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Framing The Market: Representations Of Meaning And Value in Law, Markets, And Culture

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This article forms the foundation for the approach taken in my forthcoming book LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2003). The book provides a full introduction to the terms, concepts, and methods of economics as used in legal reasoning. It explores the way in which economics is used in legal argument, and it includes case discussion, illustrative examples, and discussion problems. It is designed as an introduction to use with a variety of courses and as a core book for a course in contemporary jurisprudence. The article also builds on my book LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000).

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INTRODUCTION: EMBRACING THE HUMANITIES

In the classic film *2001: A Space Odyssey*, a large black monolith appears on the surface of a primitive but evolving planet earth.[1] The monolith intrudes upon the landscape and taunts the imagination. Its nature—its implications for the future unknown, yet it attracts the attention and admiration of ruling primates. The *experience* of touching and of interacting with the unfamiliar object transforms thought, influences the course of evolutionary progress, and frames the interpretive quest for meaning throughout the epic film.

In much the same way the emergence of law and economics scholarship, over the past thirty years, has intrigued the legal imagination. It has transformed the legal landscape and reframed our basic understandings with respect to the nature of law and society. In examining this transformation, this article explores the nature of law in its market and cultural context. It examines the way in which we, as social beings, *experience* the relationship between law, markets, and culture. This is a very different point of inquiry than that of traditional law and economics, which is primarily concerned with a narrative of economics *as science*. In contrast to this narrative, I explore economics as a cultural-interpretive vehicle for advancing particular subjective meanings and values from behind a veil of objectivity.

Even though traditional approaches to law and economics lack objectivity and are constrained by political bias, it is appropriate to acknowledge the pioneering work of

1. 2001: A SPACE ODYSSEY (MGM 1968).

such people as Gary Becker,[2] Guido Calabresi,[3] Ronald Coase,[4] and Richard Posner,[5] all of whom advanced new and

2. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191-93 (1968); GARY BECKER, THE ECONOMICS OF DISCRIMINATION (22d ed. 1971) [hereinafter "THE ECONOMICS OF DISCRIMINATION"]; Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976) [hereinafter "THE ECONOMIC APPROACH TO HUMAN BEHAVIOR"]; GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1993); GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT (2000); GARY S. BECKER, ECONOMIC THEORY (1971); GILBERT R. GHEZ & GARY S. BECKER, THE ALLOCATION OF TIME AND GOODS OVER THE LIFE CYCLE (1975); GARY S. BECKER, ACCOUNTING FOR TASTES (1996); GARY BECKER, THE ECONOMICS OF LIFE: FROM BASEBALL TO AFFIRMATIVE ACTION TO IMMIGRATION, HOW REAL-WORLD ISSUES AFFECT OUR EVERYDAY LIFE (1996) (a collection of essays on everyday topics).

3. *See generally* GUIDO CALABRESI, COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

4. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) [hereinafter "THE PROBLEM OF SOCIAL COST"]; RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988); Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1 (1998); Daniel Q. Posin, *The Coase Theorem: Through a Glass Darkly*, 61 TENN. L. REV. 797 (1994); Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73 (1982); G. Warren Nutter, *The Coase Theorem on Social Cost: A Footnote*, 11 J.L. & ECON. 503 (1968); Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783 (1990); George Daly, *The Coase Theorem: Assumptions, Applications, and Ambiguities*, 12 ECON. INQUIRY 203 (1974); Roy E. Cordato, *Time Passage and the Economics of Coming to the Nuisance: Reassessing the Coasean Perspective*, 20 CAMPBELL L. REV. 273 (1998); Wayne Eastman, *How Coasean Bargaining Entails a Prisoners' Dilemma*, 72 NOTRE DAME L. REV. 89 (1996).

5. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998) [hereinafter "POSNER, ECONOMIC ANALYSIS OF LAW"]; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory* 8 J. LEGAL STUD. 103 (1979); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999) [hereinafter "POSNER, MORAL & LEGAL THEORY"]; LAW AND ECONOMICS: THE INTERNATIONAL LIBRARY OF CRITICAL WRITINGS IN ECONOMICS (Richard A. Posner & Francesco Parisi eds., 1997) [hereinafter "LAW AND ECONOMICS"]; RICHARD A. POSNER, ECONOMIC STRUCTURE OF THE LAW (Francesco Parisi ed., 2000); RICHARD A. POSNER, ECONOMICS OF JUSTICE (1981); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001); RICHARD A. POSNER, SEX AND REASON (1992); RICHARD A. POSNER, PROBLEMS OF JURISPRUDENCE

thoughtful ways of understanding law and legal institutions. They, and others, made important contributions in many areas of law, and this should be recognized even though there may be disagreement with the subjective and political framing of their legal reasoning.[6] Collectively, they helped develop new frames of reference, and new patterns of legal reasoning. As a result, we now have new rhetorical

(1990) [hereinafter "POSNER, JURISPRUDENCE"]; RICHARD A. POSNER, ECONOMICS OF PRIVATE LAW (Francesco Parisi ed., 2001); RICHARD A. POSNER, ECONOMICS OF PUBLIC LAW, (Francesco Parisi, ed., 2001). *See also Debate: Is Law and Economics Moral?*, 24 VAL. U. L. REV. 147 (1990) [hereinafter "Debate: Is Law and Economics Moral?"] (live debate between Robin Paul Malloy and Richard A. Posner with published articles and arguments from each of the two participants).

6. *See generally* Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433 (1997); WERNER ZVI HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1999); UGO MATTEI, COMPARATIVE LAW AND ECONOMICS (1997); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997); THOMAS J. MICELI, ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION (1997); POSNER, LAW AND ECONOMICS, *supra* note 5; Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017 (1998); Avery Wiener Katz, *An Economic Analysis of Guaranty Contract*, 66 U. CHI. L. REV. 47 (1999); John Elofson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1 (1996); Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181 (1996); Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1491 (2001); Amy Farmer, *Crime Versus Justice: Is There a Trade-Off?*, 44 J.L. & ECON. 345 (2001); Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595 (1995); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Peter J. Hammer et al., *Kenneth Arrow and the Changing Economics of Health Care: "Why Arrow? Why Now?"*, 26 J. HEALTH POL. POL'Y & L. 835 (2001); Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 26 J. HEALTH POL. POL'Y & L. 851 (2001); F.M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE W. RES. L. REV. 5 (2001); Donald C. Guy & James E. Holloway, *The Recapture of Public Value on the Termination of the Use of Commercial Land Under Takings Jurisprudence and Economic Analysis*; 15 BYU J. PUB. L. 183 (2001); Daniel H. Cole & Peter Z. Grossman, *When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887 (1999); David W. Case, *The Law and Economics of Environmental Information as Regulation*, 30 Envtl. L. Rep. 10773 (2001); Nicholas L. Georgakopoulos, *Solutions to the Intractability of Distributional Concerns*, 33 RUTGERS L. J. 279 (2002); Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. INTELL. PROP. L. 1 (1999).

tools for discussing matters of liability, risk allocation, criminality, and property, among others.[7] Our legal vocabulary has embraced new terms such as transaction costs, externalities, efficiency, wealth-maximization, preference shaping, reasonable investment-backed expectations, and cost-benefit analysis.[8] We have also absorbed conceptual frameworks such as those referenced by such names as the Coase Theorem,[9] the prisoner's dilemma,[10] the tragedy of the commons,[11] the anti-commons,[12] the theory of path

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7. *See generally* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 5; ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2000); DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS (1992); DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS (2000) [hereinafter FRIEDMAN, LAW'S ORDER]; LAW AND ECONOMICS ANTHOLOGY (Kenneth G. Dau-Schmidt & Thomas S. Ulen eds., 1998) [hereinafter "ANTHOLOGY"].

8. For examples of this kind of analysis in case decisions see *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992). *See also* Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982); Dolan v. City of Tigard, 512 U.S. 374 (1994); Ross v. Wilson, 308 N.Y. 605 (1955); Unites States v. City of Niagara Falls, 706 F. Supp. 1053 (1989). *See generally* Alan J. Meese, *The Externality of Victim Care*, 68 U. CHI. L. REV. 1201 (2001); Larry A. Dimatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633 (2001); Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249 (1998); Shubha Ghosh, *Property Rules, Liability Rules, and Termination Rights: A Fresh Look at the Employment at Will Debate with Applications to Franchising and Family Law*, 75 ORE. L. R. 969 (1996); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); Shi-Ling Hsu & John Loomis, *A Defense of Cost-Benefit Analysis for Natural Resource Policy*, 32 ENVTL. L. REP. 10239 (2002); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001); *The Significance and Proper Role of Investment-Backed Expectations in Regulatory Takings Law*, 64 A.L.I.-A.B.A. 661 (2001); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995); Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996).

9. *See generally* THE PROBLEM OF SOCIAL COST, *supra* note 4; COOTER & ULEN, *supra* note 7, at 82-87; ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS 103-04 (2000) [hereinafter "LAW AND MARKET ECONOMY"]; Shubha Ghosh, *Property Rules, Liability Rules, and Termination Rights: A Fresh Look at the Employment at Will Debate with Application to Franchising and Family Law*, 75 OR. L. REV. 983 (1996).

10. *See generally* BARNES & STOUT, *supra* note 7, at 33-34; MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 12-13; FRIEDMAN, LAW'S ORDER *supra* note 7, at 87-92.

11. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243

dependency,[13] public choice,[14] and game theory.[15] Thus, for better or for worse, and without regard to one's politics, law and economics has *transformed* legal reasoning and captured an authoritative position in the legal imagination.

Recent trends are even more expansive as law and market scholarship becomes more divergent in its own interpretive points of reference. We have seen, for instance, the impressive expansion of law and market thinking brought on by a variety of approaches that might collectively be called the "new law and economics."[16] Examples of

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(1968); GARRET HARDIN & SCIPIO GARLING, THE IMMIGRATION DILEMMA: AVOIDING THE TRAGEDY OF THE COMMONS (1995); TIMOTHY M. SWANSON, THE ECONOMICS OF ENVIRONMENTAL DEGRADATION: TRAGEDY FOR THE COMMONS? (1996); BARNES & STOUT, *supra* note 7, at 28-34.

12. *See generally* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 634 (1998).

13. *See generally* Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Richard A. Posner, *Path-Dependency, Pragmatism, and a Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000); MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 102.

14. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988); DENNIS C. MUELLER, PUBLIC CHOICE II (1989); Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284 (1992); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 5, at 397; BARNES & STOUT, *supra* note 7, at 409-529; MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 99-101, 103-04.

15. *See generally* Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993); HERVE MOULIN, GAME THEORY FOR THE SOCIAL SCIENCES (2d ed. 1986); DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991); DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW (1994); JOHN F. NASH, ESSAYS ON GAME THEORY (1996).

16. *See generally* Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479 (2000); Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 L. REV. MICH. ST. U. DET. C.L. 355 (2001); Gillian K. Hadfield, *The Second Wave of Law and Economics*, 46 U. TORONTO L. J. 181 (1996); Gregory S. Crespi, *Teaching the New Law and Economics*, 25 U. TOL. L REV. 713 (1994); C.G. VELJANOVSKI, THE NEW LAW-AND-ECONOMICS

"new" approaches include ventures into behavioral law and economics (referencing work in behavioral psychology and sociology),[17] the law and economics of norms (referencing theories of norm building and of informal relationships and organizations),[18] institutional law and economics

(1982); Douglas L. Leslie, *The New Law and Economics of Labor Law*, 41 INDUS. PROC. INDUS. REL. RES. ASS'N ANN. MEETING 227 (1989); *Symposium, Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 3-191 (1989).

17. *See* BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein, ed. 2000). Sunstein provides a nice collection of introductory works in this area. Like my own work, BEHAVIORAL LAW AND ECONOMICS takes issue with the limits and constraints imposed by the simplifying assumptions of traditional economics. BEHAVIORAL LAW AND ECONOMICS, however, references a different set and type of sources than law and market economy, and it approaches analysis in a different way. BEHAVIORAL LAW AND ECONOMICS looks to refine our understanding of choice as a modification of rational thought, but otherwise stays within the bounds of a traditional law and economic method. *See generally* Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL L. REV. 225 (1986); THE ECONOMIC APPROACH TO HUMAN BEHAVIOR, *supra* note 2; Tania Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973 (2000).

18. *See e.g.*, Robert D. Cooter, *Law, Economics and Norm: Decentralized Law For a Complex Economy: The Structural Approach To Adjudicating the New Law Merchants*, 144 U. PA. L. R. 1643 (1996); JANET TAI LANDA, TRUST, ETHNICITY AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE (1994). *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 136-37; Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology Law and Social Norms*, 110 YALE L.J. 25 (2001) (book review); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and, the Behavioral Foundations of Corporate Law*, 149 U. PA. L. R. 1735 (2001); JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER (1989); George A. Akerlof, *A Theory of Social Custom of Which Unemployment May Be One Consequence*, 94 Q. J. ECON. 749 (1980); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986); ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE (1986). *See also* EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977); Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, 12 J. LEGAL STUD. 135 (1983). The law and economics of norms is, in many ways, a traditional approach to economics and the law. Generally, the law and economics of norms simply extends the approach of traditional law and economics into informal rule making. Where traditional law and economics investigates the efficiency of particular legal rules, the work on norms uses the same tools to look at norms, customs, and practices that are not a part of the formal or positive law. The basic investigation is one of demonstrating that efficient norms and practices win out over less efficient ones. In this respect it is very traditional. For a recent article addressing this field, see Richard H. McAdams, *supra*.

(referencing institutional economics rather than the more traditional appeal to neoclassical economics),[19] feminist law and economics (referencing feminist theory),[20] and interpretive and representational law and economics (referencing the humanities, various forms of interpretation and rhetoric theory, and law and society).[21]

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19. *See generally* MERCURO & MEDEMA, *supra* note 6, at 101-29, 130-56 (1997) (discussing Institutional law and economics, then discussing Neoinstitutional law and economics); DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); Douglas North, *Transaction Costs, Institutions and Economic Performance*, *in* INTERNATIONAL CENTRE FOR ECONOMIC DEVELOPMENT OCCASIONAL PAPERS NO. 30 (1992); HENRY CARTER ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION AND ECONOMICS AND JURISPRUDENCE (Joseph Dorfman ed., 1954); RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH (1914); JOHN R. COMMONS, INSTITUTIONAL ECONOMICS (1934); John R. Commons, *Law and Economics*, 34 YALE L. J. 371 (1925); THORSTEIN VEBLEN, THEORY OF THE LEISURE CLASS (1899); WARREN J. SAMUELS & A. ALLAN SCHMID, LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE (1981); ROBERT A. SOLO, ECONOMIC ORGANIZATIONS AND SOCIAL SYSTEMS (1967); C. E. AYRES, THE THEORY OF ECONOMIC PROGRESS (1944).

20. *See generally* Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000); Marlene O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary / Contract Law Distinction to Enforce Implicit Agreements*, in PROGRESSIVE CORPORATE LAW 234 (Lawrence Mitchell ed., 1995); MARIANNE A. FERBER & JULIE A. NELSON, BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (1993); Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and (Re)view*, 10 UCLA WOMEN'S L.J. 39 (1999); Katherine Wells Meighan, *In a Similar Choice: A Unifying Economic Analysis of Gillian's Amy and Jake*, 2 AM. U. J. GENDER & L. 139 (1994); FEMINISM & POLITICAL THEORY (Cass R. Sunstein ed., 1990); Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1 (1993); Terry O'Neil, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646 (1992); Martha T. McCluskey, *Insurer Moral Hazard in the Workers' Compensation Crisis: Reforming Cost Inflation Not Rate Suppression*, 5 EMPL. RIGHTS & EMPLOY. POL'Y J. 55 (2001).

21. *See, e.g.*, Denis J. Brion, *The Ethics of Property: A Semiotic Inquiry Into Ownership*, 12 INT'L J. FOR THE SEMIOTICS OF L. 247 (1999); Denis J. Brion, *Rhetoric and the Law of Enterprise*, 42 SYRACUSE L. REV. 117 (1991); Roberta Kevelson, *Transfer, Transaction, Asymmetry: Junctures Between Law and Economics From the Fish-Eye Lens of Semiotics*, 42 SYRACUSE L. REV. 7 (1991); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Robin Paul Malloy, *Law and Market Economy: The Triadic Linking of Law, Economics, and Semiotics*, 12 INT'L J. FOR THE SEMIOTICS OF L. 285 (1999); Robin Paul Malloy, *Toward A New Discourse of Law and Economics*, 42

In this article, attention is focused on the emergent interest in interpretive and representational approaches to law and market theory, and on the experiential process by which legal and market reasoning is transformed. The starting place for much of this work can be related to two early books by McCloskey: *The Rhetoric of Economics;*[22] and *If You're So Smart: The Narrative of Economic Expertise.*[23] More recent books include: Hernando DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else;*[24] Regina Gagnier, *The Insatiability of*

SYRACUSE L. REV. 27 (1991) [hereinafter "Malloy, *New Discourse*"]; Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000). *See also infra* notes 22 - 28 (identifying some leading examples of books on an interpretive approach to law and market theory).

22. DONALD N. MCCLOSKEY, THE RHETORIC OF ECONOMICS, (1998) [hereinafter "MCCLOSKEY, RHETORIC"]. This is a classic work on understanding the rhetorical structure and strategic use of economics.

23. DONALD N. MCCLOSKEY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE (1990) [hereinafter "MCCLOSKEY, ECONOMIC EXPERTISE"]. This work picks up with many of the themes of the RHETORIC book. *See infra* note 22. Basically, economics is a useful and powerful language and it can actually be used to substantively affect resource allocations and distributions, but it is not a "science" in any true sense of the word. *See generally* DONALD N. MCCLOSKEY, KNOWLEDGE AND PERSUASION IN ECONOMICS (1994) [hereinafter MCCLOSKEY, KNOWLEDGE]; Robin Paul Malloy, *Legal Economic Discourse: A Review of 'If You're So Smart: The Narrative of Economic Expertise' by Donald McCloskey*, 42 J. LEGAL EDUC. 324 (1992) [hereinafter "Malloy, *Review: If You're So Smart*"]; Donald N. McCloskey, *The Lawyerly Rhetoric of Coase's 'The Nature of the Firm'*, 18 J. CORP. L. 425 (1993) [hereinafter "McCloskey, *Lawyerly Rhetoric*"] .

24. HERNANDO DESOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000) [hereinafter DESOTO, CAPITALISM]. In this book, DeSoto makes an important contribution to our understanding of the role of law in promoting a market economy. It is particularly important that he addresses law in terms of its ability to create symbolic *representations* that have value in exchange and which promote economic activity. His discussion of legal representation involves an excellent example of applied semiotic analysis. He explains how the lack of ready access to formal legal representations, semiotic devices, hinder economic activity in less developed countries.

> In the West, by contrast, every parcel of land, every building, every piece of equipment, or store of inventories is represented in a property document that is the visible sign of a vast hidden process that connects all of these assets to the rest of the economy. Thanks to this representational process, assets can lead an invisible, parallel life alongside their material existence. They can be used as collateral for credit. The single most important source of funds for new business in the United States is a mortgage on the entrepreneur's house. These assets can also

Human Wants: Economics and Aesthetics in Market Society;[25] Israel M. Kirzner, *The Meaning of Market Process: Essays in the Development of Modern Austrian Economics*;[26] Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics*;[27] and Bart Nooteboom, *Learning and Innovation in Organizations and Economies*.[28] While each of these books takes on a particular aspect of the representational relationship between law and economics, each demonstrates the significance of interpretation theory to an understanding of law, markets, and culture.

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provide a link to the owner's credit history, an accountable address for collection of debts and taxes, and the basis for the creation of securities (like mortgage-backed bonds) that can then be rediscounted and sold in secondary markets. By this process, the West injects life into assets and makes them generate capital.

Id. at 6.

25. REGENIA GAGNIER, INSATIABILITY OF HUMAN WANTS: ECONOMICS AND AESTHETICS IN MARKET SOCIETY (2000). This is an excellent book that starts by taking direct aim at the work of Richard Posner and other traditional practitioners of an economic analysis of law. She also includes historical analysis with reference to such people as Adam Smith, Karl Marx, and John Stuart Mill. Throughout the work, she engages the reader in a careful evaluation of the values and interpretive elements of economics. *See also* EMMA ROTHSCHILD, ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT (2001) (providing a reinterpretation of market ideas which gives some added background support for Gagnier's work); Shubha Ghosh, *Enlightening Identity and Copyright*, 49 BUFF. L. REV. 1315 (2001) (review of Rothschild's book).

26. ISRAEL M. KIRZNER, THE MEANING OF THE MARKET PROCESS: ESSAYS IN THE DEVELOPMENT OF MODERN AUSTRIAN ECONOMICS (1992) [hereinafter KIRZNER, MEANING]. In looking at market process theory, Kirzner investigates the market in a manner similar to that of someone applying a Peircean approach. This is particularly true with respect to his analysis of the dynamic and complex nature of markets. The market system generates meanings and values that can not be captured in static equilibrium models. *See also* ISRAEL M. KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS (1985) [hereinafter KIRZNER, CAPITALIST PROCESS].

27. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9. It is important to note that law and market economy theory involves a *method* grounded in the semiotics of Charles Sanders Peirce. This method is different from the method used in traditional law and economics, and this difference facilitates market analysis on terms and assumptions that are independent of traditional constraints.

28. BART NOOTEBOOM, LEARNING AND INNOVATION IN ORGANIZATIONS AND ECONOMIES (2000). Nooteboom demonstrates a wonderful insight with respect to interpretive matters as he investigates a variety of issues confronting the modern organization operating in a global economy. He presents insightful analysis of market process theory, and makes important contributions to the understanding of creativity and entrepreneurship.

In exploring an interpretive and representational approach, this article embraces the humanities, including references to esthetics, ethics, and logic. It explores the subjective nature of markets, the lack of universality in a number of economic concepts, and the role of interpretive institutions in generating value and redistributing resources. Moreover, it advances an understanding of the relationship between law, markets, and culture indicating a need to democratize and enhance access to the meaning and value formation process.

At the outset, however, it must be noted that there are numerous approaches to interpretation theory and to the cognitive processes that ground interpretation.[29] The focus in this work is, therefore, limited to the interpretation theory of one of America's greatest philosophers who was also a founder of the theoretical school identified as American Pragmatism, Charles Sanders Peirce.[30]

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29. *See, e.g.,* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISM OF LAW (2000); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 67 (1980); CLIFFORD GEERTZ, LOCAL KNOWLEDGE 85 (1983); PETER GOODRICH, READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES (1986); LAW, INTERPRETATION AND REALITY: ESSAYS IN EPISTEMOLOGY, HERMENEUTICS AND JURISPRUDENCE (Patrick Nerhot ed., 1990); THE RHETORIC OF LAW (Austin Sarat & Thomas R. Kearns eds., 1994); JAMES BOYD WHITE, THE EDGE OF MEANING (2001); Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629 (2001); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Duncan Kennedy, *A Semiotics of Legal Argument* 42 SYRACUSE L. REV. 75 (1991); Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309 (2002); Symposium, *Beyond Critique: Law, Culture, and the Politics of Form*, 69 TEX. L. REV. 1595-2041 (1991) (contributions by Steven L. Winter, Pierre Schlag, Alicia Juarrero-Roque, Jeremy Paul (on legal semiotics), J.M. Balkin (on legal semiotics), Rosemary J. Coombe, Richard Delgado & Jean Stefancic, and Guyora Binder).

