency in products liability cases to look simply for the best loss spreader as if that were the only goal of accident law, and by the inclination to resort to collective fiat to accomplish primary accident cost reduction.
>
> (Calabresi and Bass 1970, 90–91)

Economics, for Calabresi, offered a way forward, and he was of the mind that "[a]nalyses like Professor McKean's, tentative and incomplete though they may be, are crucial first steps toward asking the right questions. Taken as that they are very valuable indeed" (Calabresi and Bass 1970, 90).

2.3 Dorfman's hesitancy about an economic analysis of law

While Buchanan and Calabresi were in agreement with McKean's basic thesis regarding the utility of economics for legal reasoning – even if not with the particulars of his analysis – McKean's optimism was challenged by the other two commentators, economist Robert Dorfman of Harvard, and University of Chicago Law Professor Grant Gilmore. If their objections have a familiar ring to them, it is because they seem to harken forward to the objections made over the next two decades both by some economists and by those in other disciplines to the extension of the boundaries of economics.

Dorfman, an economic theorist with a strong interest in environmental economics, certainly could not be counted as one who saw an essential unity in the social sciences, with economics providing the unifying framework. Economics and law, he said, "are such very different disciplines that lawyers and economists are bound to have difficulty in understanding each other's approach to this or any other topic," largely because they "approach problems in very different ways and with different purposes in view" (Dorfman 1970, 92). The lawyer's point of view, he suggested, is "pre-eminently practical":

> Whether the lawyer sits on the bench or stands before it, his business is to make social decisions. In making those decisions he has many things to take into account, and, in particular, he has to apply the standards of ethics and justice and mutual obligation that are inscribed in the law.
>
> (Dorfman 1970, 92)

The economist, in contrast, "is not concerned with reaching decisions at all." Instead, said Dorfman,

> His business is part that of a scientist and part that of a social critic. His task is to describe the way the world operates and if possible to describe it so well and so profoundly that he can infer how the world would operate if conditions were somewhat altered, that is, so he can predict the consequences of following different policies.
>
> (Dorfman 1970, 92)

One, then, is very much in the fray, while the other stands above, or at least apart from, it. Given their very different positions, Dorfman found it "no wonder that economists tend to feel that lawyers have inadequate understanding of the facts of life and employ low standards of analytical rigor, while lawyers regard economists as wildly impractical types." The reality of the matter, he said, is that "[w]e both are right" (Dorfman 1970, 92–93).

When it came to the particulars of McKean's analysis, Dorfman felt compelled to preface his response by noting that "it will become amply evident in the next few minutes that Professor McKean and I adhere to different schools of economics." These differences, he stressed, "are fundamental and are at bottom methodological" (Dorfman 1970, 94). The distinction, for Dorfman, was well exemplified by McKean's reliance on the Coase theorem. McKean, he said,

> believes that you can get to the economic essence of a problem by simplifying it in a particular way. I believe in simplification, too, because I recognize that the human mind can deal with only very simple problems, but I am very suspicious of the particular kind of simplification that Professor McKean regards as being most illuminating.
>
> (Dorfman 1970, 94)

The Coase theorem world assumed by McKean "is a very useful conceptual device for some economic problems," he said, but for others it "can be grossly distorting" (Dorfman 1970, 94). Products liability analysis, for Dorfman, fell into the latter category. Though he disagreed with McKean's assumptions, Dorfman was willing to see where the analysis that was based upon them would lead and to accept the resulting conclusions given the assumptions being made. The problem, according to Dorfman, was that McKean had not followed his assumptions "to their logical conclusions" (ibid., 94).

