LAW AND ECONOMICS SHOULD BE USED FOR ECONOMIC QUESTIONS

THE HONORABLE DAVID B. SENTELLE*

How should judges use economics? The simple answer to that question is that judges should use economics to analyze economic questions. In other words, they should use the discipline of economics the way they use any other discipline—to determine whether the case of fact and law presented by a party matches up with the real world.

One of the dangers in even such a limited application of economics (or any other discipline, for that matter) is that when a judge applies economics to a case in which economic theory is not reflected in the record, he incorporates it into the decision-making process as though it were part of the record. In so doing, he may deprive the losing litigant of a chance to respond to all assertions of fact.

Law and economics is a useful form of analysis in some circumstances, but once it is cut loose from its roots in antitrust law,[1] its usefulness becomes questionable. The more judges use economics to decide cases that do not turn on purely economic questions, the more their resulting conclusions tend to be either utterly irrelevant to the real questions before the court or so blindingly obvious that they could better be described as stemming from common sense than economic analysis.

One recent decision issued by the United States Court of Appeals for the District of Columbia Circuit exemplifies this principle. In *Crawford-El v. Britton*,[2] a prisoner brought a § 1983[3] action against a prison official, alleging that the official violated

---

* Judge, United States Court of Appeals for the District of Columbia Circuit.

1. *See* LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1 (1977) ("[A]ntitrust differs markedly from most branches of law in that the subjects with which it deals—competition and the kinds of industrial structures which stimulate competition—are also the explicit subjects of a branch of economics, that of industrial organization .... Today, one interested in antitrust cannot ignore economics.").

2. 93 F.3d 813 (D.C. Cir. 1996).

3. 42 U.S.C. § 1983 (1994).

his civil rights by intentionally "misdeliver[ing] boxes belonging to him containing legal papers, clothes and other personal items, thereby violating his constitutional right of access to the courts."[4] The D.C. Circuit reviewed the district court's dismissal[5] of the case en banc "[i]n order to resolve continuing disputes as to how a government official's assertion of qualified immunity, as a defense to a damage action for a constitutional tort, may affect pleading and summary judgment standards where the unconstitutionality of the official's act turns on his motive."[6]

The court fragmented heavily.[7] The opinion that announced the judgment embraced two propositions.[8] First, it explained that the plaintiff in such a case "must do better than 'show that there is some metaphysical doubt as to the material facts'";[9] he must show more than the existence of a "scintilla of evidence" in order to survive a motion for summary judgment.[10] Second, the opinion embraced the view that a judge hearing a summary judgment motion on behalf of a qualifiedly immune public official should not require discovery to go forward unless the plaintiff has in hand evidence of the defendant's motives such that a reasonable jury could find the evidence clear and convincing.[11]

However, the second proposition did not carry the day because one judge, who had been part of a majority supporting the first proposition, applied a law-and-economics analysis to this particular question.[12] He decided that,

> [A]s sure as we are that demand curves slope downward and that there will be more of a behavior when the price (or penalty) goes down, we can be confident that raising the plaintiff's burden of persuasion will embolden some additional Government officials to take actions that they know are unconstitutional.[13]

---

4. *Crawford-El*, 93 F.3d at 815.
5. *See* Crawford-El v. Britton, 844 F. Supp. 795, 802 (D.D.C. 1994).
6. *Crawford-El*, 93 F.3d at 815.
7. *See id.* at 815, 829, 838, 844, 847.
8. *See id.* at 821.
9. *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).
10. *Crawford-El*, 93 F.3d at 821 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).
11. *See Crawford-El*, 93 F.3d at 821, 839.
12. *See id.* at 839.
13. *Id.*

With all due respect to my distinguished colleague, I think we can be confident of no such thing. I simply do not accept the proposition that government officials are kept from committing conscious, constitutional torts in any measurable (or even immeasurable) set of cases by knowledge of what the plaintiffs burden of persuasion will be in related § 1983 actions.[14]

The judge continued, arguing that "[W]e cannot know how much additional unconstitutional mischief the rules proposed by [the court's plurality opinion] would elicit."[15] Undaunted, he expressed his certainty that there would be more if courts used that discovery rule. It may be the case that the court should have used a different discovery rule. If so, it is not because more prison guards will deliberately mistreat more prisoners based on what discovery rule a court might choose to apply in resulting litigation. The discovery rule that was, in this case, later to be applied by the D.C. Circuit, is simply an irrelevant factor, but one that magically became critical when it was reasoned out in pristine reasoning by a brilliant, competent, and very excellent federal judge over-applying the analysis of law and economics to non-economic questions.

