

**ECONOMIC ANALYSIS OF LAW: AN INQUIRY OF ITS
UNDERLYING LOGIC***

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Abstract

Law and economics is a success story of interdisciplinary scholarship, and the success has been attributed to the strength of economics in providing a sound behavioral theory. It is argued in this paper, however, that this is only a partial explanation, for many issues in law are not directly related to human behavior *per se*. As such, in analyzing these issues, the legal economists rely mainly on the analytical logic of economic analysis. This often neglected aspect of economic analysis can be concisely illustrated by an *A-A* 'setup'. The implications of the *A-A* 'setup' are derived.

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1. Introduction

The thriving field of law and economics is a success story of interdisciplinary research, as can be seen from several different angles. First, starting from March 1993, the *Journal of Economic Literature* introduced *Law and Economics* as a field in its classification index, thus signaling a formal recognition of the field. Secondly, both law journals and economic journals have been publishing an increasing number of papers in the area of law and economics, and the number of journals devoted specifically to law and economics is also increasing.¹ Third, a number of law and economics textbooks have been published and are in wide circulation; this can be seen as a clear sign of the maturation of a research area.² Fourth, scholars in this area are not only publishing academic papers, some of them have become federal judges in the US and thus have a chance to influence first-hand the workings of the legal system.³ Fifth, decisions of the U.S. Supreme Court have been shown to be influenced increasingly by the discipline of law and economics.⁴ Finally, the area is not only expanding in the U.S., the birth place of modern law and economics, but also gaining ground in other countries as well.⁵ As such, it is not an overstatement to say that, among the numerous outward expeditions of economics since the 1960s, law and economics has been the most successful.⁶

¹ In addition to the *Journal of Law and Economics*, *Journal of Legal Studies*, *American Law and Economics Review* etc., a new internet journal devoted to law and economics—*Review of Law and Economics*—has been launched in 2005.

² The two most famous are RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3rd ed. 1987, 5th ed. 1998, 6th ed. 2002), and ROBERT D. COOTER AND THOMAS ULEN, *LAW AND ECONOMICS* (4th ed. 2003).

³ Richard Posner became a Judge for the U.S. Court of Appeals in 1981; Frank Easterbrook followed suit soon after.

⁴ See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economics System*, 98 HARV. L. REV. 4 (1984), and the analysis below.

⁵ In *Encyclopedia of Law and Economics* (<http://inprem.rug.ac.be/~gremer/encyc/index.html>) one can access the *Bibliography of Law and Economics*, which has headings such as *Law and Economics in Germany* for over twenty countries.

⁶ Posner and Parisi argue that, “Law and economics is probably the most successful example of the recent surge of applied economics into areas that once were regarded as extraneous to economic analysis.” See Richard A. Posner and Francesco Parisi, *Introduction*, in RICHARD A. POSNER AND FRANCESCO PARISI eds. *LAW AND ECONOMICS* (1997), at ix. In addition, Ulen argues that, “One of the truly remarkable stories of academic scholarship of the late twentieth century is the rise of the field of law and economics. First of the several notable characteristics of this field is its very rapid

Nevertheless, after some forty years of rapid development, there are signs of potential problems coming to the surface. To begin with, the degree of mathematization is unambiguously increasing in law and economics journals. While it is true that mathematics is the language of modern economics,⁷ for most legal scholars the highly mathematical way of reasoning is likely to make law and economics either too difficult to understand or too abstract to be relevant.⁸ As such, while becoming more mathematical may be intellectually useful for law and economics as a research area, it may not be very much for the majority of legal scholars. Alternatively, even though the modern law and economics has been in existence for almost forty years and even though the basic concepts of economics are fairly simple, many legal scholars still seem to find the economic approach hard to accept. And, even among those legal scholars who accept or are sympathetic to economics, a misunderstanding about economics seems to be quite common. Finally, there are a number of Nobel Laureates who have made important contributions to law and economics,⁹ but it has been observed that, still, “the overwhelming majority of law school teachers have no use for economics.”¹⁰ This is indeed an unsatisfactory, or strange, situation for which legal economists are at least partially responsible. Therefore, one of the goals of the present study is, by clarifying the underlying logic of law and economics, to help improve the communication between legal economists and legal scholars.

Although the field of modern law and economics has already had a history of forty years and, therefore, parts of the present paper may seem to be reinventing the

growth.... Second, the field of law and economics has had a profound impact on legal scholarship.... Third, the field has begun to have a marked impact on the law as handed down by federal and state courts.” See Thomas S. Ulen, *Law and Economics: Settled Issues and Open Questions*, NICHOLAS MERCURO ed. LAW AND ECONOMICS (1998), at 201-02. See also the discussion in Bingyuan Hsiung, *The Commonality between Economics and Law*, 15(1) EURO. J. LAW AND ECON. 33, 2004a.

⁷ Posner argues that “the language of modern economics... is mathematics.” See Richard A. Posner, *Nobel Laureate Ronald Coase and Methodology*, 7 J. ECON. PERSP. 195, 201 (1993).

⁸ For instance, it is difficult to think that, in deciding cases, the majority of the judges can master mathematics that is more complicated than Hand’s rule. For Hand’s rule, see POSNER, *supra* note 2, 3rd ed., at 180-83.

⁹ Of the Nobel Laureates, Becker, Coase, Buchanan and Stigler have all published papers related to law. There is no dispute that Becker and Coase have made important contributions to law and economics, but there seems to be no consensus as to whether the same thing can be said of Buchanan and Stigler.

¹⁰ Remark by Professor Mark Ramseyer in personal correspondence, on file with the author.

wheel, there are some important facts that make the present inquiry necessary. First, even though the core concepts of economics are fairly simple, most legal scholars seem to have no use for economics, therefore an attempt is obviously needed to bridge the gap. Secondly, there seems to be very different perceptions concerning economic analysis of law, both among those who are sympathetic and those who are hostile to it. In this paper, an attempt is made to identify the core elements of law and economics, and hopefully the elements will become a common ground on which both groups may agree. Third, the issues covered by law and economics spread over a wide spectrum, and as such whether there exists a fundamental logic that underlies all the inquiries is an intellectually challenging issue. In the present study, a major goal is to derive the underlying logic of law and economics, and then illustrate its implications.

To achieve these goals, the following steps will be taken. In the next section, I will first describe, analyze, and compare the analytical frameworks employed respectively by Coase, Becker and Judge Posner, all important contributors to the development of law and economics. Then, I will try to identify the core elements of the economic analysis of law, and illustrate the core elements by relating them to the frameworks of Coase, Becker and Posner. Afterward, to further illuminate the core elements, by way of comparison I will identify certain perceptions that are not the core elements of the economic analysis of law. Then, two famous intellectual exchanges in law and economics will be used as examples to clarify some possible misunderstandings about law and economics. The final section offers conclusions.

Before proceeding it should be emphasized the relationship between the present study and its target audience. The main target is legal scholars, especially those who are interested in but may not be familiar with economic analysis, and those who are basically against law and economics. It is hoped that the following analysis will illustrate clearly the major insights concerning the methodology of law and economics. In addition, for economists (and legal scholars as well) working in the area of law and economics, it is hoped that the present paper can serve as a reminder that they could, and arguably should, be more explicit and consistent in utilizing economic logic in their analysis. Finally, for economists in general, the present paper may help illustrate that, as economists move into traditionally non-economics (or non-market) territories, there are potential problems that economists have to face and to deal with. As such the economists have to be conscious of the strengths and weaknesses of the economic approach.