The assumptions "placed before us," Dorfman reminded his audience, are that the costs of information, of transacting, and of enforcement are zero. Given this, he said, "I feel obliged to draw a conclusion from them – namely, that in such a world, the problem of products liability would hardly exist" (Dorfman 1970, 95). Dorfman then proceeded to make the case for his conclusion. He pointed out that two types of defects may give rise to products liability: defects in design and defects in manufacture. The latter, he asserted, "would not exist at all in a world in which information was free," since the existence and nature of the defect would be known to everyone from producers to end users. If such goods were sold at all, they would be sold as defective products, and at a discount, and there thus would be no associated liability issues. A related logic would apply to design defects in such a context (ibid., 95–98). If you knowingly purchase a product that is defective, and at a price that fully accounts for this, you get to live with the consequences. A world of costless information that McKean had assumed, then, would put us in a world in which, as Dorfman put it, "the significance and occurrence of products liability would be so wildly different from what they are in the real world that the assumptions are hardly a first approximation to the actual problem that confronts us at this meeting" (ibid., 98). Because issues of products liability arise out of a context of costly and thus inadequate information, said Dorfman, "*We cannot abstract from these costs without changing the problem in an essential manner*" (ibid., 98, emphasis added).

Dorfman also took McKean to task for assuming that markets are perfectly competitive and then failing to follow through on *that* assumption as well. While acknowledging the economists' (including his own) love of such a world and their "addiction" to thinking about markets in these terms, with the associated "beautiful theorems," one must fully understand, and allow for, he said, what all of this implies. The chief issue of present concern, for Dorfman, was that in this perfectly competitive environment there is no "brand" identity and thus no way to catch out producers of defective products or for consumers to identify higher-quality versions of the product for substitution purposes. Conversely, if the details are known, the market in question must not be competitive, and none of the competitive adjustment features on which McKean's *caveat emptor* system relied, including Pareto optimal adjustments, can be invoked (Dorfman 1970, 98–99). "Neither Professor McKean nor I can have it both ways," Dorfman argued (ibid., 99). The relevant questions, he said, bear on the economic consequences of products liability in a world of imperfect markets, and McKean's analysis had provided no insights on that score (ibid., 101).

As severe as these critiques of McKean's analysis were, Dorfman's final one – a "warning," as he called it – was perhaps the most damning of all. McKean had made much of his analysis hang on the law of demand and Dorfman noted that this was an element of the "economist's creed" with which he agreed "wholeheartedly" (Dorfman 1970, 101). The problem, as Dorfman saw it, was that "this undoubted doctrine is *largely irrelevant* to predicting the effects of changing the law of products liability" (ibid., 101, emphasis added). What was it that would cause a believing economist to doubt the application of something as fundamental as the law of demand in this context? At issue, for Dorfman, was the "psychology of responses to changes in the penalties that will be incurred in very remote contingencies":

> I do not question that people will eat more apples if the price falls. I do question that they will eat more apples or wash them less carefully if the Northwest Apple Growers Association should undertake to indemnify all people who suffer arsenic poisoning from eating apples ... It does not seem plausible to me that anyone without a suicidal bent, who is tempted by a succulent unwashed apple, would say to himself, "The chances that it will make me sick are very small, and besides, if it does so, the law of products liability is there to console my heirs and assigns."
>
> (Dorfman 1970, 102)

Nor did Dorfman contest McKean's contention that people will trade off money for risk. However, he said, "there appears to be a threshold beyond which people's reactions change, because even sophisticated minds find it impossible to envisage or appreciate contingencies with very low probabilities of occurrence" (Dorfman 1970, 102), as evidenced by the fact that people seem to treat a one in 1,000 risk identically to one in 100,000.

Dorfman, then, was questioning the very premise of applying the economic model of behavior to law, both in terms of its ability to unify the methods of these disparate fields of inquiry and as respects its utility for effective problem-solving outside its traditional domain. Though he did not go so far as to insist on the correctness of his objection to relying on the law of demand here, he did maintain that McKean was "on unsafe ground" in so confidently asserting its applicability, arguing that this is "an empirical question, not a logical consequence of the law" (Dorfman 1970, 102).

