LEGAL THEORY AND ECONOMIC ORGANIZATION

> "Economic arrangements play a dual role in the promotion of a free society. On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood, so economic freedom is an end in itself. In the second place, economic freedom is also an indispensible means toward the achievement of political freedom." —Milton Friedman.[1]

That indefatigable champion of the left-leaning legally oppressed, William Kuntsler, recently spoke at the Manitoba Law School. His visit to the University of Manitoba was one of the cardinal attractions of its annual Festival of Life and Learning. The festival is in fact a phantasmagoria of liberal and revolutionary indoctrination during which at any place and at any time on campus one may bear witness to invective, vituperation and calumny as it is relentlessly heaped upon "the system", which conveniently suffers without defence. At the Law School it was widely hoped that Mr. Kuntsler would add at least a modicum of life and learning to a rather predictable and paralytic "festival".

Since September 26, 1969, William Kuntsler has been a famous American attorney-at-law. On that day he and Mr. Leonard I. Weinglass commenced the defence in the case of *United States of America* v. *David T. Dellinger, Rennard C. Davis, Thomas E. Hayden, Abbott H. Hoffman, Jerry C. Rubin, Lee Weiner, John R. Froines and Bobby G. Seale* (No. 69 Crim. 180).[2] On February 20, 1970, this unfortunate trial ended, as it had begun, with a hostile verbal skirmish involving the judge and Mr. Kuntsler. Inevitably, the passage of time has relegated the trial to the stature of a distant but regrettably important legal event. However, Mr. Kuntsler's personal stock maneuvers comfortably near the top of the volitile current events market. Clearly he remains a person of considerable interest to the legal profession in general and law students in particular.

Happily, Mr. Kuntsler came prepared to discuss the lawyer's role in society. As he sees it, society's multifarious evils emanate mainly from the present capitalistic economic system and the perverse human values nourished thereby. Having satisfied himself that the system is fundamentally rotten and that the normal practice of law merely exploits this situation to the benefit of almost no one, he has defined a new role for the lawyer who wants to contribute to the common good. Briefly put, the new lawyer "works within the system only to destroy it". Presumably, in the course of scuttling the good ship "America Inc.", Mr. Kuntsler and his fellow reformers (revolutionaries?) will purge the souls of her people and reinvigorate their moral posture with some better values, thus effectively curing their loathsome depravity. In such manner and form

1. M. Friedman, Capitalism and Freedom 8 (1962).
2. For general information regarding this trial see, The Tales of Hoffman (D. Greenberg, M. Levine, G. McNamee, eds. 1970).

the lecture continued and then concluded as the speaker basked in the warmth of his receptive audience.

It will I suppose, be recorded in the pages of legal history in much the same way as a member of New York's White and Case might be noted as a "securities law" specialist, that William Kuntsler was a specialist of sorts in the esoteric field of "systems destruction law". It ought further to be mentioned, however, that like most other legal specialists he did not manage to elude that omnipresent scourge of modern day lawyers – insular professionalism, or, if you prefer "the plumber syndrome". Observe the following symptoms (taken in substance from the above noted speech):

> "I am a lawyer, I am not an economist. Should we succeed in destroying the system I do not know what we would replace it with. Perhaps some kind of Marxism or something–maybe some kind of modified capitalism."

In other words, when the status quo has been reduced to no quo at all the people of North America had better not look to lawyer Kuntsler for any more help. At such time he shall be functus officio and in all likelihood involved in the practice of his particular specialty in another country, or perhaps he shall seek felicitous retirement to write his memoirs with the help of that prolific novelist Abbott H. Hoffman.

But we should not be too harsh with Mr. Kuntsler for the general profusion of rudderless lawyers continues unchecked in North America. Why just the other day there was a sizeable congregation of neophytes gathered to hear speeches proffered to them by selected legal specialists in Manitoba. It was the annual Grads' Farewell Banquet of the Manitoba Law School and it provided even the most casual observer with an excellent example of the current derangement of the legal profession. By some unfortunate but not illogical turn of events, the established (for want of a better word) legal profession is presently assailed by the unestablished legal profession which might conveniently be termed the "angry young lawyers".[3] (Mr. Kuntsler incidentally is in the angriest lawyer group of them all–that of the radical or "movement" lawyers). Furthermore, it is not just rebellious elements of the profession who are riding full tilt against the prostrate legal establishment. Professor R. H. Bork of the Yale Law School reports:

> "There is abroad a feeling of disappointment with and about law, a suspicion that it may be weak and unsure. This feeling is particularly frightening because we turn increasingly to law as other supports seem to fail us. The legal establishment itself is uncertain. The signs are everywhere."[4]

The signs were at times blatantly in attendance at Grads' Farewell be-

3. Fortune 74 (September, 1971).
4. Fortune 115 (December, 1971).

cause in the dead of winter the "movement" inexorably presses on, even in Manitoba.