2. Coase, Becker, and Posner

In this section, I will illustrate, interpret and compare the analytical approaches employed by Coase, Becker and Posner. There are several reasons for choosing these three as the representatives of law and economics. The most obvious is that all of them have made important, widely recognized contributions to law and economics. Their works have been cited frequently and have often been the focus of discussion. In addition, while all of them are closely associated with Chicago, their analytical approaches are different, thus their approaches are ideal material for analysis and comparison. Finally, their personal involvements with law have been different, and as a result their views as well as expectations towards law and economics are likely to be different. Therefore, analyzing their possibly different views is both intellectually interesting and practically important.

2.1 Coase

Coase has emphasized more than once that his interest is in the economic system and not the legal system, and that he hopes to preach to his fellow economists and not to legal scholars.¹¹ Interestingly, however, the paper he published in 1960 on social cost is the most cited paper both in economics and in law.¹² This is fascinating as well as puzzling. Moreover, even after some forty years since its publication, a consensus concerning the reason of the paper's tremendous influence is still lacking among economists and legal scholars.¹³

¹¹ See RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988), and RONALD H. COASE, *ESSAYS ON ECONOMICS AND ECONOMISTS* (1994). In addition, concerning the social cost paper, Coase argues that, "It was an article written by an economist for economists. It was no part of my intention to contribute to legal scholarship." See Ronald H. Coase, *The Problem of Social Cost: The Citations*, 71 CHI.-KENT L. REV. 809, 809 (1996).

¹² For the citation of Coase's social cost paper in law journals, see Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996). For a relevant discussion of how to interpret the famous Coase Theorem, see Bingyuan Hsiung, *On the Equivalence and Non-Equivalence of James Buchanan and Ronald Coase*, 156, J. INST. & THEO. ECON. 715 (2000).

¹³ It is generally believed that the 1960 article launched the modern law and economics movement. For a discussion of its impact on legal scholarship, see Charles Schweb, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, MICH. L. REV. 1171 (1989). For a critique of Coase's paper, see Bingyuan Hsiung, *Sailing Towards the Brave New World of Zero Transaction Costs*, 8 EURO. J. LAW & ECON. 153 (1999).

Concerning the substantial contents of Coase (1960), the major points made seem to be the following: First, Coase indicates clearly that a tort is reciprocal in nature; secondly, delimitation of rights is a prelude to a transaction, and rights are determined, or assigned, by law; third, the concern for justice “is neither here nor there” in assigning rights, and instead the goal should be to maximize “the value of social production;” fourth, regardless of how the rights are assigned by law, the parties affected will always find ways to circumvent the law, if so doing is beneficial to the parties involved. However, with the possible exception of the third point, these insights do not seem to have general implications analytically. Therefore, as far as the economic analysis of law is concerned, Coase himself did not clearly state a specific analytic framework in this important paper.

Nevertheless, even though Coase did not identify a particular analytical framework himself, the 1960 paper in fact contains a simple, concrete, and persuasive analytical approach that has wide applications. Specifically, Coase adopts what can be termed a benchmark approach; in this article, he employs two different benchmarks. First, he analyzes how resources are utilized when transaction costs are zero, then he uses the world of zero transaction costs as a benchmark to analyze the case where transaction costs are positive. Secondly, when transaction costs are positive, he employs as a benchmark whether the value of production is maximized in analyzing how property rights should be assigned.¹⁴

Compared to Coase’s benchmark approach, traditional legal studies have employed the doctrinal approach; that is, using justice or various schools of thought as the benchmark in reasoning.¹⁵ Therefore, abstractly speaking, Coase’s benchmark approach and the doctrinal approach of conventional legal studies are essentially the same, at least in an abstract sense. This may help explain why Coase’s work has been widely accepted by the legal community.

¹⁴ For a more detailed discussion of Coase’s use of the benchmark approach, see Bingyuan Hsiung, *An Interpretation of Ronald Coase’s Analytical Approach*, 39 *HIS. ECON. REV.* 12 (2004b).

¹⁵ See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HAR. L. REV.* 761 (1987). Additionally, Ulen argues that, “Law was an autonomous discipline. Doctrinal research, the scholarly manifestation of this autonomy, does not pay particular attention to how people respond to legal rules, nor to the policy issues raised by law.” See Thomas Ulen, *Firmly Grounded: Economics in the Future of the Law*, *WIS. L. REV.* 433, 436 (1997).

2.2 Becker

Becker has made important contributions to both sociology and law, but comparatively speaking his influences on sociology are greater. This can be explained by the different amounts of energy he has put into these two areas over the years, as reflected in the number of publications he has published in sociology and in law. Nevertheless, even though Becker has not had a large number of publications in the field of law, his work in this area has been path-breaking.

Specifically, Becker's studies on discrimination and crime were the first attempts to use rational choice theory to analyze legal problems. Becker's work has several important implications. First of all, he did not approach the problems of discrimination and crime from an ethical or normative perspective, but instead viewed the phenomena as the result of rational choice by ordinary people like ourselves. That is, given that human behavior is based on rational choice, the resulting phenomena in non-economic areas can also be analyzed by the concepts as well as the techniques of economics. Moreover, by employing the rational choice model, Becker has demonstrated clearly that phenomena such as discrimination and crime can be fruitfully explained. For instance, when the price of discrimination is higher, the degree of discrimination chosen will be lower; when the fine for speeding increases, the number of speeding cases decreases. Alternatively put, legal punishments are just like monetary prices of goods and services, for they will affect human behavior in a predictable way.¹⁶ As such, Becker convincingly illustrates that the rational choice theory of economics provides a rigorous, powerful and persuasive framework in analyzing legal issues. Seen in this light, it is little wonder that Becker has tremendous confidence in the neoclassical paradigm;¹⁷ concurrently, it is also little wonder that Posner refers to Becker as "the greatest practitioner and exponent of non-market economics."¹⁸

¹⁶ It is also emphasized in COOTER AND ULEN, *supra* note 2, that the laws can be seen as the prices one faces.

¹⁷ The title of the book Becker published in 1976 was THE ECONOMIC APPROACH TO HUMAN BEHAVIOR, and when he accepted the Nobel prize, he felt comfortable (or confident) enough to use "The Economic Way of Looking at Behavior" as the title for his speech. Notice the subtle change from "Human Behavior" to "[all] Behavior."

¹⁸ See Richard A. Posner, *Gary Becker's Contributions to Law and Economics*, 22 J. LEG. STUD. 211, 213 (1993).

Concerning his analytical approach, Becker states explicitly as follows:

The combined assumptions of maximizing behavior, market equilibrium, and stable preferences, used relentlessly and unflinchingly, form the heart of the economic approach as I see it.¹⁹

However, while his analytical approach has produced significant contributions in many areas,²⁰ it implies two weaknesses as far as law and economics is concerned. First, Becker's approach, which can be termed the maximization approach, relies heavily on mathematical derivation and reasoning, but most legal scholars are not accustomed to mathematics, to say the least. It is difficult for them to relate mathematical equations to the real, complex legal issues that they have to deal with. Secondly, Becker's maximization approach is powerful in analyzing certain, but not all, legal issues. For those legal issues that are directly related to behavior or to interpersonal interactions, such as those involving the defendant, the plaintiff, the lawyer, the judge, etc., his approach has generated many important insights. But if the focus of attention is not directly related to behavior, then Becker's approach may not produce any useful insights. For instance, if one wants to analyze the issue of *the reform of the federal courts system*, then it is difficult to imagine how Becker's maximization approach can be applied. Finally, while utility maximization has been fruitfully employed by Becker and economists in general, it is *not* an indispensable ingredient of the economic approach, as will become clear below, and it is not even a relevant technique to analyze most legal issues.²¹

¹⁹ See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976), at 6.