2.4 *Gilmore: the lawyer's dissent*

While Dorfman remarked that he felt a bit out of place in commenting on products liability law, University of Chicago Law Professor Grant Gilmore seems to have felt himself even more so. Gilmore declared that he "was known to know nothing – either about economic theory or about recent legal trends in what has come to be called Products Liability," and thus took as his task "to comment, in childlike fashion, on these mysteries – more or less, it may be, like the little boy who, rightly or wrongly, cried out in mid-procession that the Emperor had no clothes on" (Gilmore 1970, 103).[25] However, as he did not have a horse in the race, so to speak, on either the economics or legal fronts, he provides us with a useful set of insights into how the typical legal scholar might have reacted to McKean's analysis, as well as to the broader question of bringing economic analysis to bear on the law.

Gilmore took as McKean's thesis the idea that:

> clarity of thought will be promoted if lawyers and judges, instead of concentrating on such fuzzily defined or undefined or perhaps undefinable concepts as 'fairness,' 'equity' and 'justice,' take into account the presumable economic effects of the various possible schemes of loss allocation on costs, prices, output and the use of resources.
>
> (Gilmore 1970, 104)

The problem, he said, is that despite "having, by his remarkable analysis, immeasurably clarified our thought," McKean did not appear "to have any convictions or even any particularly strong feelings about what we should do next" – about how cases should be decided or what statutes should be adopted (ibid., 104). This, he continued, posed a particularly difficult problem for the lawyer and the judge, in that they are "professionally required" to provide answers to such questions, even though lawyers understand that they cannot be certain that the answers they are providing are the correct ones. Economics, then, did not seem to Gilmore to offer much utility as a problem-solving device for law.

Like each of the other commentators, Gilmore latched onto McKean's repeated invocations of the Coase theorem, an idea to which he was no stranger given that Coase was his colleague on the Chicago law faculty. While Gilmore accepted the theorem as "true" (Gilmore 1970, 105), he took issue with McKean's contention that it is an appropriate starting point for the analysis, suggesting that it is so highly over-simplified that it simply could not be expected to provide relevant insights. Not only are there always transaction costs, said Gilmore, but also it will generally be impossible to predict how large they may be in any given situation or to ascertain how large they were even after the fact. Moreover, he added, the "truly voluntary" – that is, non-coerced – exchanges that are at the heart of the theorem have "become almost an extinct species in the all too real world" (ibid., 105). The issue that this raises, he said, is that we cannot move in straightforward fashion from the simplified Coase theorem world to the complexity of reality, as the real world is not "recognizably of the same family as the simple model." The reductionism that McKean saw as a strength of the economic approach was, for Gilmore, a fatal weakness, as conclusions drawn for the real world based upon such a model, he said, will either be false or will be true only by accident (ibid., 105–106).

All of this, for Gilmore, pointed to the dangers for law inherent in setting one's course based on the Coase theorem. Such a theory "conditions our thinking about the real world," as, indeed, "it is meant to do" (Gilmore 1970, 106). The conclusion to which it leads is that, since the direction of liability does not matter, products liability should cease to evolve further in the direction of producer liability, as it at least does no good to proceed further in that direction. This, for Gilmore, was the "ultimate counsel" of McKean's analysis. However, given the distance between the world of the Coase theorem and the world in which we live, Gilmore was not willing to accept the conclusion that the evolution of products liability law should cease, or that it would be a good thing to turn back the clock (ibid., 107). In fact, Gilmore cast doubt on the entire enterprise of using economic analysis to inform legal reasoning, and his comments on this score are worth quoting in full:

> The Coase theorem, truly understood, may prove conclusively that all the changes which have taken place in our society since 1850 – or 1750 or 1650 – have been, from the point of view of economic theory, undesirable. The realization that this was so would sadden me but I would not see that much could be done about it or that anything should be done about it. I do not for a moment dispute or deny the great value of abstract theoretical analysis or the pure delight of engaging in it. I doubt that it gives us, or is meant to give us, guidance in handling real problems in the real world.
>
> (Gilmore 1970, 116)

Nor, it seems, did Gilmore see any prospect that economic reasoning would ultimately prove to be influential in reforming law:

> It is entirely within the realm of possibility that the forces which have determined the shift in risk allocation which has been going on for the better part of a hundred years will cease to operate and that we will reverse our course – or set out in a new direction never before dreamed of. But that, if it were to happen, would have nothing to do with the fact that we had at last learned to think clearly about what was going on. The wit of man is from the start overmatched by the weight of circumstance and, except in the simplest situations, thinking clearly and acting sensibly really have nothing to do with each other.
>
> (Gilmore 1970, 116)

If Gilmore was the representative black letter man of law, the prospects for an economic analysis of law seemed grim indeed.