30. My theory of interpretation is grounded in and influenced by the Semiotic Theory of Charles Sanders Peirce. *See* 1 THE ESSENTIAL PEIRCE (Nathan Houser & Christian Kloesel eds., 1992) [hereinafter "1 THE ESSENTIAL PEIRCE"]; 2 THE ESSENTIAL PEIRCE (The Peirce Edition Project ed., 1998) [hereinafter "2 THE ESSENTIAL PEIRCE"]. *See generally* ROBERTA KEVELSON, CHARLES S. PEIRCE'S METHOD OF METHODS (1987) [hereinafter KEVELSON, METHOD]; ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS (1988) [hereinafter KEVELSON, LAW]; ROBERTA KEVELSON, PEIRCE, SCIENCE, SIGNS (1996) [hereinafter KEVELSON, PEIRCE AND SCIENCE]; KARL-OTTO APEL, CHARLES S. PEIRCE: FROM PRAGMATISM TO PRAGMATICISM (1995) [hereinafter APEL, PEIRCE-PRAGMATICISM]; VINCENT M.

Peirce's work has only recently become widely accessible to researchers because much of it existed in scattered and unpublished manuscripts.[31] This massive collection of some 90,000 manuscript pages has only recently become available as a result of years of work by Peirce scholars and

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COLAPIETRO, PEIRCE'S APPROACH TO THE SELF: A SEMIOTIC PERSPECTIVE ON HUMAN SUBJECTIVITY (1989) [hereinafter "COLAPIETRO, PEIRCE-SELF"]; ROBERTA KEVELSON, PEIRCE'S ESTHETICS OF FREEDOM (1993) [hereinafter "KEVELSON, PEIRCE AND FREEDOM"]; CARL R. HAUSMAN, CHARLES S. PEIRCE'S EVOLUTIONARY PHILOSOPHY (1993) [hereinafter "HAUSMAN, PEIRCE"]; CHRISTOPHER HOOKWAY, PEIRCE (1992) [hereinafter HOOKWAY, PEIRCE]; JAMES JAKOB LISZKA, A GENERAL INTRODUCTION TO THE SEMEIOTIC OF CHARLES SANDERS PEIRCE (1996); FLOYD MERRELL, PEIRCE, SIGNS, AND MEANING (1997) [hereinafter "MERRELL, PEIRCE-MEANING"]; FLOYD MERRELL, SEMIOSIS IN THE POSTMODERN AGE (1995); WINFRIED NOTH, HANDBOOK OF SEMIOTICS 39-47 (1995); PHILOSOPHICAL WRITINGS OF PEIRCE (Justus Buchler ed., 1955) [hereinafter PEIRCE, WRITINGS]; VINCENT G. POTTER, CHARLES S. PEIRCE ON NORMS & IDEALS (1997) [hereinafter "POTTER, NORMS & IDEALS"]; REASONING AND THE LOGIC OF THINGS: CHARLES SANDERS PEIRCE (Kenneth Laine Ketner ed., 1992) [hereinafter PEIRCE-REASONING]; JOHN K. SHERIFF, CHARLES PEIRCE'S GUESS AT THE RIDDLE: GROUNDS FOR HUMAN SIGNIFICANCE (1994); ROBERT SCHOLES, SEMIOTICS AND INTERPRETATION (1982).

31. *See* LISZKA, *supra* note 30. *See generally* NOTH, *supra* note 30, at 39 (Peirce is "now unanimously acclaimed as America's greatest philosopher"). Peirce is said to be the most significant representative of American philosophy—more significant than his contemporaries, James and Dewey. APEL, PEIRCE—PRAGMATICISM, *supra* note 30, at i-xxvii, 1-14 (in an introduction to a book by a German author seeking to bring Peirce's work into a German translation). Peirce was not only the founder of pragmaticism—he is "certainly the greatest American thinker of all." APEL, PEIRCE—PRAGMATICISM, *supra* note 30, at 5. Peirce was active in the "Metaphysical" Club in Cambridge, Massachusetts where he influenced James and Holmes, among others. PEIRCE—REASONING, *supra* note 30, at 8. His relationship was particularly close to William James. *See* PEIRCE—REASONING, *supra* note 30, at 5-36. Peirce published 10,000 pages and had manuscripts of more than 80,000 additional pages, but never published a single work that presented his general theory in a unified or systematic manner. PEIRCE—REASONING, *supra* note 30, at 8. He rejected Euclidean Geometry; broke with the pragmatic approaches of James and Dewey in a rejection of its nominalism, and believed our language was ultimately controlled by the structure of reality and not by our interests. Peirce projected a Kantian influence in his work, but developed a different theory. He is not merely a Kantian. *See* APEL, PEIRCE—PRAGMATICISM, *supra* note 30, at xxv; *see also* HOOKWAY, PEIRCE, *supra* note 30, at 154. Peirce rejected Hegel's dialectical logic "more or less vigorously his whole life long." APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at 24. Peirce's logical synthesis differs from Hegel. *See* HOOKWAY, PEIRCE, *supra* note 30, at 151-154. The interested reader can consult any of the core books used as references in this work to learn more about how Peirce is distinguishable from a variety of other philosophers and schools of thought. Such is not the purpose of this article.

by the efforts of the Peirce Project at Indiana University.[32] As a result of the difficulty of accessing much of Peirce's work, he has been relatively unknown to legal researchers, even as he has been recognized as a prime figure in the philosophy of language and of science.[33]

Peirce's work on interpretation and representation theory is categorized under the term or subject of semiotics, which means the study of "signs."[34] By this term, Peirce simply meant to reaffirm the idea that humans are sign-making and sign-interpreting beings. Signs, as such, include language as spoken and written, visual images, colors, symbols, art, architecture, music, and a variety of other ways in which ideas are communicated.[35] In this article, I refer to semiotics as a *cultural-interpretive* approach because this term seems to express the semiotic ideas of an individualized interpretive actor situated within a collective

32. *See* 1 THE ESSENTIAL PEIRCE, *supra* note 30; 2 THE ESSENTIAL PEIRCE, *supra* note 30; *see also* sources cited *supra* note 31.

33. *See* sources cited *supra* notes 30-31. My scholarship is influenced, in part, by Roberta Kevelson's work on the interpretation of Peirce. I worked with Kevelson for twelve years on a variety of projects and was a Research Fellow for ten years when she operated the Center for Law and Semiotics at Pennsylvania State University. A sample of Kevelson's work includes: ACTION AND AGENCY: FOURTH ROUND TABLE ON LAW AND SEMIOTICS 135-56 (Roberta Kevelson ed., 1991); CODES AND CUSTOMS: MILLENIAL PERSPECTIVES 153-76 (Roberta Kevelson ed., 1994); CONSCIENCE, CONSENSUS, AND CROSSROADS IN THE LAW (Roberta Kevelson ed., 1995); THE EYES OF JUSTICE: SEVENTH ROUND TABLE ON LAW AND SEMIOTICS (Roberta Kevelson ed., 1994); FLUX, COMPLEXITY, AND ILLUSION: SIXTH ROUND TABLE ON LAW AND SEMIOTICS (Roberta Kevelson ed., 1993); KEVELSON, LAW, *supra* note 30; 3 LAW AND SEMIOTICS (Roberta Kevelson ed., 1989); LAW AND THE CONFLICT OF IDEOLOGIES: NINTH ROUND TABLE ON LAW AND SEMIOTICS (Roberta Kevelson ed., 1996); KEVELSON, PEIRCE AND FREEDOM, *supra* note 30; PEIRCE AND LAW: ISSUES IN PRAGMATISM, LEGAL REALISM, AND SEMIOTICS (Roberta Kevelson ed., 1991); KEVELSON, PEIRCE AND SCIENCE, *supra* note 30; KEVELSON, METHOD, *supra* note 30; Roberta Kevelson, *Property as Rhetoric in Law*, 4 CARDOZO STUD. L. & LIT. 189 (1992) [hereinafter Kevelson, *Rhetoric*]; Roberta Kevelson, *Transfer, Transaction, Asymmetry: Junctures Between Law and Economics From the Fish-Eye Lens of Semiotics*, 42 SYRACUSE L. REV. 7 (1991).

34. Semiotics, as the study of signs, positions all sign systems and ideas as part of a process of social meaning. In this sense, a sign is significant to the extent that it has meaning or consequence in the real world. *See* NOTH, *supra* note 30; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 33, 38; LISZKA, *supra* note 30. *See also* sources cited *supra* notes 31 & 33, *infra* notes 35-36.

35. *See* ARTHUR ASA BERGER, SIGNS IN CONTEMPORARY CULTURE: AN INTRODUCTION TO SEMIOTICS (1984, 1989); JOHN DEELEY, BASICS OF SEMIOTICS (1990); ROBERT HODGE & GUNTHER KRESS, SOCIAL SEMIOTICS (1988); SEMIOTICS: AN INTRODUCTORY ANTHOLOGY (Robert E. Innis ed., 1985); NOTH, *supra* note 30.

and cultural context, and because a culture is, in essence, an implicit interpretive system. This is how one experiences the intersection of law and market economy, not as an isolated and atomistic individual, but as an individualized participant in an interpretive community.

In popular culture perhaps the best known semiotician is Umberto Eco, for he has numerous successes in both the popular and academic communities.[36] However, it is Peirce's work that is of particular interest to people exploring the relationship between law and market theory because it shares an affinity with a number of core ideas expressed in the works of Adam Smith,[37] and with work in Austrian economics.[38] The compatibility with Austrian economics is

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36. *See* UMBERTO ECO, THE LIMITS OF INTERPRETATION (1990) [hereinafter ECO, LIMITS OF INTERPRETATION]; UMBERTO ECO, THE OPEN WORK (Anna Cancogni trans., 1989); UMBERTO ECO, THE SEARCH FOR THE PERFECT LANGUAGE (1995); UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE (1984); THE SIGN OF THREE (Umberto Eco & Thomas A. Sebeok eds., 1983) [hereinafter "ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE"]; UMBERTO ECO, A THEORY OF SEMIOTICS (Thomas A. Sebeok ed.,1976) [hereinafter "ECO, A THEORY OF SEMIOTICS"]. His popular works include UMBERTO ECO, FOUCAULT'S PENDULUM (William Weaver trans., 1989); UMBERTO ECO, MISREADINGS (William Weaver trans., 1993); UMBERTO ECO, THE NAME OF THE ROSE (1983) (made into a popular hit movie, THE NAME OF THE ROSE (Fox Films 1986), starring Sean Connery.

37. *See, e.g.,* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 41-42. Smith used a semiotic approach in his metaphor of the relationship between a clock and the idea of time. This is similar to the relationship between market models and the exchange process to which they refer. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 168 (LibertyClassics 1969) [hereinafter "SMITH, MORAL SENTIMENTS"]; ADAM SMITH, ESSAYS ON PHILOSOPHICAL SUBJECTS (W.P.D. Wightman et al. eds., 1980) [hereinafter "SMITH, ESSAYS"]. Smith argued that we exist in a social context and not as isolated beings. SMITH, ESSAYS, *supra*, at 64-69, 106, 161, *citing* SMITH, MORAL SENTIMENTS, *supra*, 71, 200-260, 352, 422 (discussing the impartial spectator) and *citing* SMITH, MORAL SENTIMENTS, *supra*, 264 (discussing the way in which general rules emerge from experience). *See also* ADAM SMITH, LECTURES ON JURISPRUDENCE 14-37, 200-290, 311-330, 401-407 (R.L. Meek et al. eds., 1978) (discussing the idea of social organization based on many factors and not the idea of social contract); *id.* at 14-37, 200-290, 311-330, 401-407 (addressing the dynamic stages of economic and legal evolution); 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 420-445 (Edwin Cannon ed., 1976) [hereinafter "I ADAM SMITH, WEALTH OF NATIONS"]; 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 231-244 (Edwin Cannon ed., 1976) (discussing the dynamic stages of economic development); ADAM SMITH, LECTURES ON RHETORIC AND BELLES LETTRES (J.C. Bryce ed., 1983) (providing a similar analysis with respect to the dynamic development of language). Other secondary sources are also cited in MALLOY, LAW AND MARKET ECONOMY, *supra* note 9.

38. *See, e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) [hereinafter "HAYEK, THE CONSTITUTION OF LIBERTY"];HAYEK, LAW, LEGISLATION,

most apparent with respect to the idea of "market process theory" as expressed in the work of such well-known economists as Friedrick Hayek and Israel Kirzner.[39] Peirce's work also shares a conceptual grounding that is similar to economist Joseph Schumpeter's theory of "creative destruction," which is central to an understanding of creativity in economics.[40] In addition, because Peirce was interested in developing a theory of the sciences, his semiotic approach lends itself to the deconstruction and interpretation of empirical and social science work, such as that done within the framework of an economic analysis of law. Peirce's concern for understanding the way in which we experience the sciences makes his cultural-interpretive approach readily applicable to the study of law and market theory. Thus, it is not surprising that Peirce's work has been cited and favorably discussed by Richard Posner in two of his recent books,[41] and by Mercuro and Medema in their successful book on law and economics.[42] While Peirce is not well understood by people such as Judge Posner, it is

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AND LIBERTY: RULES AND ORDER (1973); 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976); 3 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE (1979); KIRZNER, CAPITALIST PROCESS, *supra* note 26; KIRZNER, MEANING, *supra* note26; CHANDRAN KUKATHAS, HAYEK AND MODERN LIBERALISM (1989); ALEXANDER H. SHAND, THE CAPITALIST ALTERNATIVE: AN INTRODUCTION TO NEO-AUSTRIAN ECONOMICS (1984).

39. *See* sources cited *supra* note 38. On the connection between Hayek and Peirce's semiotics, see KEVELSON, LAW, *supra* note 30, at 178-79, 181, 255, 266; KEVELSON, METHOD, *supra* note 30, at 81, 93-94; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 118-120, 123-127, 205-210; KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 36, 45, 93-110.

40. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-106 (3d ed., 1950) (discussing the process of "creative destruction" which relates to the process of creativity in semiotics and in law and market economy as explained in MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-135). Schumpeter understands the market as dynamic and evolutionary in a way that is similar to understanding Peirce as a pragmatic evolutionary realist. SCHUMPETER, *supra*, at 82. "The essential point to grasp is that in dealing with capitalism we are dealing with an evolutionary process." *Id.* at 82. "Capitalism. . . is by nature a form of economic change and not only never is but never can be stationary. And this evolutionary character of the capitalist process is not merely due to the fact that economic life goes on in a social and natural environment. . ." *Id.*

41. POSNER, JURISPRUDENCE, *supra* note 5, at 27, 105, 118, 153-54, 162, 192, 259, 450, 462-464; POSNER, MORAL & LEGAL THEORY, *supra* note 5, at 99, 104, 264.

42. MERCURO & MEDEMA, *supra* note 6, at 103.

clear that they at least recognize that his work has a contribution to make to our understanding of the connection between law and market theory.

Peirce's work should be of interest to anyone concerned with getting a better understanding of the relationship between law, markets, and culture. Peirce was not a conservative and he worked to develop a progressive and dynamic understanding of pragmatism. His work permits us to place market theory in a progressive posture so that it can be used to address human needs rather than profit motives.

In order to properly understand this new way of framing the market, one must recognize that traditional scholars of law and economics have not generally embraced interpretation theory. Perhaps this is because interpretation theory clearly brings the *humanities* to bear upon the investigation and evaluation of law and market theory. It does this by helping to shape and inform our pragmatic understanding of market relationships, and by providing the normative foundations for legal and market operations. This humanistic approach is sometimes misunderstood by many people in law and economics for they seek to make law appear more, rather than less, scientific and thus avoid references to the humanities.[43] This is unfortunate and seems to be motivated by a desire to use "science" to preserve and bolster an objective, neutral, and some might say "masculine" frame of reference for law.[44] Law is not, how-

43. The traditional law and economics approach is centered on concerns for efficiency, and for making the law more objective and predictable by reference to economics. *See* BARNES & STOUT, *supra* note 7; COOTER & ULEN, *supra* note 7; ANTHOLOGY, *supra* note 7; FRIEDMAN, LAW'S ORDER, *supra* note 7; WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1999); FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW (Avery Wiener Katz ed., 1998); ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 1-93 (1990) [hereinafter MALLOY, LAW AND ECONOMICS]; MERCURO & MEDEMA, *supra* note 6; POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 5; MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 49-60 (1996); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815, 835-51 (1990).

44. *See* FERBER & NELSON, *supra* note 20, at 69-93 (discussing the narrowness of the field); MCCLOSKEY, RHETORIC, *supra* note 22; MCCLOSKEY, ECONOMIC EXPERTISE, *supra* note 23 (challenging the "science" in economics). *See generally* THORSTEIN VEBLEN, THE PLACE OF SCIENCE IN MODERN CIVILIZATION AND OTHER ESSAYS 1-179 (1961); MCCLOSKEY, KNOWLEDGE, *supra* note 23; Debate: Is Law and Economics Moral?, *supra* note 5; FRIEDRICH A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE: STUDIES ON THE ABUSE OF REASON (2nd ed. 1979)

ever, a natural science. Even though references to the natural and social sciences can be helpful, law involves human practices and experiences that are not fully explainable or understandable in scientific terms. Interpretation theory can help us identify ways of improving legal reasoning and decision making by reclaiming a useful balance between the humanities and the sciences.

Many law and economics scholars will misunderstand and reject this view because they mistakenly believe that they are engaged in the pursuit of objectivity and science. In reality, they are trapped in their own interpretive paradigm and fear the consequences of unmasking their veil of objectivity. Even as they seemingly embrace variations on the traditional paradigm, as in behavioral law and economics, and the economics of norms, they limit their acceptance to works that perpetuate the same basic commitment to objectivity and the narrative of economics expertise. As these scholars continuously self-cite each other in a metaphorical "circling of the wagons," others are busy constructing new experiential approaches based on feminist theory, and interpretive and representational approaches, among others.

In contrast to the general lack of attention paid to interpretation theory and the process of representing meanings and values by many traditional law and economics

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[hereinafter "COUNTER-REVOLUTION"].

> In the course of its slow development in the eighteenth and early nineteenth centuries the study of economic and social phenomena was guided in the choice of its methods in the main by the nature of the problems it had to face .... Students of political economy could describe it alternatively as a branch of science or of moral or social philosophy without the least qualms whether their subject was scientific or philosophical.... During the first half of the nineteenth century a new attitude made its appearance. The term *science* came more and more to be confined to the physical and biological disciplines which at the same time began to claim for themselves a special rigorousness and certainty which distinguished them from all others. Their success was such that they soon came to exercise an extraordinary fascination on those working in other fields, who rapidly began to imitate their teaching and vocabulary. Thus the tyranny commenced which the methods and techniques of the Sciences in the narrow sense of the term have ever since exercised over the other subjects.

COUNTER-REVOLUTION at 19-21. (Hayek is making the point that science has limits. He is not arguing against science, but is pointing out that many methods of inquiry are being lost or devalued by the desire to make everything "scientific.").

scholars, critics of the marketplace have embraced the approach.[45] Critical theory scholars have, in fact, made many important contributions to our understanding of the experiential nature of law. Unfortunately, their work generally references one of a number of popular French (and European) deconstructionists but seldom, if ever, mentions Peirce.[46] This may be because Peirce's theory lends itself to an understanding of the potential benefits of exchange and of market operations.[47] Furthermore, Peirce's theory is not nihilistic, nor is it radically anti-realist.[48] Peirce was a *pragmatic evolutionary realist* whose theory has an affinity with important elements in market philosophy, as mentioned above.[49] Perhaps for these reasons, Peirce is generally mistaken for a conservative and ignored by the critical theorists who tend to dominate legal discourse on interpre-

45. *See, e.g.*, MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST THEORY (1999); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989); FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

46. *See, e.g.*, Robert W. Benson, *Peirce and Critical Legal Studies*, *in* PEIRCE AND LAW: ISSUES IN PRAGMATISM, LEGAL REALISM, AND SEMIOTICS 15 (Roberta Kevelson ed., 1991) (a survey of cites contained in a review of numerous articles on critical legal theory revealed almost no cites to Peirce, while ample cites were given to others doing related work); DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY (1997); JACQUES DERRIDA, EDMUND HUSSERL'S ORIGIN OF GEOMETRY: AN INTRODUCTION (John P. Leavey, Jr. trans., 1989); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976); JACQUES DERRIDA, *Structure, Sign, and Play in the Discourse of the Human Sciences*, *in* THE STRUCTURALIST CONTROVERSY 878 (Richard Macksey & Eugenio Donato trans., 1970); JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Wade Baskin trans., Charles Bally, Albert Sechehaye & Albert Riedlinger eds., 1966); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1975); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Les Mots et les choses trans., 1970); JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS (Alan Sheridan trans., Jacques-Alain Miller ed., 1977); CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (James Harle Bell et al. trans., Rodney Needham ed., 1969); CLAUDE LEVI-STRAUSS, RACE AND HISTORY (1953); CLAUDE LEVI-STRAUSS, THE SAVAGE MIND (1966).

47. *See generally* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 23-56 (a general overview of what is discussed in more detail throughout the book).

48. *See* HAUSMAN, PEIRCE, *supra* note 30, at 1-5, 52-53, 144-225.

49. For general discussion on semiotics and referencing, see ECO, SEMIOTICS, *supra* note 36, at 115-21 (index), 163-71 (referring); LISZKA, *supra* note 30, at 49-51 (index).

tation theory. This is unfortunate, however, because the experiential nature of Peirce's work provides a bridge for effectively translating many of the concerns of critical theory into market terms. It is for precisely this reason that Peirce's views should be of interest to people exploring the interpretive contours of the relationship between law and market theory. Peirce's work facilitates a dramatic shift in our approach to understanding the relationship between law and market theory. It opens up a number of possibilities to those of us who understand the importance of markets, appreciate the sense in which we are all embedded within markets, and yet question, doubt, or even reject some of the constraints of the traditional approaches to an economic analysis of law.

This article, therefore, examines the way in which the "institutions" of language, communication, and interpretation function to re-distribute and create wealth. It also explores ways in which an interpretive approach can make us better and more effective lawyers by facilitating an understanding of law in its market context. This can be done in at least three ways. First, Peirce's approach enhances our ability to use *framing* devices to identify value-enhancing opportunities in the exchange process.[50] Framing involves identifying a category or general viewpoint from which a fact pattern or problem will be addressed. Second, it facilitates the use of *referencing* devices that enhance our ability to mediate between contested matters within a given interpretive framework.[51] Referencing involves the identification

50. *See id.* Framing can shift between categories in the law, between law and non-law, and between political and ideological perspectives, among others. Two cases that work together to illustrate a change in value *framing* over time are *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). On virtually identical facts, and considering virtually identical state laws to restrict coal-mining activities the U.S. Supreme Court reached directly opposite conclusions. In *Pennsylvania Coal*, the state law was found to be a taking that interfered with rights established in a private, two-party consensual exchange. Sixty-five years later, in *Keystone*, the Court, working under a new value frame with respect to regulation, accepts the state determination that the underlying relationships have a public implication, and that they can be regulated for the public interest without resulting in an unlawful taking of private property.

51. *See infra* Part II.C.,D., III.A. (discussing framing, referencing and referents in a triadic approach). For an example of the strategic use of referencing, see *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The opinion considers the interpretation and application of the "takings clause." A key difference between the majority and the minority view of the case involves the interpretive refer-

and selection of particular criteria, from among several, for use in analyzing issues *within* a given frame. And, third, it explains how semiotic devices can be used to create value by transforming legal convention—by creating new *representations* that extend the networks and patterns of exchange.[52] Representation involves the way in which abstract ideas and concepts are made comprehensible and able to be exchanged, as in using a written deed to represent an estate interest in land so that it can be sold or mortgaged.

While some scholars of interpretation theory may find the above categories (frames, references, and representations) ambiguous, each is offered as a useful tool for structuring analysis of law in a market context. It helps to first think in terms of the broad cultural-interpretive frame of an argument and then to look at narrower points within that frame in terms of references. In practice the difference between framing and referencing is often a matter of emphasis and degree.