²⁰ Posner argues that, "More than any other economist in the history of the profession, with the possible exception of Bentham, Becker has insisted that the model of rational choice can be applied to all social behavior. (Notice that I have not even qualified this by saying all *human* behavior.)" See, Posner, *supra* note 17, at 213. Of course, not all economists share Posner's appreciation of Becker. For instance, Etzioni suggests that, "God, it is assumed, wired people in ways that make it easier to do neoclassical economics." See Amitai Etzioni, *Socio-Economics: A Budding Challenge*, in AMITAI ETZIONI AND PAUL R. LAWRENCE eds. *SOCIO-ECONOMICS: TOWARD A NEW SYNTHESIS* (1991), at 5. In addition, Coase was obviously aiming at something (or someone) when he remarked that, "Indeed, since man is not the only animal that chooses, it is to be expected that the same approach can be applied to the rat, cat and octopus, all of whom are no doubt engaged in maximizing their utilities in much the same way as does man." See RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988), at 3.

²¹ For an inquiry into this issue, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996). In this book, Posner is obviously not employing Becker's maximization approach. See Bingyuan Hsiung, *A Methodological Comparison of*

In short, Becker's approach may constitute a straightforward economic approach to (human) *behavior*, but it may not provide a universally applicable economic approach to *law*. The logic of the economic analysis of law should be simpler and more fundamental than the maximization approach.

2.3 Posner

Compared with Coase and Becker, Posner is distinct in at least two respects. On the one hand, Coase is concerned with law's influences on economic activities, and has no particular interest in law *per se*; Becker's interest in legal issues has been selective. In contrast, Posner's work covers a very wide range, much wider than the range of issues discussed by either Coase or Becker. On the other hand, both Coase and Becker have been economists in academia, but Posner has been a judge for the Federal Court of the United States since 1981. Therefore, Posner has to deal with legal issues first-hand; legal issues and economic analysis of law are not simply intellectual puzzles and puzzle-solving games for him, for he has to make professional judgement that often has wide ranging impact. Concerning economic analysis, Posner offers a summary as follows:

As conceived in this book, economics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his “self-interest.”²²

In addition, he outlines three fundamental principles of economic analysis:

The first is the inverse relation between price charged and quantity demanded (the Law of Demand).²³

The consumers ... —and the criminal—were assumed to be trying to maximize their utility (happiness, pleasure, satisfactions.)²⁴

Ronald Coase and Gary Becker, 3 AMER. L. & ECON. REV. 176 (2001) for a comparison of the methodological differences between Coase and Becker.

²² See RICHARD A. POSNER, *supra* note 2, 3rd ed., at 3-4.

²³ *Id.* at 4.

²⁴ *Id.* at 6.

The third basic economic principle is that resources tend to gravitate toward their most valuable uses if voluntary exchange—a market—is permitted.²⁵

The three principles have several implications. To begin with, some scholars have equated Posner's approach with the principle of wealth maximization, and have then equated the principle of wealth maximization with the economic approach. As such, to be against the principle is to be against Posner, and to be against Posner is to be against the economic approach proposed by Posner.²⁶ It is clear from the three principles stated above, however, that the principles do not necessarily imply the idea of wealth maximization, and vice versa. Moreover, Posner obviously supports the utility maximization assumption, and as such is analytically closer to Becker than to Coase. Nevertheless, Posner's style of reasoning is actually closer to Coase than to Becker.²⁷ This in turn implies that there is obviously a gap between the fundamental principles Posner states and the logical reasoning he actually employs. If the gap can somehow be bridged, the logic of the economic analysis of law is likely to be more straightforward and, as a result, more persuasive.

2.4 A Short Summary

Before proceeding to the next section and illustrating what can be seen as the underlying logic of economic analysis, a short summary here about the methodologies of Coase, Becker, and Posner is warranted. As is clear from the above discussion, their methodologies cover essentially the whole spectrum of the analytical approach in economics, with Becker on the mathematical end, Coase on the non-mathematical end, and Posner in between. This shows amply that legal issues can be analyzed from various angles, all yielding fruitful results. But for the majority of legal scholars, Becker's heavy use of mathematics implies that he is speaking a language that is different from the one that is commonly used by legal scholars. To increase the dialogue between economists and legal scholars, Becker's approach is not likely to make much headway. Alternatively, Coase's benchmark approach is an intuitively straightforward analytical technique that can be easily adopted. The setup discussed

²⁵ *Id.* at 11.

²⁶ See, for instance, Ronald M. Dworkin, *Is Wealth a Value?* 9 J. LEG. STUD. 191 (1980).

²⁷ In most of Posner's writings, he argues in words and not in mathematics. A comparison of STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1988), with WILLIAM M. LANDES AND RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1988), will clearly show the differences between Posner and Becker—Shavell's style is closer to Becker's way of reasoning than Posner's.

in the next section can be seen as giving Coase's benchmark approach a structure, so that the unique perspective of economics can be easily illustrated and become more operational.

3. The Underlying Logic of Economic Analysis

Among legal economists a general consensus is that economic analysis offers a forceful behavioral theory to study law and related issues.²⁸ By behavioral theory, what is meant is that economists have, through their study of human (and non-human) behavior, come up with a set of principles that reflect, to a certain degree at least, the regularities of human (and non-human) behavior. For instance, two of the three principles stated by Posner—that as the price is lower the demand increases and that man tries to maximize utility—are descriptions of individual human behavior, and the third principle—that resources will gravitate to their most valuable uses—implies a regularity of interpersonal interactions. Similarly, among the three pillars of Becker's maximization approach, stable preferences and utility maximization are characteristics of individual behavior, and the concept of equilibrium concerns the result of interpersonal interactions.

However, the behavioral theory of economics can be interpreted on a more abstract level. Specifically, in addition to being able to analyze (human) behavior in depth, the behavioral theory implies more importantly an *analytical logic* that has been consistently applied and that this logic can be said to be behind all of economic reasoning. As indicated above, when economic analysis is applied to law, the subject matter of the inquiries may not be related to behavior directly. Under these circumstances, what the economic analysis offers is an analytical logic, or, put alternatively, a unique perspective. In this section, an attempt will be made to illustrate the underlying logic of economic analysis from two different angles. First, it will be explained what the logic is and then the abstract concepts behind the logic will be illustrated. Afterward, to illuminate the uniqueness of the logic, it will be argued, by way of comparison, what the logic of economic analysis is not.

²⁸ See RICHARD A. POSNER, *THE PROBLEM OF JURISPRUDENCE*, chapter 12, (1990) and Robert D. Cooter and Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989).

