1997

Judges and Economics: Normative, Positive, and Experimental Perspectives

Saul Levmore

JUDGES AND ECONOMICS: NORMATIVE, POSITIVE, AND EXPERIMENTAL PERSPECTIVES

SAUL LEVMORE*

The question of how judges ought to use economics depends in large part on the sort of law and economics a judge practices, in some part on the judge's ability to do it well, and in a small way on the long-term view one takes of what the community of judges is engaged in accomplishing.

I. NORMATIVE AND POSITIVE STRATEGIES

One struggles to express anything but mixed feelings about the normative use of law and economics in judicial decisionmaking. When judges are wise, when they correctly perceive the behavioral effects of their decisions, or when they can see how their opinions might control other decisionmakers, they are tempted to set the world right. A practical (and undemocratic) way to think of this is from the perspective of comparative institutions: when judges seem better at policymaking than legislatures or agencies, it is enticing to ask judges to do more rather than less.[1] There may be a useful analogy here to comparative law, for a similar question might be asked regarding the extent to which judges ought to copy

* Brokaw Professor of Corporate Law and Albert Clark Tate, Jr. Professor, University of Virginia School of Law.

1. This is, for example, the impression most participants had at the Twelfth Annual National Student Federalist Society Symposium on Law and Public Policy, "Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law," hosted by Duke University in 1993. Judge Easterbrook spoke eloquently and sensibly about a variety of regulatory problems, so that it would be hard to defend a decision not to delegate more authority to this talented decisionmaker. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994). Of course, other judges might have elicited different reactions.

judicial decisionmaking in other—and even in foreign—jurisdictions. As with law and economics, being a bad comparativist is easy because the semiliterate observer might miss the importance of culture or of other coordinate rules. On the other hand, other jurisdictions may have developed wise solutions to difficult problems and one risks playing the fool in ignoring their evolution and decisionmaking. Comparative law (or judging) is surely to be encouraged in the hands of the skilled craftsman.

The arguments against the normative application of law and economics scarcely need rehashing here. Much of economics is built on questionable assumptions. Its very design is influenced by the positive character of most social science. It accepts a good deal as exogenously given, when law has the power to change much of the status quo. And the list goes on and on. If the question posed is, "How should judges make normative use of law and economics?", the answer is, "Wisely."[2]

The positive value of law and economics seems richer and less controversial, yet less appreciated. Law and economics has the capacity to uncover explanations for legal rules. Thus, where generations of lawyers have memorized a seemingly arbitrary or even inferior rule, law and economics may suggest an explanation for the survival or appearance of the rule. Sometimes the explanation presents an evolutionary story of the rule, but often the explanation offers a defense of the rule. Thus, a rule that has been criticized as undercompensatory may suddenly seem defensible when the economics-minded observer points out its ability to control moral hazard or to elicit information from a better-informed party. I would describe this use of law and economics as conservative in the sense that it suggests that we temper our zeal for reform with an appreciation that those who came before us often produced ingenious rules whose worth we may be slow to recognize. Any number of areas

2. One might draw here an analogy to the use of law and statistics. How should judges use statistics? In employment discrimination law, and in some of tort law, it seems inconceivable that we would ask our judges to avoid the normative use of statistical evidence and reasoning. But statistics is not a subject that comes easily to many of us, and the law reports are full of examples of poor statistical reasoning. Still, statistical reasoning and evidence will almost inevitably become an increasing part of law and judging. Our hope must be that over time the community of judges, lawyers, and scholars will educate one another in a way that improves the use of this methodology. This view of judges as experimenters is expanded in Part II, *infra*.

of law have been described as chaotic and nonsensical, only to be rationalized through the sort of behavioralist lens offered by law and economics. But these explanations are often subtle. Therefore, the message for judges (and others) may be that they should be in no rush to innovate because time and talent may reveal the utility of inherited rules.

This potential positive value is sometimes further camouflaged by other perspectives such as that offered by legal history. A rule may seem unwise, and a judge or academic or lawyer may "explain" its existence with some historical fact. The implicit argument is that it is safe to innovate away from this rule with no danger of tossing out some ingenious creation of our ancestors. We are familiar with arguments of the form "the rule is x because Senator W wanted jurisdiction over such and such" or "the rule is y because the Framers could not imagine problem z." However, such alternative, plausible explanations can be misleading. The historical explanation may not be sufficient to tell us why a particular rule emerged and survived, especially once we discover that other jurisdictions with different histories evolved toward the same, seemingly objectionable rule. I am inclined to respect the historical explanation but to allow for the possibility that it conceals a deeper, more universal, complementary insight.

II. JUDICIAL DECISIONS AS EXPERIMENTS

I have suggested thus far that skilled judges will be forgiven and even encouraged to make normative use of law-and-economics ideas, and that all judges might be encouraged to use law and economics to appreciate the value of the rules and practices that we have inherited. The first point suggests a kind of activist use of law and economics—or the opposite—depending on one's view of the skill and self-assessment exhibited by judges as social engineers, administrators, and analysts. Another problem lies in skilled judges succeeding with their innovations but encouraging other judges to copy their activism in the name of precedent and other traditions. The second point, regarding the positive use of law and economics, unambiguously suggests conservative rather than activist approaches. However, a third kind of use implied by the study of law and economics may offset much of this second point, and I now turn to this unrecognized role of judges.

Once we accept the idea that judges do more than apply the law, we can turn to various models of the ways in which judges build on one another's work. This is not the place to explore the interaction among judges and the effect of such horizontal and intergenerational interaction on stability and reform of the law, but a straightforward point is that an innovative judicial move can be thought of as an experiment. The experiment may fail because others may work to point out its shortcomings or because we may observe parties absorbing serious transaction costs in their quest to bargain around the experimental rule. But one positive effect of innovative decisionmaking is that, for better or worse, it enriches the data available to future decisionmakers. Thus, judges can do good even when they are wrong.

One may consider the argument that experimentation itself may be of long-term value without considering law and economics, but this argument has special applicability in the law and economics context. Law and economics arguments are often oriented around the question of the behavioral effects of legal rules (or of their alternatives). The methodology suggests that we study reactions to rules. In thinking about such diverse matters as rent control, gender equality in the military, term limits, and contract damages, for example, experience with different legal rules can illuminate sensible decisionmaking about the substance of the rules governing these matters. Future judges and legislatures might therefore gain from some degree of freedom exercised by current judges. In short, an argument (perhaps a surprising one) may be made for the proposition that judges ought to be thought of as a cooperative community of decisionmakers whose efforts will be improved by diverse experiences. In turn, this cooperation or group learning is generated only if there is some flexibility and variety in the members' decisionmaking. Once again, the value of these experiments increases when the innovator has good sense about where and how to experiment and when subsequent judges are less likely to follow or reject path-breaking precedents robotically. Law-and-economics analyses suggest particular areas in which a great deal depends on the magnitude of multiple and often conflicting effects that can be expected from particular legal rules. Perhaps the use of law and economics in judging will yield insight into the question of where innovation is most

valuable in the long-term, cooperative endeavor in which judges engage.