Each of these points can be initially illustrated with some simple examples.

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ence for the decision. The majority holds that the City regulation involves a quasi-judicial function and thus the burden of proving both an essential nexus and rough proportionality falls upon the City. Furthermore, the City must carry the burden by showing substantial competent evidence. Since the City cannot meet this referencing standard, the property owner wins. The minority view of the case makes reference to a different standard. In viewing the regulation as a legislative act, it holds the City to a much lower standard. It places the burden on the property owner to show that the regulation fails on the basis of a fairly debatable test. The point is that the power to select the interpretive reference for the dispute drives the outcome, and the decision makers are able to advance their meaning and value hierarchy by selecting and shaping an appropriate reference

52. *See infra* Part III.C.,D, IV.A. The idea of representation is also present in the case of *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990). The case involved a dispute over the rights a person should have in certain medical treatment products developed from studies done using some of his or her body fluids. The key issues relate to the extent to which there is a connection between the two, and the way in which it might be said that Moore has a legally recognizable representation in the products. More fundamentally we ask how the case represents the human body. For example, is the human body to be understood as something sacred or as just another commodity for sale in the marketplace? *See generally* David B. Resnik, *DNA Patents and Human Dignity*, 29 J.L. MED. & ETHICS 152 (2001); Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213 (2001); Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359 (2000).

As to the idea of framing, consider a typical real estate mortgage financing transaction.[53] Imagine that a developer has formed a corporate entity to deal in real estate transactions. In an effort to raise needed cash for a new venture, the developer seeks to borrow against $10 million in equity that it has in an office building. At the outset, one needs to consider the way in which this financing transaction might be framed. It might be framed as a loan secured by a mortgage on the office building. In this setup the developer retains full ownership of the building and gives a mortgage lien as collateral for the promise of repayment. On the other hand, the transaction could be set up as a sale and lease back of the property. Here the developer sells the building to a buyer to raise cash and then leases it back to use the space. The proceeds of sale provide funding as a substitute for the mortgage loan, and the lease payments to the buyer mimic the repayment of a mortgage. Now the transaction involves a sales contract, coordinated leasing terms, and no mortgage. A third way of doing this transaction might involve the sale or pledge of the stock in the corporate entity holding legal title to the property. In this framing of the transaction the exchange is shifted out of real property law and into the law governing corporate stock transfers. Each of these three transactional frames is common practice and collectively they illustrate several different ways of approaching the problem. Each framing of the transaction triggers different aspects of law, and different cash flow, tax, and other economic consequences.

Once a specific frame and transactional view has been decided upon, there are still many points to be considered and evaluated. Within the chosen frame there are multiple ways of structuring the details of the transaction. Interpretive references may be made to internal rates of return, out of pocket costs, sunk costs, opportunity costs, market penetration, and net and gross cash flows, among others. Different references used to evaluate the desirability of a given transactional frame will provide different conclusions about the consequences of the proposed project

In a similar way, particular drafting points may be referenced against different interpretive criteria to evaluate the status of the terms as covenants, warranties, or one of

53. *See* ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 3-43 (2d ed. 2002).

three types of conditions (simultaneous conditions, conditions precedent, and conditions subsequent). The point being, those different interpretive references may result in different risk allocations and in different legal and economic opportunities.[54] This is true even when operating within the given transactional frame. Moreover, understanding the meanings that each side attaches to particular words, terms, or conditions used in documenting a transaction is essential to advancing a client's transactional expectation. Being an effective advocate for *either* side, therefore, involves an ability to understand the framing and referencing of the transaction from *each* side.[55]

Within a given market community, exchange relationships may involve different interpretive references or perspectives, but still fall within similar value frames. One can quickly appreciate this idea, and the contrasting issues involved when moving from a concern for interpretive referencing to one of *value framing*.[56] Consider, for example, a real estate transaction involving an American developer negotiating for a project in a transitional economy such as China. Here, the developer must contend with issues beyond interpretive reference points within the same basic value frame. Here, she must appreciate the interpretive implications of *different* value frames—different conceptions of property, capitalism, profit, individual autonomy, and different formulations of the proper balance between private and public interest in market exchange.[57] Conse-

54. *See id.*

55. There are a number of classic examples of this type of interpretive problem in structuring exchange. In the area of contract law, consider two cases that appear in most first-year law-school casebooks. *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (litigating the meaning of the word "chicken" as used in a contract: did "chicken" include more expensive "fryers" or simply made reference to lower value "stewing chickens"?); Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864) (litigating confusion as to which of two ships by the name of Peerless was the one that was the subject of the contract between the parties).

56. *See* Sharon Hom & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994); MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 12-15, 66-70. *See also* KEVIN SINCLAIR & IRIS WONG PO-YEE, CULTURE SHOCK! A GUIDE TO CUSTOMS AND ETIQUETTE—CHINA (1990) (one in a series of tour guide books for travelers). *See generally* CHINESE WOMEN TRAVERSING DIASPORA: MEMOIRS, ESSAYS, AND POETRY (Sharon K. Hom ed., 1999) (exploring meaning in alternative cultural-interpretive frames).

57. *See infra* note 56 (cultural context makes a difference).

quently, understanding the deal requires an ability to effectively use the tools of interpretation theory to successfully navigate the cross-cultural waters of commerce. This is of increasing importance as the process of globalization continues.

We can also identify value-framing conflicts between interpretive communities within one country. Consider, for example, the case of *American Nurses' Association v. Illinois*.[58] This case involved a class action suit that challenged the appropriate frame of reference for determining wages for certain classifications of workers.[59] The plaintiffs in the case, brought on behalf of nurses and typists employed by the State of Illinois, alleged that the state pay scales were unfair and discriminatory.[60] The claim was that jobs associated with women paid less than jobs traditionally done by men.[61] On the surface of the text, the dispute seemed to be one of *contested facts* concerning the determination of wages when a comparison was made between the "work of women" and the "work of men."[62] The underlying tension in the case, however, really involved deeply *contested values* regarding market operations.[63] The State of Illinois, for instance, defended its wage structure by showing that it was implemented with reference to the wage rates established by the supply and demand for particular types of employees in the general labor market.[64] The plaintiffs, however, rejected the fairness of the marketplace argument and interpreted the market reference as inappropriate.[65] To them, markets were inherently biased in favor of men, and market references simply served to perpetuate the unfairness of the labor market to women.

Understanding the underlying debate in a case such as *American Nurses' Association*, and working to effectively mediate the tension between the two conflicting interpretive value frames, requires an understanding of the conflicting meanings and values dividing the two sides of the

58. 783 F.2d 716 (7th Cir. 1986).
59. *See id.* at 718-19.
60. *Id.*
61. *Id.*
62. *Id.*
63. *See id.* at 719-20. *See generally* ELLEN FRANKEL PAUL, EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE (1989).
64. *See* Am. Nurses' Ass'n, 783 F.2d at 718-19.
65. *See id.*

case. The dispute is not simply about *facts*; it is about *values* and the interpretation of market relationships. Both sides can recognize that getting the court to understand the dispute from their own particular frame and reference will affect the outcome, and ultimately the allocation of economic resources.[66] Thus, interpretation theory facilitates a deeper understanding of conflicts such as the one illustrated by *American Nurses' Association,* while directing attention to the use of law in positioning social and gender relations.[67]

In addition to explaining the significance of framing and referencing, this article addresses the way in which Peirce's semiotic interpretation theory facilitates exchange.[68] In general, semiotics deals with the way in which abstract ideas are *represented.*[69] This simply means that it deals with the devices, concepts, and tools that we use to communicate and interact with each other.[70] The ability to represent different forms of property ownership in terms of deeds, leases, and mortgages, for instance, permits exchange in ways that would not be possible without such representational or interpretive devices.[71] A deed representing fee ownership of real property, for example, permits a homeowner to control a property as a physical object and,

66. Once the court selects a particular interpretive frame and reference concerning the nature of the dispute and its resolution, the outcome and implications must be justified within that frame and reference. In a sense, one might think of selecting the appropriate frame and reference as generally related to the idea of the judge acting on a cultural-interpretive hunch; and once the judge makes a framing and referencing choice, the logic of that choice constrains the decision. *See generally* Denis J. Brion, *The Pragmatic Genesis of Constitutional Meaning*, 10 INT'L J. FOR SEMIOTICS L. 159 (1997); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1931); Joseph C. Hutcheson, *The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Mark C. Modak-Truran, *Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55 (2001); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990).

67. When this case is analyzed in a cultural-interpretive manner, one better understands the conflict while also appreciating the way in which dominant frames and references are used to inform gender politics. *See generally* FERBER AND NELSON, *supra* note 20.

68. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 23-56, 148-153.

69. *See id.* at 23-56.

70. *See* sources *supra* notes 30, 35, 69.

71. *See* DESOTO, CAPITALISM, *supra* note 24, at 4-10, 39-67.

at the same time, use it as collateral for a secured loan, or lease it for rental income.[72] Law, through legal convention, permits the property to serve multiple market functions. Not only does it provide a home and shelter, it can provide access to credit and to cash flow. In a similar manner, the ability to use a credit card as a recognized symbol or representation of financial ability enhances market exchange by eliminating the need for individuals to carry large sums of gold when they shop or travel.[73] In so doing, it raises the possibility of extending exchange beyond the boundaries of small or informal communities, and thus expands the potential for meaningful and profitable market interaction. In this way, the transformation of the interpretive frames and references of legal representation enhances our ability to create value.[74]

All of these initial points are just samples of the way in which an interpretive approach advances our understanding of the relationship between law and market theory. These points will be further elaborated upon in the remaining parts of the article. Discussion will also implicate the following:

Knowledge and information are fragmented and constrained by differences in individual and group experience and culture. Thus, legal and market institutions vary with reference to the cultural-interpretive framework in which they operate. Market concepts are therefore not universal in application, and opportunities exist for capturing or creating value in mediating between different groups.

Cultural-interpretive frameworks can vary by such factors as historical context, race, gender, age, education, class, and geographical location, among others. The variance in these frameworks creates asymmetrical positionings that can be used to shape markets, to segment markets, and to discriminate within and between markets.

Understanding law in its market context, and making sound market judgments, does not require adherence to an efficiency or wealth-maximization criterion. Efficiency and wealth maximization are oftentimes ambiguous and highly contested ideas. Addressing these ambiguities and mediat-

72. *See id.*
73. *See id.*
74. *See id.*

ing these contested ideas requires an implicit, if not express, reference to esthetics,[75] ethics, and logic.

In an interpretive approach, successful market economies can be understood as being facilitated by legal institutions that promote a concern for others—for third parties and for a public interest that is not always advanced by the fragmented pursuit of self-interest. In this regard, it is important to explore exchange in ways that go beyond assumptions of methodological individualism.

In explaining this interpretive and representational approach, it is important for the reader to understand that I am suggesting a new and additional way of exploring the relationship between law and market theory. I am exploring the relationship between law and market theory as it might be understood from the perspective of law and society,[76] or law, culture, and the humanities.[77] I am not setting out to write a critique of other approaches to law and economics, nor am I inventing a new kind of economics.[78] I am exploring the way in which interpretation theory can be applied to legal economic relationships to explore "hidden" meanings and values. And this includes understanding other approaches to law and economics as alternative interpretive frames and references.[79]

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75. Throughout the article, I use the spelling "esthetic" rather than "aesthetic" because this is the way it is spelled by Peirce in his usage. *See, e.g.*, POTTER, NORMS & IDEALS, *supra* note 30, at 4 (quoting Peirce).

76. Here, I am referencing an affinity with the Law & Society Association, *at* http://www.lawandsociety.org (last visited Nov. 11, 2002).

77. Here, I am referencing an affinity with the Law, Culture, and Humanities Association, *at* http://www.yale.edu/lawweb/lch/index.htm (last visited Nov. 11, 2002).

78. Sometimes people jump to conclusions about my work. I am using a different method than that used by people doing an economic analysis of law: my assumptions and my framework are different. My primary goal is to open up a new discourse about the relationship between law, markets, and culture, and one should read this work with this in mind.

79. For example, I do not argue that efficiency is irrelevant. Rather, it should not be given primacy in examining the relationship between law and market theory—it is one of a number of important cultural-interpretive frames and references to consider. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 136-48. Furthermore, to once again avoid confusion, I want the reader to understand that I am not claiming to have invented a new kind of economics. I am exploring the relationship between law, markets, and culture in a way that is new when compared to traditional approaches to the economic analysis of law. In my work, I consider various approaches in law and economics to be frames and references of importance to legal reasoning. In the simplest terms, I refer to my subject as law and market economy because I am not doing either

My primary concern with respect to traditional law and economics is one that points to the failure of legal economists, generally, to encourage more people to explore the application of interpretation theory in this field. This is important because we can all learn a great deal about social organization, and about law and society, by applying interpretation theory to law and economics. But more importantly, we do a disservice to law, and to the development of legal reasoning, if we permit only market critics to explore and represent the implications of interpretation theory to countless judges, students, and practitioners of law.

In this article, therefore, I explore the "institutional" connections between language, communication, and interpretation as they relate to both law and market economy.[80] In particular, I examine the role of culture in informing the process of interpretive choice, and the functioning of law as a mediator and conventionalizer of contested market meanings and values. Moreover, I suggest a need to reconsider current legal and policy conclusions, including those that have been shaped and influenced by an economic analysis of law—an economic analysis of law that has been under-informed as to interpretation theory and as to the relationship between law, markets, and culture. I show that economics is unable to provide us with optimal answers to pressing socio-legal questions. But when properly positioned as a cultural-interpretive device, economics can help us filter information to develop a finite set of plausibly good courses of action; and once a normative decision is made to pursue a specific course of action, economics can facilitate a more cost-effective, or the least costly, way of proceeding.

In explaining these ideas, I proceed in several steps. First, I explore contested interpretations of the market as represented in examples from contemporary film, case law, and competing market performance measures. Second, I present an interpretive framework and analysis of the relationship between law, markets, and culture. Third, I show how an interpretive framework can provide a new way of analyzing legal and economic disputes. To do this, I explain the idea of interpretive reference and give two examples. Fourth, I present a closer look at the basics of Peirce's

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law and economics, or an economic analysis of law.

80. I use reference to "institution" loosely to indicate a practice or process of convention.

model of interpretation as a way to better understand the interpretive framework developed in the article. Fifth, and finally, I offer a few closing comments.

I. CONTESTED "SIGNS" OF THE MARKET

The manner in which we understand the market and the relationship between law and market economy is through a process of interpretation. We process the signs and signals that are communicated to us, and translate them into meanings and values. Even the process of economic calculation requires interpretation, as we must perceive and interpret the valuation of various costs and benefits.[81] Similarly, market choice requires an interpretive process to identify, evaluate, and act upon market options.[82] These interpretive processes can be examined from a variety of perspectives, including those of cognitive theory, behavioral theory, and assorted approaches to interpretation theory. This article explores only one of these approaches. It focuses on the use of cultural-interpretation theory as related to an applied semiotics influenced by the work of Charles S. Peirce.[83]

This part of the article explores contested interpretations and understandings of the market. It is designed to set the groundwork for analysis of the way in which a changing point of view or shifting frame of reference alters the meanings and values of exchange. In illustrating several key areas of contested interpretations of the market, the article grounds the idea that substantive economic consequences, in terms of resource allocation and distribution, result from influence over the cultural-interpretive connectors of framing, referencing, and representing in law. It also points to the ambiguity of much work in law and economics, inasmuch as shifting cultural-interpretive frames, references, and representations allows for ranges of plausibly good economic results. In other words, economics cannot help us identify an optimal course of action, but it can be helpful in directing our attention to a finite set of alternative choices, all of which may be desirable or socially plau-

81. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 36-50, 70-77, 85-90, 137-48.

82. *See id.*

83. *See id. See also* sources *supra* notes 30, 33 (references to Peirce).

sible. These choices or sets of plausibly good courses of action appear ambiguous when contrasted with the idealized conception of economics as the ability to calculate optimal courses of action while bringing clarity to legal reasoning. Despite these ambiguities, economics, as a cultural-interpretive device, does help us filter the choice-making process, and after a normative decision is made to pursue any particular course of action from a range of plausibly good ones, economics can assist us in achieving our goal in a more cost-effective way.

While there are many aspects of the social and market exchange relationship that can be explored, this part of the article highlights the cultural-interpretive tension between the pursuit of *self-interest* and the promotion of the *public interest*. It does this by making reference to illustrative examples in contemporary film, case opinions, and comparative measures of economic performance.

A. *Self-interest and the Public Interest*

The traditional approach to market analysis starts from a presumption that there is a relative or close equivalence between the pursuit of self-interest and the promotion of the public interest. This idea is implicit in the standard economic assumption that, in competitive markets, marginal private benefits equal marginal social benefits, and marginal private cost equals marginal social cost.[84] This means that self-interest equals the public interest, and that there are no negative or positive externalities from market exchange. The private side of the equation equals the public side. The same idea dates all the way back to Adam Smith and his notion of the invisible hand.[85] Smith argued, for in-

84. MERCURO & MEDEMA, *supra* note 6, at 15-16 (discussing assumptions of the market, such as marginal public benefit equals marginal social benefit, MPB=MSB, meaning that private interest equals public interest; marginal private benefit equals the product price, MPB=PP, meaning that there are no positive externalities or public goods effects; and marginal private cost equals marginal social cost, MPC=MSC, meaning that there are no negative externalities).

85. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 89-90 (citing to I ADAM SMITH, WEALTH OF NATIONS, *supra* note 37, at 477-78 (discussing the invisible hand); SMITH, MORAL SENTIMENTS, *supra* note 37, at 304 (same)). Smith points out that self-interest is not a proper motivation. SMITH, MORAL SENTIMENTS, at 71-72. He denounces Hobbes and his theory of self-interest and self-love. SMITH, MORAL SENTIMENTS, at 499-508. He explains that self-interest

stance, that when individuals pursue their own self-interest, they end up promoting the public interest, even though it is no part of their original intention.[86] He suggested that an invisible hand guides us to benefit the public even as we think first and foremost of ourselves.[87] His basic point is that we must offer goods and services that the public values if we are to attract the attention, resources, and praise that benefit us. Thus, if I want to get wealthy as a computer manufacturer and my only concern is for my own self-interest, I will have to produce the products and services the public demands or I will not make money. In this way, the pursuit of my private or self-interest corresponds to the promotion of the public interest.

This "equivalence theory" of markets can make sense under traditional assumptions of perfect competition. Such markets assume that all actors: 1) act rationally; 2) in their own self-interest; 3) with good and full information; 4) under conditions where all goods and resources are freely transferable; 5) where all markets permit free and easy entry and exit; and 6) prior distributions of wealth and resources do not unfairly impact on competition. In this ideal world, we are all buyers and sellers of something.[88] For instance, I sell my labor for a wage and use my income to purchase food and shelter. At the same time, we observe that sellers have no power, since perfect competition means that sellers must respond to consumer demands and preferences or lose market share to others who will gladly step in to meet the need. This system means that countless individual

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is different from selfishness. SMITH, MORAL SENTIMENTS, at 161-65. For an interesting history of the idea of self-interest, see SELF-INTEREST: AN ANTHOLOGY OF PHILOSOPHICAL PERSPECTIVES (Kelly Rogers ed., 1997).

86. *See* sources *supra* note 85.

87. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 89-90 (citing Adam Smith).

88. *See* FERBER AND NELSON, *supra* note 20, at 37-68 (discussing assumptions); MALLOY, LAW AND ECONOMICS, *supra* note 43, at 48-56 (1990) (discussing assumptions and the problems with these assumptions); MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 125-29 (discussing reciprocity in exchange); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999). *See generally* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989); Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970) (discussing perfect competition markets without entry barriers); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001); Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293 (1992).

consumers drive the allocation of resources by pursuing their own self-interest in the marketplace.

In the real world, we know that the assumptions of the perfectly competitive market do not always hold true. Sometimes people do not act rationally, and sometimes we act altruistically rather than with self-interest. We do not have perfect information, and access to information is not evenly distributed. We also know that transferring goods and services is not always easy, just as it is not always easy to pack up and move to a distant location in pursuit of a job. It is difficult to leave family, friends, and one's roots. Similarly, markets are not always open to free entry and exit. Some markets have huge economies of scale or require licenses, or have other formal and informal restrictions in place. Likewise, we know that prior distribution does make a difference to competition. People that come into the market with more training, prior experience, and greater resources have better odds of being successful. This is true even though it is also true that the market does not guarantee success: some very rich people have gone broke because they were unable to stay competitive against new upstarts.[89]

One possible conclusion that might be drawn from this analysis is simple. The more a transactional relationship appears to resemble key elements of our hypothetical model of perfect competition, the more it validates letting individuals arrange the relationship on their own. Their pursuit of self-interest will come close to approximating the public interest. On the other hand, the less resemblance between a given market context and the hypothetical of perfect competition, the closer we must look at considering ways in which to facilitate the coordination of private and public interest. In this regard, we must consider the ways in which law

89. EDWARD CHANCELLOR, DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION 252 (1999) (discussing Hunt brothers' effort to corner the international silver market in 1979-80); Laurie Cohen, *Hunts Charged in Silver Scheme: 5-Year Probe Says Group Manipulated Market*, CHI. TRIB., Mar. 1, 1985, at C1; Michael A. Hiltzik, *Hunt Brothers Accused of Manipulating Silver Futures in '79 and '80*, L.A. TIMES, Mar. 1, 1985, Pt. 4, at 1, Col. 5; Roy Rowan, *A Talkfest with the Hunts*, FORTUNE, Aug. 11, 1980, at 162. *See* Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1, 57 (2001); Robert Hahn, *Foreword to Competition Policy and the New Economy*, 32 UWLA L. REV. 159 (2001); James F. Moore, *U.S. v. Microsoft: The Bigger Question*, N.Y. TIMES, Jan. 25, 1998, at 12-BU.

might be used to enhance the process of exchange so as to make it come closer to the ideal.

There are several factors that can cause a variance between private (self-interest) and the public interest. These factors include: high transaction or coordination costs when multiple parties of interest are involved; lack of good information; irrational discrimination directed at certain market participants; extensive externalities; path dependencies; public goods or commons problems; and poorly defined legal rights, among others.[90]

There is, of course, another, perhaps more fundamental, problem with equating the pursuit of self-interest with the promotion of the public interest. In traditional approaches to law and economics, this assumption works to focus attention on the actions of detached and atomistic individuals. It also operates to frame the vast majority of socio-legal disputes as ones of contested facts, within the given economic framework, rather than of contested values between claimants in differently situated interpretive communities. This framing may be wrong, and it is at least highly contestable since it is generally linked to an assumption of methodological individualism.[91] This means that it is linked to the assumption of detached and purely rational individuals. But individuals, as interpretive beings, are not isolated, detached, and atomistic; instead, they are embedded within communities. And successful market economies may suc-

90. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1029 (1995) (regarding transaction costs when multiple parties are involved); George Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, *in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 239 (Avery W. Katz ed., 1998) (regarding information availability in the market); THE ECONOMICS OF DISCRIMINATION, *supra* note 2, at 14-15 (regarding irrational discrimination in the marketplace); BARNES & STOUT, *supra* note 7, at 40-42 (regarding externalities); MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 101-02 (regarding path dependency and citing KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951)); Hardin, *supra* note 11, at 1243 (regarding tragedy of the commons and overuse of public resources); COOTER & ULEN, *supra* note 7, at 94-95 (demonstrating delineation of legal rights).