3.1 Economic Analysis

When people (including legal scholars and economists) perceive or analyze a particular matter, say A , they tend to think of various aspects of the matter. To simplify the analysis, we can focus on only two aspects of the matter: the positive aspect and the negative aspect. Then, this particular matter A can be represented as $A: P_1, P_2; N_1, N_2$. The P s and the N s represent respectively the attributes of the positive aspect and negative aspect, and for expository reasons only two P s and two N s are indicated. Compared with this commonly employed way of perceiving things, the unique perspective as implied by economic analysis is more refined. The following two graphs illustrate the contrast:

A: $P_1, P_2; N_1, N_2;$
 A': $P_3, P_4; N_3, N_4;$

A: $B_1, B_2; C_1, C_2;$
 A': $B_3, B_4; C_3, C_4;$

Figure 1: Generalized Version

Figure 2: Economic Analysis

The only difference between *Figure 1* and *Figure 2* is that the positive and negative attributes (P s and N s) in *Figure 1* are replaced by benefits and costs (B s and C s) in *Figure 2*. Since the difference is not significant and the terms of cost and benefit are more familiar to both legal scholars and economists, therefore *Figure 2* will be used to interpret the analytical logic of economic analysis.

On the surface, the meanings implied by *Figure 2* are fairly clear. The B s and C s represent benefits and costs and are not necessarily in terms of money, for they may represent moral, ethical, and other values. Moreover, the choice between A and A' is a tradeoff: If one chooses A , then one obtains the benefits of B_1 and B_2 , but one also has to bear the costs of C_1 and C_2 . Concurrently, choosing A and not A' implies that one cannot enjoy the fruits of B_3 and B_4 , but one also avoids the pitfalls of C_3 and C_4 . As such, the choice of A (or A') means that one gets a mixed bag of costs as well as benefits. Finally, both cost and benefit are subjective concepts, the contents of which are to be determined by the actor who makes choices. But if some overlapping consensus is present, then cost and benefit may acquire objective elements.

Underlying these straightforward interpretations, however, there are more substantial implications of *Figure 2*. First, the meanings of A are supported, and thus determined, by the elements of B_1, B_2, C_1 , and C_2 . As such, the meanings of A are not given or fixed; they are determined either consciously or un-consciously by the actor

who perceives A by recognizing the B s and C s implicit in A .²⁹ Secondly, the *values* of A are supported, and thus determined, by the alternative A' (and A'' , etc.). That is, an assessment of A is not based on an objective or absolute standard, but is based on a comparison or a contrast with respect to other potential alternatives. Third and most importantly, the heart of economic analysis is that, in studying a particular issue, economists will always consciously try to bring in materials or circumstances that are relevant, and then use these as contrasts (A' , and A'' , etc.) to illustrate A . Furthermore, if A is the current situation or current policy, then A' implies a different situation or policy that one may contemplate as a potential alternative.

We can use *Figure 2* to interpret the analytical approaches of Coase, Becker and Posner discussed previously.³⁰ Consider first the benchmark approach of Coase. Take the case of the railway company and the nearby cornfield in the 1960 article as an example. When transaction costs are zero, A is the situation in which the train's owner is liable for the damage caused by the sparks, and A' is the situation in which the train's owner is not liable but the cornfield's owner is liable. Coase argues that, when transaction costs are zero, A and A' are the same—the famous Coase Theorem. When transaction costs are positive, Coase again uses the A - A' setup to examine which property rights assignment can maximize the value of production, whether it is more beneficial, for instance, for the airline to bear the cost of preventing the noise (the A) or for the residents living nearby to be liable (the A').³¹

Next, consider Becker's maximization approach. The concept of maximization implies clearly that one has to, through differentiation or other means, find the maximal value among A , A' , A'' As for the concept of equilibrium, it is neutral in itself—as there are high equilibria as well as low equilibria³²—but if an equilibrium is seen as A , then the non-equilibrium states can be seen as represented by A' . The state of an equilibrium then implies that A is easier to be supported by the

²⁹ In addition, for an illuminating discussion of the importance of interpretative meanings in legal studies, see BRIAN TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* (1997).

³⁰ Notice that we are employing A - A' setup in this very illustration. The methodology implied by *Figure 2* is A' , and the methodology employed by Coase, Becker, and Posner respectively is A .

³¹ In Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), A is relying on the market mechanism in utilizing resources, and A' is forming a firm. It is evident that different entrepreneurs will make different choices under different circumstances between A and A' .

³² For an analysis of low equilibrium, see DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

surrounding conditions and thus is more stable. In this particular sense, it is a better state. Moreover, seen abstractly, the maximization approach is A , and all other approaches can be seen as A' . For an approach that can be used “relentlessly and unflinchingly,” it is obviously superior to other approaches, for Becker at least. In short, Becker’s maximization approach also contains elements of the A - A' setup. As for Posner’s approach, since it will be elaborated in more details in the next section, it will not be discussed here.³³

3.2 The Analytical Logic of A - A'

A comparison of *Figure 1* and *Figure 2* shows clearly the differences between economists and the general public (including scholars in other social sciences). Specifically, *Figure 2* indicates that economists tend to perceive (and analyze) things in terms of cost and benefit. In contrast, *Figure 1* shows that ordinary people tend to perceive things in terms of right and wrong, good and bad, beautiful and ugly, etc.; that is, in terms of various P s and N s as perceived by them. However, these two different ways of perceiving things are nominally different but essentially the same, for conceptually or abstractly speaking, the concepts of right and wrong, etc. can be interpreted as benefit and cost. That is, if one does a right thing and gains satisfaction from doing it, then, from an economist’s point of view, it simply means that one does something that brings him benefit. Moreover, the most important message conveyed by *Figure 1* and *Figure 2* is the very logic of economic analysis—the *relative* perspective and the concept of *alternatives*.

More specifically, it was pointed out above that the meanings of A are fulfilled, and thus determined, by B_1 , B_2 , C_1 , and C_2 . Moreover, the valuation of A is supported, and thus determined, by a contrast of A with respect to A' (and A'' ...), where A' , A'' , etc. are the alternatives of A . Therefore, the logic of economic analysis is not maximization or equilibrium, but to perceive, compare and assess things from a *relative* perspective. In addition, for any goal that is chosen either by an individual, the society, or the law, the economic perspective is unique in trying to consider various potential *alternatives*. The insight can be illustrated by examining two important issues discussed in law and economics.

³³ It may be pure coincidence that the A - A' setup is perfectly parallel to the plaintiff-defendant setup; but it should be evident that by employing the A - A' setup to interpret economic analysis, legal scholars may find economic analysis more understandable and thus acceptable.

First, consider the issue of monopoly. As a general rule, both economists and legal scholars dislike monopoly and favor competition. But why is monopoly deplorable, and what is good about competition? The answer is simple: Competition means that the consumers can choose from two or more *alternatives*, while monopoly implies that consumers have no other *alternatives*. Because of the existence of other alternatives, in a competitive market firms will not, or cannot, grossly misallocate resources. In contrast, a monopoly implies that there are no alternatives and thus the monopolist is likely to utilize resources inefficiently. As such, for economists the number of firms is not important; what is important is whether the consumers have more than one alternative. For even if there are several firms in a particular industry, the consumers may not enjoy the possibility of having more than one alternative, as the firms may decide to collude or form a cartel. *Alternatively*, even if there is only one firm, as long as there are potential entrants, the nominally monopoly may not constitute a problem, for there are (potential) alternatives standing by.³⁴

Secondly, consider the concept of efficiency. One of the criticisms that has often been levied against economics (and economists) is that the concept of efficiency is not neutral, or value free. That is, efficiency is determined according to a particular property rights structure, or more specifically a particular set of economic and political institutions.³⁵ As such, if the existing property rights structure is not satisfactory, then the resulting efficiency does not have any particular legitimacy. This perception of efficiency, however, is misleading. The reason is that, for economic analysis in general and economic analysis of law in particular, the concept of efficiency is important as a means and not as an end. That is, even if the goal is justice (or equality, or any other value), by employing the relative perspective and the concept of alternatives, economists can try to find a better (i.e., a more efficient) way to pursue justice (or other values).³⁶ Consequently, the underlying rationale of

³⁴ Concerning this argument, see Michael A. Spence, *Contestable Markets and the Theory of Industry Structure: A Review Article*, 21 J. ECON. LIT. 981 (1983), for an analysis of the contestable market. In addition, Oliver E. Williamson, *Intellectual Foundations: The Need for a Broader View*, 33 J. LEG. EDU. 210, 213 (1983), also emphasizes the importance of considering alternatives in organizational choices.