What then, did the immaculately tuxedoed leaders of the bench and bar say to these vulnerable neophytes? Did they seize the moment and indulge in serious discussion? Did they for one moment depart from the beaten path of setting out handy tips to better legal plumbing and attempt to explore some new directions for the law and lawyers alike? Did they have any suggestions at all regarding just what it is they are all tinkering with? Alas, the answer is no. To the enduring chagrin and embarrassment of their audience they (with but a couple of exceptions) laid waste to their allotted time with ejaculations of unctuous fatuity.

Crisis in Law:

At this point one may be forgiven for possessing a rising despair regarding the fate of the law as it has presently come to be known. Tritely put, the law is an integral part of Western Society, which, as everyone knows, is presently in deep trouble. The law, viewed carefully from afar and illuminated by its societal background, is certainly dynamic within its structural boundaries but continues to occupy a relatively static functional position within the broad construction of the system. Thus, it has an accepted role in economic, political and social life but unlike those spheres in the structure really does not presume to determine the extensive goals of the system and, more importantly, has little to contribute to the formulation of the means to attain those ends. It is submitted that therein lies much of the strength of the positive lawyer's basic argument.

Daily, the lawyer works in the legal system in such diverse areas as criminal, family, administrative, corporate, commercial and taxation law. It is fair to say that generally speaking, he as a lawyer is not concerned with the directional results, if any, of his performance as they bear on the course of the system through time. As recently as a decade ago, the lawyer could behave in this fashion and ignore, for example, the nature of economic organization in North America. He was a member of a respected profession which steadfastly served the vital goals of society —and therein lies the rub.

Today both those goals and the means of attaining same have been seriously questioned by almost all human participants in the system. Economic, political and social life are disrupted daily by the words and actions of reformers, revolutionaries and reactionaries. Emergency envelops the lawyer for if, as is popularly believed, the plumbing is faulty or obsolete, the plumber is the first one turned to for the remedy. Curiously enough, in this case he does not have one.

It is submitted that if a solution to this monstrous problem does exist, it is not a simple one and does not lie strictly within the bounds of the function of law in society. If so, it must be lurking behind the mass of rules with which the lawyer is so familiar. Therefore, he must examine the economic, political and social elements of society in order to evaluate their necessary connection to the law. As an aid to such an examination this paper will attempt to superficially analyze the factor of economic organization and its interaction with the law. Because of the nature of its subject matter this inquiry likely will not result in any answers. It can only be hoped that it might raise a few of the relevant questions.

The Concepts of Jurisprudence:

> "The trouble springs in large part from our inadequate understanding of law and its uses. The striking, and peculiar, fact about a field of study so old is that it possesses very little theory about itself. There is no body of systematic learning about the law's inherent capabilities and limitations. I have heard an eminent economist who became closely acquainted with a major centre of legal scholarship remark with astonishment: 'You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own.' And, a few scattered insights aside, he was right."[5]

Professor Bork in the above statement has focused upon the pure cause of the lawyer's current dilemma. This fundamental weakness in the law is the most tragic failure of jurisprudence and is probably the result of the wasteful clash between positive and natural lawyers. Staunch advocates of their respective theories, the two schools have done battle for many years without producing much more than protracted academic confusion. The discussion has been at such a lofty level that the average practising lawyer can glean from it very little help in his time of crisis and therefore regards it with but a mild curiosity. Indeed, the legal philosopher himself has not been immune to the "plumber syndrome". He tinkers with the internal workings of legal theory and seldom ranges far from the more traditional problems of jurisprudence. When he does turn to broader issues he is invariably working on some moral problem in the law as it relates to such matters as abortion or homosexuality.

One might observe that the legal philosopher is concentrating upon important problems. In a society which appears to place more value on the freedom to consume types of chemical escapism and copulate with almost anything that moves, than the economic freedom of man, he may be reflecting the topography of the most urgent legal questions. It is submitted that this is just not so.

As collectivists and individualists continue to conflict and cause economic perturbation it is further submitted that the economic organiza-

5. Id. at 116.

tion of North American society implacably continues to be the paramount economic and legal issue facing the members of that society today. The true statement is that the legal philosopher has either failed to recognize the considerable role of law in economic organization or has done so and has chosen to ignore it. Clearly, the lack of interaction between legal and economic thinkers indicates that he has followed a definite course of non-action.

