

Economic Efficiency and the Law: Distinguishing Form from Substance

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Scholars of law and economics have long been fascinated with and intrigued by claims that legal processes promote economic efficiency. Richard Posner's initial (1973) edition of *Economic Analysis of Law* is a treatise on jurisprudence wherein Posner claims that the entire body of common law rulings can be rendered coherent by recognizing that those rulings promote economic efficiency. The subsequent literature spewed theoretical seeds in several directions. One notable direction concerned whether statute law was also economically efficient (Wittman 1989, 1995; Backhaus 1998), something that Posner originally denied. Another concerned whether efficiency resulted from the intention of judges or was a systemic product of the common law process, a topic that was central to James Buchanan's (1974) long review of Posner (1973). Other efforts replaced Posner's equilibrium framework with a framework that entailed evolutionary development (Rubin 1977, 1982; Priest 1977). Yet another line of thought claimed that the search for legal efficiency was misplaced because the emphasis was better placed on the stability of the legal framework, for it is legal invariance and not the adaptability of law to changing circumstances that facilitates economic efficiency (Epstein 1980, 1995; Rizzio 1980).

This essay explains why claims regarding the economic efficiency of legal arrangements are problematical in any case. In short, those claims mostly confound the form of an argument with its underlying substance. Economic efficiency is a feature of a particular economic model, the model of competitive equilibrium. In evolutionary and other nonequilibrium models, efficiency is undefined. Efficiency pertains to the form and not the substance of an economic model. Efficiency claims are instances of Paretian derivations whereby a logical-sounding argument is set forth to justify what cannot truly be demonstrated but is desired by the speaker all

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the same, as Pareto (1935) sets forth and as Patrick and Wagner (2015) and Wagner (2016) elaborate. Furthermore, the efficiency claim presumes the existence of something that should surely be the task of analysis to establish, namely whether there exists some universal point of agreement common to all members of a society. In this respect, Vilfredo Pareto once asked how it could be sensible to speak of maximizing happiness for a community when happiness for the wolves required eating the lambs while happiness for the lambs required the avoidance of being eaten. Even more, to speak of common law or statute law is to speak of some social whole without regard to how that whole is constituted and without regard to the relationships and interactions among the constituent elements of that whole. In other words, there are numerous possible versions of a common law process, with differing operating properties, that can reside within the general rubric of common law.

1 A Quick Review of Some Efficiency Claims

Posner's (1973) *Economic Analysis of Law* was fundamentally a treatise on the coherence of common law. Posner's self-adopted burden was to show that the body of common law rulings can be rendered coherently by recognizing that common law operates to render judgments in favor of economic efficiency. Someone who understood the principles of economic efficiency and who subsequently read through the body of common law rulings would see economic efficiency as the common thread that unites those myriad rulings across time and place. A jurisprudential theory of common law can thus be constructed around economic efficiency as an imperative of the common law process. Subordinate to this primary claim was the claim that statute law did not have the same efficiency properties. Hence, there would seem to be some tendency for societies to be wealthier the more fully legal relationships are governed by common law relative to statute law.

Before distinguishing between form and substance with respect to claims that common law promotes economic efficiency, it may be helpful to set forth briefly a few illustrations that Posner (1973) uses to illustrate the efficiency claim. For instance, in his chapter on property law, Posner explained that a railroad owed a duty of care to people, trespassers, who crossed the tracks at recognized crossing points, but owed no such duty to people who crossed those tracks elsewhere. In contrast, railroads owed a duty of care to trespassing cattle at all times. The difference in treatment between people and cattle reflects economic efficiency, Posner asserts, by invoking claims about the comparative costs of preventing accidents. It would be very costly for a railroad to prevent people from crossing tracks everywhere. Furthermore, trains would mostly encounter people at recognized crossing points, where a duty of care would entail relatively low cost. In contrast, it would be very costly for ranchers to fence their land to keep their cattle from wandering across railroad tracks. Collisions between trains and cattle can be prevented more cheaply by placing the duty of care on railroads rather than placing it on ranchers.

Children were treated differently than adults in this application of economic analysis to law, and this difference was likewise described as illustrating economic efficiency. Children have not yet acquired the full range of cognitive sensibilities that adults mostly have, though children have more acute sensibilities about danger than do cattle or sheep. To this threefold distinction between adults, children, and cattle, the legal doctrine of attractive nuisance reflects recognition of the three levels of cost. Railroads did not owe a duty of care to children who crossed or played on railroad tracks. In this, children were treated like cattle. But such things as railroad turntables would understandably be attractive to children, and here railroads owed a duty of care to watch for children. Hence, legal principles regarding trespass over a railroad's property reflected a threefold distinction among adults, children, and cattle that reflected comparative efficiencies in the avoidance of accidents.

