Linking the Visions

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Law and economics is a methodology that helps answer three types of questions:

- What effect do legal rules have on individuals' behavior?
- How should legal rules be designed to increase human well-being?
- How does the design of legal institutions affect the content of legal rules?

In the area of private law, where law and economics has its main contribution, the focus is on the ability of legal rules to create incentives for private parties to behave in conformity with social goals. How should liability rules in tort law be designed to promote incentives for care and reasonable safety? What remedies for breach of contract provide private transactors with sufficient regard for the interest of their contracting partners? What bundle of ownership rights is necessary to induce creation of new property by individuals? How do trial procedures and settlement patterns affect the value of substantive rights?

Economic theory derives most of its analytical prowess from the assumption that individual decision-makers conduct their affairs in a rational manner, namely, that they are consistent in their pursuit of their subjective goals and interests. A variety of economic methods have been imported into law to sharpen our understanding of the effects that legal rules have on rational actors. The clearer understanding of the incentives of individuals and the pattern by which they will react to social regulation is important for the evaluation of rules and their ability to promote any desirable set of policy concerns. The economist is, in a way, a skeptic who is concerned with the limits of implementation: how far can legal rules affect private behavior and what are the bounds of society’s power to control individuals?

Exploiting such tools, my own research has demonstrated various patterns of behavior that are likely to arise under specific legal rules. For example, in a recent paper with Professor Lisa Bernstein of the University of Chicago (“The Secrecy Interest in Contract Law,” 109 Yale Law Journal 1885), economic analysis was utilized to challenge the wisdom of prominent contract and commercial law doctrines. Consider a party who wishes to sue for remedy for breach of contract. Under current law, this party is required to disclose information about its business operations that is necessary to assess its losses from breach and its actions to reduce the loss. If this aggrieved party has, for any one of numerous reasons, a secrecy interest in these operations, it might be reluctant to sue and undergo the costly scrutiny of its business and the discovery of its private information. This party might, in fact, prefer to entirely forego the compensatory remedy in order to protect its secrecy interest. Recognizing this incentive to protect information suggests that various remedial provisions in the law are ill-suited to provide the relief for which they are intended. Thus, economic analysis demonstrates that the traditional goal of contractual remedies — to make the aggrieved party “whole” — may be better served by remedies such as specific performance and summarily enforced liquidated damages that do not demand proof of actual loss and do not permit the defendant a broad scope of discovery.

The economic analysis is employed here, as in many other places, not to prescribe a social policy, but to better understand the fitness of a particular legal doctrine to achieve its stated goals. In this or in other areas of law, the normative implications of the economic analysis may be embraced, or rejected on the basis of other, non-utilitarian concerns. Either way, the analysis highlights the cost and the feasibility of choosing any social course of action.
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