3 Conclusion: boundary crossing, or scientific imperialism?

It hardly needs stating that in the decades following the products liability conference, the economic analysis of law evolved into the most important new movement in legal scholarship in the last half-century – though there is plenty of room for argument over the extent to which the insights of economics have influenced the law itself.[26] That said, if influence on subsequent scholarship is the measure of importance, the products liability symposium organized by the Joint

Committee of the AEA and the AALS is a relatively minor blip in the history of law and economics. The papers from the symposium are seldom cited, and historians seem largely unaware of its existence or that of the Joint Committee.[27] McKean's perspective on the potential fruits from extending the economic paradigm eventually won the day among substantial groups of both lawyers and economists, but it was Calabresi and Posner (1973), rather than McKean, who persuaded lawyers to begin to take economics seriously as a tool of analysis, and scholars such as Becker and William Landes who convinced economists to do the same.[28]

Yet, the symposium is an important moment in the history of economic analysis of law for several reasons. First, it reflects an overt attempt to *create* an economic analysis of law. Economic analysis of law did not just happen; a small community of scholars made a conscious effort to bring it into being as a replacement for (in the minds of some) or complement to (in the minds of others) traditional methods of legal analysis. The fact that the Joint Committee's effort did not succeed does not make the concerted effort any less real, particularly when one realizes that certain of the key players – notably Manne – were engaged in similar efforts on other fronts.[29]

Second, even among those who agreed that economic thinking could profitably inform legal analysis – in the present instance, McKean, Buchanan, and Calabresi – there was no uniformity of view on what the analysis entailed or implied. Differently put, economics did not offer a "science" of law in the sense of suggesting singular determinate optimal solutions to legal questions. While its proponents preached clarity of thought, there was no real clarity on what that thought should be, as evidenced from the very different conclusions regarding liability for product-related harms reached, and the justifications offered, by these three economics-favoring protagonists.

Third, and perhaps most obviously, the symposium provides the first real insight into the challenges that economic analysis of law would confront in establishing a toehold within both economics and law. Gilmore's commentary is illustrative of the barriers that economists faced in marketing their product to lawyers, even within the walls of the University of Chicago Law School, while Dorfman's critique made it clear that convincing leading economic theorists that their models could be exported outside their traditional context was not going to be an easy road.[30]

It is fair to say that no small amount of the explanation for the critical responses of Gilmore and Dorfman lay in McKean's decision to ground his analysis in the Coase theorem.[31] Viewed from the perspective of the present, McKean's move seems a logical one. After all, the theorem is one of the core ideas of the economic analysis of law and the basis for much of the reasoning that flows from it. The symposium witnessed no dissent regarding the theorem's validity as a proposition in economic logic. The issue, instead, was relevance and whether the reductionism that the economist brought to the table had any currency in the legal realm. The clash between the messy practicalities of law and the "all is for the best in the best of all possible worlds" nature of the Coase theorem could not have been more stark. This is not to say that McKean made a mistake making the theorem the starting point for his analysis. Indeed, one could argue that Posner did the same in *Economic Analysis of Law* (1973), and to great effect. The problem was that McKean approached the subject with an economist's mentality, allowing abstraction to be the driver of his analysis. If economic analysis was going to make serious inroads into legal analysis generally, the game would have to be played on the legal scholar's turf, even if using the economist's ball. In the end, that turn was the key to its eventual success.