Cogent to the discussion herein is the caution that henceforth it does not deal with the law as it has become stratified within the system. It will endeavour to expand the role of the law beyond that of a tool to assist in the performance of economic organization to that of an equal participant with the discipline of economics in the construction and direction of economic behaviour. In this regard, neither natural nor positive law theory alone can provide a satisfactory vehicle for said expansion. However, it is submitted that economic and legal elements, when combined and then analyzed with the assistance of natural law constructs and methodry will yield a comprehensive and instructive body of theory which could become a unique new part of the law.

The following passage serves to illustrate just how little research has been done by legal philosophers, past and present, in the realm of economics:

> "The primary concern of natural law is with justice and the moralization of power. Therefore, traditional natural law doctrine supports full employment, a factory organized on democratic principles, just wages and prices—both of which are in effect controlled by labour and consumers—the exemption of conscientious objectors as combatants, the right to strike, even to conduct a general strike, the redistribution of incomes, the progressive income tax, widening credit to take care of small businessmen and small farmers, the social control of technology, the social control of the interest rate and many other objects that modern reformers demand. It condemns absolute national sovereignty, totalitarianism, the general sales tax, the power of banks and finance capital, and many other features of modern society that reformers want to change. The natural law stands for the Rights of Man: for freedom of conscience and of religion, for the right to one's own life, to one's honor, to the inviolability of the person, to the inviolability of property, to make a livelihood, to educate one's children, to choose one's way of life, to develop one's own personality, to free expression, to free association, and to a voice in the government of the community. The nature that natural law refers to is a free nature, and the society that it proposes is a fellowship of free persons. The ends of human life are held to be unchanging; the search for the best way of achieving them is continuous and adapted to changing conditions and new knowledge.
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> Since natural law occupies a middle position on many issues, it is attacked by both extremes. Natural law rejects both capitalism and socialism. It affirms at one and the same time the primacy of politics and the subsidiary role of the state and of the common good. The primacy of politics means that government allocates functions among individuals and groups and protects them against one another; the subsidiary role of the state and the common good means that the common good serves the good of the individuals who make up the community. The doctrine, in short, is balanced, and therefore complicated. Those who plunge for any uncom-

plicated view of society are bound to have trouble in understanding and appreciating natural law.

> Natural law is afflicted by the rhetorical difficulty that must plague any doctrine that proceeds from principles and tries to apply them in changing historical situations in the light of developing knowledge. This is the danger of being quoted out of context. Unless all the explicit and implicit qualifications are taken into account, the statement of the principle is likely to give a false impression of the directive that is being offered for the practical life. General pronouncements in the literature of natural law often seem to condemn public education, inheritance taxes, the nationalization of property, the closed shop, and the welfare state; but on examination it turns out that public education is legitimate on certain terms, that the closed shop is permissible if the circumstances require it, that some types of industries, beginning with atomic energy, should be nationalized, that inheritance taxes are proper if they are not indiscriminate, that there is no "sanctity of private property" in the sense in which nineteenth-century liberals used the phrase, and that the whole object of the political community is the welfare of its members."

One does not have to be an economist to see that legal philosophy will remain very vague in this area if the above approach persists at such a shallow stage of analysis. W. Friedmann has noticed that the positivists have not progressed even as far as their natural law brethren:

> "Secure under the power of the state, which maintained in principle separation of powers and allowed an independent legal profession to develop, legal positivists could delude themselves that they were not concerned with legal ideology. In reality these lawyers were legal philosophers, like everyone who has to solve legal problems, but their philosophy was often inarticulate. They were on the whole unconscious of the non-legal values and ideals involved. On the whole those lawyers who are unconscious of their legal ideology are apt to do more harm than their more conscious colleagues. For their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and prejudices without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake."
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> "Practically all English decisions which are concerned with matters of economic competition, e.g., in conspiracy or in restraint of trade, display a similar outlook. Economic doctrines of far-reaching consequence, such as principles according to which price or market control or monopoly of production may be upheld, have been developed in a rather haphazard manner, without much consciousness of the economic and social problems at stake and with little, if any, scientific inquiry into such economic problems as that of a fair and reasonable price."[7]

Paton clarifies the problem as it relates to jurisprudence and the protection of interests. His discussion reflects the elementary and unsatisfactory nature of the inquiry into economic organization, and demonstrates the disheartening fact that at present, legal philosophers are not prepared to and are perhaps not even interested in exploring economic theory in quest of some assistance. Consider the following:

> " The social interest (as does the individual) demands a society that is economically prosperous. This requires some security with regard to property, acquisitions, and transactions. In other words the law of property and contract must function satisfactorily or else the real basis of economic

6. Natural Law and Modern Society 36 & ff. (Centre for the Study of Democratic Institutions, 1966).
7. W. Friedman, Legal Theory 401 & ff. (4th ed., 1960).