Perhaps nowhere is the claim in support of economic efficiency as providing coherence to common law rulings more fully in evidence than in Posner's treatment of torts, a treatment that Landes and Posner (1987) amplify and extend. The instrument for doing this is Judge Learned Hand's formulation in *United States v. Carroll Towing Co.* [159 F.2d 169 (2d Cir. 1947)]. This case concerned an unattended barge that had broken loose from her moorings in New York Harbor. The legal issue was whether the owner of the barge was negligent in leaving the barge unattended, and thus liable for damages. In his ruling, Hand asserted that negligence in this case depended on three considerations: (1) the likelihood that the barge would break loose from her moorings, (2) the likely damage that would result if the barge did break loose, and (3) the burden involved in ensuring that the barge did not break loose. Hand summarized his judgment by invoking a piece of algebra that has become a staple formulation in the law and economics literature. In particular, liability for negligence was said to result if $B < PL$, where B is the burden or cost of preventing the barge from breaking loose, L is the damage that would result from breaking loose, and P is the likelihood or probability that the barge would break loose.

Judge Hand's formulation of liability in *Carroll Towing* can be readily apprehended according to Coase's (1960) later presentation of efficiency and liability. The owner of the barge would be liable for damages under either of two circumstances. Under one circumstance, the owner of the barge had the right to let his barge wander in the harbor unless the other users of the harbor could buy the barge owner's agreement to tether his barge. Under the alternative circumstance, the owner of the barge had no such right unless he could buy the agreement of the other users of the harbor to leave his barge untethered. Regardless of the initial circumstance, the Hand formula leads to the same assignment of liability as expressed in Coase's subsequent formulation. If the expected cost from the damage caused by a wandering barge exceeded the cost of keeping the barge tethered, the Hand formula yields that outcome regardless of the initial locus of property rights.

Just as this formulation provides a useful framework for thinking about this and related situations, it is also apparent that the three variables in what has come to be called the Hand Formula reflect observer judgments and not unambiguously objective magnitudes. For instance, Hand noted in his decision that it would be

unreasonable to expect a barge to be attended continuously, even in a crowded harbor during war. But Hand also noted that the barge had been left unattended for 21 h, which he declared to be an excessive length of time. While the variables in Hand's formula are judgments and not facts, those judgments can serve as a useful heuristic for organizing thought about this and similar situations. In this respect, Landes and Posner (1987, pp. 96–107) examine 14 cases with respect to the Hand Formula.

The first two of those cases can be used to illustrate how the Hand Formula might be used to lend coherence through economic efficiency to contrasting judgments about liability in tort cases, and with Wagner (1992) providing further amplification. In *Hendricks v. Peabody Coal Co.* [115[1].App. 2d 35, 253 N.E.2d 56 (1969)], a 16-year-old boy dove into an abandoned strip mine that had filled with water. He was injured upon hitting a submerged shelf. The court ruled for the plaintiff, noting that the abandoned mine could have been enclosed by a fence at a cost of between \$12,000 and \$14,000. This cost was low relative to the potential damage from diving into the water. In their review of this case, Landes and Posner (p. 97) declared that “the court was on safe ground in concluding that the defendant had failed to use due care.” In *Adams v. Bullock* [227 N.Y. 208, 125 N.E. 93 (1919)], by contrast, the court ruled against the plaintiff. In this case a 12-year-old boy was swinging an eight-foot long wire as he was walking across a bridge that passed over an electric trolley track. The boy's wire touched the trolley wire, burning the boy. In ruling against the plaintiff, the court held that the injury was an “extraordinary casualty, not fairly within the area of ordinary prevision.”

The contrary rulings in the two cases can be reconciled within the framework of the Hand Formula, Landes and Posner argued. In *Hendricks v. Peabody Coal*, the likelihood that people would find the water-filled mine an attractive swimming hole was high, while the cost of fencing off the hole was relatively small. For *Adams v. Bullock*, the reverse relation held. It is not likely that people would be encountered who were dangling wires while crossing over a trolley track. Furthermore, it would be comparatively expensive to cover all bridges to prevent such situations. The claim on behalf of common law efficiency is that if a set of rulings is separated between those the plaintiff wins and those that the defendant wins, economic efficiency will be on the side of the winners whether plaintiffs or defendants.