³⁵ See Warren J. Samuels and Nicholas Mercuro, *Posnerian Law and Economics on the Bench*, 4 INT. REV. L. & ECON. 107 (1984).

³⁶ Posner argues forcefully that, "The demand for justice is not independent of its price." See Posner, *ECONOMIC ANALYSIS OF LAW*, *supra* note 2, 3rd. ed., at 26. Similarly, he suggests that "we surely are not willing to pay an infinite price, perhaps not even a very high price, for freedom." See Posner, *supra* note 28, at 370.

efficiency is still to put an emphasis, perhaps implicitly, on finding the relatively better alternative in trying to pursue whatever goal that has been chosen.

3.3 What Economic Logic is Not

In the last two sub-sections, the *A-A'* setup has been employed to illustrate the relative perspective and the concept of alternatives, and it was argued that these two constitute the core logic of economic analysis. To further sharpen the contrast between this interpretation and other analytical perspectives, it will be argued in this sub-section what is *not* the core logic of economic analysis. Clearly, the various points discussed below are illustrative and not meant to be exhaustive.

First, economic analysis is not necessarily related to money or monetary prices. While this point is clear and simple, misunderstandings still persist in the literature. From the work of Becker, Buchanan and Posner, however, it is crystal clear that economic analysis can be employed to study not only economic phenomena, but also social phenomena, the political process, as well as legal issues; in all of these endeavors, money and monetary prices have not been, at least explicitly, involved. Secondly, economic analysis is not necessarily related to numbers or calculation.³⁷ This is an extension of the previous point. As non-economists often associate economics with calculation and numbers, they tend to think that economic analysis trivializes human beings by viewing human beings as calculating machines.³⁸ However, among the three economists just mentioned, Buchanan and Posner have very little use for mathematics in their work.³⁹ Their analyses show that they argue

³⁷ For instance, Anderson argues that, "It is mistaken in thinking that a person's valuations always express the orientation of an egotistic consumer." Moreover, she criticizes "the commodity fetishism of welfare economics: the assumption that people intrinsically care only about exclusively appropriated goods, and that they care about their relations with others only for their instrumental value in maximizing private consumption." See ELIZABETH ANDERSON, *VALUES IN ETHICS AND ECONOMICS* (1993), at 200-03.

³⁸ For instance, Makgetla and Seidman argue that, "Few people want their family situation to mirror their relationships on the market. Rather, they value the family precisely because it permits spontaneous behavior and implicit, un verbalized communication — which a calculating approach would exclude." See Neva Seidman Makgetla & Robert B. Seidman, *The Applicability of Law and Economics to Policymaking in the Third World*, 23 *J. ECON. ISS.* 35, 59 (1989).

³⁹ A relevant point: when economists conduct cost-benefit analysis, they usually convert various costs and benefits into monetary values. However, for certain costs and benefits, it is difficult to do such conversions or transformations. Alternatively, the *A-A'* setup implies a comparison and a contrast only, and no transformation or conversion is needed.

from a particular perspective—the economic perspective—and are not calculating with numbers.⁴⁰

The previous two points have often been misunderstandings of non-economists concerning economic analysis; but the following two points represent misunderstandings of some economists (or some legal scholars who accept economic analysis) towards economic analysis.⁴¹

First, economic analysis is not necessarily related to scarcity, not directly at least. It is true that numerous economics textbooks define economics as the science of studying scarcity, and some scholars even equate economics with the issue of scarcity. For instance, Stiglitz argues that, “Economics is the study of how individual, firms, and governments within our society make choices. Choices are unavoidable because desired goods, services, and resources are inevitably scarce.”⁴² But there are a couple of reasons why this perception is misplaced. To begin with, it is true that scarcity implies a particular state which may constitute the driving force behind subsequent human activities; however, the concept of scarcity does not imply a logic of analysis. Moreover, for many issues that are of interest to economists, scarcity is not the major concern. For instance, when the Supreme Court is dealing with a difficult case, it has all the time it needs and it can even reject the case. Therefore, the critical issue for the Justice is to find a (relatively) good decision; the concept of scarcity would not (or does not have to) be a major concern in the whole process.

Secondly, the core logic of economic analysis is not necessarily related to choice.

Just like the concept of scarcity, numerous economics textbooks define economics as the science of choice. For instance, Parkin defines economics in the following way: “Economics is the study of *choices* people make to cope with *scarcity*.”⁴³ While choice is obviously a part of each and every human behavior, it does not constitute the core logic of economic analysis. Specifically, in the A-A’ setup

⁴⁰ As another example, North interprets history from the institutional perspective and obtains many important insights; but it is difficult to associate his analysis with the concept of calculation. See North, *supra* note 30.

⁴¹ See, for instance, Willis P. Whichard, *A Common Law Judge’s View of the Appropriate Use of Economics in Common Law Adjudication*, 50 LAW & CONTEMP. PRO. 253 (1987).

⁴² See JOSEPH E. STIGLITZ, *ECONOMICS* (1993), at 24.

⁴³ See MICHAEL PARKIN, *ECONOMICS* (3rd ed. 1996), at 8. (emphasis original)

introduced previously, all of the *Bs* and *Cs* and the *A'*, *A''*, etc. are perceptions of either a conscious or un-conscious choice made by the actor involved. But the choice is only a description of the behavior; what is more important is the behavioral characteristics as reflected by the action of choice. Namely, the more important questions are how does one *make choices* and what is the *nature* of a choice? As indicated previously, economic analysis adopts the *relative* perspective to perceive, interpret, and analyze; and the economist is always trying to use relevant and similar *alternatives* to illustrate, by way of contrast and comparison, the meanings of the subject matter under study. That is, the *A-A'* setup implies both the relative perspective and the concept of alternatives but not the concept of choice, at least not directly. Moreover, it was pointed out above that the subject of analysis may not be directly linked to behavior—for instance, the problem of the federal courts system—and consequently the importance of the idea of choice is greatly reduced. In analyzing these and other issues, economists are obviously employing the logic implicit in the economic analysis and are not emphasizing the analytical concept of choice.

The four points just stated are likely to cause disagreement even among die-hard economists. However, the goal of the present study has been, by taking a more extreme stand, to re-emphasize the arguments of the previous two sub-sections: The core analytical logic of economic analysis is composed of the relative perspective and the concept of alternatives in perceiving, analyzing and reasoning.

4. Economic Analysis and Legal Reasoning

In the last section, the contrast of *A* and *A'* has been employed to illustrate the analytical logic of economic analysis. In this section, two famous intellectual exchanges in the law and economics literature will be reviewed to further demonstrate the usefulness of the *A-A'* setup.