> life is absent. This does not necessarily mean that there must be capitalism and private property, but only that the legal order must provide a basis on which man can plan with relative security.
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> The theory of economic determination suggests that legal theories are merely a reflection of the economic base on which the life of the community is built. This is an exaggerated view, but rejection of early crudities should not blind us to the great influence of these economic forces, and in a section concerned with the human interests protected by law, the economic philosophy held by a particular community is all-important.
>
> The conflict today is between those who value the protection of property and individual freedom and those who would sacrifice both to the extent made necessary by the demand of the economically weaker classes for an assured protection in the present chaotic economic state of the world."[8]

For the moment, Paton apparently has rejected thoughts of any incursion by legal thinkers into the realm of economic philosphy. He accepts without question the idea that there is a pigeon hole each for law and economics within the societal structure and rather than attempting to link them up at some of their common philosophical points he prefers to effect a trade-off between them when they clash in daily life.

> " The real problem is one of compromise. 'Unfortunately, the struggle for the rights of man consists of a struggle between the rights of man! Law does not create these interests—they exist already and the function of the law is to effect a delicate compromise between them. Hence particular rules frequently do not protect one interest, but rather determine the boundary between two clashing interests. It is easy to lay down a scale of absolutes—freedom of religion, freedom of speech, freedom of association: the real difficulty is that of technique, the working out of effective rules which will provide reasonable protection for each without endangering the others. When a particular religious sect attacks the State, or refuses to salute the flag, when does religious freedom cease and the interest of social security begin to operate? Freedom of property is a right to which many subscribe, but if laid down as an absolute right, it may stultify social progress. Hence an abstract bill of rights or table of interests cannot afford much direct help to the judiciary in their work from day to day. A broad objective may be provided but life is too complex to be adequately covered by abstract generalizations."[9]

However, he does recognize that there is room for legal philosophy in the effectuation of the trade-off if only the legal philosopher could produce something of use to the practising bench and bar.

> "To repeat, the jurisprudence of interests raises the same problem as does natural law. Are there any ideal values which can guide the law in its evolution and furnish assistance in the task of choosing the interests which are to be protected and the extent of that protecion? This problem can be solved by the community only in the light of the particular philosophy which it adopts. Every jurist or judge has his natural law theory—the only difference is that some deliberately set it out and others hold it unconsciously. All individual life proceeds on a choice of values and so must the community. We cannot wait till philosophy solves its problems—urgent problems demand an immediate answer. The orthodox natural law theory based its absolutes on the revealed truths of religion. If we attempt to secularize jurisprudence, where can we find an agreed basis of values?[10]

8. G. Paton, Jurisprudence 135 (D. Derham, ed., 3d ed., 1964).
9. Id. at 124.
10. Id. at 126.

Finally, and it is submitted, as a result of his realization that the aforesaid superficial trade-off has not worked very well in practice and is perhaps more a symptom of deeper trouble than a method of conflict resolution, Paton (during his discussion of natural law and public policy as measures of interests) echoes the complaint *(supra)* of W. Friedmann concerning the law and economic organization:

> "Where the law comes into contact with economic theories, the result is not altogether happy. No evidence is given of what is in accord with public policy—this is left (in spite of some judicial doubts as to capacity) to be decided by the judge on his knowledge of the world. The result of this is that the development of the doctrine has been rather haphazard as it has depended, firstly, on the accidents of litigation and, secondly, on the views of the judges before whom the problem arose. Especially in relation to economic problems, the law has failed to develop a consistent and realist theory. Moreover, public policy has an essentially negative function—in the main it destroys certain types of agreements and transactions: only rarely can it be used to create a positive protection of interests. Natural law may claim to be the measure of all interests: public policy is only one of many doctrines used by the common law for the protection of particular interests.[11]

Suffice it to say that jurisprudence has not yet broken the bonds of its self-defined insular position. In effect, it merely mirrors the practical labours of the legal plumber as it strives to formulate new theories (or to destroy some of the old ones) to aid him in the performance of his circumscribed duties. It is submitted that the law will never develop its full capabilities in North American society so long as it fails to recognize its role as a structural and directional determinant combining with economics, politics and the social sciences to set goals for the system while concurrently absorbing and interpreting said goals in its role as a technical aid to the performance of the system.