As my analysis of the *Crawford-El* case suggests, I fear that danger increasingly pervades law and economics as it is applied to questions with little or no economic character. To illustrate this point, I note that one analyst decided that laws prohibiting rape result from society's determination that the displeasure to the rape victim outweighs the pleasure to the rapist.[16] I will not deny that this is a possible reason for the rape laws but I suggest that it is not the main reason. I suggest that rape is and should be outlawed because it is immoral—rape offends our most deeply rooted moral norms. Rape is outlawed because it is violent, invasive, and dehumanizing. The fact that it will not survive an economic analysis adds little, if anything, to the plethora of good reasons for outlawing rape. Laws prohibiting

14. As an attorney, I represented a number of public officials, some of them in constitutional tort cases. I do not think any of them went through an analysis of whether or not to violate a person's constitutional rights on the basis of what burden of persuasion would be applied by a federal court in a resulting lawsuit. It is possible that the prison official sued in the *Crawford-El* case thinks of little else, but I doubt it.

15. *Crawford-El*, 93 F.3d at 840.

16. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 218 (1992) ("Rape bypasses the market in sexual relations (marital and otherwise) in the same way that theft bypasses markets in ordinary goods and services, and therefore should be forbidden.").

rape are better understood by examining religion and tradition than economics.

The same analyst suggested that laws prohibiting blackmail result from the fact that legislators have reasoned that the economic value of the conduct of suppressing information in return for an economic transfer results in a negative economic effect and should therefore be avoided.[17] I have known many legislators, and I know that they do not reason at that level. I believe that modern legislators have outlawed blackmail for two reasons. One is that it has historically been illegal and the other is that legislators are often frightened of being blackmailed. The latter is a justification based on self-interest, which I understand is an economic argument. However, it is not the kind of sophisticated economic analysis characteristic of law and economics.

Similarly, I do not think that a thug who stands on the corner in the dark in front of a jewelry store with a brick in his hand calculates the value of the jewels that he sees in that window against the consequences if he gets caught throwing the brick, discounted by the percentage of the chance that he will not get caught.[18] As an attorney, I represented a lot of street thugs, and I do not think they do that.

I do understand that people make intuitive economic calculations. That is, people will engage in a behavior when the reasons for doing so outweigh the reasons for not doing it. To be sure, this point is valid and relevant. It is also such blinding common sense that we do not need to put it under the heading of law and economics. One could reach the same conclusion through a critical analysis based upon law and literature, law and history, or law and country music for that matter. Willie Nelson and Merle Haggard sang a duet a few years ago about why an

---

17. *See id.* at 601 ("The decision to forbid blackmail follows directly from the decision to rely on a public monopoly of law enforcement in some areas of enforcement.... If blackmail were lawful, the public monopoly would be undermined.").

18. Many proponents of law and economics unintentionally ascribe an extremely high degree of intelligence to common criminals through their use of complex mathematical formulas. *See, e.g.,* Richard A. Posner, *The Future of the Law and Economics Movement in Europe,* 17 INT'L REV. L. & ECON. 3, 12-13 (1997) ("[L]et the expected cost of punishment, a measure of deterrence, be EC=pS, where p is the probability of apprehension and conviction and S is the sentence.")

alcoholic kept drinking despite adverse consequences: "Reasons for quitting don't outnumber all the reasons why."[19]

Neither of these musicians ever studied economics at the University of Chicago. Yet they reached the same common sense conclusion that a Chicago economist would have reached. If that is what law and economics (removed from its antitrust roots and applied outside the realm of economic questions) is all about, then I will accept its validity. But I do not accept the necessity of complicated analysis of simple questions.[20] Simple explanations of simple concepts are much better suited for the judicial task.[21]

Law and economics is an excellent way of analyzing economic circumstances confronting the law. But cut loose from economic

---

19. WILLIE NELSON & MERLE HAGGARD, *Reasons to Quit*, *on* PONCHO AND LEFTY (Epic Records, 1982).

20. In sharp contrast to Willie Nelson and Merle Haggard, one scholar educated at the University of Chicago has developed an extremely complex equation in order to describe essentially the same principle. In explaining the seemingly simple concept that burdens of proof are higher in criminal cases because the consequences of criminal cases are more severe, he uses the following formula:

$L = DC + EC\,[kQq_1EC_1 + (1 - k)Qq_2EC_2]$, where:

L = the social loss function

DC = direct costs of litigation

EC = error costs of litigation

Q = quantity of litigation

$(1 - k)$ = fraction of cases where defendant is truly not liable (innocent)

kQ = number of defendants who are truly liable (guilty)

$(1 - k)Q$ = number of defendants who are truly not liable (innocent)

q_1 = probability that truly liable (guilty) defendant will be found not liable (not guilty) (Type I error)

$(1 - q_1)$ = probability that truly liable (guilty) defendant will be found liable (guilty)

q_2 = probability that truly not liable (innocent) defendant will be found liable (guilty) (Type II error)

$(1 - q_2)$ = probability that truly not liable (innocent) defendant will be found not liable (not guilty)

EC_1 = error costs per Type I error

EC_2 = error costs per Type II error

See Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 4-5 (1997).

21. For example, the principle described in Lee, *supra* note 20, can be explained simply. In his concurring opinion in *In re Winship*, 397 U.S. 358 (1970), Justice Harlan explained that

> in a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

Id. at 372 (Harlan, J., concurring).

areas, it risks becoming as irrelevant or artificial as the doctrines of critical legal theory, critical racial theory, critical feminist theory, or any of the other one-size-fits-all theories that attempt a self-proving theoretical explanation for the real world.

Excessive use of law and economics in non-economic cases carries the seeds of two kinds of arrogance. The first is professorial arrogance. Some law professors begin discussions of judicial opinions by rejecting the stated reasons of the judges and forwarding statements like "now let's talk about why the judge 'really did' what he did in this case" or questions like "did the judges really do what they say they did in this case?"[22] These practices bespeak a great academic arrogance. The professor is saying that either (a) he knows better than the judge what the judge is about, or (b) he is more honest than the judge about what the judge is about. There is no reason to suspect that there is either greater knowledge or greater intellectual honesty in the legal academy as an institution than there is in the bench as an institution. The advancement by the academy of these claims of superior wisdom and superior honesty is an act of professorial arrogance.

Second, using law and economics as the primary normative control on judicial behavior (as opposed to a mere element of judicial behavior) is an act of generational arrogance. Before our generation, law and economics did not exist as a discipline. For this generation to say that we have a method that will displace all that has been learned over hundreds of years by all of the lawyers and judges in the Anglo-American tradition bespeaks an arrogance that we think ourselves wiser than all those before us.[23]

---

22. Reducing (or attempting to reduce) the judicial decision-making process to any single process, be it conscious or subconscious, is as impossible as it is demeaning to the legitimacy of the judiciary. Unfortunately, this kind of second guessing has become extremely popular. One of my colleagues has, through economic analysis, essentially reduced the judicial decision-making process to a system of criticism avoidance by positing that "[t]he costs to judges of professional criticism are modest, but because the rules of judicial tenure and compensation attenuate the usual incentives that operate on people, judges are likely to be influenced by what in most walks of life is a weak force (criticism)." POSNER, *supra* note 16, at 541.

23. This "generational" arrogance becomes increasingly evident when viewed in light of the logical and legal assumptions under which law and economics devotees operate. As one commentator recently noted, "Law and economics was founded on the notion that 'one can determine the legal implications of any choice or action by looking at the consequences, and then measuring the consequences against some normative criteria—usually efficiency or the aggregation of total social welfare.'" J.B. Ruhl, *The Fitness of Law:*

In conclusion, there is a place for economics in the courtroom, but that place is limited. Law and economics would function as a universal theory, if only the law dealt exclusively with rational actors pursuing economic goals. However, the law must also deal with the irrational and with those who seek uneconomic goals such as revenge, morality, immorality, lust, or sheer cussedness. How should judges use economics? They should use economics to answer economic questions.

Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy, 49 VAND. L. REV. 1407, 1433 (1996) (quoting Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993)). Continuing:

> Hence, the dominant theme of Law and Economics is the "repair" of market failure. In terms not surprisingly reminiscent of Adam Smith's historical theory of legal evolution, Law and Economics thus portrays the common law as an attempt to achieve economic efficiency and posits that efficient rules will be reached regardless of the underlying bases for judicial decisions.

Id. (citing JULES COLEMAN & JEFFREY LANGE, 1 LAW AND ECONOMICS xii (1992)).