It is easy enough to understand why many economists have been attracted to claims that legal processes supported economic efficiency. Yet it is also possible to find cases that seem to point clearly in the contrary direction. Consider two of the many cases that Huber (1988) examines. In one case, a man tried to mount a 16.5 in. tire on a 16 in. rim. To get the tire to hold to the rim, the man had to inflate the tire to 48 lb of pressure per square inch. After the tire expanded when the air heated up after driving for some time, the tire exploded, crashing the car and injuring the man. The man sued the manufacturer on the grounds that the company had not warned him against the dangers of overinflating the tire and of putting the tire on the wrong-sized rim. The man won his case. In a second case, a teenaged boy was burning a candle in his room. Wanting to add aroma to his room, the boy poured cologne over the burning candle, engulfing himself in flames in the process.

The manufacturer was ruled liable for the boy's burns, on the grounds of failing to warn about the flammability of cologne. Consideration of such cases as these almost unavoidable leaves one to wonder whether the claim of economic efficiency is a reasonable scientific finding or a metaphysical ordering principle that speaks particularly strongly to economists.

2 Common Law Efficiency: Science or Metaphysics?

To claim that common law rulings reflect economic efficiency requires a theorist to claim to be able to distinguish objectively what is efficient from what is inefficient. With respect to the preceding set of cases, there might be intuitive plausibility at work in making the aforementioned distinctions regarding the assignment of court verdicts based on economic calculation. Still, intuition is a subjective quality, and people can differ in their judgments. Those who lose most cases probably think they had the better case. The central claim of economic theory, moreover, is that efficient economic outcomes are not subject to determination by outside parties. Rather, efficient outcomes are conclusions drawn from an understanding of the operating properties of a particular institutional arrangement.

Within an institutional arrangement governed by the legal principles of private property, freedom of contract, and liability for harms and damages, the internal logic of the market economy is that transactions will continually move resources from employments that are less highly valued by resource owners to employments that are more highly valued. If such a market economy is conceptualized in equilibrium terms, no unexploited gains from trade will exist. It is not, however, possible to cite any set of economic observations as corresponding to a state of equilibrium within the context of economic theory. Indeed, it is almost surely the case that actual societies are always operating within a nonequilibrium environment because continual experimentation and change is a normal feature of modern life. To recognize this situation, however, is to point to some alternative theoretical framework that conceptualizes a process that operates over some duration of time rather than to conceptualize a state of affairs that exists as some particular instant of time, as Wagner (2010) explains.

Consider the manner in which economists derive cost functions from production functions. To start, production is conceived as a process by which inputs are combined to produce some output. If X is output and a and b are inputs, $X = f(a, b)$. The inputs a and b must be combined to produce X . Typically, those inputs can be combined in various ways, some of them more costly than others. In this respect, it is typically assumed that producers seek to minimize the cost of producing any particular output. To do this requires that they select a combination of inputs such that the ratio of the marginal products of the inputs equals the ratio of input prices. From these production relations, cost functions are readily derived. Perhaps the most notable feature of a cost function is that it creates a separation between situations that are possible and situations that are impossible. A cost function

describes a relationship between cost and output, and with that function derived from assuming that a firm minimizes the cost of producing output. For any given output, any cost measure above the cost function is possible while any measure below that function is impossible.

The cost function is an imaginary construction that is developed by facing a hypothesized firm with different production functions and input prices. Yet economic theory is based on the presumed congruence of those functions with observable reality. Yet there is no way that such a boundary can be observed. As a logical matter, it is impossible to assert that an actual cost of production is below the boundary. Any observed cost of production must either lie on the boundary or above it. Why, then, locate it on the boundary when that boundary is impossible to locate? To declare that common law is economically efficient is to locate legal processes as operating at the boundary between possibility and impossibility. This claim might be a reasonable metaphysical ordering principle, but it cannot be claimed to be a refutable statement about the world of actual experience.

What makes this boundary claim seem reasonable is that it corresponds with reasonable intuitions about human nature within the institutional arrangements governed by private property and freedom of contract. Those arrangements create positions of residual claimacy wherein some people own the residual between the revenue a firm derives from selling its output and the expenses it incurs in hiring the inputs necessary to produce that output. It is reasonable to think that people who receive that residual, which can be negative as well as positive, will prefer larger to smaller residuals. If a residual claimant can develop a lower cost method of producing the same output, that claimant will have strong motivation to shift to that lower cost method. Recognition of this motivation does not demonstrate that production in market economies always takes place along the boundary. Indeed, the simple observation that many firms fail and undergo reorganization is evidence that not all firms operate along the boundary. Still, residual claimacy is an institutional arrangement that yields a plausible basis for thinking that the institutional arrangements of a market economy have a strong tendency to induce firms through experimentation to gravitate toward least-cost input combinations. By extension, something similar could be said about legal processes if they were governed by the same institutional framework.