91. Methodological individualism refers to the traditional economic focus on individuals as rational and self-interested calculators of efficiency. *See* MARK BLAUG, THE METHODOLOGY OF ECONOMICS 46, 49, 50, 227-28 (1980) [hereinafter "BLAUG, METHODOLOGY"]; MERCURO & MEDEMA, *supra* note 6, at 114-15 (institutional economics focuses on "mutual interdependence rather than atomistic independence"); MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 57-69 (an interpretive critique of the concept).

ceed, in part, precisely because they construct legal institutions capable of representing a public interest that is not expressed by the fragmented pursuit of individual self-interest.[92]

Even Adam Smith understood, for instance, that individuals exchange and act within a social fabric.[93] Economic calculus does not occur in isolation, nor is it detached from a conception of meaning and value informed by social interaction and point of view. Consequently, to the extent that markets involve the actions of individuals embedded within a social fabric, we need to know something about how these individuals understand and communicate. We need to understand human action in terms of the meaning and value formation process. We need to understand market choice not as a form of mathematical calculus, but as a process of experiential interpretation involving individuals embedded within and between cultural-interpretive communities.[94] Market choice and market action are, therefore, socially situated, and we need to think in terms of the legal institutions that can enable us to exchange beyond our own cultural-interpretive boundaries.

Consequently, market transactions are constrained and influenced by an individual's experience, position, and frame of reference within a community. The idea of promoting the pursuit of self-interest as a means of advancing the public interest is, therefore, contingent upon one's interpretive conception of self and public—of self and other—of autonomy (freedom) and coercion (necessity).[95] From a cultural-interpretive point of view, this means that market analysis is contested not only in terms of *facts*, but also in terms of *values*. And, from the perspective of legal decision-making, it is important to develop a pragmatic under-

92. *See supra* Part IV.C and related notes.

93. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 64-69, 106-115, 118; SMITH, MORAL SENTIMENTS, *supra* note 37, at 71, 200-60, 352, 422 (discussing the impartial spectator). Smith also discusses the need to humble the pursuit of self-interest and to realize that we all operate within a social context. SMITH, MORAL SENTIMENTS, *supra* note 37, at 161-62.

94. *See generally* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9 (this is the general theory developed in the book).

95. *See* KEVELSON, PEIRCE AND FREEDOM, *supra* note 33, at 1-47. Freedom is the opposite of necessity. *Id* at 16; HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 38, at 20-21 (discussing the conflict between coercion and individual liberty).

standing of the contested frames and references at issue in a given dispute.

We can begin to understand the contested nature of the relationship between law and markets by examining a few illustrations from contemporary film, case opinions, and comparative measures of economic performance.

B. *Framing the Market in Contemporary Film*

Contemporary films include numerous examples of contested interpretations of market values and meanings. These film images and representations are useful to explore as they reflect and illuminate tensions in underlying legal, cultural, and economic relationships. These film clips can include images of urban gentrification and the market exploitation of African Americans as presented in a number of scenes in the movie *Boyz N The Hood*,[96] or a discussion of reverse discrimination in hiring in the movie *Jungle Fever*.[97] Similarly, films such as *Do The Right Thing*[98] explore the claims that a community might have upon a business operating in a given neighborhood. One can also find very useful scenes in such diverse films as *Class Action*,[99] and Disney's *Pocahontas*.[100] For law to mediate these tensions and command respect across diverse communities, it cannot presume a singular and universal interpretation of the marketplace.

Two films, *Wall Street* and *Other People's Money*,[101] contain significant scenes involving corporate stockholder

96. BOYZ N THE HOOD (Columbia Pictures 1991) (including discussion of biased college testing standards, under funded school, unsafe neighborhoods, police brutality, and the economic destruction of neighborhoods resulting from the sale of guns, liquor, and drugs to African Americans by whites).

97. JUNGLE FEVER (Universal City Studios 1991) (the main character, an African American architect named Flip, objects when his white bosses hire an Italian American secretary after Flip had requested that an African American be hired; his bosses accuse Flip of wanting to impose illegal reverse discrimination).

98. DO THE RIGHT THING (MCA Universal 1989) (discussed in this section of the article).

99. CLASS ACTION (Twentieth Century Fox 1990)(discussed in this section of the article).

100. POCAHONTAS (Walt Disney 1995) (discussed in this section of the article).

101. WALL STREET (Twentieth Century Fox 1987); OTHER PEOPLE'S MONEY (Warner Bros. 1991). *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 168-70 (the discussion here expands on an example used in my earlier book).

meetings, and raise interesting issues about the nature of market values and the purpose of exchange. They also raise questions about the nature of the firm, the characteristics of ownership, and the community obligations of business. Both films involve a takeover bid by an investor seeking to break up a company as a way of enhancing stockholder value. The lead characters in each film make appeals to the stockholders urging the stockholders to vote in favor of the takeover, and for liquidation of the firm in an effort to maximize stockholder value.

In *Wall Street*, Gordon Gekko, played by Michael Douglas, takes the center stage at a stockholder meeting held in the surroundings of a well-appointed convention center. In the room, there are plenty of well-dressed stockholders who are seated on chairs at the floor level, looking up to a platform stage upon which sits the president and his thirty-three corporate vice presidents. After the corporate president warns stockholders that Gekko is a destroyer of companies, and that they should reject any takeover offer from him, Gekko takes up the microphone, from the floor, and declares, "I am not a destroyer of companies, I am a liberator of them." Gekko goes on to tell stockholders to vote in favor of his takeover bid because he will make them rich. He tells them "greed is good, greed simplifies, greed clarifies, greed in all of its forms makes the marketplace work." He tells them to ignore the concerns of the inefficient management of the company, and to pursue their own self-interest, to follow their greed in the pursuit of wealth. The clarity of the self-interested pursuit of greed will bring them to a freedom that only Gekko can deliver.

Similarly, in *Other People's Money*, Danny DeVito, playing Larry the Liquidator, makes an appeal to stockholders to vote in favor of his takeover bid because he will make them money. He tells them that the company, while profitable, is worth more dead (liquidated) than alive. He tells stockholders to vote for making the best return on their money, and that they have no obligation to the employees of the company or to the community where its factory is located. Their only obligation is to make the best profit for themselves.

In contrast to these views, Gregory Peck, playing the role of the eighty-one-year-old founder and president of the New England Wire and Cable Company in *Other People's Money*, argues that a company is worth more than the value

of its stock. He says that a business is about people. It is about people who work together pursuing a common purpose, and who share the same friendships and live in the same community. He cautions the stockholders to avoid selfish and greedy actions and instead asks them to vote with their feelings. He asks them to vote for the continuation of a profitable business. He asserts that a business is more than a collection of capital goods. He tells them that a business is a community.

In contrast to the scene from *Wall Street*, the stockholder meeting in *Other People's Money* occurs at the factory, and the film's director presents us with images of the "blue collar" town and workers who are present both inside and outside of the meeting. The meeting is not set in some sterile convention hall as in *Wall Street*, but is held in the very town that will be affected by closing the plant. The dispute is not about an inefficient management team; it is about a company that is no longer as productive as other investments because new technologies are cutting into its market. The common theme between these films is the same, however. Each involves the takeover of a company by a rational, but "heartless," Wall Street "money-man" declaring that the only obligation people owe one another is to maximize wealth in the pursuit of self-interest.

In both *Wall Street* and *Other People's Money*, the takeover advocates address the legal owners of the company, the stockholders, and tell them to maximize their wealth by voting to liquidate the companies while they are still valuable. In contrast, Peck's character frames the appeal differently. He basically asserts that a company has obligations to its "stakeholders," and not just to its legal owners. He positions the proper market analysis as including the community, the schools, residents, workers, and others that have contributed to the company over the years. The company is not simply a detached and impersonal capital good; it is more than a physical object; it is a web of interconnected interests and values. He argues that resource determinations should account for a broader set of interests than those reflected by *legal owners* simply pursuing self-interest. In part, therefore, Peck's character questions the value frame and the interpretive reference set by the wealth maximizing character, Larry the Liquidator. By changing the value frame and the interpretive reference, Peck's character can logically promote a different economic calculus.

In viewing these scenes, one gets a close-up look at the real tension between two different visions of the market. It becomes clear that the disagreements are as much, or more, about *values* as they are about *facts*. It is not just a debate about the profitability of the various companies in question, for instance, but about the values to be promoted and endorsed by a market economy.

These two film clips also deal with tensions surrounding the meaning of property. Both involve corporate takeovers and, in a similar way, each raises fundamental questions about ownership and the corporate form. Each asks us to consider who owns a company—the stockholders, the management, the workers, the community? How does ownership relate to having a "stakeholder" interest? Are claims by the community in this type of situation any different than the ones made by fans when their favorite major league football or baseball team threatens to pull out and move to a new city? Do corporations exist simply to maximize profit for the stockholders? Is there such a thing as good corporate citizenship? What is the basic nature and role of the firm in law and society, and how do alternative conceptions of the firm, and of the market, relate to matters of information costs, risk assessment and management, production costs, market price, firm valuation, and labor relations? These considerations set up an examination of the exchange relationships within the firm, and between the firm, its constituent parts, and the community. Understanding the relationships helps us establish a map or plan for a more detailed investigation of factors to address in legal reasoning and public policy making.

Another insightful contemporary film that contests the meanings and values of the marketplace is Spike Lee's *Do The Right Thing*.[102] There are a couple of important scenes to consider in this film. The first involves a discussion between Sal, the owner of Sal's World Famous Pizzeria, and his oldest son, Pino, who works at the Pizzeria. Sal operates his Pizza shop in a neighborhood that has been transformed. Once it was an Italian American community that Sal identified with, but over the twenty-five-year period that Sal has been there, the neighborhood has become home to an Hispanic and African American community. Sal is very Italian and his shop celebrates this by having a "wall

102. DO THE RIGHT THING, *supra* note 98.

of fame" where there are pictures of great Italian Americans. The problem is that Sal's customers are African American and Hispanic, and they do not identify with the same heroes.

At several points in the film, some of his teenage customers complain that they want to see "some Black heroes on the wall of fame." This causes a lot of heated debate and tension. It is interesting that Sal's response is positioned in the classic framework of neoclassical economics. Sal argues that "it is his shop, he built it, he worked it, he owns it, and he will put whomever he wants on his wall of fame." Sal's response is understandable and justifiable in the individualist framework of traditional law and economics. On the other hand, Sal fails to appreciate the nature of the claim being raised. While the teenagers are talking about specific pictures on a wall, they are also "representing" a broader question about the community responsibility of a business. In this sense, the issues seem close to those raised by the two movies just discussed. Here, the question is not so much about who owns a corporation as it is about the claim that a community has on the people and activities within its boundaries. Sal is a part of the neighborhood, but like the detached and atomistic figure of "homo-economicus," he is not a part of the community. He claims his pizza shop is an island, but the community questions his ability to be there without being a part of the people he serves.

In another scene from the same film, Sal is talking with Pino inside the pizza shop. The son looks through the window and outside to the neighborhood and complains that he hates working in this place. He hates all the black people, it drives him crazy, and his friends laugh at him for working in that community. Sal tells his son that these people who laugh at him for working in this neighborhood are not his friends. He asks, "Who puts the food on your table, who pays for your clothes, and who puts a roof over your head? These people, and I am proud that they have grown up on my food." In this scene, Sal is once again representing the traditional law and economics view. He is not really connected to his customers as people, as friends, as part of his community, but he sees them, through a glass enclosure, as a means to serving his own self-interest. They are the source of his income, and, in pursuing his own self-interest, he has promoted the public interest by providing these people with food. In the end, Sal seems to be telling his son

that his friends are not really friends because they do not understand how the market works. They do not understand how Pino gets an economic advantage from selling pizza to the people in this neighborhood. These so-called friends should not make fun of Pino for serving African American and Hispanic people; they should applaud Pino for so cleverly serving his own self-interest.

At the end of the film violence breaks out as community members trash and burn Sal's Pizza shop. The hope is for law to provide a mediating mechanism to avoid this kind of violence. To do this, however, law (and theory of law and economics) must account for alternative market experiences. Law cannot presuppose a singular or universal market frame if it is to provide credible and meaningful resolution to the tensions depicted in the film. Thus, this clip, once again, raises important issues about the patterns of exchange and the nature of social meanings in market society. It opens the door to a discussion of self-interest and the degree to which it permits market actors to treat others as objects of trade or simply as a dehumanized means to their own economic ends. Pursuing useful information about the nature of these exchange relationships and contested interpretations is important to developing a responsive and pragmatic approach to law, because the appropriateness of a response will be judged differently depending upon the use of any given value frame or interpretive reference. Likewise, alternative frames and references promote different resource distributions that should be accounted for in legal decision-making.

Two other contemporary films to consider include *Class Action*,[103] and Disney's *Pocahontas*.[104]

One scene from the film *Class Action* involves a discussion of cost and benefit analysis related to the question of repairing a defect in an automobile that a company has on the market. This scene is reminiscent of the Ford Pinto litigation, and is reflective of the more recent rash of lawsuits involving allegedly defective Firestone tires.[105] In the film,

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103. CLASS ACTION, *supra* note 99.

104. POCAHONTAS, *supra* note 100.

105. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 568-70 (2000); LEE PATRICK STROBEL, RECKLESS HOMICIDE? FORD'S PINTO TRIAL (1980); Bob Van Voris & Matt Fleischer, *Feeding Frenzy over Firestone*, NAT'L L.J., Sept. 11, 2000, at A1; Jeffrey A. Fick, *Calif. Jury Rules*

the automobile in question has a defective turn signal switch that causes sparks to ignite the vehicle in certain types of collisions. The sparks cause the vehicle to explode, and a number of plaintiffs are suing the company for burns and deaths. In this particular scene, the company president explains to the corporate lawyers that statistical studies were done by the company indicating that it would be cheaper to deal with potential lawsuits than to recall and fix all of the cars. "It's a simple cost and benefit analysis." Thus, the company knowingly chose to leave the defective cars on the market and allow people to be injured and killed.

The scene provides a glimpse into a purely "rational choice" discussion that leaves the viewer wondering about the nature of justice, and the decision-making process of the corporate enterprise. The scene clearly depicts the nature of discussion within a given cultural-interpretive value frame, and viewers are challenged to understand the implications. Viewers are confronted with the consequential meaning of promoting a system of social organization grounded in simple cost and benefit analysis, and driven by a desire for wealth maximization. They are also challenged to formulate alternative strategies based on competing values, and different interpretive frameworks.

The question that remains is: if the company cannot use cost and benefit analysis, what can it use as a guide to decision-making? A reasonable response might involve reframing the question. One might ask: what considerations and information beyond a cost and benefit analysis should be used to guide us in decision-making? In this respect, the challenge is to see that multiple frames and references can be used together, at the same time. There is no need to accept a simple dualistic frame that positions the choice as between using only cost and benefit analysis, or suggesting a complete rejection of cost and benefit analysis. Life in a modern market economy is too complex for simple dualistic responses. Moreover, social and market choices are too complex to be simplified into mere factual disputes. As this example illustrates, the underlying dispute is more profound than a contest between two different teams of experts

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Ford Explorer 'Defective', USA TODAY, Feb. 1, 2002, at B1. *See generally* Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729 (1996).

and their calculation of the proper costs and benefits for announcing a recall on the defective automobile. The deeper issue concerns the proper value frame to be used in identifying and evaluating the appropriate facts to be considered in making a decision with major individual and community implications.

We can even find images of deep-seated social tension about the meanings and values of the marketplace in films for children. Disney's *Pocahontas* presents the contrast of two competing frames of reference for market analysis. One view, put forward by the character of John Smith, is based on a belief in science, technology, and the separation of man from the natural world.[106] The other view, represented in the character of Pocahontas, is grounded in a connection to nature, and based on an emotive sense of belonging and a non-monetary sense of value.[107] The scene, therefore, positions tension between two competing value frames and different sets of interpretive references.

In one particular scene, Captain Smith is alone with Pocahontas in the woods. He is telling her about his home in London, and explaining the way in which the English will show Pocahontas and her people how "to make the most of their land." He explains how England has civilized "savages" all over the world and showed them how to industrialize and make progress. Smith sees the land and its resources in terms of the ability to commodify them for purposes of economic gain and wealth maximization. Pocahontas responds that her people already know how to make good use of the land, and that they are not savages just because they are different from the English. She explains the connection between nature and her people, and wonders if Smith can ever understand the value of the land without calculating its monetary worth.

In a sense *Pocahontas* reiterates the theme of each of the other films. Each reflects a deeply contested public discourse regarding the nature of market life. Each contests assertions of ownership and of the pursuit of self-interest as a sustainable and worthy criterion for social organization. Each raises questions of valuation and of participation in

106. *See* FERBER AND NELSON, *supra* note 20, at 1-93 (discussing the objective male perspective in economics and the bias that this has relative to the differences indicated by a feminist view of the market).

107. *See id.*

the decision-making process. Each offers competing frames and references and challenges us to develop supportable and persuasive justifications for invoking one frame rather than another. Similarly, each provides us with an understanding of the way in which alternative cultural-interpretive frames promote different potential distributions, as well as competing meanings and values.

Collectively, these scenes from selective contemporary film illustrate, at a popular culture level, the highly contested interpretive conflicts represented in modern legal and economic discourse. Debates concerning these same issues fill law reviews, law school curriculums, courthouses, and legislative hearings. Gaining a better understanding of these discursive tensions, and their implications for law and market economy, requires an interpretive approach to law and economics. Furthermore, once we understand the framing and referencing conflicts that ground these interpretive conflicts, we can employ a variety of social science tools to assist us in clarifying and enlightening the process of pragmatic legal decision-making.

C. *Framing the Market in Case Opinions*

There are numerous case opinions that contain illustrations of contested visions of market relationships. Since space is limited, however, this section of the article only discusses a few cases with the hope that they will serve as an adequate example of cultural-interpretive framing issues at play in using market analysis to address pressing socio-legal problems. There has been no systematic attempt to select the "best" or most favorable case opinions; rather, a simple selection of useful cases has been made.

In *Merritt v. Faulkner*,[108] a prisoner in the Indiana State Prison, Billy Merritt, challenged the denial of appointment of counsel in a civil action. While in prison, Merritt experienced medical problems with his eye related to sickle cell disease.[109] As a result of incomplete and alleged incompetent medical treatment, and as a product of the alleged deliberate indifference of prison officials, Merritt suffered the loss

108. 697 F.2d 761 (7th Cir. 1983), *cert. denied*, 464 U.S. 986 (1983). *See also* ROBIN PAUL MALLOY, LAW AND ECONOMICS, *supra* note 43, at 126 (providing a similar discussion of this case).

109. *Id.* at 762.

of his eyesight.[110] In reviewing the denial of appointed counsel for Merritt, the majority of a three judge panel of the Seventh Circuit Court of Appeals held that it was improper to deny appointed counsel to Merritt, who, as an indigent prisoner, was seeking to advance a claim against prison officials based on the denial of his civil rights.[111]

The majority opinion, delivered by Judge Swygert, recognized that "[i]ndigent civil litigants have no constitutional or statutory right to be represented by a lawyer."[112] Yet, he found that "when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility."[113] Furthermore, he stated that "[i]n some civil cases meaningful access requires representation by a lawyer."[114] The Court then went on to set out five non-exclusive factors to be considered and balanced in determining an indigent individuals right to appointed counsel in such a case. These factors included:

> (1) whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint.[115]

Using these factors, the court held that the trial court abused its discretion in not providing Merritt with appointed counsel.[116]

Judge Posner offered a separate opinion.[117] Posner framed his analysis of the case in market terms. He argued for a presumption against appointed counsel in such a civil action,[118] his general reasoning being that any individual with a good case for tort liability would be able to get a lawyer because of the economic incentive of recovering a con-

110. *Id.*
111. *See id.* at 763-68.
112. *Id.* at 763.
113. *Id.*
114. *Id.*
115. *Id.* at 764.
116. *Id.*
117. *Id.* at 769 (Posner, J., concurring in part and dissenting in part).
118. *Id.*

tingency fee.[119] Thus, it was unnecessary to do an after-the-fact-balancing test because the market could more readily and efficiently pass upon the merits of the case. If it were a strong case with substantial prospects of prevailing against the state, the indigent would show up with an attorney. In other words, the market would respond to the need and the potential for economic gain. The fact that Merritt showed up without an attorney resolved the matter against the indigent claimant.

Posner's position is altogether consistent with framing this issue within an individualist, self-interested market model. He suggests that prisoners have ample access to information about lawyers,[120] and that lawyers have ample access to information about potential civil claims within the prison system. He imagines a competitive market for providing civil legal services to indigent prisoners, and he rejects the majority opinion's statement that "[a]n underlying assumption of the adversarial system is that both parties will have roughly equal legal resources."[121] To the contrary, Posner asserts that "[t]his has never been an assumption of the adversarial system."[122]

Such a view is consistent with Posner's assumptions about a perfectly competitive market. In the perfectly competitive market, there is no assumption about equality of resource allocation, and inequalities in prior distributions are dismissed as unproblematic. Posner frames his investigation in terms of the organizing principles of self-interest. In this frame, the lawyer and the indigent prisoner will both be lead by an invisible hand to achieve justice without the need for government intervention into the marketplace. But Posner's framing misses an important element that is at work in the framing of the majority opinion with which he disagrees.

A problem with Posner's opinion, even if one were to accept the idea of a well functioning and competitive market in this context, is that it leaves the indigent claimant with no legal representation unless there is a significant contingency fee available. This means that slight injuries, or injuries that are important but difficult to quantify in eco-

119. *Id.* at 769-70.
120. *Id.* at 770.
121. *Id.* at 771.
122. *Id.*

nomic terms may well go unaddressed. This is because the market responds to *the willingness and ability to pay*. And when an injury is slight, the potential fee to a lawyer will be negligible. Thus, there will be little if any incentive for a lawyer to aid the indigent claimant. A similar problem arises with slight or technical violations of the Constitution. The violation may impose only a minor cost or burden on the individual but the redress of the violation may be costly to society. Thus, a simple cost and benefit analysis may lead one to over look the technical or minor violation. It would make rational economic sense to do so. The problem with this conclusion, however, is that it ignores the positive externalities that flow to the benefit of others from requiring the State to uphold the Constitution and to respect the human dignity of all its citizens.[123]

In other words, litigation that addresses constitutional considerations about the relationship between individuals and the state has implications for people beyond those that are the immediate parties to the suit.[124] Where Posner uses a "zoom lens" to focus in on a two party transaction to calculate efficiency, the majority seemingly takes a "wide-angle" look at the public interest represented by the underlying issues at stake in the dispute. Where Posner imagines that the pursuit of self-interest leads to the promotion of the public interest, the majority identifies a problem with this rationale. The majority opinion expresses a concern that justice, even justice based on a desire for efficiency, might not prevail where extensive positive externalities are present.[125]

Consequently, the case can be interpreted in different ways. It can be understood in terms of a difference in the

123. A positive externality involves a benefit that "spills over" to third parties. The immediate parties to the transaction are unable to capture all of the benefits from the exchange relationship. *See generally*, COOTER AND ULEN, LAW AND ECONOMICS, *supra* note 7, at 40-41.

124. *See* Cooter & Ulen, *supra* note 7, at 42-43 (defining aspects of public goods); NONPROFIT ORGANIZATIONS IN A MARKET ECONOMY: UNDERSTANDING NEW ROLES, ISSUES, AND TRENDS 23-78 (David C. Hammack & Denis R. Young eds., 1993) [hereinafter NONPROFIT ORGANIZATIONS] (explaining public goods issues and examples in the role of nonprofit organizations); PUBLIC GOODS AND MARKET FAILURES: A CRITICAL EXAMINATION (Tyler Cowen ed., 1992); JOHN G. HEAD, PUBLIC GOODS AND PUBLIC WELFARE (1974); HARVEY S. ROSEN, PUBLIC FINANCE 55-58 (2002).

125. RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS (2001); COOTER & ULEN, *supra* note 7, at 42-43; ROSEN, *supra* note 124, at 55-58.

cultural-interpretive referencing of individual rights, and of the relevant market concepts to be considered. The case is not so much about disputed facts concerning Merritt's injury or the cost of an attorney to represent him. It is about the underlying values we seek to promote in our particular form of constitutional and representative government. We must, therefore, work to develop a logical and useful method of analysis that includes both fact-based and value-based components—one that balances the relationship between the humanities and the sciences.

One can identify similar contested interpretations of market framing in cases dealing with issues of commodification and entitlement respecting the human body.[126] Consider, for example, the case of *In the Matter of Baby M.*[127]

The *Baby M* case involved a private contractual attempt by three individuals to rearrange the family formation process.[128] The exchange in question involved William Stern, Elizabeth Stern (his wife), and Mary Beth Whitehead (the surrogate mother).[129] Mr. and Mrs. Stern were unable to have a child, but desperately wanted to start a family. They were discouraged by the adoption process and wanted a child that would reflect some of their own genetic makeup. This prompted the Sterns to enter into a contract with Whitehead, providing for Mr. Stern's sperm to be used to artificially inseminate Whitehead.[130] Whitehead agreed to carry the resulting child to term and upon birth to deliver the baby to the Sterns.[131] Upon delivery of the baby Mrs. Stern would adopt the child and Mary Beth Whitehead would terminate and relinquish all maternal rights.[132] For her services, Whitehead was to be paid $10,000 and the

126. *See, e.g.*, In the Matter of Baby M, 537 A.2d 1227 (N.J. 1988); Moore v. Regents of University of California, 793 P.2d 479 (Cal. 1990).

127. 537 A.2d 1227.

128. *Id.* at 1234. *See* June Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 872-75 (2000); Lawrence O. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL'Y 429, 435-38 (2001); Carol Sanger, *(Baby) M Is for the Many Things: Why I Start with* Baby M, 44 ST. LOUIS U. L.J. 1443 (2000).

129. *Baby M*, 537 A.2d at 1235.

130. *Id.*

131. *Id.*

132. *Id.*

Stern's agreed to cover the costs of fertilization and maternity.[133]

The case is interesting because it involves issues of representation, framing, and referencing. At the outset we need to consider the way in which the law represents Ms. Whitehead's body and that of Baby M. Are they beings endowed by their creator with certain inalienable rights, or are they simply new examples of post-industrial commodities, available for sale or lease? Is this a case about the degradation of human life or a celebration of the legal commodification of children and of the woman's womb? The case also raises further questions concerning the legal representation of family formation, motherhood, and paternity, among others.

Beyond the above issues, we can frame this case in several ways. For example, the transaction might be framed in at least one of three ways. The transaction might be framed or represented as one involving the sale of a baby; as payment for incubation services; or as a lease of space in an otherwise empty or underutilized womb. The legal system, given the tragic experience with treating people as objects of sale in the United States, is generally not inclined to view these transactions favorably when they are cast as baby sales. On the other hand, as a contract for services, or perhaps even as a lease of space, the transaction may be sustainable.

First of all, the transaction initially appears as consensual between all of the parties. Consequently, it was initially a pareto efficient arrangement because at least one party was made better off while no one was made worse off as a result of the exchange.[134] The Sterns wanted a child and had sufficient income to make the payments necessary to attract a willing person to participate in their plan. Mrs. Whitehead consented to all of the contract terms and found that this was a viable way to earn additional income by taking advantage of her fertility and her ability to carry a child to term.[135] Her payment would reflect the value of other income producing opportunities that she would forego

133. *Id.* at 412.

134. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 108, 154 (discussing consent and basic definitional issues with respect to pareto and kaldor-hicks efficiency).

135. *Baby M,* 109 N.J. at 413-14.

in order to perform her part of the contract. In the end, however, after the baby was born, Mrs. Whitehead had a change of mind and did not want to give up the baby.[136] This resulted in litigation to enforce the contract.

While an initial review of the case can be framed as a consensual two-party transaction between Whitehead and the Sterns, a closer examination indicates the possibility of another more complex framing. The exchange also involves Baby M, potential relatives, and the public. First, Baby M is a person with constitutional rights. The Sterns and Whitehead acted in an agency capacity in contracting over the status and identity of this baby, but Baby M has some rights independent of the contract and these rights need to be reflected in the transaction.[137] This raises a question of how these rights or meanings would or could be properly represented and incorporated into such an agreement. Second, the Sterns and Whitehead made a contract that had implication not only for themselves but also for people that would be genetic or contractual relatives to Baby M. Other children of Mrs. Whitehead, for example, would be denied a relationship with their sibling as a result of this contract. The contract also had a public implication. Beyond the public policy question related to upholding such private contracts there is a public interest in family stability, and in factors related to the healthcare, schooling, and parenting implications of new children brought into a community. Furthermore, what of the situation where the baby might have been born with severe genetic defects, could the Stern's have rejected delivery on terms of it being a nonconforming good? Would Mrs. Whitehead be able to refuse a return of the baby under such circumstances, and would the baby end up as a charge of the public?

When Mrs. Whitehead breaches the contract by seeking to retain maternal rights, the economic question arises as to if the breach is efficient. Here we can select from several economic reference points to analyze the situation. Using a pareto efficiency test we know that the breach is inefficient because at least one party is made worse off as a result of the breach. With reference to kaldor-hicks efficiency we can

136. *Id.* at 415.

137. *See* NONPROFIT ORGANIZATIONS, *supra* note 124, at 23-78 (discussing agency issues related to education, health care, and other examples. Agency in the sense of making decisions for others).

generate additional views of the case. As between the parties it might be asked if Mrs. Whitehead wins more than the Sterns lose, or perhaps there is a need to expand the scope of this calculation to one of asking if Mrs. Whitehead and Baby M win more than the Sterns and Baby M lose. We also have to view this from a publicly positioned evaluation of kaldor-hicks efficiency and ask if the public gains more than these private parties lose by taking one position or another as to the validity of such transactions. In each situation one must consider the extremely difficult matter of valuation on all sides of the exchange. In the actual case the court decided that the contract could not be enforced.[138] Public policy favored other channels, such as formal adoption, as an alternative way to establish a family.

Thus, the court denied private parties a right to rearrange public conceptions of the family and the family formation process, at least until such time as the legislature might expressly provide otherwise. Moreover, the issues in the case indicate a variety of potential economic outcomes depending upon the way in which alternative market framings and references are used. The outcome, in part, turns on how one defines or frames the relationship between the parties, and on how one frames and references the potential interests involved.

More important than recognizing the ambiguity of economic calculation in this situation is the understanding of how the authority to represent the meanings and values of this relationship inform the outcome. The case illustrates the flexible nature of an economic calculus, with different outcomes able to be declared efficient based on the use of particular framing and referencing devices. Framing the transaction as a simple two party exchange to be analyzed under a pareto efficiency standard, for instance, leads to a very different result than would prevail if it was framed as a multiparty transaction with numerous public externalities, and with a reference to a kaldor-hicks efficiency standard. The authority, therefore, to set the cultural-interpretive frame and reference has implications for resource definition and distribution. More fundamentally, and perhaps more difficult to appreciate, is the matter of representation in this exchange. Who should have the authority to define the relationships between the parties, and who

138. *Baby M,* 109 N.J. at 411.

should control the representation of meaning and value in this complex human exchange? These are important questions because the authority to represent and to interpret relationships involves the power to create and redistribute wealth and resources.

A final case to consider in this section of the article is *Honorable v. Easy Life Real Estate System*.[139] This case addressed the issue of market power in housing markets when a claim was asserted with respect to the racially discriminatory practices of Easy Life.[140] Easy Life was in the business of rehabbing houses and financing their acquisition by homebuyers.[141] The aggrieved homebuyers in the case were African Americans.[142] They claimed that Easy Life exploited them in the market, and that Easy Life violated both the Civil Rights Act and the Fair Housing Act.[143]

In *Honorable*, the evidence indicated that Easy Life targeted a sales market in a neighborhood that was 95% African American, and that the products sold in this market were priced at substantially higher rates than comparable ones sold to white customers in other neighborhoods.[144] The basis of the claim was, therefore, that Easy Life was following a dual market strategy and exploiting African American consumers. Easy Life argued that it did not and could not exploit African American homebuyers in this way, and that it could not be held liable for exploitation because it lacked the market power needed to successfully advance such a discriminatory strategy.[145] It referenced a Federal Trade Commission (FTC) guideline for the proposition that a seller with less than a 35% market share was presumed not to have the market power necessary to split and exploit the market.[146]

The FTC guideline in question can be understood as embodying a traditional neoclassical economic assumption that a seller in a competitive market lacks the power to set terms and to exploit consumers. In the perfectly competitive

139. Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885 (N.D. Ill. 2000).

140. *See id.* at 886-87.

141. *Id.* at 886.

142. *Id.*

143. *Id.*

144. *Id.* at 886-87.

145. *See id.* at 890.

146. *Id.*

market paradigm, sellers are without power. Power resides in the consumer because they can easily shift to a new seller if one seller attempts to deal on undesirable terms. Easy Life presented economic information about the definition of the market and of its relevant market share.[147] It argued that in the absence of market power it could not accomplish the ends alleged by the plaintiffs.[148] In essence, Easy Life asserted an inability to influence the meanings and values of the exchange because formal equality existed between the parties in the absence of market power.

The court rejected the interpretive framing and referencing offered by Easy Life. It reasoned that market exploitation was possible in the absence of a 35% market share.[149] It held that markets could be segmented and fragmented into enclaves informed by certain behavioral and interpretive practices.[150] Here Easy Life controlled information and market access for the consumers in question.[151] It shaped the interpretive framework of the exchange relationship and could, by such practices, exploit a particular set of consumers even if it otherwise lacked broad market power.

The analysis in *Honorable* worked to frame the market in terms of potential sub markets, and in terms of the inability of assumptions about perfectly competitive markets to fully inform the situation. Asymmetrical positioning within the community made it possible for Easy Life to segment and exploit an identifiable group within the community and this raised clear questions of discrimination that could not be understood or addressed by simplified concepts of efficiency, wealth maximization, and perfect competition.

The opinion is important because it confirms the difference between an economic analysis and a concern for the authority to represent and interpret meanings and values in the relationship between law, markets, and culture. Where traditional economic analysis of law focuses on individuals stripped of their character, culture, history, and other human qualities, an interpretive or representational

147. *Id.*

148. *See id.*

149. *See id.* at 890-91.

150. *See id.* at 888 (referencing Jon D. Hanson & Douglas Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 635 (1999).

151. *See Honorable*, 100 F. Supp. 2d at 888.

approach recognizes these qualities. This means that it does not assume that people are fungible, detached, and atomistic. To the contrary, it understands the individual as embedded within particular social and market networks that can vary by such factors as history, race, gender, age, class, education, and geographic location, among others. Variances between individuals and groups create asymmetrical relationships with respect to the authority to influence the cultural-interpretive framework of an exchange. Consequently, there are real opportunities for market and social segmentation, and for exploitation that are independent of broad based and generalized conceptions of market power.

In *Honorable*, as in each of the cases discussed above, we find illustrations of the way in which market framing can shape both the legal and economic approach to an exchange relationship. Referencing different assumptions about self-interest and the public interest, or viewing the exchange from a variety of different perspectives changes the way in which the legal argument develops. It also influences the ultimate outcome of the case. Consequently, the authority to influence the value framing and referencing hierarchy for decision-making is valuable, and it can be used to advance a special interest over that of a broader public interest. It also shapes resource distributions between competing parties, and presents opportunities for capturing and creating value in the process of mediation.

D. *Framing Contested Measures of Market Performance*

There are a number of ways in which one can measure market performance. At an individual firm level one might look at market share, stock price, or price to earnings ratios, for instance. At a national level one might look at statistics on gross national product, gross domestic product, inflation, or unemployment. Interpreting the importance or relevance of these measures is once again a matter of framing.

In this section, I briefly illustrate this problem with reference to two examples from Amartya Sen's book *Development as Freedom*.[152] The first example concerns the use of a wealth indicator as a reference for well being in a given

152. AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

community. The second concerns the referencing of unemployment rates relative to social welfare payments.

Sen argues that a variety of measures must be employed to map a reasonable understanding of well being in a given context.[153] One of the examples he gives involves the position of African American men in the U.S. economy.[154] He points out that by reference to a wealth indicator African American men are among the richest black people in the world.[155] As a group they have higher incomes than black men located almost anywhere else.[156] At the same time when he compares the same population groups for life expectancy and mortality rates he finds that African American men are doing much worse than black men in some of the most impoverished countries in the world.[157] His point is that one needs to consider a variety of measures if one is to gain real insight into the condition of African American men in the U.S. economy. At the same time his work supports the observation that the power to frame the interpretive reference of analysis influences the understanding of the market relationship being investigated. This is important because different public policy approaches will be triggered or justified based on the meanings and values presented in any particular frame.

A second illustration used by Sen references a difference in economic policy and social welfare in comparison between the U.S. and Europe. He points out that by American standards Europe has generous social welfare benefits.[158] The social safety net, as it were, is thicker in Europe than in America. This, as many Americans like to point out, can create incentives for staying on welfare and can increase market costs resulting in higher unemployment rates in Europe than in the U.S. To better evaluate the difference between U.S. and European social policy, however, one must look more closely at the U.S. frame of reference. Sen points out that the U.S., while providing less of a social safety net than Europe, focuses much more attention on employment rate policy.[159] He argues that the U.S. is able to

153. *Id.* at 13-14.
154. *Id.* at 21-24.
155. *Id.* at 21.
156. *Id.*
157. *Id.* at 21-24.
158. *Id.* at 21.
159. *Id.* at 95.

spend less on social welfare primarily because it spends more time and focuses more attention, than Europe, on employment.[160] U.S. policy tends to tinker with market mechanisms designed to keep unemployment rates very low by European standards. This permits it to pay less attention to social welfare as long as it can hold out the promise of available employment for those who seek it.[161] European policy, by way of contrast, is focused less on low employment numbers.[162]

The basic point to be gathered from the distinction is that both the U.S. and Europe need to be concerned with providing for the needs of their citizens, but there are different ways of framing the issues and the responses. In response to the effects of unemployment or economic dislocation European countries tend to redistribute resources through social welfare programs. The U.S., on the other hand, redistributes resources under policies intended to create jobs and stimulate employment. Thus, both intervene in the market to advance social policy, and the way in which they frame their concern has different substantive impacts in terms of the allocation of resources—there are different winners and losers under each approach. Understanding the interpretive frames and references for different situations permits one to gain a deeper insight into the broader socio-economic considerations at work in each community.

In both of the above examples we see, once again, that alternative frames and references highlight different facts and policies. The point is that interpretation theory helps us identify alternative understandings and approaches so that a broader set of facts and values can be investigated as relevant to mediating and resolving a particular dispute. To simply conclude that a particular course of action is or is not efficient, wealth maximizing, or inevitable on a given set of facts, begs the question. The facts and the values behind those facts are often times contested and subject to interpretive ambiguity. These ambiguities present opportunities for value enhancing or wealth exploiting exchanges. Therefore, better-informed legal reasoning and policy

160. *Id.*
161. *Id.*
162. *Id.* at 95.

making requires attention to a variety of framing and referencing devices.

II. AN INTERPRETIVE FRAMEWORK

A primary objective of Part I of this article involved showing the various ways in which market interpretations are contested in our society. We witness these contested interpretations in contemporary film, in case law, and in the various approaches to evaluating market success. The point of these illustrations is to indicate the way in which market reasoning, like all reasoning, involves reference to an interpretive framework. Moreover, it indicates that the potential to interpret the market frame in alternative ways gives rise to the possibility of using competing economic frames and references to achieve alternative distributional and value outcomes.

In this part of the article attention turns to the development of a better understanding of the interpretive process in law and economics. Using references to the work of Charles S. Peirce, this part of the article focuses on taking an *interpretive or representational turn* in understanding the relationship between law and market theory.[163] It does this by using semiotic, or cultural-interpretation theory to investigate the connections between law, markets, and culture. I call this approach *law and market economy*, and it should be understood from the outset that this approach is not the same as law and economics.[164] Law and market economy involves the application of *semiotic interpretive method* to the study of the relationship between law and market theory.[165] This is very different from the traditional approach of law and economics, which applies *economic method* to the study of such subjects as law and language, among others.[166]

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163. *See, e.g.*, HAUSMAN, PIERCE, *supra* note 30, at 194-225 (Hausman discusses Peirce's work in terms of a "linguistic turn."); DENNIS PATTERSON, LAW & TRUTH 71-127 (1996) (discussing the "interpretive turn" in contemporary theories of jurisprudence).

164. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9.

165. *Id.* It is important to understand that my method is grounded in a reference to Peirce's semiotics and is not economic method.

166. *Id.* Economic method is different and this should be kept in mind when evaluating this approach. *See, e.g.*, BLAUG, METHODOLOGY, *supra* note 91; MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS (1953).

In developing an interpretive approach to law and market economy, this part of the article first briefly summarizes key foundational elements that have been explored in some detail in *Law and Market Economy: Reinterpreting the Values of Law and Economics.*[167] Second, it presents an interpretive framework that goes beyond that work. It presents a framework for understanding the relationship between law, market theory, and culture. Third, it develops a way of "mapping" exchange relationships. And, fourth, this mapping process is explained in terms of the lawyer's role in formulating legal argument. It is then applied in a later part of the article.

A. *Foundation in Law and Market Economy*

In *Law and Market Economy* I explore an interpretive approach to the understanding of the relationship between law and market theory. I make reference to the work of Peirce to advance this approach, and offer the first comprehensive examination of the way in which interpretation theory enhances our understanding of the relationship between law and economics.

In this part of the article I will not go into a detailed discussion of the points that are covered in *Law and Market Economy*. Instead, I offer a few brief comments regarding some of the key points discussed in the book that are important for the reader to have in mind in proceeding with this article.

First, I explain that the market can be understood as a place of meaning and value formation.[168] Meanings and values arise from the process of people seeking to equate between different items of exchange.[169] In addition, choice in the marketplace involves a process of interpretation.[170] Understanding the value and nature of the objects of exchange, and the purpose and terms of exchange presupposes an interpretive process. This includes the idea that cost and benefit analysis in traditional law and economics is really about an interpretation of costs and benefits and not simply about a calculus of choice. This is important because

167. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9.
168. *Id.* at 1-56.
169. *Id.*
170. *Id.*

the interpretive process is *grounded in experience* and experience varies by such factors as culture, race, age, gender, education level, and rural or urban location, among others.[171] This helps to explain the contested understandings of the market. It also helps explain some of the differences in practice when legal and economic concepts are borrowed from one culture and translated into another culture. The market process in China is not the same as in the U.S., for example, because the translation into practice is framed by a different cultural-interpretive reference.[172]

The idea of interpretation being grounded in experience also helps to explain one aspect of the market information problem. Information and knowledge are fragmented, in part because experiences are different.[173] These experiences function as key interpretive ingredients for exchange and are important for market coordination. An important function of the market involves maximizing the creative and value enhancing potential of dispersed information and knowledge.[174] Thus, the more extensive, accessible, and diverse the networks and patterns of exchange, the greater will be the potential for wealth formation.[175]

This idea is similar to the concept of a *positive network externality*.[176] For instance, having a telephone system with one phone is not very valuable but when you have 2, 4, 100, 10,000, 200 million or a billion users you add value. Value arises from the potential to greatly multiply the exchange potential of the system. The more extensive, diverse, and accessible the exchange system the more information and knowledge that can be traded. And, the more trading and exchanging in the system the more potential there is for promoting and discovering value enhancing relationships.[177]

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171. *Id.* at 1-77.

172. *Id.* at 12-15. *See also* Hom & Malloy, *supra* note 56 (the article takes the form of a unique exchange of letters and observations between the authors when they worked in China).

173. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-105, 148-53.

174. *Id.*

175. *Id.*

176. *See* DESOTO, CAPITALISM, *supra* note 24, at 72 (citing to "Metcalfe's Law" dealing with computer networks). While stand-alone computers are useful, value really takes off when they are linked in networks. *Id.* This is my point as well, market values take off and are made sustainable by extensive networks and patterns of exchange, and these networks and patterns are facilitated by institutions of language, communication, and interpretation.

177. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-105, 148-53.

In my analysis the "institutions" of language, communication, and interpretation function like the "telephone system," providing the interpretive network that facilitates exchange and the process of wealth formation.

In *Law and Market Economy* I also explore the ambiguity of efficiency as a criterion for decision-making.[178] Using a *market process* approach, similar to that suggested by Hayek and by Kirzner, I show that markets are more fundamentally about the dynamic process of exchange than about the calculation of efficiency.[179] Markets and the process of sustainable wealth formation are about extensive networks and patterns of exchange in environments that favor experimentation, trial and error, risk taking, shared information, and convention breaking relationships, even when efficiency calculations are difficult or impossible to make.[180] More importantly, I demonstrate that efficiency is an ambiguous concept apart from a given situational context, and with reference to chaos or complex systems theory, I discuss the impossibility of determining an optimal course of action in a complex system such as a market economy.[181] The best that can be achieved, through careful proc-

178. *Id.* at 78-105. *See generally* KIRZNER, CAPITALIST PROCESS, *supra* note 26; KIRZNER, MEANING, *supra* note 26.

179. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-105, 106-48.

180. *Id.*

181. *Id.* Complexity involves complex systems theory or chaos theory and research in this area holds that there is no optimal outcome that can be determined in a complex system. *Id.* at 139-40. *See also* STUART KAUFFMAN, AT HOME IN THE UNIVERSE: THE SEARCH FOR THE LAWS OF SELF-ORGANIZATION 248-62, 268-69 (1995) (it is impossible to determine an optimal course of action even in a system with only a few independent variables, much less one with as many variables and actors as a market economy); SUNNY Y. AUYANG, FOUNDATIONS OF COMPLEX-SYSTEMS THEORIES IN ECONOMICS, EVOLUTIONARY BIOLOGY, AND STATISTICAL PHYSICS 80-82 (1998) (in a complex system the idea of optimization is limited and relative, and even then it is in the nature of a *set* of possibilities rather than any absolute optima); JOHN BRIGGS & F. DAVID PEAT, TURBULENT MIRROR: AN ILLUSTRATED GUIDE TO CHAOS THEORY AND THE SCIENCE OF WHOLENESS (1989); JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987) [hereinafter "GLEICK, CHAOS"]; BRIAN GREENE, THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY (1999). In a recent book Richard Epstein addresses the idea of complexity but his conception of complexity is very confusing if one actually has an understanding of complex systems theory, or the more formal meaning of complexity. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) [hereinafter SIMPLE RULES]. Epstein argues for simple rules to make the market work better by defaulting to a greater degree of private coordination. He is confusing in his analysis, however, because a market is the perfect example of a complex

ess analysis, is the formulation of sets of plausibly good courses of action.[182] Mapping out and identifying these sets is useful and is facilitated by reference to economic and market concepts. Economics facilitates the filtering of information in a way that can assist in developing a finite set of decisional options. Ultimately, however, selecting a particular course of action from a number of plausibly good alternatives requires an appeal to values, meanings, and mechanisms that go beyond traditional economic tools.[183] Selecting from among alternatives, just like the process of market framing, requires reference to Peirce's idea of the normative sciences of esthetics, ethics, and logic (ideas to be further developed in a later part of this article).[184] After a given course of action is selected, on normative grounds, economics can then be helpful in identifying a more cost effective, or perhaps a least cost method, for achieving a particular goal.