Economic Theory:

One realizes after fairly extensive study of basic economic principles that the legal thinker has at least one good reason to avoid mixing theories of law and economics: it is, to say the least, a task of staggering proportion. Worse still, one may at some point in his analysis feel that he is actually accomplishing something, yet at some point he may decide that the whole exercise is utterly without merit, unless, of course, he is an intellectual masochist. Therefore, the lawyer must bring to the task both inspired determination and the patience of a saint.

Perfect Competition and the Invisible Hand:

Any human society must confront the question of economic organization. Samuelson has briefly and adequately summarized the three fundamental and interdependent problems involved in the confrontation:

11. Id. at 130.

> 1) "WHAT commodities shall be produced and in what quantities? That is, how much and which of alternative goods and services shall be produced? . . .
>
> 2) HOW shall goods be produced? That is, by whom and with what resources and in what technological manner are they to be produced? . . .
>
> 3) FOR WHOM shall goods be produced? That is, who is to enjoy and get the benefit of the goods and services provided? Or to put the same thing in another way, how is the total of national product to be distributed among different individuals and families? . . ."[12]

It will be immediately obvious that different societies have tackled these universal problems in many varied ways and the solutions arrived at often involve not only economic thinking but also the contribution of political scientists, philosophers and other social scientists. Canada and the United States operate mixed economies in which both public and private institutions exercise economic control.

The mixed economy or free enterprise system is remarkable in that no individual or organization administers the societal approach to the three aforementioned economic problems.

> "A competitive system is an elaborate mechanism for unconscious coordination through a system of prices and markets, a communication device for pooling the knowledge and actions of millions of diverse individuals. Without a central intelligence it solves one of the most complex problems imaginable, involving thousands of unknown variables and relations."[13]

The economist measures the performance of the modern mixed economy by making use of the "perfect competition" model. This model is a valuable tool of theoretical analysis and gives economists "means for vigorously exploring the interrelationships of certain specified market forces."[14] The requisite conditions of the perfect competition are:

1. The number of buyers and sellers in any goods or resource market must be sufficiently large (the quantity each takes or offers is sufficiently small compared to the total traded) to yield the result that no buyer or seller, acting alone, can noticeably influence the market price.

2. All units of a good or resource traded must be homogeneous in the eyes of buyers. Goods and resources are of uniform quality.

3. It is assumed that any buyer and seller wants to and is able to act in his self-interest.

4. Goods and resources must be perfectly mobile.

12. P. Samuelson, A. Scott, Economics: An Introductory Analysis 15 (Canadian Edition, 1966).
13. Id. at 38.
14. H. Einhorn, W. Smith, Economic Aspects of Antitrust: Readings and Cases 20 (1968).

5. It is assumed that all households and firms possess perfect knowledge concerning all markets.[15]

The prime result of perfect competition under the above conditions is the "Invisible Hand" effect ("Wealth of Nations"—Adam Smith) which dictates that every individual by pursuing his own interests (see condition 3 above) is led as if by an invisible hand, to achieve the maximum economic good for all, without governmental intervention in the competitive system. Also, at any moment there can be only one "market price" for any given good or resource. Simply stated, this market price is set by the combined action of households and firms.

The competition factor in this perfectly competitive market is not comprised of vicious personal rivalry but rather is marked by its impersonal character.[16] The competition factor is governed by the market price which in turn is determined not by any one individual's actions but by the total effect of all separate actions in the market place.

In sum, perfect competition is a static concept which in the long run would produce the following results:

1. "Consumer desires registered in the marketplace would be satisfied to the maximum degree possible from available resources. No rearrangement of inputs or outputs among firms and products would increase consumer satisfactions—given the existing distribution of incomes.[17]
2. Prices would equal long-run average cost of production, including profits sufficient to bring out that production but no more.
3. Productive capacity would be fully utilized in periods of high demand, and firms with idle normal capacity would earn no profits.
4. Changes in consumer demand would induce equivalent changes in productive capacity in each industry.
5. Production would occur at minimum costs, in plants of efficient scale at efficient locations."[18]

Economists term this happy situation "economic efficiency" as brought about by a condtion of perfectly competitive equilibrium.

The Model and Reality: Free Enterprise:

Helpful as the model is, it does not and indeed cannot provide one with a detailed description of the North American free enterprise economy. To state the rigorous conditions of perfect competition is to make manifest their hypothetical character as tools of analysis, not delineation of reality. Because it is of necessity superimposed on a population of human participants, economic organization in North America is often referred to as a situation of imperfect competition. This label is as good

15. See, H. Kohler, Scarcity Challenged: An Introduction to Economics 351 (1968).
16. M. Friedman, **supra** note 1, at 119.
17. P. Asch, Economic Theory and the Antitrust Dilemma 16-37 (see especially, Competitive Optimality) (1970).
18. P. Areeda, Antitrust Analysis: Problems, Text, Cases 8 (1967).

as any other available for the purposes of discussion, mainly because it is broad enough in scope to cover most of the areas which trouble economists and lawyers alike.