But legal processes are not governed by that type of framework. Neither are contemporary economic processes for that matter. Much economic activity is organized through governmental entities which operate through a budgetary process that operates in a significantly different fashion from residual claimacy. Buchanan (1969) explains that the cost of an action is the value of the highest-valued alternative action that the chooser rejects in choosing the preferred action. Cost and choice are reciprocals, as the essays in Buchanan and Thirlby (1973) elaborate. The cost of a choice typically differs when it is made under residual claimacy then when it is not. With respect to legal processes, for instance, residual claimacy might lead two commercial litigants to settle a dispute because they are residual claimants to their legal expenses. Should the plaintiff be a governmental agency, however, principles of residual claimacy are not in play. Should the public agency settle the

case, there is no residual for executives or owners of the agency to capture. Whatever expenses of litigation might be saved by settlement will be swept back into the agency's budget. Cost is different for a public litigant than it is for a private litigant, due to the absence of residual claimancy for public litigants. A public litigant who settles a case rather than going to trial has no residual to claim. Either that unclaimable residual is returned to the Treasury or is spent on other activities preferred by agency executives.

Popper (1959) locates the boundary between science and metaphysics according to whether a claim is falsifiable or just verifiable. While Popper's demarcation has received much criticism on various grounds since he first advanced it that demarcation point to a significant distinction is all the same even if falsifiability is incapable of being implemented. When the various controversies are cleared away, what perhaps remains is recognition that there are two forms of verification, one subjective and one objective, or at least intersubjective. In *Carroll Towing*, for instance, the categories in Judge Hand's formulation are subjective in that they pertain to Judge Hand's sense of the matter. No external and objective appraisals of B, P, and L were presented that would command universal assent by their objective quality. This does not mean that judgment is arbitrary in the sense that anything is possible. It does, however, mean that reasonable people can reach different judgments regarding the same situation.

This recognition has implications for claims about legal efficiency. Consider again Posner's illustration of railroads, people, and cattle and his argument that owing a greater duty of care to cattle than to people illustrates economic efficiency at work. With respect to Posner's claim, Tullock (1980) points out that Posner's claim is not accompanied by evidence that speaks to his claim. For instance, Posner asserts that it would be less costly for a pedestrian to choose a path that avoided crossing a railroad track than it would be for locomotive engineer to watch continually for passengers. This might be so, but no evidence is presented on the point. The efficiency claim is not a hypothesis that can be tested, but is rather a logical implication of a prior presumption that common law rulings reflect economic efficiency. If someone presumes that common law rulings reflect economic efficiency, it must be concluded that it is relatively more costly for railroads to exercise care toward passengers than toward cattle. Yet a locomotive engineer who is watching for cattle will unavoidably see pedestrians at the same time, so the marginal cost of watching for pedestrians is zero. Recognition of the joint cost character of watching for cattle and pedestrians refutes the claim that the differences in the duties of care reflect economic efficiency. It would seem to be the case that the desire to treat economic efficiency as giving coherence to the body of common law comes first, and with observations pertaining to particular rulings woven around that metaphysical ordering principle. It is here where Pareto's distinction between logical and nonlogical action becomes relevant to appraising the claims on behalf of common law's ability to promote economic efficiency.

3 Paretian Derivations and Efficiency Claims

It is easy enough to accept that these efficiency claims because they sound reasonably reasonable. But perhaps this reasonable quality reflects a preceding willingness to believe the claim. In this respect, Pareto (1935) advanced the vital distinction between logical and nonlogical action, and with Backhaus (1978) exploring some of the public choice implications of Pareto's distinction. It should be noted at the start that this distinction is not a distinction between rational and irrational, though a number of commentators on Pareto have asserted that it is. For Pareto, all action was rational. In this respect, Pareto would surely have agreed with Szasz's (1961) formulation that mental illness was largely a myth created to make it easier for the speakers to make their speech. For instance, an elderly and wealthy widow with four children who she believes are doing little more than waiting for her to die so they can inherit her wealth, may use her wealth to endow an orphanage, or worse, an asylum for unwanted dogs and cats. If the children can have her declared mentally incompetent, they can contest their mother's will and inherit her fortune.