In law and market economy attention is also directed at the promotion of a process of *sustainable wealth formation* rather than at the idea of wealth maximization.[185] This is a broader concept than wealth maximization as it focuses on a *market process approach* to creativity as a source of long-term economic growth.[186] It also involves an understanding of the difference between seeking to improve your position and seeking to maximize your wealth advantage. In a complex exchange system such as the market it is not always clear that people act to maximize wealth even if they do seek to improve their position. A process of sustainable wealth formation considers a variety of factors, including ef-

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system. It has innumerable degrees of freedom because it has so many individual participants, and contrary to Epstein it is precisely the idea of complexity that makes for more extensive and wealth enhancing market arrangements. Legal rules that make property more, rather than less, complex create value. A property system that only recognizes a fee simple absolute estate creates less extensive exchange potential then a property system with numerous estates and interests that can be broken down and targeted to increased numbers of potential investors. The real estate markets in the United States involve trillions of dollars of activity not because they are simple but because of complexity. Legal infrastructure needs to support complexity. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 112-13.

182. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* at 139-40.

183. *Id.* at 139-48.

184. *See infra* Part IV.B. of this article and accompanying notes.

185. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-105.

186. *See id.*

ficiency, that work together to sustain market operations and social prosperity over the long-run.

Law and Market Economy addresses the role of creativity in the process of sustainable wealth formation, and the need to address the legal and cultural framework of social organization as a means of better understanding the creative process.[187] Creativity requires an environment that encourages and facilitates unconventional, extended, diverse, and accessible networks and patterns of exchange.[188] Creativity is dynamic and unconventional; therefore, it can not be easily understood by reference to traditional concepts such as efficiency.

With reference to creativity, the book discusses several studies that support this view.[189] The studies indicate that countries and companies that promote extensive, diverse, and accessible networks and patterns of exchange are more likely to be creative and prosperous.[190] In general, however, it is easy to point to the fact that many of the world's most prosperous countries, with sustainable market economies, are governed by pluralistic and democratic forms of government. These forms of government are in many ways less efficient than alternative forms but they foster environments that are conducive to creativity and to sustainability. They facilitate more open, diverse, and unconventional exchange relationships and this enhances the potential for creative value formation. In other words, the nature of the networks and patterns of exchange is important for reasons that are not necessarily captured by a wealth or efficiency criterion.

On this point I make a comparison between the market economy in the U.S. and that of a developing market econ-

187. *Id.* at 78-105, 106-35.

188. *Id.*

189. *Id.* at 129-35. (The studies look at firms for a micro analysis, and give a macro analysis at the level of comparing nation states.)

190. *Id.* at 129-31. The studies look at a variety of companies to consider the work environment, the communication and exchange networks and the relationship to creativity. *Id.* at 132-34. They explain, for example how the idea for a mini van first died at Ford Motor Company only to later grow at Chrysler, making millions of dollars for the company. *Id.* at 132. The studies indicate that particular organizational structures favor creativity, convention breaking, and value enhancing interpretive institutions and networks. The same holds true for the studies related to nation states. *Id.* at 129-35. The more that the legal systems gave space to individuals to establish their own meanings and values, the more prosperous the economy. *Id.* at 130-31.

omy like China.[191] Here I explain that the U.S. economy, to a significant extent, is fueled by creativity — by invention, new ideas and technology. This creative economy is the basis for long-term and sustained wealth formation. Emerging economies are somewhat different. They may generally start out as what I identify as "copy cat economies."[192] This means that their primary market advantage is not so much creativity as it is the ability to produce things invented elsewhere at lower cost. This strategy works well for early stages of development but has limitations. Ultimately an economy must facilitate extensive and unconventional exchange. It must facilitate accessible, diverse, pluralistic, and extensive networks and patterns of exchange.[193] It must tolerate and encourage challenge to convention and authority, and it must make vast amounts of information widely available.[194] In many emerging and transitional market economies this requires basic political and cultural adjustment. It does not mean, however, that one must have a political system like that of the U.S.[195] There is a range of political structures that can work, but in general there must be space for individual experimentation, and the legal infrastructure must support dynamic exchanges and transformations of meanings and values. Thus, law and market economy theory suggest that we need to be concerned about exchange environments and relationships, as well other economic factors.

Moreover, my primary thesis in *Law and Market Economy* is that "institutions" of language, communication, and interpretation play an important role in the creative process. Wealth formation, development, and creativity expand with the specialization and transformation of cultural-interpretive frames and references, or semiotic connectors. Markets are enhanced by increases in grammatical forms, styles of legal discourse, and by advancing representations of property capable of extending the networks and patterns of exchange. Interpretive processes, in other words, have substantive economic implications, and communities that are more tolerant, less hierarchical, more participatory,

191. *Id.* at 113-18.
192. *Id.*
193. *Id.* at 62-64, 75-77, 112-36.
194. *Id.* at 112-36.
195. *Id.* at 116-19.

that have more extensive distributions, and that have greater semiotic democracy, are more likely to translate interpretive potential into actual market value.

From this brief discussion it should be apparent that the study of law and market economy differs from the traditional study of law and economics. This section of the article, therefore, provides a foundation for understanding the difference.[196] Unlike traditional law and economics, law and market economy is not so much about efficiency analysis as it is about understanding the meanings, values, and processes of exchange.[197] With this in mind, this part of the article presents the basic foundations for understanding and using a law and market economy approach.

B. *Relationship Between Law, Markets, and Culture*

Law and market economy theory involves the study of the social/market exchange process by focusing on the relationship between law, culture, and markets. This relationship is triadic, dynamic and multi-directional. Moreover, in this relationship, one can understand the market sphere as

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196. It is important to note that law and market economy theory involves a *method* grounded in the semiotics of Charles Sanders Peirce. This method is different from the method used in traditional law and economics. *See id.* at 118-19.

197. Unlike law and market economy, the traditional law and economics movement is centered on concerns for efficiency. *See infra* note 43. The traditional view usually leads to debate about a conflict or necessary trade off between efficiency and fairness, but a law and market economy approach positions the primary tension as between efficiency (a status quo analysis) and creativity (a dynamic analysis). In taking this position, law and market economy offers an important paradigm shift. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9. For an example of the traditional debate see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-11 (1983); Hovenkamp, *supra* note 43, at 835-51; POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 5, at 25-31; FRIEDMAN, LAW'S ORDER, *supra* note 7, at 21-24; 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, 210-74 (1988) [hereinafter "Malloy, *Invisible Hand*"]; Robin Paul Malloy, *Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147 (1990); Richard A. Posner, *Law and Economics is Moral*, 24 VAL. U. L. REV. 163 (1990); Robin Paul Malloy, *The Limits of "Science" in Legal Discourse—A Reply to Posner*, 24 VAL. U. L. REV. 175 (1990); Richard A. Posner, *Rebuttal to Malloy*, 24 VAL. U. L. REV. 183 (1990) (collectively, the exchange between Malloy and Posner is referred to as the *Malloy and Posner Debate*, 24 VAL. U. L. REV. 147 (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 (1986).

expressing a concern for individualization, with a market focus on the pursuit of self-interest. On the other hand, culture is a collective concept, and therefore the cultural sphere can be understood as expressing a community perspective or a notion of the public interest. The theory also considers law, culture, and market economy to be complex representational systems of meaning that can be usefully connected by a variety of semiotic processes including rhetoric, linguistics, metaphor, and grammar, among others.[198] More specifically, law and market economy involves the study of interpretive choice and the pursuit of interpretive influence over the choice and decision making process.[199] As such, law and market economy theory suggests that alternative cultural-interpretive or semiotic frameworks can produce different substantive outcomes in terms of the generation and distribution of resources.[200] Given this perspective, law and market economy employs a multi-valued analysis in identifying wealth enhancing exchange opportunities for achieving particular public policy objectives.[201]

Diagram 1, below, depicts the law and market economy relationship. The sides of the triangle represent the semiotic or cultural-interpretive connectors that link each of the key spheres of the law and market economy relationship. These links represent the cognitive processes of value framing and interpretive reference. They include "institutions" of language, communication, and interpretation, and such "tools" as metaphor, rhetoric, grammar, and narrative, among others.

198. *See generally supra* notes 30, 35, 36 (semiotics as the study of signs).

199. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9.

200. *Id.* at 153-65.

201. *See, e.g., supra* notes 152-162 and accompanying text. For example, Sen argues for the use of a variety of measures of social well being rather than putting too much focus on the wealth based measures of traditional neoclassical economics. He gives an example related to African American men. *See* SEN, *supra* note 152, at 87-110. He explains that African American men are the richest black people on earth when we look at a wealth measure, but when we look at life expectancy and mortality rates they are much below the rates for black men living in many third world and impoverished countries. Thus, we need multiple variables for comparison in order to get a proper picture of the fairness, justice, and social implication of exchange in the U.S. SEN, *supra* note 152, at 87-110.

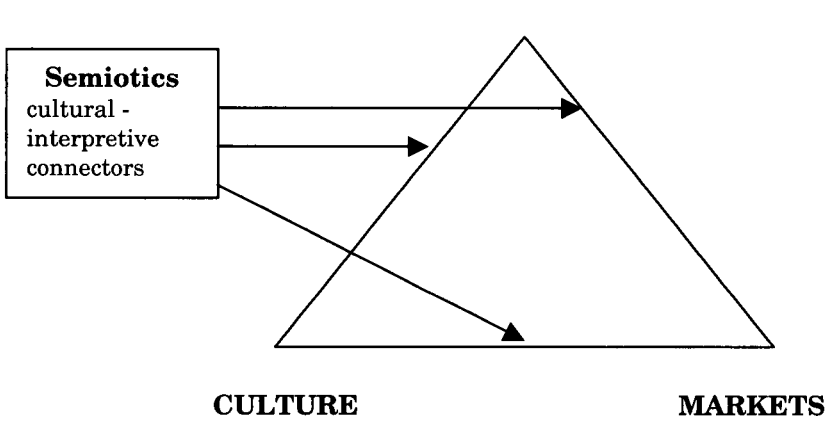

Diagram 1

Diagram 2, below, provides a further elaboration of the basic model. It indicates some of the traditional or typical categories or concepts to be included within each sphere of law, markets, and culture.

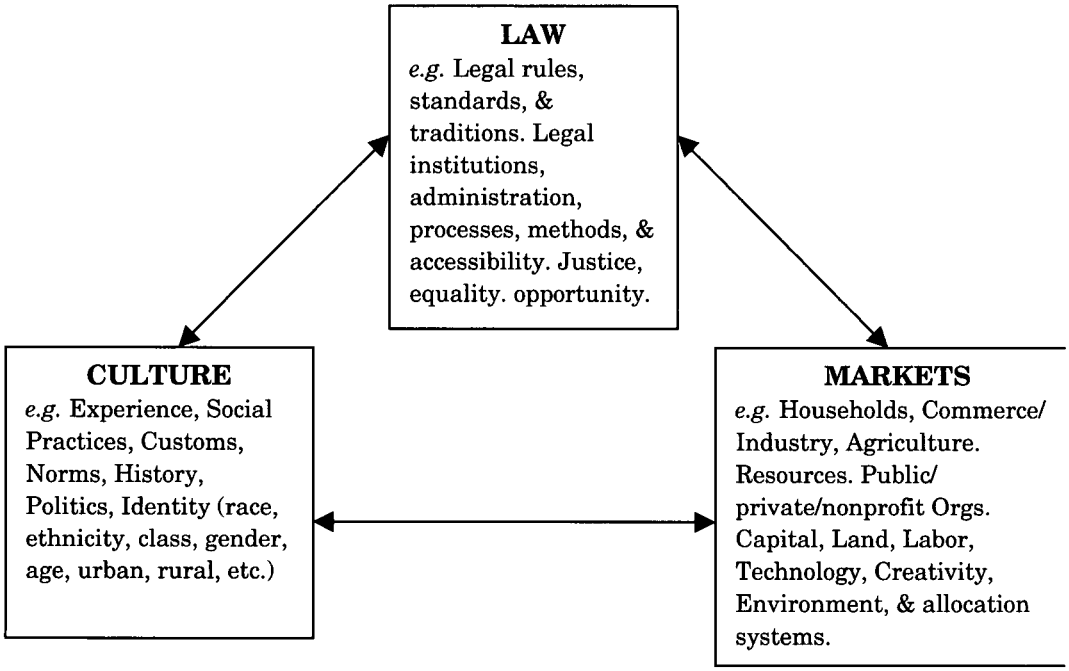

Diagram 2

As these diagrams indicate, law and market economy theory is not the same as law and economics.[202] Market theory goes beyond the interests and concerns of economics.[203] This is evident to anyone who has ever been to business school or worked in a commercial enterprise. Markets involve references to disciplines such as sociology, organizational theory, marketing, behavioral psychology, and interpretation theory, among others. Thus, while market actors can benefit from an understanding of economics something more is needed to understand the relationship between law and market economy. In other words, there is a need for a clear recognition of approaches that study market activities as relationships and exchanges that go beyond the traditional boundaries of economics.[204] And, we need to bring a variety of information, gathered from multiple disciplines, to bear upon our understanding of law in its market context.

Law and market economy has, as two of its primary concerns, a desire to understand (a) the way in which we, as social beings, *experience* the relationship between law and markets, and (b) the way in which this experience, as a ground in Peircean semiotics, translates and transforms human relations through an on-going process of meaning and value formation. In this regard, the intersection of law and market economy is *experienced* in a variety of ways. It is experienced in terms of the networks and patterns of exchange in which people participate, and in terms of the way in which these networks and patterns relate to such characteristics as race, gender, age, education level, income, and geographic location, among others. It is also experienced in terms of the way in which the institutions of language, communication, and interpretation facilitate our understanding of choice while bringing coherence and compre-

202. *See generally* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9.

203. *See, e.g.*, SEN, *supra* note 152; ECONOMICS, VALUES, AND ORGANIZATION (Avner Ben-Ner & Louis Putterman eds., 1998); NOOTEBOOM, *supra* note 28.

204. *See generally* FERBER AND NELSON, *supra* note 20. This book contains an informative collection of essays and references with respect to the narrowing of economic inquiry. In particular, the narrowing has caused the field to pay inadequate attention to issues and dynamics relevant to women. *See* MCCLOSKEY, RHETORIC, *supra* note 22; MCCLOSKEY, ECONOMIC EXPERTISE, *supra* note 23. McCloskey argues that this narrowing is part of a rhetorical strategy for making economics seem more scientific and less subjective.

hensibility to the process of wealth formation and resource allocation. Furthermore, law in its market context is experienced culturally and collectively, with reference to contested interpretations of market functions, outcomes, consequences, and assumptions. It is experienced in ways that our individualized rather than universal, and in ways that go beyond the constrained and bounded universe of economic calculation.

Law and market economy is also about the human practice of exchange and the strategies for directing exchange toward worthy esthetic and ethical values. It is, in fact, an esthetic and ethical reference that frames the market, and the pragmatic selection of any particular course of action from the sets of plausibly good courses indicated by market analysis.[205] To this end, law and market economy theory uses semiotics, or cultural-interpretation theory, to address the meanings and values of market relationships.[206] It does this by identifying and "mapping" the networks and patterns of social/market exchange.

In doing this, law and market economy proceeds from the proposition that law is the product of human agency, and a primary motivation for human action is the pursuit of authoritative influence over the process of cultural-interpretive framing, referencing, and representation. This process of framing, referencing, and representing translates and transforms meanings and values, and the ability to influence these cultural-interpretive connectors is a primary concern of self-interest. This influence is important because authority in this regard informs the process of interpretive choice and produces substantive outcomes in terms of the generation and allocation of resources.

This aspect of self-interest can be understood in simple terms. Self-interest includes a desire to influence or control the spaces and forms of socio-legal discourse. We seek this control for a variety of reasons, some of which can not be easily quantified. All of us recognize a motivation, at some

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205. *See infra* Part IV.B. and accompanying notes.

206. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9; KIRZNER, MEANING, *supra* note 26, at 3-54. Kirzner's point is that a dynamic and complex market system can not be captured in static equilibrium models—creativity is important yet it escapes proper study in traditional neoclassical economics. KIRZNER, MEANING, *supra* note 26, at 3-54. *See also* KIRZNER, CAPITALIST PROCESS, *supra* note 26; Kevelson, PEIRCE AND FREEDOM, *supra* note 30, at 1-47; SHERIFF, *supra* note 30, at xiii-xxi, 9-16, 31-49.

level, to influence people's opinions and viewpoints. To have people agree with us on how to improve the economy, fight terrorism, promote racial equality, and what have you. We can even observe this in very young children. At an early age children seek to define and claim space in the world around them by telling others, "that's *my* toy, *my* book, *my* mommy, *my* daddy." In this way they lay claim to specific resources and power sources. We observe a continuation of this practice as children get older. As teens, people seek to define a space of authority apart from their parents and use clothing, music and other accessories in this process. They also seek to define who is "cool" and who is not. As adults, people try to convince others to read certain books or articles and to understand them in a particular way; they want other people to agree in judgments as to the best sports teams, the best computer, and the hottest car. They want to influence each other on political issues and on voting. These are all examples of the basic idea of self-interest related to the desire to shape and influence the process of interpretive framing and referencing.

The key here is that we understand that success in this process of framing and referencing results in generating opportunities for capturing and creating value. We also understand that various legal forms facilitate this interpretive framing and referencing process, and give us influence over extended spaces. We can operate through the corporate form, for instance, to develop and shape a particular corporate culture, and to promote the values of commodification and wealth maximization. We can also work within a nonprofit organization to shape a *private* definition of the public interest, or work within the public sector to direct community resources at our own conception of the public welfare. All of these institutional and organizational forms, in which we can operate, are products of legal convention. They create mechanisms and manageable frameworks for exerting influence over interpretive hierarchies that shape the generation and allocation of resources.

More specifically, the ability to establish or influence a frame, reference, or interpretive hierarchy, conventionalizes decision-making authority in favor of a particular interpretive community. This then influences and constrains the people, groups, and institutions having responsibility for generating, responding to, or otherwise participating in fu-

ture decisions or exchanges.[207] In this way we use particular legal forms and conventions to exercise a self-interested authority over the meanings and values of the world around us.

For example, if the interpretive hierarchy, expressed in the corporate form or in a judicial or legislative convention, requires that cost and benefit analysis be used in all decision-making, values that are difficult to price will be highly discounted or ignored.[208] Correspondingly, the pursuit of profit will be elevated and extended at the expense of other normative values such as those related to the environment, public health, or family services.

As such, the conventionalized aspects of interpretive hierarchy interact with the self-interested pursuit of influence over semiotic space. The interpretation process of encoding and decoding meaning is, thus, influenced by conventionalized rules and norms, and the individuals and groups with authority over the production of such rules and norms also end up exercising authority over the distribution and allocation of resources.

In this way interpretive hierarchies provide continuity and guidance for future decision making while framing the boundaries and alternative paths of market exchange. In the language of semiotics, interpretive hierarchies operate as *indexical referents* that mediate and inform the process of interpretive choice.[209] In this context, the pursuit of self-interested behavior is directed at two primary objectives. It is directed first, at the pursuit of strategic opportunities for interpretive influence within the given hierarchy (within the value frame or reference), and second, either at the pursuit of reinforcing or replacing the given interpretive hierarchy. Thus, contested understandings of the market reflect struggles over the conventionalized decision-making process, with the understanding that authoritative influence over this process results in substantive influence over resource allocations and distributions.

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207. *See* NEIL M. KAY, PATTERNS IN CORPORATE EVOLUTION 50-58, 91-93, 234-44 (Oxford 1997).

208. The form of the organization we make is used to structure interpretive institutions and to organize value and meaning preferences.

209. This means that they operate in a mode of secondness. *See* LISZKA, *supra* note 30, at 1-52 (discussing the basic structures including the mode of secondness). *See also* Part II.B.,D. of this article and accompanying notes.

This idea of a *cultural-interpretive hierarchy* can be understood by comparison to an operating system in a computer.[210] The operating system conventionalizes the computing environment and only compatible software will work in the system. Any software that is incompatible with the conventionalized operating system is rendered inoperative. This control over the meanings and values that are expressed within the system is very valuable as is evidenced by the market position of Microsoft Corporation. In a similar way, control over the cultural-interpretive environment of law and market economy gives primacy and power to discourses, meanings and values, which are compatible with the dominant interpretive hierarchy. Dissenting and contested points of view must struggle for recognition. They must generate doubt in the conventionalized mode of thinking and they must suggest "better" alternative framings, references, and representations. Again, different legal forms and associations can be used to facilitate the influence and imposition of a particular cultural-interpretive hierarchy.

Similarly, the idea of *semiotic space* might be compared to a territorial interest in a geographic or representational "place." This idea can be better understood with reference to such concepts as a king or a state having authority over a defined geographic jurisdiction, or in the old adage of "a man is the king of his castle." Each of these references reflects the idea of control over space as a foundation for authority and influence within the given environment. Early rules tended to focus on authority being linked to clearly definable space and place, as in jurisdictional authority within a geographically identified state or territory.[211] This idea has expanded to include abstract and representational spaces, as in the exercise of "long-arm" jurisdiction beyond the boarders of a given state, or as reflected in arguments in support of the extraterritorial application

210. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 170-71.

211. *See generally* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141 (2001); VED P. NANDA, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS (1994); ERWIN CHERMINSKY, FEDERAL JURISDICTION (1989); ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION (1988). *See also* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS 71 (1998).

of U.S. law.[212] The space in which meanings and values are formed has also been redefined by the process of globalization, with its "fluid" streams of commerce, the chameleon like nature of corporate identities, and the "virtual" exchange networks of the Internet. Authoritative influence over these spaces creates power in the same way as a king or geo-political state exercises power over its territorial place

Another way of viewing the concept of semiotic space is to think of it in terms of a market actor pursuing a market-share strategy.[213] In such a situation, self-interested behavior involves a desire for economic gain but not necessarily the desire to maximize wealth or efficiency. Gain is understood in terms of defining and controlling authoritative influence over the market. A market-share strategy can involve a number of criteria and can vary with the scale or nature of the market, the measures applied to market evaluations, and the market position of the actor.[214] A market-share strategy involves a continuous tension between the need to respond to and conquer indeterminate and dynamic exchange spaces, and the desire to preserve conventionalized and determinate control over already "acquired" spaces. This is just as important when the market space

212. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Int'l. Shoe Co. v. Washington, 326 U.S. 310 (1945); Pennoyer v. Neff, 95 U.S. 714 (1877). *See generally* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998); Sean D. Murphy, *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, 95 AM. J. INT'L. L. 418 (2001); Geoffrey C. Hazard, Jr., Michele Taruffo, Rolf Sturner & Antonio Gidi, *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L. L. & POL. 769 (2001); Jeffrey A. Brown, *Extraterritoriality: Current Policy of the United States*, 12 SYRACUSE J. INT'L. L. & COM. 493 (1986); Afshin Atabaki, *Extraterritorial Prescriptive Jurisdiction*, 34 INT'L. LAW. 564 (2000).

213. *See generally* IAN H. GORDON, COMPETITOR TARGETING: WINNING THE BATTLE FOR MARKET AND CUSTOMER SHARE (2000); DAVID I. ROSENBAUM, MARKET DOMINANCE (1998) (the strategy can include efficiency but does not require efficiency); KEVIN B. TYNAN, MULTI-CHANNEL MARKETING: MAXIMIZING MARKET SHARE WITH AN INTEGRATED MARKETING STRATEGY (1993). A market share strategy might also be compared to an animal "marking" and defining its territory. Humans use language and other semiotic devices to "mark" their "territory" or authority over particular cultural-interpretive space. This authority gives rise to value enhancing opportunities.

214. TYNAN, *supra* note 213.

concerns control over the mechanisms for producing meaning and conventionalizing decision-making authority, as it is when the market is about labor or various factors of production.