It is cogent at this point to note, that although perfect competition is generally conceded to be an unattainable structure, its position as an analytical and theoretical ultimate has given it normative qualities which in varying degrees affect the doctrine of workable competition and public competitive policy. Samuelson visualizes a continuum of competition which graphically demonstrates that the strict conditions of the model are in fact rarely fulfilled by the economy and that there exist several overlapping types of imperfect competition. These latter categories unlike the model, are capable of describing real world situations within the economy. Briefly they are: monopolistic competition, oligopoly and complete monopoly. (There are other forms of imperfect competition but they are not relevant and are accordingly omitted.)

Here is Samuelson's continuum of competition in simple form:[19]

Kind of Competition:	Number of Producers; and Degree of Product Differentiation:	Degree of Control over Price:
Perfect Competition	Many Producers; Identical Products.	None
Monopolistic Competition (Many differentiated sellers).	Many Producers; Many Real or Fancied Differences in Product.	Some
Oligopoly (Homogeneous)	Few Producers; Little or No Difference in Product.	Some
Oligopoly (Differentiated)	Few Producers; Some Differentiation of Products.	Some
Complete Monopoly	Single Producer; Single Product without Close Substitutes.	Considerable

Without becoming unnecessarily enmeshed in economic theory which is not relevant to the discussion herein, suffice it to say that once the dream-like world of perfect competition as defined *supra* is marred by imperfectly competitive constituents, 100% economic efficiency is no longer the automatic result of a laissez-faire market. Thus imperfectly competitive factors in the economy are even more serious deviations from the model than the human frailties noted above. They may result in "wrong" pricing, incorrect and wasteful resource allocation, monopoly profits and improper concentrations of economic power within society.

19. Samuelson, Scott, **supra** note 12, at 516.

The lawyer must believe the economist when the latter refers to inefficiency in the North American economy. Such inefficiency is "economic inefficiency" and has nothing to do (theoretically speaking) with the technical efficiency which dominates contemporary industrial society. (Technical efficiency will be discussed *infra.*) However, the lawyer must remember that the economist is in this area using extremely strict procedures of analysis designed for use with his theoretical ultimates. Samuelson puts the above discussion into proper perspective:

> "All economic life is a blend of competitive and monopoly elements. Imperfect competition is the prevailing mode, not perfect competition. This is a fact, not a moral condemnation. A good approximation of perfect competition may be all one need hope for."[20]

Economic Reality: Workable Competition:

Given the realities of the North American economy and the numerous questions left unanswered by the model, some economists have launched bold new incursions into the problems of economic organization. Accepting the fact that perfect competition is a theoretical ultimate rather than a readily available economic goal, they have set about analyzing the competition factor in economic organization. They seek in fact the best arrangement that is practically attainable. Their goal has been called the workably competitive market system.

Competition in the North American market economy "can and does tend toward the same results as the competitive model, though less precisely or inevitably so."[21] The actual level of prices in competitive markets in the short run more accurately reflects the influence of demand and cost, and thus in the long run helps guide the flow of capital and other resources toward the most productive possible uses.[22] Competition stimulates more efficient production through lower costs(and thus lower prices) and provides powerful incentives for the improvement of product quality. Cogent to any theory of workable competition is this quality factor. It is one of the most important factors not expressly accounted for in the model. Yet competition does promote product innovations, development and long-run cost reduction by way of improved technology and management techniques.

A competitive market tends towards an equitable diffusion of income among firms and consumers who participate therein. Competition also induces continuous market adjustments and thus it is easier and cheaper for the economy to adjust to industrial fluctuations, and for the Government "to carry through effective contracyclical programs of stabilization, primarily utilizing methods of monetary and fiscal policy."[23]

20. Id. at 44.
21. Areeda, supra 18, at 9.
22. S. O. Oppenheim, G. Weston, Federal Antitrust Laws: Cases and Comments 78 (3 ed., 1968).
23. Id. at 78.

