GARY BECKER’S CONTRIBUTIONS TO LAW AND ECONOMICS

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Gary Becker’s contributions to the law and economics movement have been very great; but this claim, although true, is likely to occasion some surprise, because he is not so commonly associated with law as such other Nobel laureates in economics as Ronald Coase, Freidrich von Hayek, James Buchanan, and George Stigler. Even within the law and economics movement, his significance for the movement is not fully appreciated.

His contributions cannot be understood merely by enumerating his writings on specific topics within the field of law and economics, important as those writings have been. They are familiar, so I can be brief. The most important in terms of impact is the 1968 paper on the economics of crime and punishment.¹ It has given rise not only to a considerable empirical literature on deterrence, by Isaac Ehrlich and others, which challenged and ultimately changed the sociological and criminological consensus on deterrence, but also to a theoretical literature, to which A. Mitchell Polinsky and Steven Shavell and others have contributed, that refines and extends Becker’s original model of crime and optimal punishment, to papers on criminal procedure by William Landes and by Frank Easterbrook, to papers by Shavell and by me on the economic structure of criminal law, and lately to the decision by the federal sentencing guidelines commission to emphasize fines in the punishment of white collar criminals. It is not widely realized that Guido Calabresi’s path-


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breaking paper with A. Douglas Melamed on the distinction between property rights and liability rules was written in reaction to Becker’s article. The article had seemed to imply that if the probability of apprehension and conviction for theft was one, the optimal fine for theft would be simply the value of the good taken. But then people would be indifferent between stealing and buying the things they want. The point of property rights, as Calabresi and Melamed explained, is to compel voluntary transacting where transaction costs are low.

Gary Becker’s first book, on the economics of racial discrimination, has given rise to a growing literature, to which James Heckman, John Donohue, Ian Ayres, Richard Epstein, and others have contributed, on the economics of Title VII (the federal employment discrimination law), of affirmative action, and of discrimination in services ranging from the sale of automobiles to the provision of bail bonds. Becker’s analysis of no-fault divorce, predicting that it would have only a transitory effect on the divorce rate, has begun to influence legal discussion of family law. And his very recent work on the economics of drug addiction is beginning to influence academic thinking about the war on drugs.

But Becker’s greater significance for the law and economics movement lies elsewhere than in his “law and economics” papers. It lies in general economics, in economic methodology, and in personal influence and example.

First, Becker’s contributions to general economics have provided the foundations for a number of promising areas of law and economics research. His analysis of human capital, and particularly of the distinction between general and firm-specific capital, lies behind Richard Epstein’s important paper on the economics of employment at will, the most common contractual form of employment in the American economy and also the most legally controversial. For Becker’s analysis of how investments in firm-specific capital bind employee and employer to each other shows how employment at will can be the basis of stable employment relations even when those relations are terminable by either party without legal liability. And Becker’s analysis in the paper on private enforcement that he wrote with George Stigler—but I am speaking here of Becker’s part of the paper—which showed how an employer can deter employee mal-

feasance by backloading the employee’s compensation in order to increase the cost of termination to the employee, has been the key to understanding a variety of employment contracts that often have struck lawyers as exploitive. Becker’s economic model of the traditional household, in which the wife specializes in household production, forgoing investment in market human capital, while the husband specializes in market production, has been used to explain how male-female wage differentials, so often used in litigation as evidence of sex discrimination by employers, can be due simply to decisions by the household on the allocation of work and investment between household and market. The economic model of the household also has broad implications for family law (going far beyond the effects of no-fault divorce), for taxation, and for inheritance. And Becker’s economic model of the household is part of his more general model of the allocation of time and effort and the production of nonmarket commodities, and the more general model has applications to law as well. Just recently I have used his discussion of effort in my own effort to analyze judicial behavior.

The second point that I want to emphasize about Gary Becker’s contributions to law and economics is methodological. Many economists have believed that the proper domain of economics is markets, because, as Ronald Coase has explained, in markets there are explicit prices and readily quantifiable outputs to provide hard data for empirical testing of economic theory and because people might be expected to behave more rationally and less emotionally when they are engaged in market activities. 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 social behavior.) This insistence has been immensely important for the law and economics movement. After all, the legal system has never thought to limit itself to regulating markets. Much of the subject matter of law concerns precisely those areas of seemingly emotional, impulsive, nonrational, incentive-absent, or otherwise nonmaximizing behavior—ranging from drug abuse, murder, sodomy, adoption, persecution, religious observance, bigotry, confessions, and the practices of primitive and ancient peoples to prosecution and adjudication—that many economists believe or assume to be outside their field. Gary Becker disagrees and has demonstrated through his work how it is possible to model nonmarket behavior in ways that while maintaining the assumption of rationality explain patterns of behavior and generate empirically testable implications.

