Law as a Moral Science

The neoclassical social welfare function is an attempt to provide economics with a means of bringing interpersonal comparisons of utility to bear on policy decisions. No branch of economics has as generally accepted a claim to failure as welfare economics, the branch of economics in which constructing social welfare functions lies. Most economists seem to take this failure as evidence that interpersonal comparisons cannot be made with the precision required by policy decisions. The main argument of this and the last two chapters is that this particular failure of economics is merely a failure of approach, and that there does exist an established and successful scientific procedure for making interpersonal comparisons.

Law as a Kuhnian Science

In Part 1 neoclassical economics was appraised by means of the half dozen properties which Kuhn has argued are

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necessary, and perhaps sufficient, for the existence of a science, viewed more as a social system than in terms of its epistemological commitments. On that basis it was clear that economics meets quite well these criteria, which were established originally from a study of the history of natural sciences. We now apply the same rules to law, defining the field so as to make the fit as close as possible to the Kuhnian standard:

1 The first test is the existence of an invisible college defined in terms of commonalty of training and of the network of professional interactions. Law, as a system of science, revolves around the work of appellate courts. The decisions of these courts, including of course in the United States the supreme courts at both the state and federal level, are the ones that make their way into the texts, commentaries, and casebooks that are the lifeblood of the legal profession. The judgments of these courts are taken as the primary basis for the precedent system of judgment in the making of current decisions, and are the ingredients on which budding lawyers are trained. Interconnections are thus established, at least within the American judicial system, among appellate judges, academic lawyers, and practicing lawyers, which provide the system of interactions required by the invisible college concept. One might think of the scientists of this system as consisting of appellate court judges, the lawyers who frequently argue before them, and the academic commentators whose writings are read by this group, with other members of the profession serving, functionally speaking, as apprentices, research assistants, and the like. But there is no real need to dichotomize. Lawyers, like other scientists, are given a careful indoctrination in the appropriate set of commitments in the