Law and Market Economy

Reinterpreting the Values of Law and Economics

ROBIN PAUL MALLOY

Law and Market Economy

Reinterpreting the Values of Law and Economics

Robin Paul Malloy

Professor of Law and Economics
Syracuse University, New York

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK www.cup.cam.ac.uk
40 West 20th Street, New York, NY 10011–4211, USA www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain

First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeface Plantin 10/12pt *System* 3B2 [CE]

A catalogue record for this book is available from the British Library

ISBN 0 521 78214 7 hardback
ISBN 0 521 78731 9 paperback

For Margaret
"As Time Goes By"

Preface

In writing this book I see my primary audience as made up of people interested in legal theory, law and society, jurisprudence, applied semiotics, law and interpretation, and in market theory as more generally understood. I suspect that traditional practitioners of law and economics will find much here that is challenging, unfamiliar, and disquieting. I hope, however, that some of them will see this work as an exciting, new, and complementary addition to our search for a better understanding of the relationship between law and market theory.

In undertaking this project, I have benefited greatly from the research support of the Oxford Centre for the Environment, Ethics, and Society ("OCEES") at Mansfield College, Oxford University, where I served as a 1997 Sun Life Visiting Research Fellow, as well as from the Syracuse University College of Law. I also benefited from the feedback, discussion, and support of participants in a number of workshops, seminars, and conferences including: the 1997 Trinity Term Seminar Series of OCEES; the Tenth Round Table on Law and Semiotics sponsored by the University of Massachusetts at Amherst and the Pennsylvania State University; the Eighth Annual Canadian Law and Economics Association meeting (particularly participants in the working papers session on "Frontiers in Law and Economics"); the faculty workshop series at the University of Georgia, College of Law; the Twelfth Round Table on Law and Semiotics held at the Pennsylvania State University; the 1998 meeting of Law and Society (particularly participants in the working papers session on "Interpretation Theory and the Market"); the Tenth Annual Meeting of the Canadian Law and Economics Association; and the 1998 Annual Meeting of the Semiotic Society of America.

I extend special thanks to Peter Bell, Alan Childress, Maurie Cohen, Antonia Layard, and Bhaskar Vira for taking time to discuss some of my ideas for the book, and to Denis Brion, Maggie Chon, Kenneth Dau-Schmidt, Jerry Evensky, and Roberta Kevelson, for reviewing and commenting on various drafts. I thank Neil Summerton and Anne Maclachlan for their help and assistance while I was at Oxford, and

Stacy Crynock for assistance with footnote form. I acknowledge my indebtedness to Robert Moffat and Winston Nagan for introducing me to legal theory, and to Margaret for her support during the duration of my research and writing for this book. I also thank my editor at Cambridge University Press, Finola O'Sullivan, for her patience and guidance during the process of publication, and my copy editor, Katy Cooper, for her helpful assistance in reviewing the final manuscript.

Finally, I should say that I personally benefited from twelve years of ongoing support from Roberta "Bobbie" Kevelson who first turned my attention and then my mind to a consideration of the work of Charles Sanders Peirce. Over those years she constantly pushed me to think about law and about economics in a new and intellectually exciting way. She had a profound influence on the development of my work over those years. In November of 1998 Bobbie departed from this world. Her passing is a great loss to me for if I had never met Bobbie this book would never have been written and I would not be the person that I am today. Thank you, Bobbie.

Contents

1 Introduction

> *An open society, in which an open legal system usually predominates, rests not on the assumption that the world is fully created once and for all, but rather on the belief in the possibility of real change in the world, that is, on the conviction that the universe* becomes *and not that it is, that something really new may be created, and that this real novelty is not manifest in the actual order of things but is present in the evolving concepts of signs which stand for a reinterpretation of values and meanings of relationships between things.*
>
> Roberta Kevelson, *The Law as a System of Signs*[1]

The relationship between law and market theory is one that invokes a variety of opinions. To the traditional law and economics scholar the relationship is positive, efficient, and wealth maximizing. It is a relationship that inherently promotes autonomy, prosperity, and social justice. To others, the relationship may seem exploitative, chaotic, and oppressive. It is a relationship that fosters self-interested behavior and institutions of greed and profit. To me, however, the matter seems more complicated. The relationship between law and market theory is dynamic. It is at one and the same time determinate and yet indeterminate; self-interested and yet community situated. It is not merely an object of investigation or simply a set of institutions. It is a relationship grounded in the human practice of exchange and it therefore involves a continuous process of meaning and value formation.