This brings us directly to a final lesson to be drawn from the products liability symposium: the difficulties attending attempts to fasten the "imperialism" moniker to boundary crossings involving economics. One of the great myths surrounding the history of economic analysis of law – one perpetuated by economists as well as by critics of the economic approach – is that it developed out of an exporting or colonization effort by economists. This early effort was not, despite McKean's centrality in the story, one of economists attempting to take over law. While McKean himself may be seen, without violence, as engaged in imperialism, Manne, as a lawyer, could not have been, and McKean was a tool enlisted to help reshape legal thinking in a manner that Manne and others he had recruited to the cause found congenial. The reality is that the scholarly and institution-building pioneers of the subject – Calabresi, Manne, and Posner, lawyers all – were *importing* economic analysis into the legal arena. Economists were relative latecomers to the party, Becker's and Landes' contributions notwithstanding.[32]

The term "imperialism" denotes the effort of *A* to exert power or influence over *B*.[33] The early history of economic analysis of law, though, represents anything but this. A small group of lawyers decided that it would be useful for their discipline to draw more heavily on the methods of economics. Yes, some economists slowly began to join the chorus. Yes, with time, economic analysis came to inform legal reasoning in a significant way. And yes, a significant number of economists have come to believe that economics offers the best grounding for legal reasoning. Yet, the economics profession has, to this point, exerted no power or influence over law.[34] Instead, the influence of economics on legal reasoning is the result of an increasingly large group of legal scholars finding utility in the methods of economic analysis and adding it to their box of tools in their research and in the classroom, and of law school deans making the decision to place economists or lawyers with substantial economics training on their faculties and add "law and economics" courses to the curriculum.

The process at work here, then, was not "imperialism" but boundary crossing – of which imperialism is a subset. Boundary crossing, including with economics, has been at the heart of American jurisprudence since the early 20th century,[35] though the economics of this earlier period was of a decidedly different flavor and, ironically (but not coincidentally), gave rise to some of the legal principles called into question by the modern economic analysis of law and defended vociferously by critics of it. It is all well and good to question whether the tools of the economist are appropriate for the analysis of legal relationships, but to do so within the context of imperialistic rhetoric serves both to mask and fundamentally misunderstand the historical processes through which the economic approach to law came to be, and to garner a measure of acceptance within the legal academy.

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Notes

1 Distinguished Professor of Economics, University of Colorado Denver, USA. Email: steven.medema@ucdenver.edu.
2 However, see Mitchell (1999) and Medema (2000) for an analysis of the development of public choice analysis and the work of Pedro Teixeira (e.g., Teixeira 2009, 2014) on the development of human capital analysis. The Introduction by Mäki, Walsh, and Fernández Pinto offers a sketch of the various extant perspectives on scientific imperialism.
3 Medema (2013) provides an overview of the formation and early history of the Joint Committee.
4 See e.g., Calabresi (1961, 1965a, 1965b, 1970).
5 Marciano (2012) and Medema (2014a, 2014b) provide discussions of the treatment of Coase's negotiation result – better known today as the "Coase theorem" – by Calabresi and in the legal literature during the 1960s.
6 Two significant pieces of evidence for its solidity within the economics profession are its recognition within the *Journal of Economic Literature* field codes, and the presence of "law and economics" courses in the undergraduate economics curriculum across the United States.
7 It goes almost without saying that "law and economics" has a long heritage in legal analysis, its heyday coming during the legal realist period of the 1920s, 1930s, and 1940s, but that law and economics was of a very different type from the modern economic analysis of law. See e.g., Hovenkamp (1990), Duxbury (1995), and Medema (1998) for analyses of the earlier and later law and economics movements.
8 By "traditionally 'non-economic' areas of law" we exclude antitrust, regulation, etc., where economists and legal scholars had worked side by side and even hand in hand for many decades. See e.g., Duxbury (1995) and Hovenkamp (1990).
9 The same, as it happens, is true of the history of the application of economic analysis to political science.
10 This goal is consistent with what Mäki (2013, 334) has characterized as "imperialism of style."
11 It is worth noting, however, that McKean referred the reader to Armen Alchian and William Allen's *University Economics* (1967) for an elaboration of the points raised in his tutorial, rather than, say, a more popular textbook such as Samuelson's *Economics* (1967). Alchian and Allen had been McKean's colleagues at UCLA, and their text is generally considered to have a more market-oriented flavor than Samuelson's.