There might be nothing wrong with the widow's mental faculties. Certainly, leaving her fortune to establish a foundation to support stray animals rather than supporting her adult children who have led shiftless lives is in no way evidence of mental incapacity. Indeed, it could well be evidence of acute mental capacity in recognizing shiftlessness in her children in conjunction with their anticipations of receiving hefty inheritances. In contesting the will, moreover, the adult children could not expect to find a sympathetic judge or jury to support their desires to live shiftless and profligate lives. To be successful in their pursuit of inheritances, the adult children would have to develop derivations that resonated with the sympathies of those would decide about their contestation of their mother's will.

This situation fits nicely Pareto's distinction between logical and nonlogical action. That difference has nothing to do with some actions being rational and others being irrational. The difference is rather due to different environments in which action takes place, with some environments eliciting action of the logical type and other environments eliciting nonlogical types of action. Basically, logical action is the domain of action within market settings while nonlogical action is the domain of action within political and religious settings. All action aims at improving an actor's situation relative to what that situation would otherwise have been. But there are different environments in which action occurs, and the substantive content of rational action plays out differently between those environments that elicit logical action and those that elicit nonlogical action. The former environments correspond to notions of inspection and experience goods, while the latter environments correspond to credence goods.

In market settings, people take actions to alleviate uneasiness they sense. They might be hungry and seek a place to eat. They might be unhappy with their old television and want to get a new one. Whatever the object at which the actor aims, the actor is engaged in a scientific-like process of forming and testing hypotheses. In some cases the qualities of goods can be reasonably well gauged by inspection, as

in looking over items at a salad bar. In other cases, those qualities require some period of experience with the good, as illustrated by a television set. In either case, buyers form images of what they are looking for, and can compare vendor offerings with the prices they are asked to pay.

Furthermore, vendors are in open competition with one another within this particular type of market setting. With experience goods in particular, vendors will have to overcome some understandable reluctance of buyers to buy a product when they cannot determine a product's qualities until after the purchase has been made. There are numerous things vendors do to overcome that reluctance. One important thing is the development of reputation. Products and producers that develop strong reputations for delivering reliable quality will face less resistance in selling experience goods. That reluctance can be lowered further by such practices as allowing returns within 30 days, and with this practice being less costly to producers of reliable products. In other words, logical action for Pareto corresponds to a scientific-like setting where vendors advance claims about the ability of their products to satisfy buyer desires. Potential buyers can test those claims by choosing to buy one product over another, and in a context where various practices and conventions have emerged through the efforts of vendors to overcome possible buyer reluctance, especially with relatively high-priced experience goods.

Not all arenas within which people act conform to the scientific-like setting of logical action where people perform experiments with their resources, choosing outcomes based on those experiments. With respect to the earlier illustration of a widow and her adult children, logical action would pertain to an environment where the children were exploring different options for caring for their mother, making a choice based on the evidence they accumulate. With nonlogical action, by contrast, the desired end is first chosen and the challenge for action is to get the required other people to support that desired end. The children want their mother's estate for themselves and not as a foundation for orphaned animals. But they need support from other people, who have their own values and constraints, to be able to achieve this end. To claim openly and forthrightly that they want their mother's fortune for themselves is unlikely to muster much support. To combine some psychiatric examination with a declaration of wanting to do good for their mother will surely be more effective in getting control of their mother's estate. Reason is still in play with nonlogical action, but it operates within a different environment from ordinary market environments.

Political and religious arenas, Pareto recognized, mostly involve environments where evidence cannot be acquired and acted upon. Voters, for instance, cannot choose their desired politicians or policies. In this alternative environment, political vendors likewise recognize that listeners will not subject a candidate's claims to scientific-like tests because the nature of the settings renders this impossible. Political competition thus revolves around the creation of ideological images by candidates and parties, seeking to construct images that resonate well with voter sentiments. Political candidates are in the same position as the adult children who wanted to gain control of their mother's estate, and had to construct an ideological image that would resonate positively with the sentiments of those who controlled that outcome.

With respect to religion, numerous efforts have been made to render religious belief a matter of logical action by explaining why a person must believe in the existence of God. Some of those arguments invoke a chain of causation that is traced back to an original uncaused cause, and with that uncaused cause pointing to God. Others have made use of probabilistic arguments, as illustrated by Pascal's wager in which a rational gambler would choose to believe in God based on calculations of expected value. In these types of arguments, logic-based arguments are invoked to convince the listener to embrace a belief in the existence of God. These formulations seek to reduce belief to logic, and with the employment of the relevant logic forcing belief upon an otherwise skeptical person.