A simple way to understand this desire to control semiotic space or to follow a market share strategy is to consider the views of some local community leaders. When I lived in New Orleans, for example, a number of people expressed a very limited desire to pursue certain types of economic development even when they knew it could have broad based benefits.[215] One reason expressed for this position was that they did not want New Orleans to become another Atlanta. The "leading" families wanted to remain in authoritative positions of influence and this was more important than certain forms of economic development. Some expressed their concerns rather bluntly with such phrasing as "after Atlanta welcomed in all those corporations and rich out-of-staters, the old families were just pushed aside, we don't want that to happen here."[216] The locals understood the self-interested value of controlling the cultural interpretive frames and references of community decision-making.

Economic concepts remain important in all of this analysis because economics provides a formal representational sign system, or "language," for "mapping" the process of exchange to which semiotics refers.[217] It provides a

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215. The author lived in New Orleans between 1988-90 and was on the Tulane faculty.

216. Many rich oil & gas executives complained about an inability to buy their way into New Orleans society. They complained about the inability to fully access the private clubs, Crewes, Mardis Gras connections, schools and traditional teenage girl coming-out parties. As another very different example, consider the position of the Castro government in Cuba. Authoritative control over place and space seems to be a primary objective for the government. Authoritative control can provide benefits and serve interests that are difficult or impossible to quantify in standard economic terms, but we can still learn from studying these exchange relationships from an interpretive perspective.

217. *See generally* KEVELSON, LAW, *supra* note 30 at 167-201; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30 at 199-218. Kevelson explains:

> The first decades in the emergence of modern semiotics since the 1960's brought forth little interest in economics. The legal system. . . was first brought into the framework of semiotic investigation by Kevelson, and from the perspective of structural sociology by Greimas and Landowski. . .
>
> . . .But the triadic linking of law, economics, and semiotics makes its most recent debut in the work of Robin Paul Malloy. . .Malloy shows how signification of cultural values evolve and are transformed

mechanism for conventionalizing decision-making because it offers a way to understand or map the process of exchange, and this is useful even as we appreciate the fact that "the map is not the territory" — as we acknowledge that our models are partial and incomplete representations.[218]

This can be better understood if one thinks in terms of the way in which a legal description "represents" a particular piece of property even though it is not itself the property to which it refers.[219] The legal description simplifies the process of identifying and transferring the property, but it is not the property and it does not represent all of the characteristics of the property. It is a partial and incomplete rep-

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through use and exchange in living community. He suggests that it is by using the instrument of semiotic inquiry, in the sense that all theories have instrumental purpose, that we can begin to perceive and explain previously undisclosed processes of value development, i.e., aspects of emerging value which appear only as a result of a certain way of being observed.

This is what I extrapolate from Malloy's study of the iconic function in law and semiotics. . . No term and its current definition are mere substitutes for one another. Every use and mention of a term and every attempt to redefine and sharpen the meaning of a term creates an asymmetrical relationship between the known and the new, just as every marketplace transaction changes the value of the objects exchanged and increases the meaning of each, so that the value of each becomes off-balanced from its previous marketplace value and acquires, as if repricing were redefinition, an increase in meaning.

KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 205-06.

218. *See also* S. I. HAYAKAWA & ALAN R. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 13-21 (5th. ed. 1990) (the map is not the territory and the symbol is not the thing symbolized). Likewise, our market models and theories are symbols and sign systems *of* but are not the real social/market exchange process. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 39-44 (discussing the idea of "the map is not the territory" as related to law and to market theory); GLEICK, CHAOS, *supra* note 181, at 92-121 (mapping and measuring depend upon scale and point of reference—fractals in complex system theory.)

219. I am talking about the formal metes and bounds, government survey or plat based description that appears, for example, in the deed and mortgage. *See* MALLOY & SMITH, *supra* note 53, at 317-360. Note that representation occurs in a variety of areas and not just with respect to real estate. For example, the corporate form of organization operates as a representation that extends the authority and action of an individual or group. It permits action and exchange with a different and legally distinct identity, and permits the legal entity to act beyond the identity of the real people whose interests it represents. This extended representation can itself be limited, however, with such concepts as acting ultravires (beyond the authority of the entity), or by the process of "piercing the corporate veil."

resentation. In a similar sense, economic concepts function as signs that define, simplify, and facilitate exchange but like the legal description mentioned above, these concepts are merely partial and incomplete representations of underlying exchange processes which are complex and dynamic.

Thus, economic concepts function as partial and incomplete representations even though they are useful for given purposes and in particular situations. In this way economics is like a map. A road map, for example, is useful for assisting in the task of driving around town but it tells one little or nothing about the quality of schools or home prices, and gives no indication of crime rates, climate or other important characteristics that collectively give meaning to a particular property located along a particular street in a given community. In this respect, the map is not the territory, and the market model is not the market exchange process. Nonetheless, economics, as a cultural-interpretive device, facilitates the mapping process and can help us identify a finite set of plausibly useful courses of socio-legal action. Furthermore, once a normative decision is made about the particular map or path that we want to take, economics can assist in advancing our objective in a more cost effective or least cost manner.

In a semiotic sense, therefore, markets are important because they function as primary cultural-interpretive systems for the process of meaning and value formation. Furthermore, law, markets and culture interact to continuously transmit, and to encode and decode social meanings and values. In this transmission process opportunities arise for generating and capturing value. This process also reveals the convergence between conceptions of freedom, sustainability of wealth formation, and the advancement of a more ethical and participatory social order.[220]

C. *Mapping Exchange Relationships: A Triadic Approach*

Law and market economy differs from other approaches to understanding the relationship between law and economics. A primary difference is that it does not seek so much to ask questions about efficiency as it does seek to explore the nature, scope, and consequence of various ex-

220. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-135.

change relationships. It attempts to develop a method that will help us formulate better legal reasoning and public policy by addressing the process of exchange in terms of alternative cultural-interpretive frames and references. It seeks, therefore, to understand the market process as a meaningful human experience, and not merely as an exercise in "scientific" calculation.

In developing the method of law and market economy, reference is made to the semiotic method of Charles Sanders Peirce.[221] Peirce developed a theory of semiotics based on a triadic theory of signs involving three modes of logic.[222] He identified these three modes as firstness (icon), secondness (index), and thirdness (symbol).[223] These three modes of being, when taken together, function as the semiotic sign or idea. The relationship between these modes is dynamic, and the process of semiosis is continuous, with every third re-informing a first.[224]

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221. *See supra* note 30.

222. *See supra* notes 30, 31; 1 THE ESSENTIAL PEIRCE, *supra* note 30, at 289-99 (a brief discussion of the triadic relationship between firstness, secondness, and thirdness), 276-79 (on the tendency towards habit and regularity in the relationship between firstness, secondness, and thirdness).

223. *See generally* LISZKA, *supra* note 30. These three categories are further broken down and discussed in Liszka's book as Speculative Grammar, Pure Grammar, Universal Grammar involving deduction, induction and objective (hypothetical) reasoning, and as Speculative Rhetoric, Formal Rhetoric, and Universal Rhetoric. *Id.* at 10. In general, Peirce's classifications for this approach to signs involve grammar as the "study of formal features of the sign and its modes of expression," logic as "concerned with the manner in which signs can be used to discern truth," and rhetorics as "the investigation; the manner in which signs are used to communicate and express claims within a community." *Id.* at 9-10, 78-108. Each of these areas is explained with good illustrations throughout the book.

224. *See infra* Parts III., IV., at 176-83, 186-217, 220-25. *See also* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 23-78. The key to this method is in using Peirce's triadic approach as opposed to the bilateral model of Saussure. Saussure basically considered the sign to be composed of the "signifier" and the "signified." NOTH, *supra* note 30, at 56-63. Thus, we would think in terms of the word "table" as a signifier for an object being a table (the thing signified). Similarly, we might view a trademark such as the Nike swoosh as the signifier of the Nike brand. When we see this trademark on clothing or running shoes we identify it with the Nike company. In the triadic approach of Peirce the sign is made up of three parts, the icon (firstness), the index (secondness), and the symbol (thirdness). Peirce's primary contribution is in recognizing that when we observe the word "table" or the Nike swoosh, we reference this to other images or signs already stored in our memory. After making an indexical reference, we then draw a conclusion. In this way Peirce gave express recognition to the importance of the indexical reference in the interpretive process. This is im-

Peirce's theory describes an understanding of the cognitive process. It offers a way of visualizing the mind at work. Our mind responds to stimuli; to facts and information, and these are processed and translated into meanings, values, feelings, and actions, including the triggering of further thought. Peirce's contribution to our understanding of this process is his idea of the triadic relationship between firstness, secondness, and thirdness. This understanding differs in an important way from the more traditional idea of a bilateral model of interpretation. For example, consider the relationship between the word "table" and the object that we identify as a table. One way to view the relationship between the word and the object is to see them in a bilateral relationship. In a bilateral model the word is a representation of the table to which it refers. There is the table, and the representation of the table in the word. Peirce's insight involves the recognition of an intermediary step in the interpretive process that he called "secondness." This additional step expands the model into one that is triadic rather than bilateral. In this approach, secondness involves a reference/referent and comparison. In simple terms, Peirce's logic suggests that between the word "table" and the object, our mind searches, as a computer might, for something in its memory that can be used to process the connection between the word and the object. Upon seeing the table (firstness), for example, the mind searches its memory for other objects of similar look, design, purpose, and quality (secondness). This referencing triggers the conclusion, "table" (thirdness). Likewise, when we encounter the word "table" we search our memory banks for things that we have previously associated with that word, and we draw a conclusion about the image of the thing being represented by the word "table."

This triadic process is key to an understanding of law and market economy because it permits us to explore the process of framing, referencing, and representing in the structure of legal argument. It is this process, as secondness, that assists us in understanding economic concepts

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portant to law and market economy because it provides the theoretical foundation for discussing the importance of having authoritative influence over the cultural-interpretive referents. In other words, competition ensues for influence over the index because the reference influences the conclusion and thereby shapes the development of social policy and resource distribution.

and tools as important devices for framing, referencing, and representing exchange relationships in law. Secondness also helps us understand the idea of culture and experience in our model of law and market economy. Culture and experience play a significant role in shaping the references and comparisons that are metaphorically stored in our cognitive memory banks. Consequently, they influence our understanding and meaning of law and of exchange. Furthermore, this idea of secondness also helps us to visualize the power involved in controlling or influencing the frames, references, and representations used in the interpretive institutions of the law. It does this by showing us that meaning is filtered through the idea of secondness, and thus conclusions are influenced by and differ with reference to such things as culture and experience, and these are further varied by reference to such characteristics as race, gender, age, education, class, income, geographic location, and history, among others.

Using Peirce's method of analysis, law and market economy positions the market as a complex and dynamic web of representational networks and patterns of exchange wherein the nature, scope, and content of these exchange relationships inform social meaning and value.[225] Law and market economy undertakes an examination of these relationships by using a multi-valued approach.[226]

Diagram 3, below, depicts the semiotic process of law and market economy using Peirce's triadic theory of signs (icon, index, and symbol).[227] In this diagram the *icon* is of firstness, and of quality. It is the exchange itself, standing for itself and for all exchange in general. It arises in an ex-

225. Law and market economy examines exchange systems, and the scientific method of inquiry used in semiotics to understand exchange systems reveals that they are like a "web" with indefinite boundaries. *See* PEIRCE, WRITINGS, *supra* note 30, at xii. This is also a point raised in general chaos or complex systems theory. *See* KAUFFMAN, *supra* note 181, at 270-87 (discussing co-evolving webs in complex systems). In studying these webs of exchange it is important to investigate and understand discourse across a number of conventionalized boundaries. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30 at 11, 63, 78, 109, 131; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 27-28, 62-64.

226. *See supra* note 152 (Sen and multi-valued measures). *See also* ELAINE MORLEY ET AL., COMPARATIVE PERFORMANCE MEASUREMENT (The Urban Institute Press 2001); HARRY P. HATRY, PERFORMANCE MEASUREMENT: GETTING RESULTS (Urban Institute Press, 1999).

227. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 23-50.

periential context of social or interpretive conflict or tension. It involves the generation or identification of information fragments or "facts." The *index* is of secondness, and of comparative reference. It functions as an interpretive screen. It frames, filters and influences the encoding and decoding of socio-legal meanings and values. It "maps" the relationship between a particular quality or exchange and other such exchanges or qualities. Alternative mappings are possible with different cultural-interpretive referents. This involves the process of understanding the relationship between particular information fragments or facts, and a varying set of comparative measures or referents. The *symbol* is of thirdness, and of argument, action, or contingent "truth." It is what gets constituted as law, or what gets justified and represented as a legal rule, holding, or conclusion. It provides a basis for further investigation of quality and of exchange. Through *semiosis*,[228] the continuous relationship between these three modes, we transform public policy, legal action, and socio-legal meanings and values. This interpretive transformation is "real" in the Peircean sense that it affects the material world of resource definition, allocation, and distribution.

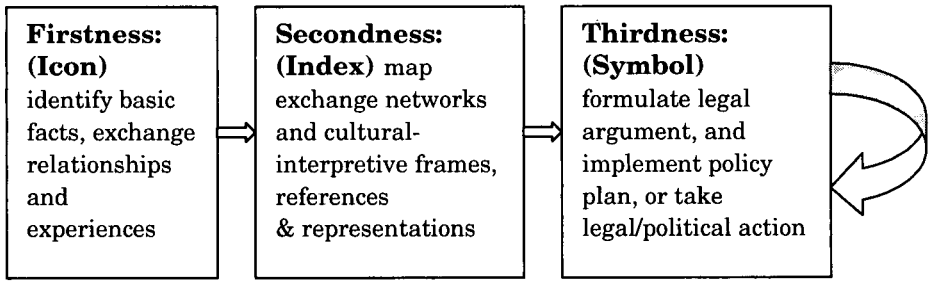

Diagram 3

In simple terms, Peirce's triadic theory helps us reframe market analysis in a way that differs from other approaches to law and economics. The triadic relationship introduced above and depicted in diagram 3, indicates the way in which law and market economy approaches the analysis of legal problems. Law and market economy undertakes the identification and formulation of legal argu-

228. *Id.* at 21, 33-35, 87.

ment or action based on the use of particular cultural-interpretive frames and references. The process is not one of calculating efficiency, but of *mapping* and representing alternative cultural-interpretive understandings of the market as a human exchange process capable of continuously generating and transforming meanings and values. The goal is not to assume an ability to calculate an economically optimal course of action, but to improve legal reasoning and public policy making by exploring alternative ways of logically and ethically advancing worthy esthetic values.[229]

Peirce's approach is also helpful because it enhances our ability to appreciate a primary focus of tension in law and public policy. Using Peirce's triadic model it is easy to grasp the idea that the index, or secondness, is a focal point for competition between alternative interpretive communities and socio-legal theories. The greater the ability of an individual or a group to influence or control the index (cultural-interpretive frames, references, and representations) the more power she or they will have over the conventionalizing of an interpretive hierarchy. This provides influence over future decision-making by constraining the people, groups, and institutions having responsibility for making and responding to future decisions and policies. Consequently, an important part of law and market economy involves understanding the competition for influence over the cultural-interpretive frames and references of exchange. It also involves a need to explore institutional arrangements capable of mediating between and beyond the boundaries of individuals and the particular cultural-interpretive communities in which they are situated.

The development of law and market economy, and the mapping of exchange using the process depicted in Diagram 3, is also important because it involves matters of resource allocation and distribution, as well as matters of law and legal institutions. In this context, law and legal institutions provide the infrastructure for social and market exchange. Law operates to define the terms of permissible exchange and provides the social and public definition of the various objects of trade. Law also maps the consequences of certain types of trade, and facilitates the coordination of exchange with particular importance for multi-party trades, trade be-

229. *See* text and related notes *infra* Part IV.B. *See also* GANIER, *supra* note 25.

tween impersonal or distant market actors, and non-simultaneous exchanges that take place over extended periods of time, place, and space.[230] In all of these exchange relationships, cultural-interpretive or semiotic theory is at work because market actors must make choices based on meanings and values derived from the application of interpretive frames and references to factual experiences and information fragments.[231] Moreover, the more distant, extended, and diverse the networks of exchange the more they need to be formalized and conventionalized through interpretive mechanisms facilitated by law.[232]

In using Peirce's mapping approach, economics helps us to understand and filter information through a cultural-interpretive "language" of market exchange. Economic concepts can be used initially to help filter a potentially endless number of viewpoints down to a finite set of plausibly good outcome choices, or decision paths. And, once normative analysis directs us to the selection of a given choice option, economics can direct our attention to more cost-effective mechanisms for achieving our given objective.

Peirce's mapping process also advances a lawyer's ability to understand and to generate useful legal arguments. The lawyer's stock-in-trade involves the ability to draw on an inventory of familiar *patterns* of legal argument. By working through the process of seeking and manipulating alternative frames, references, and representations the lawyer continually revises and adds to her inventory of legal argument patterns. And, in seeking to remain attentive

230. *See* ,MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 136-40, 157-58, 164-67 (The more predictable, accessible, and transparent the legal system the more it facilitates the semiotic process and the potential for creative wealth formation.).

231. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 59-69. When we reason we bring experience, subjective bias, and various values to the process. The things that shape our experiences and values will thus effect the meanings we derive from present and later exchanges. KEVELSON, LAW, *supra* note 30, at 81-87. It is possible to influence interpretation and meaning by shifting the referential baseline of inquiry. We can "contribute to the reformulation and transformation of official, ideal Law Language and Law Discourse as authoritative symbol." KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 115. Rules of interpretation constrain and mediate the privilege of the reader and this would be similar to the way in which conventionalized theories of the market exchange process constrain and mediate the market as a text. *See generally* ECO, LIMITS OF INTERPRETATION, *supra* note 36, at 58-60.

232. *See supra* note 230.

to the way in which law is *experienced* by people situated in various and competing cultural-interpretive communities, the lawyer expands her mapping and argument tools while facilitating her creativity.

Her creativity is enhanced by expanding her ability to understand law and market relationships from an increasing number of perspectives. This creates tension between the dynamic aspects of exchange as experienced in a dynamic world, and the tendency of legal argument to become conventionalized. This tension fosters a constant re-evaluation of law and creates the potential for developing entirely new frames, references, and representations.

In this process, we can understand that the primary professional skill of lawyers and legal actors relates to language, communication, and interpretation. Legal actors read cases, legislation, contracts, court proceedings, and a variety of other texts. They write memoranda, pleadings, briefs, position papers, contracts, wills, and legislation. They make oral arguments, take depositions, conduct interviews, address the jury, appear before boards, negotiate with one another, and make a variety of persuasive appeals in formal and informal settings. In order to do their work they must be able to interpret the meanings of the texts and arguments they encounter, and they must make sure that their own writings and arguments embody the intended meanings that they hope to express. To be persuasive they must understand their audience, and work effectively within and around legal conventions. They must appreciate the way in which the intended and unintended interpreter will read and hear their words, their mannerisms, and their entire delivery. All of this involves cultural-interpretation theory and an indirect, if not direct, knowledge of semiotic connectors such as linguistics, metaphor, rhetoric, narrative, and logic.[233] It also involves working through Peirce's three-step process to identify and organize basic facts, to filter those facts through a variety of frames and references, and to construct logical and persuasive justifications for the selection of given frames and references, while advancing a specific legal argument and course of action. Therefore, when we think about law and market economy we focus our

233. *See* NOTH, *supra* note 30; BERGER, *supra* note 35; HODGE & KRESS, *supra* note 35; ECO, A THEORY OF SEMIOTICS, *supra* note 36; ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE, *supra* note 36.

attention on the relationship between our skills of interpreting and creating meaning, and the way in which these meanings can influence or facilitate particular allocations of resources.

In law we do not simply write or tell stories, our words have consequences that go beyond mere story telling. Our words may sentence a man to death, or spare him from that fate. Our words may allow a grandchild to enjoy an inheritance, or permit the development of a multi-million dollar mall or office building, or assure a disabled child's access to medical treatment. Legal words and legal texts exist in a market context and they shape the distribution of resources within society.[234] The structure of these "texts" or semiotic signs can also facilitate the process of economic growth and wealth formation.[235]

Law can be used to help shape the distribution of resources in society by the way in which it indexically "frames" the issues, questions, facts, consequences, and interpretive environment of the disputes and exchanges to be mediated.[236] In simple terms, familiar to all lawyers and law students, indexical framing or shifting of interpretive reference involves positioning or characterizing our situation in a manner that most favors an advantageous outcome. For example, if my client is injured because a new lawn mower he purchased was defective I might consider framing the claim for recovery as one in contract, for breach of warranty, or as one in tort or products liability.[237] Shifting from contract to tort law allows for different remedies and requires different elements of proof. It also involves a moving away from the idea of a fully informed and consensual exchange between market participants to a concern for under-informed or nonconsensual exchange. Similarly, one can often reframe a long-term land sales contract as a lease relationship, or as a constructive conveyance subject to an implied or equitable mortgage.[238]

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234. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 136-65.

235. *Id.*

236. *Id.*

237. *See generally* Trevino v. Gen. Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989); Upjohn Co. v. Rachelle Laboratories, Inc., 661 F.2d 1105 (6th Cir. 1981); Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964).

238. *See, e.g.* MALLOY & SMITH, *supra* note 53, at 813-46 (discussing examples related to mortgage substitutes, disguised mortgages, and installment land

Reframing the situation works to change the meaning of the exchange relationship and implicates different elements of substantive and procedural law.[239] It also raises issues related to resource allocation, as the different parties to the exchange will seek an interpretive frame or reference that is most favorable to her or him.

This framing and referencing process includes the ability to create value opportunities from innovations in structuring tax planning, real estate transactions, financial investments, and other exchange relationships. Generating "loopholes," developing new financing techniques, and creating other legal devices involves careful and insightful use of language, communication, and interpretation skills.[240] In these and numerous other ways legal actors generate and capture value through the interpretive process.

There are also important moves to be made in framing the manner in which the legal system itself is understood. This involves the framing of underlying assumptions about the legal system that inform us about the kinds of moves or categories that are available.

To understand this point just think of a time when you may have visited a different country or culture, or even just a family from another neighborhood, and discovered that they did not do everything the way that you did.[241] They had different customs, different assumptions about the roles of women and men, or about shaking hands, bowing, or eating. Perhaps you discovered that in this other country or place it is thought to be unheard of that a private person can own a lake or a beach, or that a woman would question the authority of her husband in public. What one discovers in these situations is that certain basic assumptions are so fundamental to a system of social organization or cultural-interpretive hierarchy that they are not even made visible until someone challenges them in a direct or indirect way, or in an intentional or unintentional way.[242]

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contracts).

239. *See, e.g.*, this article, text and related notes *infra*Part I.C.

240. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 43-49, 78-90, 106-35.

241. *See, e.g.*, Hom & Malloy, *supra* note 56 (discussing interpretive issues confronted by working on law and market issues in a non-U.S.A. cultural-interpretive context); SINCLAIR & PO-YEE, *supra* note 56 (one in a series of tour guide books for travelers).

242. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 12-19, 66-70.

This is also true when we think about the relationship between legal and economic systems. In the United States, for instance, we are accustom to validating private property ownership and to keeping detailed records to protect title to valuable land holdings. Under Marxism, however, land had no value except to the extent that labor was applied to the land. Consequently, the Russian legal system, under the Soviet Union, did not keep records of land ownership but rather focused its attention on recording the ownership of buildings and improvements to the land.[243] The underlying frames and references resulted in a different approach to legal action. In a similar way we have a number of competing interpretive frames and references at play in our own legal system. We have liberal and conservative views of law, we have feminist and critical race views of law, and a variety of other conceptions each competing for authoritative influence over the way in which we interpret and understand law. Each of these interpretive frames and references seeks to influence, through law and legal institutions, the allocation of scarce resources and the access to decision making authority. Each attempts to indexically frame and influence the process of interpretation, and thereby the process of social/market choice.