12 McKean cites *Escola v. Coca-Cola Bottling Co.* as an illustration of this attitude. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

13 Although McKean did not note it in his essay, this very sentiment was at the heart of Blum and Kalven's (1964) critique of Guido Calabresi's (1961) analysis of deterrence, a line of argument that was very much informed by his extensive training in economics.

14 McKean defined zero transaction costs as a situation in which there are zero costs of negotiating and enforcing agreements, and "zero costs of information about products' characteristics." Such a world, he said, is not one "of complete certainty in this analysis, for such a world would have no accidents, unforeseen events, or doubts about liability" (McKean 1970, 43, n.108).

15 See e.g., McKean 1970, 50–51.

16 It is curious that McKean saw fit to label absolute producer liability "extreme" but did not do the same for absolute consumer liability (*caveat emptor*).

17 Still worse, though, McKean argued, would be a no-fault system with *governmental* compensation, which some were advocating, as this would remove the burden of accident costs from producers as well as consumers, leaving both parties with reduced incentive to engage in precautionary activities (McKean 1970, 52).

18 McKean went on to note that prices would rise in industries producing *safe* products as well, as consumers of products whose prices had risen substituted other products. There would also be secondary distributional effects, as returns to inputs in industries producing unsafe products would fall, while owners of inputs in safe products industries would rise (McKean 1970, 51). Interestingly, these effects would also accompany a system of *caveat emptor*, but McKean did not note these as a black mark against that system.

19 The reference here is to John Godfrey Saxe, "Six Blind Men and the Elephant," in *The Poems of John Godfrey Saxe* (Boston, MA: Ticknor and Fields, 1868).

20 McKean cited as illustrations of such work Franklin (1966), Keeton (1967), Plant (1955), Blum and Kalven (1964) and, notably, Calabresi (1965a, 1970).

21 It is not surprising to see Buchanan make an appeal to fairness as well as efficiency. His 1974 essay reviewing Posner's *Economic Analysis of Law* finds Buchanan far more comfortable with the use of price theory to assess the impacts of legal rules than with efficiency-driven jurisprudence (Buchanan 1974).

22 The logic, according to Buchanan, is that transaction costs which preclude further exchange make the existing position efficient, in that it is not cost-effective to move away from it.

23 Calabresi noted that his paper had been prepared as a reaction to an original draft by McKean, and that McKean had since made some modifications of emphasis that might cause his own remarks to seem a bit strong (Calabresi and Bass 1970, 74).

24 See e.g., Calabresi (1965a, 1970).

25 Gilmore's most significant contributions to law include his book, *The Death of Contract* (1974), and his role as one of the architects of the Uniform Commercial Code. This raises the question of why Manne did not secure the services of someone who had written on products liability but was not attached to the economic approach, as Calabresi was, and thus could be suitably critical of McKean's analysis. Unfortunately, the archival records contain no information on this score.

26 That law itself has been more immune from the influence of economics than legal scholarship could be said to validate Gilmore's prediction.

27 This author is currently engaged in a study of the history of the Joint Committee's origins, activities, and eventual demise in the mid-1970s.

28 Landes was Becker's student at Columbia in the 1960s and appears to have been the first economist to establish a research agenda in the economic analysis of law, one

that emphasized empirical analysis as a necessary complement to theory. Landes began a long and fruitful research collaboration with Posner in the mid-1970s.

29 The most influential of these other efforts may be the institutes, organized by Manne, that taught economic analysis and its application to law to law professors and judges. See e.g., www.law.gmu.edu/about/history (accessed January 28, 2016).

30 Even Ronald Coase, widely credited as one of the founders of modern law and economics, was skeptical of the application of economics outside the traditional realm of the subject – a position that put him at odds with his law school colleague, Richard Posner. See e.g., Coase (1978, 1993) and Posner (1993).

