

Volume 50 | Issue 2

1999

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Recommended Citation

Warren F. Schwartz, *What Do I Do for the Economists*, 50 Case W. Res. L. Rev. 347 (1999)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol50/iss2/18>

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WHAT DO I DO FOR THE ECONOMISTS?

Warren F. Schwartz[†]

I was in Henry Manne's very first "Pareto in the Pines" summer camp for law professors. The effect of the experience, and my effort to gain a command of the economic theory that it inspired, was profound. It is not an exaggeration to say that all of my teaching and research was revised to accommodate the centrality of the economic paradigm in my approach to legal problems. As this process unfolded, I had the extremely good fortune of working with, and being instructed by, outstanding economists. So, I cheerfully acknowledge that economics and economists have done a great deal for me. In this paper, however, I address a different question that I have been pondering for a long time. What have I done for economists and economic theory?

When I say "I," I don't mean to limit the discussion to my personal contribution. Rather I am interested in the contribution of people like me. What I mean by "people like me" are those scholars who have no formal training in economics but do have a sophisticated understanding of the process through which legal rules are formulated and implemented.

With increasing generality, and decreasing egocentricity, I pose three questions and search for what I believe to be a common answer to all of them: (1)(a) Why have extremely able economists been willing to collaborate with people like me? (b) What benefits have they realized from the experience? (2) What is the essential contribution to "law and economics" of people like me? (3) To what extent has economic theory been enriched by economists addressing legal questions and collaborating with people like me?

I do not have definitive answers to any of these questions. What I can offer, however, is three respects in which people like me may have insights which even talented economists working alone may be unable to duplicate.

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I put aside the obvious contribution of establishing what the law is. The relevant portion of the Uniform Commercial Code, for example, could easily be found by a legal assistant with only a superficial understanding of the problem being addressed. In simple terms, people like me are more than "gofers."

The first contribution that I am able to identify is what I characterize as diagnosing the legal problem. Every legal problem implicates a central tension between competing ends, or equivalently, an essential set of tradeoffs. The first step in doing good legal scholarship is to identify this core set of issues. There is a substantial danger that economists will do this poorly. Indeed, I believe that economists often do this poorly and produce an elegant analysis of a trivial aspect of the question under consideration.

A much harder question is what do people like me know that makes us better able to diagnosis the legal problem. My speculation is that we have a better understanding of the complexities of the legal process. The formulation and implementation of legal rules implicates a recurring set of issues concerning the use of language to communicate; the ability to anticipate future events; the information available to and incentives of decision-makers; and the many margins on which the people formulating and implementing legal rules, as well as those whose behavior is affected by the possibility that the legal system will impose a cost on them if they do certain things. Issues like these can, of course, all be translated into formal economic terms. But they interrelate in a complicated way in the process of formulating and implementing legal rules. People like me often understand this complicated process better than economists whose inclination is to abstract from complexity in order to gain a more precise understanding of one aspect of a complicated reality.

The second contribution that people like me can make is to constantly remind the economists that the "law" in law and economics comes before, not after, the "economics." A large body of work by economists about law concerns itself with demonstrating the inefficiencies produced by government intervention. This work has made an important contribution in limiting, and sometimes eliminating, foolish regulation like the former antitrust policy with respect to mergers, government price fixing in transportation, and restrictions on competition among law firms. But inefficient intervention of this kind represents a very small, and relatively unimportant, part of the legal system.

What people like me understand is that investment in human and physical capital and the mutually advantageous exchange of goods and services can only occur because of the existence of a legal foun-

dation. Such foundations permit people to capture a sufficient share of the benefits they create so that they are willing to commit the resources and take the risks required to produce those benefits.

From this perspective, the interesting question is not why there is so much rent seeking and inefficient regulation but rather, how have we managed to provide such a good foundation for socially useful economic activity; especially when some people seek to manipulate government to serve their narrow interests and government officials have such bad incentives to produce socially beneficial law.

This question, of course, has taken on great urgency in the countries that have recently turned to capitalism but do not have the legal structure enabling investment and exchange to occur that has evolved over a very long period in countries like the United States. In these countries, it is necessary to decide both what legal provisions should be employed and how the political system should be designed so that the miracle of a self-interested population and body of government officials with bad incentives producing a good set of laws can be duplicated.

The third contribution that people like me can make is with respect to what I think of as the reentry problem. After a legal problem is diagnosed, an economist may construct a formal model designed to capture the essential interactions that will determine the behavioral consequences produced by the legal provision being studied. The model will, of necessity, abstract from the complex reality in which these interactions occur. It is, of course, only through abstraction of this kind that better understanding can be gained.

When, however, the attempt is made to use the results reached by the formal analysis to provide a basis for a policy recommendation, the complications that have been put aside are once more encountered. It is often difficult to know how strong or general are the policy implications that can be derived from the formal analysis.

People like me may have something to contribute in determining this. Once again it is our grasp of the complexity of a legal system which may permit us to determine better than the economist who has done the formal analysis, exactly how the insights gained through the formal analysis may best be put to practical use in the legal regime being studied.

CONCLUSION

I have long wondered where I fit in the world of law and economics and, even more grandly, the world of economic theory. This question has considerable importance for this Symposium.

Henry Manne's programs have played a large role in inducing many legal academics to adopt the economic paradigm as the essential organizing principle for their teaching and scholarship. He is surely entitled to much gratitude for what he has done for us. Maybe, however, the economists also owe him a debt of gratitude for getting them involved with people like me.