4.1 Tribe v. Easterbrook

Easterbrook (1984) has reviewed the Supreme Court decisions handed down in 1983.⁴⁴ In this widely cited article, Judge Easterbrook suggests three criteria to evaluate the Court decisions.

⁴⁴ According to Shapiro, *supra* note 12, among all the articles published in law journals in 1984, Easterbrook, *supra* note 4, ranks fifth in the number of citations. In addition, see William M. Landes and Richard A. Posner, *Heavily Cited Articles in Law* 71 CHI.-KENT L. REV. 825 (1996), for a relevant discussion.

Specifically, they are: first, whether the decision is based on *ex ante* or *ex post* analysis; secondly, whether the decision shows a consideration of the incentive impact on the margin; and third, whether the decision differentiates between private-interest legislation and general-interest legislation. While the three criteria reflect different emphases, they all clearly demonstrate the logic of A-A'. Concerning the first criterion, Easterbrook argues forcefully that *ex ante* analysis is more concerned with maintaining a general principle, while *ex post* analysis puts more emphasis on the particularities of the case at hand. Emphasizing the general principle has long term implications and thus will influence the size of the pie; in contrast, stressing the particularities emphasizes the details of individual cases, and is thus equivalent to pondering over the proper division of a pie of fixed size. As such, Easterbrook believes that, judged in the long run, a decision framed in terms of *ex ante* analysis is superior. But this simply means that Easterbrook is implicitly using the A-A' setup to discuss whether A (*ex ante* analysis) is better than A' (*ex post* analysis). Secondly and similarly, a consideration of the incentive effect on the margin versus the effects on the total is again a comparison of A (marginal impact) and A' (total impact). Finally, differentiating the nature of legislation according to whether it is private-interest legislation or general-interest legislation is evidently a contrast of A (private-interest legislation) and A' (general-interest legislation).⁴⁵

By employing these three criteria, Easterbrook examines decisions of the Supreme Court in 1983 and concludes that, judging from the decisions of the Justices, the Court has not only gradually accepted economic analysis but also used economic reasoning to reach decisions. For instance, consider the first decision discussed by Easterbrook, the case of *Clark v. Community for Creative Non-Violence* (CCNV).⁴⁶ The National Park Service of the Department of the Interior of the US Federal Government stipulates clearly that in the parks it oversees within Washington, D.C. camping is prohibited. But the Service granted CCNV the permission to set up two symbolic tent cities in Lafayette Park near the White House, so that the plight of the

⁴⁵ In addition, Easterbrook argues that, “The *alternative* ways of predicting effects of decisions—often unfounded guesses, counterfactual beliefs, and superstition—do not become more attractive just because economic analysis is incomplete.” (emphasis added) See Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 625 (1985).

⁴⁶ Since this case is also discussed in Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?* HARV. L. REV. 592 (1985), it is appropriate to contrast his and Easterbrook’s views on this case. Interestingly, in discussing this case, Easterbrook uses ‘Static Versus Dynamic Perspectives’ as one of the headings—a contrast of A and A’ again. See Easterbrook, *supra* note 4, at 19.

homeless could be vividly demonstrated. Furthermore, the Service even granted the demonstrators the right to lie down in the tents. But the CCNV asked for more; it hoped that the demonstrators could sleep in the tents so that the real homeless people will be attracted and as such their dire situation could be more acutely illustrated. The Service rejected the request and the CCNV sued. Based on the First Amendment, the D.C. Circuit ruled for the CCNV. The Service appealed, and the Supreme Court overruled the decision of the D.C. Circuit and supported the Park Service's position.

We can employ the *A-A'* setup to illustrate clearly Easterbrook's interpretation of the Supreme Court decision:⁴⁷

A: National Park Service wins

*B*₁: The Service's prohibiting camping is not un-constitutional;

*B*₂: The regulation is applicable to all demonstrators and not specifically aimed at CCNV.

A': CCNV wins

*B*₁: The camps are already there, and sleeping in the tents will not cause additional problems;

*B*₂: Allowing the homeless to sleep in the tents will make the demonstration more persuasive;

*C*₁: Once CCNV wins, more demonstrators will apply to set up tents;

*C*₂: The number of people who want to use the parks as living quarters (e.g., to "protest" the high prices of regular hotels) will increase;

*C*₃: More similar requests are likely to follow, and the drawing line of granting or not will be continuously challenged.

From this structure, Easterbrook argues that the Supreme Court comes to the conclusion that if the CCNV wins, then the implicit costs are too high. As such, giving the decision to support the Park Service is to support a general principle and not to the Park Service *per se*. Seen more abstractly, Easterbrook employs the *A-A'*

⁴⁷ See Easterbrook, *supra* note 4, at 19-21.

setup on two different levels. On the theoretical level, he outlines the differences between *ex ante* analysis and *ex post* analysis, clearly a contrast of A-A'. On the empirical level, Easterbrook compares the merits (the *Bs* and *Cs*) of the arguments by both the Park Service and CCNV, and is thus a clear application of the A-A' setup again. Therefore, Easterbrook' analysis vividly demonstrates that the economic analysis of law implies consistently employing a particular perspective in reasoning.

Easterbrook's article attracts much subsequent discussion, and the article by Tribe is one of the most cited.⁴⁸ Tribe's refutations of Easterbrook's article can be separated into two parts: refutations of economic analysis as well as Easterbrook's analysis, and refutations of the Supreme Court decision. Concerning economic analysis and Easterbrook's analysis, Tribe makes several point: First, he believes that, while economics emphasizes efficiency only, law is more concerned with distribution; this refers to the distributions of wealth as well as power both prior to and after the court's decision.⁴⁹ Secondly, he believes that Easterbrook misunderstands the basic functions of the Supreme Court. Specifically, Tribe argues that "[a] court not only chooses *how* to advance preexisting ends, but also affects *what* those ends are and *who* we are to become."⁵⁰ Third, Tribe believes that economic analysis is illusory in claiming to be value neutral but in fact often neglects the procedural justice as well as the "irreducible and inalienable values."

Concerning the Supreme Court decision on *Clark v. Community for Creative Non-Violence* and Tribe's criticism of the Court's ruling, his analysis can also be framed using the A-A' setup.⁵¹

A: National Park Service wins

B₁: The Court is applying the general rule and not aiming particularly at CCNV;

C₁: It will be an impeachment of CCNV's right as protected by the First Amendment of the US;

⁴⁸ See Tribe, *supra* note 44.

⁴⁹ Tribe, *id.* at 594, argues that, "Professor Easterbrook ... does not bother to inquire how those same alternatives will affect the future distribution of power and wealth among those individuals, nor does he care to know how the parties actually before the court initially arrived at their unequal positions."

⁵⁰ See Tribe, *id.* at 595. (emphasis original)

⁵¹ See Tribe, *id.* at 500-601.

C_2 : Prohibiting certain behaviors may cause harm to particular individuals only, thus a law that is nominally “content-neutral” may in fact be substantially selective in essence;

C_3 : The executive branch may over-regulate to protect its self-interest, and in the process harms interest groups that are weak.

A' : CCNV wins

B_1 : Real homeless people will participate, and thus can convey their message to the public more vividly;

B_2 : Demonstrating at the front gate of the government is likely to be more effective in getting substantial aid; as a result, when the homeless problem is alleviated, similar demonstrations will no longer be needed and the park will be in an even better condition;

C_1 : The decision may cause administrative problems to the Park Service.