Competition tends to produce reasonably competitive prices and an element of choice for buyers and sellers. Professor Areeda of Harvard calls this fairness in economic behavior. This factor leads into areas of social benefit gained from competitive markets which are deeply related to the customs and the laws of both Canada and the United States. Such benefits are related to the economic good done by the competitive market system but at the same time are both simpler and broader:

> "Especially valued is free individual opportunity to carry on business and to prosper on one's merits as determined by a free market. That is, a free market may be seen as emphasizing competition as an aspect of human liberty."[24]

Furthermore, a competitive market system diffuses power within society. Dean Bellan of Manitoba points out that:

> "The broad dispersion of economic power which characterizes a free enterprise society limits the harm which can be done through the abuse of power by individuals who possess it."[25]

"Workable" competition is a concept through which economists attempt to identify the conditions which will provide proper indicia for policy designed to assure society of a substantial number of the advantages that competition should provide. Samuelson has noted that this is "the frontier for economic research and policy"[26] and because it is an unsettled area of economics there are numerous theories relating to market structure and performance which would not be profitable additions to this paper (even if such a comprehensive collection could be assembled in an orderly fashion). Professor Areeda has outlined a workably competitive market structure in detail that is sufficient for the discussion herein:[27]

> "1. There must be an appreciable number of sources of supply and an appreciable number of potential customers for substantially the same product or service . . .
> 2. No trader must be so powerful as to be able to coerce his rivals, nor so large that the remaining traders lack the capacity to take over at least a substantial portion of his trade.
> 3. Traders must be responsive to incentives of profit and loss . . .
> 4. Matters of commercial policy must be decided by each trader separately without agreement with his rivals.
> 5. New traders must have opportunity to enter the market without handicap other than that which is automatically created by the fact that others are already well established there.
> 6. Access by traders on one side of the market to those on the other side of the market must be unimpaired except by obstacles not deliberately introduced, such as distance or ignorance of the available alternatives.
> 7. There must be no substantial preferential status within the market for any important trader or group of traders on the basis of law, politics, or commercial alliances."

24. Areeda, **supra** note 18, at 10.
25. R. Bellan, Principles of Economics and the Canadian Economy 579 (3d ed. 1967).
26. Samuelson, Scott, **supra** note 12, at 552.
27. Areeda, **supra** note 18, at 15-16.

It will be readily appreciated that the theory of workable competition is less exact, less "perfect" than the theory of perfect competition. It attempts to cope with the inherent nuances of the human economic situation. Thus, it provides "a more meaningful and useful policy objective than can be drawn from the competitive ideal."[28] Workable competition theory in a sense expands upon the competitive ideal by evaluating such factors as quality of product and realistic market barriers which are not represented in perfect competition theory, but are important elements of the North American economy.

J. M. Clark developed the idea of workable competition[29] and in so doing raised many basic questions about the nature of competition itself. Economists now analyze competition in terms of market structure, market performance and firm conduct within the market place. Certainly, these categories are interrelated and require empirical analysis within the existing economy before any satisfactory theory of workable competition can be formulated as a definite policy guideline. This may all seem somewhat remote from the model of perfect competition but in truth the model as a theoretical ultimate, is inherently present within the discussion above:

> "There are no objective criteria of workable competition, and such criteria as are proferred are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition."[30]

Legal and Economic Theory: Where the Twain do Meet:

> "The economics of Canada's particular policies to control "combination in restraint of trade", or combines, have not been widely studied. At any given time, no more than a handful of academics have been fully informed on the laws and their administration. This situation is quite unlike that in the United States, where economists, lawyers and historians have long devoted their professional careers to one or another aspect of their antitrust laws . . . Compared with the United States, or even with the United Kingdom, Canadian policy to prevent monopolistic inefficiency is unspectacular. The legal mind is not interested in relative prices, price flexibility, or resource allocation. Yet lawyers advocate, make and administer the policies. The number of economists employed at any stage of an investigation or trial is very small, and frequently zero."[31]

Antitrust law in the United States is extremely cogent to the present discussion. In this field the law does come close to fulfilling an expanded function within the economic organization of society. Here the lawyer must be the economist as well as the advocate of his client's cause. A brief examination of Professor Areeda's text on antitrust analysis[32] will reveal that this is an area unlike any other in the law. The book begins

28. Asch, **supra** note 17, at 118.
29. J. Clark, Toward a Concept of Workable Competition, American Economic Review, 30, June, 1940 at 241-256.
30. Oppenheim, Weston, **supra** note 22, at 91.
31. Samuelson, Scott, **supra** note 12, at 543 & ff.
32. Areeda, **supra** note 18.

with a substantial body of economic theory designed to provide the necessary background to basic antitrust statutes and cases which follow therein. It then relates social and political beliefs to the economic foundation and in so doing provides antitrust law with a more "valid" philosophical core than that of almost any other area of modern law.[33]

