Comment

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In one of Truffaut's films, the hero puts his son on a train to summer camp and says, "Practice your violin so that you can become a performer like your mother." The boy calls back, "And if I don't?" His father replies, "Then you shall have to become a critic."

I am going to criticize Henry Hansmann for not performing something that I cannot do myself. Hansmann has surveyed the conjunction of law and economics in detail, and he deserves credit for doing this job well. However, there is something pushing economics into law, something which everyone experiences who works in the area. This push needs to be explained and I do not think that Hansmann has done so.

I want to sketch some of my own ideas about this matter and then show how they relate to the contours of law and economics which Hansmann describes. Lawyers frequently talk about reasonable behavior, and economists frequently talk about rational behavior. The ideal decision maker for purposes of the law is perfectly reasonable. For example, jurors should evaluate evidence reasonably, judges should strike a reasonable balance when rights conflict, manufacturers should not produce unreasonably dangerous products, the victim of a broken contract should take reasonable steps to mitigate damages, etc. By contrast, the ideal decision maker for purposes of economics is perfectly rational. For example, the ideal firm maximizes profits and the ideal consumer maximizes utility.

The push of economics into law can be understood in part by understanding the relationship between legal theories of reasonable behavior and economic theories of rational behavior. When we criticize someone's behavior as unreasonable, we may be criticizing the person's ends or the means by which the ends are pursued. For example, a manufacturer who produces an unreasonably dangerous product may do so because he is indifferent to the resulting harm, in which case his ends are unreasonable. On the other hand, he may produce an unreasonably dangerous product because he has made an error in designing it, in which case he may have chosen unreasonable means to reasonable ends.

By contrast, the economist's concept of rationality is usually used to criticize the means chosen to an end rather than the end itself. For example,
if a firm's goal is to maximize profits, then the firm must equate marginal revenue to the marginal cost. A firm is irrational if it pursues the goal of maximizing profits by setting average revenue equal to average cost. In general, the economist's test for rationality is so weak that a decision maker's behavior will usually pass, regardless of his ends, so long as the ends are pursued consistently.

Thus, reasonable behavior may be defined as behavior which is rationally adjusted to the pursuit of socially acceptable ends. It follows from this definition that a theory of rational behavior is an important component of a theory of reasonable behavior. In my opinion, economics offers a theory of rational behavior which is deeper and more rigorous than any alternative. Consequently, the law is bound to draw upon concepts of rationality developed by economists in order to develop an account of reasonable behavior. The causal push of economics into law is explained by the need of law for a rigorous theory of rational behavior and the availability of such a theory in economics.

An example may illustrate the application of my claims. Hansmann shows that economics has been more successful in dealing with private law than with statutes. Much of private law consists of broad requirements of reasonable behavior, whereas much of public law consists of regulations and procedures aimed at specific objectives of legislators. In so far as economics is a theory of rational behavior, which is an aspect of reasonable behavior, the greater success of economics in private law is to be anticipated.

These comments are reminiscent of the criticism of Hume's theory of causation. Hume asserted that our idea of cause is nothing more than the idea of the constant conjunction of events, and for two hundred years philosophers have argued about what is missing in this definition. Similarly, there is a causal push of economics into law which needs explaining, but it cannot be explained by describing the conjunction between the subjects. The explanation which I have offered must seem cryptic, but it is not my purpose here to develop a novel theory at length. Instead, I hope my remarks prove useful to those who reflect upon the contours of law-and-economics scholarship described in Hansmann's paper.