In this book I explore these meanings and values in a way that goes beyond the boundaries of traditional law and economics. I examine issues related to racial discrimination, surrogate motherhood, prostitution, mortgage markets, environmental protection, international trade, and new technologies, among others. In each of these situations I look closely at the way in which exchange takes place as a dynamic process. I explore the networks and patterns of exchange by placing the individual back into a community context linked to experience, and I suggest that

[1] Roberta Kevelson, *The Law as a System of Signs* 35 (1988) (emphasis in original).

wealth-promoting exchanges are sustainable only in so far as they are embedded within dynamic and multivalued communities. In doing this I introduce the idea of "law and market economy" as a new way of understanding the relationship between law and market theory.

The object of this new approach is different than that of traditional law and economics. Law and market economy uses a form of semiotic interpretation theory to uncover the dynamic process of creativity and sustainable wealth formation, whereas traditional law and economics concerns itself with static analysis and the calculation of contextualized notions of efficiency. The difference between these approaches is important because it influences the nature of our existence as human beings. As such, the difference presents both a challenge and an opportunity to traditional law and economics. It challenges some basic assumptions of an economic analysis of law while creating an opportunity for an expanded jurisprudence of social exchange.

At the outset, since I am crossing three interdisciplinary boundaries (law, economics, and semiotics), it may be helpful for me to frame the three most significant conceptual challenges raised in this work. First, semiotic interpretation theory allows me to question the conventional thinking that positions the primary tension in law and market theory as one between efficiency, and the related concepts of social responsibility, justice, and fairness.[2] In contrast to this view, I suggest that the real conflict is one between *efficiency and creativity.* This paradigm shift breaks rank with the conventional debates in law and economics and in legal theory, but the application of semiotic interpretation theory to the market exchange process reveals that such a shift is fundamental to an understanding of wealth formation.

My conclusion on this point is based on an appreciation of the distinction between efficiency and creativity. Efficiency, the traditional and predominant concern of the law and economics movement,[3] is grounded, as an interpretive matter, in a contextual framework of habit,

[2] For an example of standard considerations, *see, e.g.*, Cass R. Sunstein, *Free Markets and Social Justice* (1999); Herbert Hovenkamp, "Positivism in Law and Economics," 78 Cal. L. Rev. 815, 815–852 (1990) (in particular at 835–851); Richard A. Posner, *Economic Analysis of Law* 16–18, 23–28 (4th ed., 1992); Robin Paul Malloy, "Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics," 36 U. Kan. L. Rev. 210, 210–274; Robin Paul Malloy and Richard A. Posner, "Debate: Is Law and Economics Moral?" 24 Val. U. L. Rev. 147, 147–184 (1990); Robin Paul Malloy, "Equating Human Rights and Property Rights – The Need for Moral Judgment in an Economic Analysis of Law and Social Policy," 47 Ohio St. L. J. 163, 163–177 (1986). For some alternative perspectives *see Law and Economics: New and Critical Perspectives* (Robin Paul Malloy and Christopher K. Braun, eds., 1995).

[3] *See, e.g.*, Posner, *Economic Analysis*, at 1–29; David Barnes and Lynn Stout, *Law and Economics* (1992); Robert Cooter and Thomas Ulen, *Law and Economics* (2nd ed., 1997); Mark Seidenfeld, *Microeconomic Predicates to Law and Economics* (1996).

convention, and continuity. It involves a determinate process of calculation identifiable within a static and closed environment.[4] It is reactive and grounded in the status quo because it is concerned with making the most of our current understanding of market opportunities. In simple terms, it focuses on how we cut the pie rather than how we increase the size of the pie or make an entirely new pie, or perhaps even bake a cake. Creativity on the other hand, is grounded in an environment of potentiality, of discontinuity, and indeterminacy.[5] From a semiotic perspective, it involves a dynamic process of discovery, which is enhanced by an ethical environment of social responsibility. It is by definition proactive and continually evolving.