31 One finds a similar set of attitudes in the conference discussion that followed the five paper presentations – the analysis of which here is precluded by space limitations. However, see Manne (1970).

32 Indeed, when Landes presented some of his early research on the subject at Chicago in 1967, he was told by a senior Chicago economist that he should instead focus on subjects that were of more than "marginal interest" to economists (Landes 1997, 34).

33 See e.g., the *Oxford English Dictionary* entry on "imperialism," www.oed.com/view/Entry/92285?redirectedFrom=imperialism#eid (accessed January 27, 2016).

34 In fact, an argument can be made that a goodly number of the economists working on legal topics have little interest in law or the legal reasoning process, but instead have mined this territory because of the publication possibilities it offered (Medema 2015).

35 See e.g., Duxbury (1995) and Hovenkamp (1990).

References

Alchian, Armen A. and William R. Allen. 1967. *University Economics*. Second edition. Belmont, CA: Wadsworth Publishing Company.

Becker, Gary S. 1968. "Crime and Punishment: An Economic Approach". *Journal of Political Economy* 76(2): 169–217.

Becker, Gary S. 1976. *The Economic Approach to Human Behavior*. Chicago, IL: University of Chicago Press.

Blum, Walter J. and Harry Kalven, Jr. 1964. "Public Law Perspectives on a Private Law Problem: Auto Compensation Plans". *University of Chicago Law Review* 31(4): 641–723.

Blum, Walter J. and Harry Kalven, Jr. 1965. *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans*. Boston, MA: Little, Brown and Company.

Buchanan, James M. 1970. "In Defense of Caveat Emptor". *University of Chicago Law Review* 38(1): 64–73.

Buchanan, James M. 1974. "Good Economics. Bad Law". *Virginia Law Review* 60(3): 483–492.

Calabresi, Guido. 1961. "Some Thoughts on Risk Distribution and the Law of Torts". *Yale Law Journal* 70(March): 499–553.

Calabresi, Guido. 1965a. "The Decision for Accidents: An Approach to Nonfault Allocation of Costs". *Harvard Law Review* 78(4): 713–745.

Calabresi, Guido. 1965b. "Fault, Accidents and the Wonderful World of Blum and Kalven". *Yale Law Journal* 75(2): 216–238.

Calabresi, Guido. 1970. *The Cost of Accidents: A Legal and Economic Analysis*. New Haven, CT: Yale University Press.

Calabresi, Guido and Kenneth C. Bass III. 1970. "Right Approach, Wrong Implications: A Critique of McKean on Products Liability". *University of Chicago Law Review* 38(1): 74–91.

Coase, Ronald H. 1960. "The Problem of Social Cost". *Journal of Law and Economics* 3(October): 1–44.

Coase, Ronald H. 1978. "Economics and Contiguous Disciplines". *Journal of Legal Studies* 7(2): 201–211.

Coase, Ronald H. 1993. "Law and Economics at Chicago". *Journal of Law and Economics* 36(1): 239–254.

Dorfman, Robert. 1970. "The Economics of Products Liability: A Reaction to McKean". *University of Chicago Law Review* 38(1): 92–102.

Dupré, John. 1994. "Against Scientific Imperialism". *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association* 2: 374–381.

Dupré, John. 2001. *Human Nature and the Limits of Science*. Oxford: Oxford University Press.

Duxbury, Neil. 1995. *Patterns of American Jurisprudence*. Oxford: Oxford University Press.

Fine, Ben. 1999. "A Question of Economics: Is it Colonizing the Social Sciences?" *Economy and Society* 28(3): 403–425.

Fine, Ben. 2002. "Economic Imperialism: A View from the Periphery". *Review of Radical Political Economics* 34(2): 187–201.

Fine, Ben and Dimitris Milonakis. 2009. *From Economics Imperialism to Freakonomics: The Shifting Boundaries Between Economics and Other Social Sciences*. Abingdon: Routledge.

Franklin, Marc A. 1966. "When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases". *Stanford Law Review* 18(6): 974–1020.