In sharp contrast was Anselm's approach to God's existence, which is summarized by the title of Barth (1960), *Anselm: Fides Quaerens Intellectum*. In this instance, belief is the point of departure and not the destination, for it is faith seeking understanding. This is Pareto's approach to nonlogical action. Belief precedes action, it is not generated through action, as when repeated satisfaction with a particular product creates brand loyalty. With logical action, an action is taken based on a hypothesis about the consequences of that action. With nonlogical action, a belief or desire creates a corresponding action. To avoid appearing arbitrary, the taker of any particular action must give logical-sounding reasons even though the correct order runs from desired outcome to supporting reasoning.

4 Institutional Arrangements: Generics Versus Specifics

Scholarly controversies over common versus statute law, or over democratic versus authoritarian political regimes, typically operate at a highly aggregate level of discourse. Legal systems are thus distinguished according to whether they operate according to common or civil law systems. Similarly, political systems are distinguished according to whether they are democratic or authoritarian, with democratic meaning that some political officials are selected through election. While this manner of approach is readily susceptible to statistical analysis, the meaningfulness of such efforts is also questionable, especially if there are particular details inside those systems that do significant work in channeling outcomes in particular directions.

With respect to democratic polities, for instance, it is common to distinguish between presidential and parliamentary systems and to use statistics to reveal differences in average values between those classes of regime. This procedure is genuinely informative, however, only to the extent the generic difference in form accounts for the substantive differences between the regimes. Within each class of regime, however, enormous differences are possible in many respects, and those differences may be responsible for the observed differences among regimes. For instance, a democratic regime that operated under a constitutional requirement that all revenue must be raised by a flat-rate tax on all income without exemptions or exceptions would surely exhibit significantly different characteristics than one

where legislative majorities can do whatever they choose with respect to taxation, even if this leads to a majority of the population being exempt from tax. Whether a regime is presidential or parliamentary may pale in significance besides the systemic properties through which revenues are raised.

The same types of issues pertain to the economic analysis of legal systems. The standard distinction between common law and civil law is purely generic, and yet the most significant lines of analysis might require efforts to plumb institutional details regarding those systems. If the devil truly resides in the details, as a piece of ancient wisdom remarks, this will truly be the case. Hogue (1966) and Berman (1983) show that common law practices originated in an environment that more closely resembled what people mean when they speak of free and open competition wherein judges had to attract custom than is true these days. The same term “common law” is used to describe wide differences in the practical arrangements through which law is generated. At an earlier age, common law emerged through decisions of judges and juries as these were subsequently rendered coherent by such codifiers and systematizers as Blackstone (1979 [1765–1769]). Legislation resided in the far background of the common law process in Blackstone’s time. These days, the requirements of legislation reside in the foreground.

In the early days, the common law process was polycentric. The formation of law was a bottom-up process, and with scholars like Blackstone seeking to find and explain the unity that existed among the rulings across different courts. These days, the common law process is monocentric, and with conflicting rulings across jurisdictions being something to be eliminated by a higher court or through legislation, as against being an indication of local differences in relevant sensibilities. To say this is not to say that the old ways were better, but is only to note that common law is a generic or formal term that does not prescribe some particular process. These days, for instance, jurors are silent during a trial and are given parameters to stay within in reaching their determination. At an earlier time, jurors could ask questions during a trial and were participants in the conduct of a trial. Again, to say this is not to make a judgment but is only to note that analysis at the generic level might as much obscure reality as it reveals it.

5 Some Concluding Remarks

There is a bidirectional relationship between law and economics. From one direction, producing law is an ordinary economic activity, as Hogue (1966) explains in his analysis of the entrepreneurial construction of particular causes of action. At any instant there is a social division of labor, wherein such occupations as judges and lawyers emerge through the same processes of economizing action as do all other occupations in society. Among other things, changes in the pattern of occupations and activities through time or among places should be amenable to the same

principles of economizing action. Humans are both cooperative and quarrelsome creatures, and law is necessary both to harness the gains from cooperation and to restrain the destructive power of quarrelsomeness unleashed. At the same time, however, changes in particular details regarding legal arrangements can confer advantages on some while imposing disadvantages on others. The intersection of law and economics provides a fascinating and fecund vantage point for observing the human drama in all of its glory and malice, and which Jürgen Backhaus's writings and editorial activity have done much to illuminate.

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