The distinction between efficiency and creativity, as outlined above, leads me to my second fundamental challenge to traditional law and economics. Using semiotic method, I argue that a primary engine of wealth formation and social prosperity is creativity and, thus, efficiency analysis should not be given primacy in the study of law and market theory. Instead of focusing so much attention on efficiency, we should examine more carefully the process of creativity as related to market exchange and the networks and patterns of interaction in society. Efficiency analysis has a role to play in market theory but it is incapable of adequately addressing creativity because creativity is indeterminate. To understand creativity as a habit-breaking and convention-challenging concept, one must look to the types of legal, ethical and value laden environments most likely to promote creativity through extended and unconventional patterns of thought and interaction. One must identify the types of communities which, by ethics and social values, tend to foster diversity, experimentation, and unconventional networks and patterns of exchange. In other words, creativity must be examined indirectly by reference to the context in which convention-breaking ideas and relationships are encouraged and facilitated. Consequently, social values and ethical norms are central to an understanding of market theory because they relate to the potential for creativity and wealth formation. This position runs counter to the conventional "wisdom" of traditional law and economics.

My third fundamental challenge to traditional law and economics involves an understanding of the process of market choice. I suggest that market choice is not the rational, objective, and scientific product of cost and benefit analysis, but rather the consequence of an *interpretation*

[4] *See* Israel M. Kirzner, *The Meaning of Market Process* 1–54 (1992).

[5] Kirzner, *Meaning*; Roberta Kevelson, *Peirce's Esthetics of Freedom: Possibility, Complexity, and Emergent Value* 1–47 (1993); John K. Sheriff, *Peirce's Guess at the Riddle: Grounds for Human Significance* xiii–xxi, 9–16, 31–49 (1994).

of such incentives and disincentives. This means that market choice, in a system of iterative exchange, is grounded in the process of interpretation and is, therefore, informed by reference to our experiences as participants in dynamic networks and patterns of social intercourse. This distinction is important because the process of interpretation is community based, and because it indicates that even though exchange takes place as a continuous part of a dynamic system, our understanding of the exchange process is shaped by the interpretive "lens" or "screen" through which we view it. Furthermore, this lens or screen, as an indexical reference in semiotics, is grounded in a system of values informed by experience rather than by purely objective and rational choice. In this sense it is, in some respects, subjective and arational, and undercuts the centrality of two key assumptions in traditional law and economics – objectivity and rationality.

Similarly, the interpretation of cost and benefit relationships undercuts the commitment of traditional law and economics to the primacy of methodological individualism because the process of interpretation involves a reference to the community(ies) in which people are positioned. This means that the process of interpretation is always one that displays a certain degree of independence, of inexactness or variance, as no two individuals have exactly the same experiences or point of reference. It is not, however, entirely indeterminate because communities are bound together by conventions that "mark" the limits of authoritative interpretive variance. Consequently, a principal concern of law and market economy is not simply price coordination, nor the question of how to distribute goods and resources efficiently. Rather, it is the mediation of conflicting meanings and values in the exchange process itself. In particular, there is a concern for facilitating an authoritative frame of reference that is capable of addressing both determinate (habit/convention-based) and indeterminate (creativity-based) modes of interpretive logic while promoting: extensive exchange networks; patterns of sustainable wealth formation; and the mediation of value differences between competing interpretive communities. In this regard, law and market economy explores a "world' beyond the boundary lines of traditional law and economics.

In going beyond the boundaries of traditional law and economics I am mapping out a new way of thinking about the relationship between law and market theory. I am arguing that there is a need to expand the nature of market inquiry and I assert that the authoritative positioning of an interpretive screen or indexical reference is significant because it has implications for the patterns and networks of exchange and for the process of wealth formation. I call my method of understanding law and

market theory, "law and market economy." My approach is different, although not unfamiliar, from that of traditional law and economics and it reflects a concern for an important aspect of market theory that is not properly addressed in the current law and economics literature. The focus of traditional law and economics, as I see it, is on the use of economic analysis, as a science of choice, to bring more certainty, objectivity, and impartiality to law. It positions most disagreements over law and social policy as disagreements of fact in which a positive and scientific method of economic analysis can be used to resolve differences.

Law and market economy, in comparison, seeks to understand and to influence, the meanings and consequences of legal economic relationships within a dynamic and complex system of exchange. It is an interpretive approach that positions the market as a place of meaning and value formation and which identifies a wealth-based ethic of social responsibility. It is an approach that investigates different questions than law and economics. It does not seek so much to determine the outcome of transactions as to understand the *meaning* of exchange. It studies problems in a market context and reasons about the relational meaning, value and consequences of particular actions, inactions, or ideas. The law and market economy approach questions the ability of economics to bring certainty, objectivity, or impartiality to law and public policy. More particularly, it focuses attention on disputes in law and social policy that are fundamentally grounded in disagreement as to underlying values rather than to perceptible objects or facts. It seeks, therefore, to focus attention on the *exchange process* – on the networks and patterns of social interaction – rather than on cost and benefit analysis, and it integrates concerns for efficiency while addressing the indeterminate nature of change. In so doing it suggests that a variety of ethical and multidimensional factors are logically consistent with a concern for wealth maximization and social prosperity.