Gilmore, Grant. 1970. "Products Liability: A Commentary". *University of Chicago Law Review* 38(1): 103–116.

Gilmore, Grant. 1974. *The Death of Contract*. Columbus: The Ohio State University Press.

Hovenkamp, Herbert. 1990. "The First Great Law & Economics Movement". *Stanford Law Review* 42(April): 993–1058.

Joint Committee of the American Economic Association and the Association of American Law Schools. 1967. "Report of the Joint Committee of the American Economic Association and the Association of American Law Schools". *American Economic Review* 57(2): 715–717.

Keeton, Robert E. 1967. "Is There a Place for Negligence in Modern Tort Law?" *Virginia Law Review* 53(4): 886–898.

Landes, William M. 1997. "The Art of Law and Economics: An Autobiographical Essay". *The American Economist* 41(1): 31–42.

Lazear, Edward. 2000. "Economic Imperialism". *Quarterly Journal of Economics* 115(1): 99–146.

Mäki, Uskali. 2013. "Scientific Imperialism: Difficulties in Definition, Identification, and Assessment". *International Studies in the Philosophy of Science* 27(3): 325–339.

Manne, Henry G. 1970. "Edited Transcript of AALS-AEA Conference on Products Liability". *University of Chicago Law Review* 38(1): 117–141.

Manne, Henry G. and Gerald M. Meier. 1970. "Foreword". *University of Chicago Law Review* 38(1): 1–2.

Marciano, Alain. 2012. "Guido Calabresi's Economic Analysis of Law, Coase and the Coase Theorem". *International Review of Law and Economics* 32(1): 110–118.

McKean, Roland N. 1970. "Products Liability: Trends and Implications". *University of Chicago Law Review* 38(1): 3–63.

Medema, Steven G. 1998. "Wandering the Road from Pluralism to Posner: The Transformation of Law and Economics in the Twentieth Century". *History of Political Economy* 30(Supplement): 202–224.

Medema, Steven G. 2000. "'Related Disciplines': The Professionalization of Public Choice Analysis". *The History of Applied Economics: History of Political Economy Annual Supplement* 32: 289–323.

Medema, Steven G. 2013. "Bringing Law and Economics Together". Working Paper, University of Colorado Denver.

Medema, Steven G. 2014a. "Debating Law's Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s". *Texas A&M Law Review* 2(2): 159–213.

Medema, Steven G. 2014b. "Juris Prudence: Calabresi's Uneasy Relationship with the Coase Theorem". *Law and Contemporary Problems* 77(2): 65–95.

Medema, Steven G. 2015. "From Dismal to Dominance? Law and Economics and the Values of Imperial Science". In Aristides N. Hatzis and Nicholas Mercuro (eds). *Law and Economics: Philosophical Issues and Fundamental Questions*. London: Routledge.

Mitchell, William C. 1999. "Political Science and Public Choice: 1950–1970". *Public Choice* 98(3–4): 237–249.

Plant, Marcus L. 1955. "Strict Liability of Manufacturers for Injuries Caused by Defects in Products – An Opposing View". *Tennessee Law Review* 24: 938–945.

Posner, Richard A. 1973. *Economic Analysis of Law*. Boston, MA: Little, Brown.

Posner, Richard A. 1993. "Ronald Coase and Methodology". *The Journal of Economic Perspectives* 7(4): 195–210.

Samuelson, Paul A. 1967. *Economics*. Seventh edition. New York: McGraw-Hill.

Stigler, George J. 1966. *The Theory of Price*. Third edition. New York: Macmillan.

Stigler, George J. 1984. "Economics: The Imperial Science?" *Scandinavian Journal of Economics* 86(3): 301–313.

Teixeira, Pedro N. 2009. *Jacob Mincer: The Human Capital Labour Economist*. Oxford: Oxford University Press and IZA.

Teixeira, Pedro N. 2014. "Gary Becker's Early Work on Human Capital – Collaborations and Distinctiveness". *IZA Journal of Labor Economics* 3(1): 1–20.

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