> "What is unique to antitrust is the lower-order, more immediate objective, which serves as the means to the final ends. The proximate objective is to maintain a competitive market system, in the belief that such a system ultimately yields progress, efficiency and freedom."[34]

Peter Asch is but one American economist who has examined the antitrust question in considerable detail. His book, "Economic Theory and the Antitrust Dilemma" discusses the interrelationship between legal and economic theories as they apply to the technical problems of antitrust. Predictably, he encounters great difficulty in translating competitive policy into concrete guidelines for antitrust law; mainly because the situation is not one which can be dealt with effectively by the mechanical infusion of economic theory alone. Asch dramatically demonstrates that antitrust law must result from an alliance of economic theory, empirical evidence and public policy in order that its primary goals of progress, efficiency and freedom might successfully be attained.

What is particularly striking about this work however, is not its aforementioned struggle with mere tactical matters but its consistent call for help from the legal theorist. Time after time it is confronted with policy dead ends that jurisprudence could and should help it demolish. Asch, in his competent analysis of antitrust law has discovered perhaps the most prominent and dangerous regime of "the plumber syndrome". The legal thinker has steadfastly ignored the vast policy issues of economic organization in North American society and it is accurate to say that both he and his society continue to suffer the effects of his inadequacies.

JURISPRUDENCE TO THE RESCUE?

Clearly, the legal philosopher has been challenged by economists like Asch, and by a number of the more thoughtful members of the antitrust academy and bar. More important, however, is the explosive mood of the people who make up North American society and who directly confront the law with valid complaints about poverty, pollution, inequality and other social ills.

Economic, social and political realities dictate that the lawyer must shatter the plumber syndrome quickly and completely. If it is not al-

33. Id., see Ch. 1.
34. Asch, supra note 17, at 128.

ready too late (it must be remembered that politicians and voters seldom dally while the lawyer belatedly endeavours to construct a case for "reasonable" action) the law must direct itself to a broader role in the fashioning of societal goals. To do this it very desperately needs a sound philosophical basis to furnish it with both a stable framework and fresh ideas of reform. Here are the groves of the legal philosopher. Here is where jurisprudence can deliver much of what the law has to offer. The question which remains is, will any of this come to pass?

It is the writer's contention that one of the law's most consistent objectives has been the ordering of a free society with a minimal sacrifice of freedom, its most precious element. This presumption in favour of freedom permeates virtually all of the law in North America and, hopefully, still permeates the majority of the people who live within the scope of the law. Economic freedom exists in the realm of contract, commercial and corporate law and reflects the belief that man has a right to participate in economic life just as he has a right to enjoy the fruits of the political and social segments of society. While the legal philosopher has unfortunately declined to explore the area of economic liberty it has become one of the most important factors of contemporary life. It has also become a very contentious issue which threatens to politically resolve itself without much help from the lawyer.

It is submitted that in addition to the compelling economic presumption in favour of a competitive free market as a basis for economic organization there is a very cogent libertarian argument which is substantially in agreement with the bias towards freedom running through the law.

> "Conservatives have failed to alert the community to the interconnection between economic freedom and—freedom. No government would dare be so abusive as ours is of our economic freedoms if we were alive to the relationship. It is a part of the conservative intuition that economic freedom is the most precious temporal freedom, for the reason that it alone gives to each one of us, in our comings and goings in our complex society, sovereignty—and over that part of existence in which by far the most choices have in fact to be made, and in which it is possible to make choices, involving oneself, without damage to the other people. And for the further reason that without economic freedom, political and other freedoms are likely to be taken from us."[35]

To be sure, not all legal philosophers and practitioners will agree with the intense conservative point of view, but the root tenet of freedom in that passage remains the underlying strength of the North American economy. Despite this indisputable fact, legal philosophers have not pursued the study of economic liberties at all, preferring instead to undertake vigorous and extensive analysis of civil and political rights

35. W. F. Buckley, Jr., Up from Liberalism 156 (1959).

("rights" and "liberties" are used in their popular rather than Hohfeldian sense here).

However, such work is valuable not only to the concept of civil liberties law, but also to the basic proposition contained in the present discussion. Civil liberties law is not confined by the injurious constraints of the plumber syndrome. It possesses an enormous scope and very pronounced directional presumptions of theory. Its vital approach to society demonstrates the fact that the days of the value-neutral lawyer may well be numbered.

Argument could be made that the value-neutral lawyer never really existed; not even in the law schools where his legend still exists. Nevertheless, his approach to law has perpetuated the plumber syndrome far past its time of useful existence. The lawyer must now embrace and cultivate his philosophical foundation in North American society. It is the writer's submission that jurisprudence is the necessary means to that end.

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