My conception of law and market economy emerges from the application of interpretation theory to the process of exchange. The method of interpretation that I use is grounded in semiotic theory, that is a branch of philosophy concerned with grammar, logic, and rhetoric.[6] My

[6] My approach to interpretation theory is grounded in the semiotic theory of Charles Sanders Peirce. *See The Essential Peirce*, vol. 1 (Nathan Houser and Christian Kloesel, eds., 1992); *The Essential Peirce*, vol. 2 (edited by the Peirce Edition Project, 1998). *See generally*, Roberta Kevelson, *Peirce, Science, Signs* (1996); Kevelson, *Peirce and Freedom*, at 17; Roberta Kevelson, *Charles S. Peirce's Method of Methods* (1987); Kevelson, *Law*; Winfried Noth, *Handbook of Semiotics* 39–47 (1995); Sheriff, *Peirce*; James Jacob Liszka, *A General Introduction to the Semeiotic of Charles Sanders Peirce* (1996); Vincent M. Colapietro, *Peirce's Approach to the Self: A Semiotic Perspective on Human Subjectivity*

use of semiotic theory, as will be explained and applied in this book, involves the investigation of the meaning and value relationships of social/market exchange. As such, my approach might be thought of as "a semiotic of law and market theory," or as "interpretive law and economics," but whatever it is called, the basic point of my inquiry relates to the way in which our networks and patterns of exchange, in fact, create value and meaning. Consequently, the concerns of law and market economy are not merely the economic analysis of legal rules, but rather the market context in which social exchange takes place; takes place as a *process* made coherent and understandable by reference to law.

Law and market economy involves more than an inquiry into efficiency as the source of wealth maximization because it focuses on the social, political, and cultural context in which exchange takes place, and on the way in which our characterization and understanding of the exchange process itself affects wealth creation and social prosperity. Therefore, law and market economy involves the examination and exploration of pressing social problems within an integrative market context – within a reciprocal and multidimensional exchange process, rather than by reference to a particular or specific economic criterion such as efficiency.

Some of my colleagues in law and economics have asked, "But why call this approach 'law and market economy'? What is the difference – don't we all do law and market economy?" To them I suggest that we do *not* all do law and market economy. The concerns of law and market economy, as expressed above, are different in nature and scope from those of traditional law and economics. The law and economics movement, a movement I have been a part of for all of my seventeen years as an academic, is not focused on the meaning and substantive implications of market economy as a system of social exchange. It is not focused on the process of social exchange as a system of continuous substitution and permutation. It is not focused on the cultural, historical, and contextualized nature of exchange nor on the meanings and values generated by such interaction. The law and economics movement is centered around concerns for economic calculation and particularized conceptions of efficiency.[7]

(1989); Karl-Otto Apel, *Charles S. Peirce: From Pragmatism to Pragmaticism* (1995); *Philosophical Writings of Peirce* (Justus Buchler, ed., 1955); Christopher Hookway, *Peirce* (1992); *Reasoning and the Logic of Things: Charles Sanders Peirce* (Kenneth Laine Ketner ed., 1992); Floyd Merrell, *Peirce, Signs, and Meaning* (1997); for additional references *see* below, Chap. 2, n. 3.

[7] *See* Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* 1–93 (1990); Posner, *Economic Analysis*; Cooter and Ulen, *Law and Economics*; Barnes and Stout, *Law and Economics*; Seidenfeld, *Law and Economics* (in particular at 49–60); "Symposium on Efficiency as a Legal Concern," 8 Hofstra L. Rev. 485 (1980); Malloy and Posner, "Debate."