The third way in which Becker has influenced the law and economics field, the personal, is the least well known. William Landes entered the
law and economics field, with his thesis on state employment discrimination laws, as Gary Becker’s student; and Becker encouraged Landes’s pathbreaking article on the courts—the first article to apply economics to legal procedure—at a time when other economists thought Landes was making a serious career mistake in studying the economics of some noneconomic an institution as the judiciary. It was Becker who first suggested that Landes and I collaborate, before Landes came to Chicago; and Becker played a big role in getting him here. Becker helped solidify my own commitment to law and economics by signing me up as a research associate of the National Bureau of Economic Research; and I remember, though I am sure Becker does not, the very helpful comments that he made twenty-two years ago when I gave my paper on negligence\(^6\) at George Stigler’s industrial organization workshop. I have received constant aid and encouragement from Becker at workshops and in other settings ever since.

What I have said so far, though appropriate for a commemorative occasion, is retrospective, and I want to end on a more forward-looking note. I have thought a lot about Becker’s career and the ingredients of his success. The key ingredients cannot be duplicated, of course; otherwise we would all be Gary Becker. But there are lessons from his career from which we can profit. I go further. I think even a person as bright as Gary Becker could be a failure by failing to heed these lessons.

One is the difference between working on problems and working on a literature. Most economists read the economic literature in their area of interest, and if they notice a mistake they write an article pointing it out, or if they see room for an extension or refinement or reformulation of the model in the existing literature they make the extension or refinement or reformulation. The result is that the literature in law and economics as in other subfields of economics tends to cluster around a relative handful of issues simply because those are the issues that early on received treatment in a way that facilitated correction, extension, refinement, and so on. An example is the “Averch-Johnson effect,” a mathematically tractable suggestion concerning the scale of capital investment by public utilities that generated a huge literature, although the empirical significance of the phenomenon was never demonstrated.

Becker’s approach has been different. He has chosen problems in the real world like discrimination, education, and crime and written about them rather than about the literature about them. It is one of the advantages of an applied field like law and economics that it is rich in con-

crete real-world problems just waiting to be analyzed, and not just a literature waiting to be further annotated.

Second, Gary Becker’s work is convergent. The lifetime output of an economist or a lawyer-economist is apt to consist of several dozen articles dealing with several unrelated areas within a field of economics. Such a product contributes usefully to the advance of knowledge; but the same brains and effort devoted not necessarily to fewer areas but to areas deeply related to each other would produce a much greater contribution. Becker has worked in a number of different fields, but the work is convergent because it deals with the same basic phenomena, mainly career choices (very broadly understood), the production of nonmarket commodities, and interdependent utilities, all manifested in a variety of different areas of human behavior.

Third, Becker’s work has had a powerful cumulative impact, not merely because of the convergence that I have just mentioned but also because he has studied problems at a greater depth than is possible in a single article. In this respect the article on crime7 is unusual; it had no follow-up in his own work except his part of the paper with Stigler on malfeasance. Most of his theories have been developed at book length, at a time when leading economists, in part out of physics envy, have almost stopped writing books other than textbooks and occasional collections of essays. The writing of an original book of economics requires and imposes a discipline that is often essential to the making of an enduring scholarly contribution. Becker is a pioneer, but he is more than a pioneer; a sprinter, quick off the mark, but also a marathon runner. His career shows that the Marquis of Deffand was wrong when he said, commenting on the story that Saint Denis had walked two leagues carrying his head in his hands: “The distance is nothing; it is only the first step that is difficult.”

I happen to believe that Gary Becker’s economic work has more applications to law than have as yet been realized, in both senses of “realization” (understanding and accomplishment). However that may be, we can continue learning from him in another way, as I have tried to indicate, by identifying the replicable features of his success and replicating them in our own careers.

7 Becker, supra note 1.