Generally speaking, the numbers of B s and C s do not necessarily reflect their relative weights. In the case of Tribe’s analysis, however, the numbers of B s and C s assigned to the two opposing sides accurately reflect his viewpoint—he believes that the Court’s ruling for the Park Service is not a good decision. Interestingly, even though Tribe is vehemently against economic analysis,⁵² judging from the framing of his reasoning as illustrated above, his reasoning in fact indicates that he is employing the logic of economic analysis unknowingly!⁵³ It comes as no surprise, then, that after presenting the arguments of both Easterbrook and Tribe, we can now present their arguments—again using the A - A' setup:

A : Easterbrook’s analysis

B_1 : The analysis states clearly three criteria of evaluation;

⁵² Tribe, *id.* at 614, argues that, “The genuinely *constitutional* question presented by the choice of these two very different societies cannot be made with the help of *any* form of cost-benefit analysis of or by *any* utility-maximizing strategy.” (emphasis original)

⁵³ Thus Easterbrook indicates persuasively that, “Even within Professor Tribe’s framework one cannot escape economics.” See Easterbrook, *supra* note 43, at 626.

*B*₂: Both the criteria and his analysis are supported by the behavioral theory of economics that can be verified empirically;

*C*₁: The analysis puts more emphasis on efficiency and less on distributional considerations.

A' : Tribe's analysis

*B*₁: The analysis emphasizes the Court decision's impact on the distributions of both wealth and power;

*B*₂: The analysis illustrates the possibility and necessity of the Supreme Court pursuing certain social values through its decisions;

*C*₁: The analysis does not offer an analysis about feasible, operational ways to pursue important social values;

*C*₂: The analysis does not have any behavioral theory to support the reasoning, i.e., its conjectures are not likely to be verified by reality.

In summary, considering both the benefits and costs (the strengths and the weaknesses) as well as their respective weights of *A* and *A*' , two conclusions seem to follow naturally. First, while Tribe's arguments about the constitution and the Supreme Court are illuminating and inspiring, the reasoning itself lacks the support of a well-founded behavioral theory. As such, it is void of operational content and thus weak in persuasiveness.⁵⁴ Secondly, Easterbrook focuses on a particular decision of the Supreme Court and the likely impact of this decision; in contrast, Tribe puts more emphasis on the functions of the Supreme Court that have vague direct connection to the particular decision under consideration. Consequently, both the focus and the nature of their analyses are different; there is little intersection of their arguments. Based on these two considerations, one tends to conclude that Tribe's accusation of Easterbrook does not stand!

⁵⁴ For instance, Easterbrook believes that if CCNV wins, then the decision will attract more (real as well as nominal) demonstrators. In contrast, Tribe argues that, if CCNV wins, their message will be conveyed more easily to the government and their problem will be dealt with accordingly. As a result, fewer demonstrations will occur. It does not need much pondering to answer the question which prediction is more likely to be correct in the real world—Easterbrook's or Tribe's?

4.2 Malloy v. Posner

On the surface, the exchanges between Malloy and Posner were caused by their different readings of Adam Smith. When examined deeper, however, the issue is related to their different viewpoints concerning law in general and economic analysis of law in particular. The confrontation was initiated as Malloy and Posner first exchanged different opinions in journal articles; then the conflict culminated in a show-down at Syracuse University in 1989. They agreed to a face-to-face debate. Malloy delivered his argument first; he was critical (hostile may have been more accurate) towards both Posner and the economic analysis he represents. Malloy's arguments can be framed with the A-A' setup:⁵⁵

A: Posner's analysis

C_1 : The analysis is not persuasive—because of the values it supports and because of the consequences of supporting these values;

C_2 : The concept of wealth maximization is anti-humanistic as well as anti-liberatarian;

C_3 : Posner opposes slavery based on efficiency consideration, and not because slavery is deplorable under all circumstances;

C_4 : Posner's theory demeans human dignity and personal liberty by analyzing related issues in terms of prices;

C_5 : Posner's analysis is nothing but the slave of so-called scientific economic analysis.

A': Malloy's own analysis

B_1 : The concepts of efficiency, market, and wealth maximization are only means to achieve a higher and more noble end—the ends of liberty and freedom—not ends to be achieved for their own sake;

⁵⁵ See Robin P. Malloy, *Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, in ROBIN P. MALLOY AND JERRY EVENSKY eds. *ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS* (1994).

*B*₂: The values he himself supports are moral, and thus will be supported by the general public;

*B*₃: All human beings should enjoy the rights to life, liberty, and the pursuit of happiness; moreover, these rights are natural and inalienable;

*B*₄: Slavery is wrong under all circumstances;

*B*₅: Man is the master and not the slave of economic analysis.

While it is true that the stark contrast—all *C*s for Posner and all *B*s for himself—is one possible interpretation of Malloy’s arguments, the *B*s and *C*s do unmistakably reflect the deep gulf that Malloy believes lies between Posner and himself.⁵⁶ After Malloy delivered his argument, Posner first revealed that his real name was Doctor Frankenstein and that he was proud of his monster—the principle of wealth maximization; he then argued his case. His own position and his criticism of natural rights argument can also be illustrated by the *A-A*’ setup:⁵⁷

A: Posner’s position

*B*₁: The principle of wealth maximization gives economic libertarianism its operational contents;

*B*₂: In conducting public policy analysis, one can set aside distributive considerations first and focus on the efficiency of resource utilization;

*B*₃: In the area of common law, the judges may not want to be entangled in distributive considerations; instead, they may adopt the neutral concept of wealth maximization as the guiding principle in making decisions.

A’: Position of the natural rights supporters (Malloy’s position)

⁵⁶ The following remarks by Malloy are sufficient to convey his strong feelings towards Posner: “I cannot endorse a theory such as that offered by Judge Posner; and I cannot endorse a person that finds himself unable to clearly and unequivocally renounce the most outrageous consequences of the theory he offers.” See Malloy, *supra* note 53, at 164.

⁵⁷ See Richard A. Posner, *Law and Economics is Moral*, in MALLOY AND EVENSKY, *supra* note 53.

*C*₁: For public policy analysis, natural rights arguments cannot offer a complete, reasonable, and persuasive framework. Any government policy—no matter how interventionist and socialistic in character—can be rationalized by natural rights arguments;

*C*₂: The more basic rights people have, the less room is left for public policy discourse; as a result, representative democracy loses its important functions;

*C*₃: The starting point for natural rights argument is the rights human beings have in the *natural* state; but in the *natural* state, human beings are nothing but unclothed apes—enjoying essentially no rights;

*C*₄: Those who support natural rights have never made it clear why natural rights should be the benchmark for discussion.

From their respective arguments, it is clear that there is a wide gap lying between Malloy and Posner; and the differences cannot all be attributed to the fact that the occasion is a debate and the arguments are expected to be on opposite extremes. More importantly, there does not seem to be any intersection in their dialogue.⁵⁸ For the focus of the present paper, three issues will be considered—two related to Posner’s arguments, and one Malloy’s—to illustrate their differences in reasoning. Hopefully, the discussion will not only illustrate their respective way of reasoning but also provide a bridge by which a connection between Posner and Malloy becomes possible.