The law and economics movement has always identified itself, its associations, its journals, and law school courses as "law and economics," not as law and market economy. This is not mere coincidence, it is "significant" (meaning that it has consequence in the way we perceive the field) because law and economics has sought to avoid an express concern for the normative and philosophical issues and implications of social organization and exchange within a market context. It has intentionally narrowed the definition and scope of inquiry so as to preclude broader considerations of market economy and to distinguish itself from the rich, but less "scientific," tradition of political economy.[8] This positioning of the law and economics movement, as a positive inquiry into matters of efficiency in law, has mirrored the positioning of economics with respect to its relationship to the other social sciences.[9]

Law and economics, in its reference to economics, has likewise sought recognition for being a more concrete, more scientific, approach to law. Its positive structure of inquiry and argument is meant to radiate a sense of objectivity, a feeling of existential separation between a rule of law and the mere normative squabbles of philosophers, political scientists, sociologists, and other "less insightful" participants in social discourse. As a result of this positioning, the law and economics movement has traditionally frowned upon, outright ignored, or declared beyond its boundaries, normative approaches to the questions of fairness, justice, diversity, and inclusion.[10] It has similarly been unreceptive to problems of interpretation, historical inequality, and cultural and situational difference. This positioning is unfortunate because market theory should contribute to such discussions. As a result of its positioning, the discourse of efficiency, provided by traditional law and economics, is simply unpersuasive to many people when it comes to a wide range of

[8] *See, e.g.*, *Beyond Economic Man: Feminist Theory and Economics* (Marianne A. Ferber and Julie A. Nelson, eds., 1993) (discussing the narrowness of the field); Donald N. McCloskey, *The Rhetoric of Economics* (1985); Donald N. McCloskey, *If You're so Smart: The Narrative of Economic Expertise* (1990) (McCloskey challenges the "science" in economics).

[9] On positive economics *see* Milton Friedman, *Essays in Positive Economics* (1953); Hovenkamp, "Positivism." *See also*, McCloskey, *Rhetoric*; McCloskey, *If You're So Smart*; Donald N. McCloskey, *Knowledge and Persuasion in Economics* (1994); Thorstein Veblen, *The Place of Science in Modern Civilization and Other Essays* 1–179 (1961); Friedrich A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason* (1979, 1st ed. 1952).

[10] *See* Malloy and Posner, "Debate"; Malloy, *Law and Economics*; Robin Paul Malloy, "A New Law and Economics" in Malloy and Braun (eds.), *Law and Economics*; Richard B. McKenzie and Gordon Tullock, *The New World of Economics: Explorations into the Human Experience* 6 (1975); David W. Barnes, "Economics 2001: A Carpenter's Odyssey," 42 Syracuse L. Rev. 197, 197–208 (1991). *See contra* Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 190–191 (1950); Hovenkamp, "Positivism."

particular social policy matters, including issues concerning such things as family values, personal relationships, and social justice. Not surprisingly, this lack of persuasiveness seems most acute when economic analysis is applied to those areas of life where underlying value differences, between interpretive communities, are likely to be at their greatest.

Even law and economic authorities of the stature of Judge Richard Posner and Judge Guido Calabresi recognize that, in practice, we cannot simply apply law and economic analysis as a sufficient theory of law or adjudication – we need something more.[11] The question this raises is do we need something outside of law and market theory or do we need to move forward by embracing a broader and more inclusive vision of the relationship between law and market economy. This in turn raises yet another question: if we seek to extend the boundaries of law and market theory, can we do so while retaining the core focus of our discipline? I think that we can, provided we believe that a central tenet of law and market inquiry is the promotion of a theory of sustainable wealth formation leading to a form of social organization capable of enjoying both freedom and prosperity.

In speculating as to a theory of law and market economy, therefore, I seek to investigate the possibility of advancing a new jurisprudence of exchange while retaining a commitment to this central tenet. I use semiotic interpretation theory to extend and reconceptualize the relationship between law and market theory – not to reject it. My inquiry, therefore, synthesizes market theory with an expanded, relational, and multidisciplinary approach to legal reasoning in a market context of social exchange. This synthesis enables us better to understand the role of law and of market theory in the promotion of creativity and sustainable wealth formation.

Several shortcomings in traditional law and economics have led me to contemplate the need for a broader approach to law and market theory. I believe, for example, that one such shortcoming of traditional law and economics has been that it borrows too heavily from positive economics without acknowledging that the tools and methods of economics are directed at a different "end" than that of law. A central focus of the economist, it must be remembered, is on the construction of a model of human behavior capable of providing predictive information with

[11] *See* Richard A. Posner, *The Problems of Jurisprudence* 454–469 (1990); Posner, *Economic Analysis*, at 27. Also, Judge Calabresi made this point clear in his comments at the Eighth Annual Canadian Law and Economics Association (CLEA) conference held on September 27, 1996 at the University of Toronto – in his John M. Olin Lecture in Law and Economics entitled "What Economic Analysis of Law Must Address Next: Some Thoughts on Theory."

respect to a limited field of activities within clearly defined constraints. The assumptions of the economist embody certain subjective choices concerning what gets measured and valued and what is ignored or excluded.[12] This naturally results in conclusions that reflect these assumptions and constraints. Nevertheless, the economics profession can assert a particular level of accomplishment in predicting at least some outcomes with respect to choices and trade-offs confronting society. As an example, consider what economists can tell us about the market for gasoline. If there is a shortage of gasoline, prices will rise and people will tend to reduce consumption. Conversely, if the supply of gasoline increases, prices will go down and people will increase consumption. This simple exchange relationship is useful to know and it provides insightful implications for a variety of public policy concerns. At the same time, it tells us little about the extent or fairness of the distribution of gasoline in either situation, and it provides little, if any, insight respecting the interpretive values at work in competing exchange communities.

The role of the lawyer is different than that of the economist. The lawyer is not simply interested in constructing a predictive model. The legal profession is challenged to go beyond prediction because the discourse of law is one of persuasion and of mediation between conflicting interpretive viewpoints and value frameworks. Law, for instance, must deal with the claims of distributive inequality and of the unfairness of a price-based allocation system when disgruntled consumers, in our example of the market for gasoline, raise them. Law, must, in other words, mediate between competing claims when market processes fail to produce results acceptable to all of the parties involved. Law, therefore, directs its attention to influencing the normative *ground* upon which social organization rests.[13] This means that law must influence beliefs about underlying relationships in the meaning and value-formation process of social interaction and exchange. Consequently, the real mission of the lawyer is different than that of the economist.

An economist may find it sufficient to conclude that given such-and-such constraints in the US economy African-American men will

[12] Malloy, *Law and Economics*, 2–13; Malloy, "New Law and Economics," at 1–30; *see* Robin Paul Malloy, "Toward a New Discourse of Law and Economics," 42 Syracuse L. Rev. 27 (1991); Robin Paul Malloy, "Letters From the Longhouse: Law, Economics and Native American Values," Wisc. L. Rev. 1569 (1992); Malloy and Posner, "Debate."

[13] The *ground* serves as the *basis* upon which a sign can represent its object in some regard or respect. *See* Liszka, *Introduction to Peirce*; Sheriff, *Peirce*, at 49. To Peirce the ground was a *belief* about underlying relationships that allows us to make conclusions or references from signs. Hookway, *Peirce*, at 124. There are three types of grounds: the *icon*, the *index*, and the *symbol*. *Id.*, at 124–144.

experience lower levels of employment and lower wages than other Americans. Similarly, the economist does her job when she constructs a model allowing us accurately to predict lower levels of home ownership, higher rates of infant mortality, and higher levels of police brutality for some groups in our society relative to others. The economist, in other words, uses market mechanisms to mediate our understanding of social "facts" within a conventionalized and authoritative frame of interpretive reference – a frame of reference grounded in the values and assumptions of the "science" of positive economics. Such predictions, consistent with her model, therefore, are generally all that is expected from the economist, but the lawyer and the legal system must deal, openly and expressly, with the normative questions of meanings and values, including those of fairness and justice, associated with the construction of such models and their predictions.

In order to persuade and to mediate between competing claims, the law must influence opinions, beliefs, and values – it must shape and influence behavior. Law must be concerned with the *meanings* of economic assumptions and predictions, and with the exercise of market choice which always involves a process of interpretation – of selecting between the meanings and values of "A" or "B," for example, and their various relationships. This requires the identification of an interpretive frame of reference capable of both signaling and influencing the networks and patterns of social exchange. The lawyer cannot simply approach the relationship between law and market theory by purporting to use a method of inquiry that is objective and amoral. This may discharge the social obligation of the economist who seeks only to provide theoretical answers for a theoretically constructed world grounded in one interpretive set of values, but it is an insufficient response from the lawyer who must mediate real-world conflicts between people with different experiences, different values, and alternative frames of reference. The lawyer must act pragmatically to solve problems as they arise and to mediate the tension between real people situated in conflicting interpretive communities. This means that the lawyer must strive for an understanding of the meaning and value-formation process of social/market exchange – including its many subjective and value-laden elements.

A second shortcoming of traditional law and economics has been its general acceptance of an artificial dichotomy between wealth maximization and an ethic of fairness and social responsibility. It has viewed concerns for efficiency, which it associates with rational choice based on human reason standing above and apart from society and nature, as the key to wealth maximization and the goal of social organization. It has