The first issue is Posner’s analysis of monopoly. Posner points out that monopoly is bad for three reasons: First, the monopolist will lower the level of production and raise prices, thus the efficiency of resource utilization is adversely affected. Secondly, consumers will face higher prices, and may have to switch to substitutes; thus consumer welfare is harmed. Third, other firms may take the monopolist as an example and try to influence legislation so as to gain a similar status, and resources spent in this pursuit are purely waste. Therefore, in analyzing monopoly, Posner is implicitly employing the competitive market as a benchmark for comparison; alternatively put, the monopoly is *A* and the competitive market is *A*’.⁵⁹

⁵⁸ Evensky argues that “they talked at each other, not with each other—they exchanged words, but not ideas.” See Jerry Evensky, *Professor Malloy, Judge Posner, and Adam Smith’s Moral Philosophy*, in MALLOY AND EVENSKY, *id.* at 196.

⁵⁹ In contrast, Malloy sees monopoly in this way: “monopoly is detrimental because it represents a unified dominating source of power that is able to inhibit the liberty of

The next issue is Posner's explanation of his view of slavery; he makes two forceful remarks concerning slavery.⁶⁰ First, Posner argues that: "Slaves in society are better than free people in the state of nature."⁶¹ Secondly, Posner suggests that, "When slavery took the place of genocide in welfare, that was a moral advance."⁶² In the first remark, Posner uses free people in the state of nature (A') to contrast with slaves in society (A); in the second remark, he employs genocide in warfare (A') as the benchmark to contrast with the fate of prisoners of war in becoming slaves (A). As such, for Posner the meanings of slavery are determined by a comparison with respect to the alternatives. Posner has been consistently trying to adopt relevant alternatives (A', A"...") to illustrate the meanings of the particular issue (A) at hand.⁶³

The third issue is related to Malloy's questions concerning so-called first principles. Specifically, Malloy argues that,

We ask first questions, for example, when we ask, 'Do people have a right to housing; do people have a right to minimal level of medical care?' Economics does not tell us the answer to these difficult first questions.⁶⁴

It is very true that economics and economists cannot offer clear-out answers to those questions; but what is more important is that economists, or good economists anyway, would not frame questions in this way. Instead, they would ask: Between the

individuals precisely because there are no competitive and counterbalancing sources of effective power." While the basic point is not very different from Posner's, one cannot fail to notice that Malloy tries to convey other messages by using terms such as "power" and "liberty." See ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990), at 191.

⁶⁰ Posner's argument concerning slavery was arguably what caused the confrontation which led to the debate. As a matter of fact, Posner's point was to illustrate the concept of wealth maximization by using slavery as an extreme example. Those who criticize Posner have focused on the slavery issue but seem to have missed the real message that Posner wanted to convey. See Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. LAW, ETHICS AND PUB. POL. 85 (1985).

⁶¹ See Posner, *supra* note 55, at 175.

⁶² See Posner, *id.* at 176.

⁶³ In analyzing Posner's writings on the bench, Samuels and Mercurio have a section with the heading of "Balancing." The authors use numerous examples to illustrate that Posner has been very careful to balance different interests. The A-A' setup delicately reflects the concerns of balancing various values, including but not limited to costs and benefits. See Samuels and Mercurio, *supra* note 33, at 116-17.

⁶⁴ See Robin P. Malloy, *The Limits of Science in Legal Discourse—A Reply to Posner*, in MALLOY AND EVENSKY, *supra* note 53, at 181. (footnote omitted)

right to housing and the right to a minimal level of medical care, which right should be realized first, and why? If one (or both) of these rights is to be realized, what level of taxation is the general public is willing to support? The first question is implicitly framed in terms of the *A-A'* setup—*A* is the right for housing and *A'* is the right for medical care; similarly, the second question is also framed in terms of the *A-A'* setup, but the underlying reasoning is a bit more complicated. Specifically, *A* is a certain level of right (of housing or medical care) that comes with a certain amount of taxes; *A'* is to increase both the level of the right and the amount of taxes. Therefore, a trade-off has to be made between *A* and *A'*. In contrast, Malloy's questions imply that *A* is to enjoy the rights and *A'* is not to enjoy those two rights; but to ask for a choice between Malloy *A* and *A'* is not to ask a meaningful question at all for the question bypasses all the relevant, important, and substantial considerations such as how to support the rights, the relative priority of the rights, the proper levels of the rights, etc.

In summary, Malloy's criticism of Posner and his own reasoning contain two serious problems. First, he does not quite understand Posner's way of reasoning—the way of economic analysis—which is to analyze issues with a conditional, relative perspective and always try to find potentially better alternatives. As a result, his criticism of Posner is off the mark by a wide margin. Secondly, Malloy's own reasoning of stressing natural rights and asking first principle questions is in essence making normative remarks. He does not offer a convincing or a supporting analysis for the remarks; thus the remarks become simply value judgements that are void of practical considerations. Furthermore, even granting those value judgements, the economic or legal issues that can be effectively dealt with by employing these value judgements are in fact quite limited. Consequently, Malloy's accusations of Posner are unfounded; the case should be dismissed!⁶⁵

5. Conclusions

In the beginning of the article, it was emphasized that this article is written mainly for legal scholars, especially those who do not understand or who are against economic analysis. Therefore, in this concluding section the major points of the analysis above will be summarized especially for them.

⁶⁵ Of course, the debate leaves one interesting question unanswered: Even though the natural rights arguments are not persuasive, the arguments are still popular in some circles at least. Moreover, the fact that the constitutions of various countries contain natural rights stipulations cannot be brushed away easily. Perhaps economic analysis can suggest an efficiency explanation for this seemingly paradoxical phenomenon.

To begin with, since the publication of Adam Smith's *Wealth of Nations*, economics as a discipline has developed rapidly. Because the major issues were related to goods and services, therefore economics has been closely associated with money and (monetary) prices. However, since the 1960s economists have gradually applied their analytical tools to study so-called non-market behaviors that are traditionally the domains of political science, sociology, law, and other disciplines. Through this endeavor, economics has emerged as not a particular subject matter but a unique analytical approach. It has been argued in this article that the analytical approach can be further separated into two categories: a behavioral theory and an analytical logic. In law and economics, previous discussions have emphasized the behavioral theory of economics, and the behavioral theory of economics has been understood to be the rational choice theory of neoclassical economics. For legal scholars, however, the concepts of utility, maximization and equilibrium are on the one hand difficult to understand and on the other hand somewhat separated from the issues they actually face. In contrast, illustrating the logic of economic analysis may prove a more fruitful way of interpreting economics. Secondly, the underlying logic of economic analysis has been illustrated from two different angles. One was to use the *A-A'* setup to demonstrate the basic framework of economic analysis, and the other was to point out the relative perspective as well as the concept of alternatives that underlie the setup. Also, to relate the logic to economic analysis, Easterbrook's, Tribe's, Malloy's, and Posner's reasonings have all been framed in terms of the *A-A'* setup.

Finally, as has been emphasized in the previous discussion, the *A-A'* setup implies an important insight that tends to be neglected. Specifically, the analyst's own judgment is reflected by the choices of both the *Bs* and *Cs* that are implicit in the perception of *A* and *A'*, *A''*, etc. that are employed to support *A*. As such, the analyst has to consciously think about the proper choices of *Bs* and *Cs* as well as *A'* and *A''*, etc. Furthermore, the analyst has to convince not only himself but others of the choices. If this process of persuasion can be helped by the *A-A'* setup, then economic analysis and/or economic analysis of law is likely to become more persuasive. As a result, while one may not be able to find the best answer to the problems one faces, at least one is confident that one has in command *a better way* to try to find the best answer!

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