Standard market models and concepts are also important because they function as interpretive frames and references for justifying and validating standards and criteria used in the allocation of resources and access to decision making authority.[244] For example, legal concepts such as fairness, justice, and reasonableness can be given meaning by reference to ideas or signs of "competition" and "market opportunity." Likewise, legal outcomes can be justified by reference to various economic concepts such as efficiency, externalities, transactions costs, and other interpretive devices. In a similar manner legal and cultural mechanisms embrace interpretive frames and references that give substantive form to market development. These may include reference to transparency, stability, liquidity, reciprocity, accountability, diversity, and tolerance.[245] All of this is im-

243. Conversation with Ivan Velev of Land and Real Estate Initiative (LARI) Group of The World Bank, Washington, D.C. April 10, 2001.

244. *See* SEN, *supra* note 152. Sen argues for a variety of measures of economic well-being because different measures focus on different information and criteria.

245. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 76-77. This is

portant to the form and structure of persuasive legal argument, and to the way in which law and legal institutions generate value-enhancing opportunities.[246]

D. *The form of Legal Argument*

In discussing the form of legal argument, law and market economy borrows from the conceptual work of Charles Sanders Peirce on semiotics and interpretation theory. Basically it breaks legal argument down into three related modes of forming and shaping meaning as depicted in Diagram 3, above.[247] This section of the article relates the form of legal argument to Peirce's three modes of logic.

As indicated, Peirce referred to these modes as firstness, secondness, and thirdness.[248] All argument forms

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also a theme promoted by DeSoto in his recent book, DESOTO, CAPITALISM, *supra* note 24. DeSoto makes an important contribution to our understanding of the role of law and legal infrastructure for development. It is particularly important that he addresses law in terms of its ability to create symbolic representations (semiotics) that have value in exchange, and which promote economic activity. Even so, there are major weaknesses in his approach. First, he discounts cultural context and historical differences between people and countries. This is a typical assumptional move in economics, but it is not very persuasive in his work. Second, he argues that the key to economic success in the West is the presence of various legal rules. In making this point he argues as if none of these rules are present in poor or developing countries, but in fact many South American countries have the type of legal rules discussed. The problem is that the rules and the legal institutions do not work the same as they do in the developed West. Thus, I think he needs to tell us more about why they do not work the same way, rather than asserting that the legal rules are simply absent. This would, of course, raise cultural and contextual issues that he seeks, as an economist, to avoid.

246. In order to influence and mediate this referential process of market interpretation, the law and market economy movement is developing a theory of interpretation, and this theory must be capable of going beyond the "predictive" confines of positive economics. *See, e.g.*, MALLOY, LAW AND MARKET ECONOMY, *supra* note 9; Malloy, *New Discourse, supra* note 21; ROBIN PAUL MALLOY, *New Law and Economics, in* LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 1-30 (Robin Paul Malloy & Christopher K. Braun eds., 1995); Robin Paul Malloy, *Letters From the Longhouse: Law, Economics, and Native American Values*, 1992 WISC. L. REV. 1569 [hereinafter "Malloy, *Longhouse*"]; MCCLOSKEY, RHETORIC, *supra* note 22; MCCLOSKEY, ECONOMIC EXPERTISE, *supra* note 23; Malloy, *Review: If You're So Smart, supra* note 23; McCloskey, *Lawyerly Rhetoric, supra* note 23; MCCLOSKEY, KNOWLEDGE, *supra* note 23; KEVELSON, LAW, *supra* note 30.

247. *See* this article *supra* at Part II.C. (diagram).

248. *Id.* Part II.C. (text and notes).

can be understood within these three modes.[249] *Firstness* involves basic elements or the facts of a relationship. Firstness is experience based.[250] *Secondness* involves the referencing of the facts to a cultural-interpretive referent, model, theory, or convention.[251] It is reflective, comparative, and indexical (meaning it points to or references). *Thirdness* is the bringing together of firstness and secondness to form an argument, a plan of action, or conclusion.[252]

The relationship between these modes is continuous.[253] Thus, the conclusion reached in thirdness influences the further understanding of a first. Likewise, these modes are

249. The relationship between these three modes involves semiosis. *Semiosis* is the process of "synthesis" between Peirce's three modes of logic and it is continuous. NOTH, *supra* note 30, at 39-47. Peirce uses a complex triadic structure to analyze the relationship of signs. *Id.*; SHERIFF, *supra* note 30, at 31-47; LISZKA, *supra* note 30, at 18-52 (explaining the triadic relationship and providing definitions of various classifications of signs); HOOKWAY, PEIRCE, *supra* note 30, at 106-74, 272; PEIRCE, REASONING, *supra* note 30, at 68-150; PEIRCE, WRITINGS, *supra* note 30, at 74-119. In Peirce's triadic approach there are three modes of logic or trichotomy and each of these has three ways in which it can be categorized, and each of these has three correlates such that there are twenty-seven classes of signs in Peirce's system. NOTH, *supra* note 30, at 44-45. The standard presentation of Peirce's triadic theory generally focuses on nine classifications as follows:

Trichotomy **(across)** ***Category*** **(down)**	**I** **of the representamen**	**II** **of relation to object**	**III** **of relation to interpretant**
Firstness	Qualisign	Icon	Rheme
Secondness	Sinsign	Index	Dicent
Thirdness	Legisign	Symbol	Argument

See NOTH, *supra* note 30, at 45. All of the classes are described but much of the technical detail is unnecessary for purposes of my explanation in this article. *See also* PEIRCE, WRITINGS, *supra* note 30, at 74-119; LISZKA, *supra* note 30, at 18-52 (explaining the triadic relationship and providing definitions of various classifications of signs).

250. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 29-36.

251. *See id.*

252. *See id.*

253. *See supra* note 249.

dynamic.[254] As an example let us consider the simple process of using precedent in law. Let us assume that our client was just involved in an automobile accident at a busy intersection. We can proceed to question the client and any witnesses about what happened. In doing this we are gathering and establishing the "experiential" facts of the exchange as a mode of firstness. Then we go to our office and compare these facts against statutes and earlier cases. This indexical referencing process involves secondness. Finally, after determining the rules applied in earlier cases and applying them to our facts we put together an argument for a particular result. This argument operates as a mode of thirdness. Notice that we took our facts then referenced precedent and reached a conclusion. We might just as easily have proceeded by gathering basic rules on car accidents (legal precedents), as a mode of firstness, and then referencing our facts to these rules, in a mode of secondness, to reach our conclusion. Furthermore, in each instance the initial conclusions drawn, as a mode of thirdness, actually operate to focus and shape our consideration of the first.[255] Simply put, our initial conclusions lend guidance and further refinement to our interpretation process. They help us identify and justify which facts and which rules are most important for any given or particular purpose. In this way we are always refining and reading back into our analysis as we move between these modes. In other words, we do not have simple dualistic or binary relationships. We have integrated webs of triadic relationships.

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254. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 29-36. This same dynamic nature is found in economics and in chaos or complex systems theory. *See generally* KIRZNER, CAPITALIST PROCESS, *supra* note 26, at 157. Creativity is a process and it is one that can not be captured using models of traditional neoclassical economics. *See* KIRZNER, CAPITALIST PROCESS, *supra* note 26, at 1-168. KIRZNER, MEANING, *supra* note 26, at 3-54. Kirzner's point is that a dynamic and complex market system can not be captured in static equilibrium models - creativity is important yet it escapes proper study in traditional neoclassical economics. KIRZNER, MEANING, *supra* note 26, at 3-54. *See also* KAUFFMAN, *supra* note 181, at 19-22 (stating that we live in a nonequilibrium universe and that all free living organisms are in nonequilibrium systems); GLEICK, CHAOS, *supra* note 181, at 140 (focusing on points of equilibrium is not that helpful since the system is always in flux and you never pass through the same point twice).

255. It is the relationship between the modes of logic that is significant and not that a particular one must be first in the process of semiosis. SHERIFF, *supra* note 30, at 37-47; KEVELSON, LAW, *supra* note 30, at 253 (according to Peirce anywhere is a place to begin).

In moving through these modes we employ a number of semiotic devices. We make reference to logic, metaphor, analogy and story.[256] We construct a beginning, middle and an end as we tell the story of what happened on the fateful day when our client became involved in the car accident. We use metaphor when we explain how the rain falling on the road that day left the surface as slick as ice causing our client to lose control of the vehicle through no fault of her own. We use analogy when we explain how these road conditions and our client's response are just like the facts in an earlier case and that the court should therefore follow the decision of that earlier case. We are descriptive and persuasive in our narrative. We appeal to logic in setting up the premises of our case and ask others to follow us through to the logical and favorable conclusion we seek. We also employ references to a variety of other quasi and non-legal sources such as statistics on car accidents, engineering and design information on cars and road intersections, insurance tables and costs. All of these devices rely for success upon our ability to master the skills of constructing persuasive arguments. This means that they rely upon our ability to understand and to shape the way in which others interpret the facts, the rules, and the contextual environment surrounding the accidental exchange involving our client.

More generally, we can create value as well as redistribute resources by inventing and transforming legal convention—by creating new grammatical forms, styles of discourse, and representations of property. Developing cultural-interpretive skills, therefore, is important for anyone interested in being an effective lawyer or legal actor. In a world of diverse and multi-valued interpretive communities, one must be able to understand exchange with reference to multi-factor references and intermittent framing variables. It is no longer sufficient to simply rely on knowledge of traditional legal categories sounding in contract, property, or tort, for example. To be competent one must be able to understand the meanings and values of exchange from a variety of legal, market, and cultural positions.

Peirce's triadic theory of signs helps us to better understand these complex relationships. It also provides a useful method for understanding the way in which particular ap-

256. *See* MCCLOSKEY, RHETORIC, *supra* note 22; MCCLOSKEY, ECONOMIC EXPERTISE, *supra* note 23; FERBER & NELSON, *supra* note 20.

proaches to exchange facilitate more extensive, creative, equitable, and wealth promoting relationships.

In a similar manner, semiotics helps us to understand better the strategic and representational function of legal concepts as cultural-interpretive signs. Consider, for example, the idea of property.[257] In semiotic terms property is not a bundle of sticks, property is a representational sign referring to a particular web of exchange relationships.[258] This distinction is important because property rights do not exist as independent sticks or objects of coherent investigation in the absence of an interpretive web of relational exchange. The idea of property functions as a cultural-interpretive referent and operates to organize exchange relationships in accordance with particular conventionalized interpretive hierarchies. Property in other words, organizes social status, defines power over semiotic space, and allocates resources according to conventionalized rules.[259]

Property law, in a semiotic sense, functions in a representational capacity and allows us to deal with relationships in abstract terms.[260] For instance, a leasehold estate and an interest in air rights are representational. Such property interests organize exchange relationships between owners, landlords and tenants in the one case, and between

257. *See, e.g.*, Kevelson, *Rhetoric*, *supra* note 33; Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998); Denis J. Brion, *The Ethics of Property: A Semiotic Inquiry Into Ownership*, 12 INT'L J. FOR THE SEMIOTICS OF LAW 247 (1999).

258. Law and market economy examines exchange systems, and the scientific method of inquiry used in semiotics to understand exchange systems reveals that they are like a "web" with indefinite boundaries. *See* PEIRCE, WRITINGS, *supra* note 30, at xii. This is also a point raised in general chaos or complex systems theory. *See* KAUFFMAN, *supra* note 181, at 270-87 (discussing co-evolving webs in complex systems). In studying these webs of exchange it is important to investigate and understand discourse across a number of conventionalized boundaries. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30 at 11, 63, 78, 109, 131; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 27-28, 62-64.

259. *See generally* KEVELSON, LAW, *supra* note 30, at 181-93. "From this point of view, the legal idea of Property is taken as the name of the game of a certain set of moves and countermoves for the purpose of bringing about, or realizing, continually changing social-status significances." Kevelson, *Rhetoric, supra* note 33, at 203. And significance is related to the result or consequences of the sign's relation to its final or ultimate interpretant. LISZKA, *supra* note 30, at 80.

260. *See* DESOTO, CAPITALISM, *supra* note 24, at 153-205 (explaining how legal rules allow for representation of rights and this furthers exchange and participation in both markets and social life).

surface, subsurface and above surface interests in the other case. These concepts tell us something about the characteristics of exchange and the infrastructure of exchange. They also inform us about the distribution of power, authority, and the allocation of resources between the parties to an exchange. A leasehold estate or an air right, however, is not something that one can physically put in a box and move. Leaseholds and air rights are representational signs that convey meanings and values about the relationships between people, places, and things.

Using Peirce's triadic approach, the physical object of property, a specific parcel of land for instance, stands as a mode of firstness. In its physical sense the property is of quality and stands for itself as a specific item of property, and at the same time stands for and represents similar categories of property more generally. The abstract legal devices we create to represent interests in property, such as recordable deeds, leases, and air rights, are in a mode of secondness. These devices refer to the physical object in some way and allow us to capture and create value by enhancing our ability to use property as collateral and as an item of exchange. Thirdness involves the various meanings and values that can be generated from the legal conventions linking property to its various representative forms.

Understanding the function of representational signs in the process of exchange is important because it is central to an appreciation of the way in which ideas and categories evolve, and to the way in which they are borrowed and transferred between communities. The cultural-interpretive representation of a legal right is not, in other words, the same as the idea or the right itself. Consequently, understanding exchange and market economy as a human practice involves a communicative study of the networks and patterns of exchange. Furthermore, it involves an appreciation of the central function of indexical referents in shaping resource allocations. While there are numerous ways of working through the interpretive process of exchange, the point of law and market economy is that one needs to start by recognizing the semiotic connection between law, markets and culture.[261] This is the key starting point for under-

261. *See, e.g.,* KEVELSON, LAW, *supra* note 30. In addition to discussing law in this book Kevelson also discusses economics. *Id.* at 167-193. *See also* KEVELSON, METHOD, *supra* note 30, at 83-96 (discussing money); KEVELSON,

standing exchange as a process of meaning and value formation, and of developing a multi-valued framework for imagining more extensive, participatory, equitable, and creative social arrangements. It is also the starting point for understanding the way in which institutions of language, communication, and interpretation can be used to create new value.

Moreover, semiotics informs us of the changing nature of *value* in social understanding. Value is not simply based on labor inputs or on consumer preferences, *value arises from the continuous expansion and transformation of ideas through exchange*. By informing us about exchange systems, semiotics reveals that all such systems involve a continuous process of substitution and permutation,[262] and since, in a semiotic sense, there are no perfect substitutes, all substitutions or exchanges generate the potentiality of new meaning and new value.[263]

PEIRCE AND FREEDOM, *supra* note 30, at 202-12 (discussing law and economics); REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 1-2 (Stuart Hall ed., 1997) [hereinafter "REPRESENTATIONS"].

> Culture. . . is not so much a set of things — novels and paintings or T.V. programs and comics — as a process, a set of *practices*. Primarily, Culture is concerned with the production and the exchange of meanings — the 'giving and taking of meaning' — between members of a society or group. To say that two people belong to the same culture is to say that they interpret the world in roughly the same ways and can express themselves, their thoughts and feelings about the world, in ways which will be understood by each other.

REPRESENTATIONS, *supra*, at 1-2.

> . . .'culture' is. . .a set of attitudes, beliefs, mores, customs, values and practices which are common to or shared by any group. The group may be defined in terms of politics, geography, religion, ethnicity or some other characteristic. . . . The characteristics which define the group may be substantiated in the form of signs, symbols, texts, language, artifacts, oral and written tradition and by other means.

DAVID THROSBY, ECONOMICS AND CULTURE 3-4 (2001).

262. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 29-77. *See also* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30. Dialogic exchange characterizes all semiotic interactions and dynamic evolution. KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at i. "This method assumes that inquiry, always dialogic, is a process of communication or message exchange by means of signs and sign systems. Law is one such sign system, as are other social institutions, e.g., language, economics, politics, the family, and so on." KEVELSON, LAW, *supra* note 30, at 3. Semiosis is a structure of exchange. *See* KEVELSON, LAW, *supra* note 30, at 49.

263. KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 8. "[B]ut even the mere repetition of a sign is a new sign which creates a new dimension of meaning that holds within itself a cumulative meaning and value of all that which

Thus, law and market economy investigates exchange because an understanding of the networks and patterns of exchange is important. Furthermore, exchange is not so much concerned with efficiency as it is with the idea of facilitating accessible, extensive, transparent, reciprocal, and participatory market or sign systems. In this regard, interventions or redistributions may be desirable in order to change or alter certain conventionalized networks and patterns of exchange.[264] This may be an important element in dealing with people or groups that find that they are continually excluded from important market activities such as access to housing and mortgage markets. It may also be important for helping people "trapped" in intergenerational dependence on welfare, or in the criminal justice system. Mapping exchange relationships and using this as a starting point for law and public policy reform is important, and it can be both liberating and empowering.[265]

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preceded it and which it represents in each successive 'here and now.' " *Id.* at 198. "[W]e cannot observe the same thing twice, and not only that we cannot observe a given thing exactly as someone else claims to observe it or can be shown to have observed it. . . . ." KEVELSON, METHOD, *supra* note 30, at 7. "[A] semiotic methodology will assume that a mark of a mark is not a 're-mark' but an Interpretant, or new potential subject." KEVELSON, METHOD, *supra* note 30, at 8.

264. I take this view even though such a view is not a part of traditional law and economics. Generally, law and economic analysis ignores the prior distribution problem which is to ignore a great deal of historical context. For discussion of these types of problems see MALLOY, LAW AND ECONOMICS, *supra* note 88, at 45-58; FERBER AND NELSON, *supra* note 20; Malloy, *A New Law and Economics*, *in* LAW AND ECONOMICS NEW AND CRITICAL PERSPECTIVES *supra* note 246, at 1-30; Malloy, *New Discourse*, *supra* note 21; Jeffery L. Harrison, *Class, Entitlement, and Contract*, *in* LAW AND ECONOMICS NEW AND CRITICAL PERSPECTIVES, *supra* note 246, at 221-48; (arguing that one's prior position and distribution may effect how one feels about alternative contract arrangements, how they value alternatives, and how one values ones own self worth); Jeffery Evans Stake, *Loss Aversion and Involuntary Transfers of Title*, *in* LAW AND ECONOMICS NEW AND CRITICAL PERSPECTIVES, *supra* note 246, at 331-60 (citing studies on how original allocations can effect later values and trades, and applying this concept to real property issues concerning adverse possession).

265. Peirce was very interested in the idea of mapping. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 12-14. Peirce thinks of maps as attempts to represent our experiences of the real world—to present the real in ideational form. *Id.* In an open-ended and dynamic universe these ideas or representations are always provisional and limited by the constraints over boundaries of the interpretive tools we use. *Id.* at 1-42. Thus, our models and theories are by definition always partial, incomplete and provisional. In a logical and scientific community they are always open to revision, correction and fallibility. On the idea of partiality in economic analysis see also Helen F. Longino, *Economics For*

In this approach to the relationship between law, markets, and culture, a primary function of law involves the mediation of conflicting claims to interpretive authority, and the objective of this mediation process is not so much one of achieving efficiency, or some abstract notion of justice, as it is to facilitate convergence toward the successful pursuit of common goals and purposes within and between competing interpretive communities. Understanding this mediation process also means appreciating the way in which legal actors create value through the development and transformation of cultural-interpretive frames and references.

Having provided a broad sketch of the general foundations for an interpretive framework on the relationship between law and market economy, this article proceeds by discussing some additional examples.

III. SOME BASIC EXAMPLES OF MAPPING EXCHANGE RELATIONSHIPS

As I have said, law and market economy positions the market as a place of meaning and value formation. It contends that choice involves a cultural-interpretive process, and that this process influences the generation and allocation of resources. To understand better the relationship between law, culture and markets, law and market economy "maps" exchange relationships.

The mapping process involves the identification of basic exchange relationships with reference to Peirce's triadic approach. This involves examining legal disputes from a variety of cultural-interpretive perspectives to gain a better "picture" or "map" of the contested facts and values. This approach can be used to examine problems of choice, two party exchanges, multi-party exchanges, commons problems, Coase problems, public goods problems, agency and externality problems, among others.[266]

To gain a better sense of this process I offer two examples. First, I explain concepts of *scale*, *measure*, and *position*, as they relate to the use of alternative cultural-inter-

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Whom?, in FERBER AND NELSON, *supra* note 20, at 158-68.

266. *See, e.g.*, MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 90-99 (Coase); *id.* at 99-105 (public choice); *id.* at 144-46 (efficient breach).

pretive frames and references.[267] Then I examine two specific exchanges: an exchange for sexual favors;[268] and an exchange involving automobile sales.[269]

A. *Interpretive Reference: Scale, Measure, and Position*

Law and market economy involves a socially contextualized approach to market theory because it is grounded in the simple belief that markets involve exchange, and exchange implies interaction by and between people.[270] It, therefore, centers attention on the social process of exchange rather than on the "optimal" or efficient exercise of purely rational choice.[271] Exchange, in a market sense, does not take place on an isolated island of individual autonomy no matter how many choices a person must make under conditions of scarcity and uncertainty.[272] Meaningful exchange occurs when there is a community of people involved, and law and market economy primarily concerns it-

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267. *See id.* at 123-27.

268. *See id.* at 140-41 (I develop this example in more detail in this article than in the book).

269. *See id.* at 40-41 (I add more detail to this example than in the book).

270. Exchange does not happen in an isolated way. Exchange happens between people in community. Exchange, in Peirce's theory, must always proceed in a dialogic way—as a dialogue. *See* HOOKWAY, PEIRCE, *supra* note 30, at 119. Peirce also says, that an individual person is, by himself, incomplete—it requires a referential relationship to another to make the meaning of individual provisionally determinate. KEVELSON, LAW, *supra* note 30, at 147. According to Peirce, "the initial assumptions one brings to the process of reasoning are syntheses of values shared between an individual and a community. All logical methodology has its origin in the identification of self-interest with the interests of one's community." KEVELSON, LAW, *supra* note 30, at 81. Furthermore:

> It is one thing to show that all value exchange is relational. . . . It is quite another to assume that to go beyond the notion that our acts and ideas are relative with respect to their ability to evolve into new significations is to say that value is merely the expression of arbitrary power and will. From this viewpoint . . . a consensus is never the result of relativism, and neither is it the determination of an external authority upon members of a community. Rather, the capacity for self-determination—for self-governance and self-organization—pertains to choosing partners or relates in self-binding and contractual ways.

KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 45.

271. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 137-48. *See generally* KAUFFMAN, *supra* note 181, at 248-62, 268-69. It is impossible to optimize a course of action in a complex system - one can only hope to make a reasonable compromise within a wide range of constraints. KAUFFMAN, *supra* note 181, at 268-69.

272. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 57-78.

self with the examination of the exchange process—with the study of the networks and patterns of exchange in society. As a consequence, law and market economy is about people interacting in and between interpretive communities — it is about individuals participating in reciprocal relationships, relationships that are not given and finite but which are continually evolving and transforming.

In law and market economy, markets function as communicative networks of exchange responding to and simultaneously influencing law and culture. These responses and influences filter and frame the process of choice and shape the contours of resource allocation. As a semiotic *sign system*, or cultural-interpretive process therefore, the market gives meaning and value to human action while making the exchange process comprehensible.

In a sense, law and market economy involves taking an *interpretive or representational turn* in the understanding of the relationship between law and market theory, but not a radical anti-realist turn.[273] It involves a "Peircean turn" — a turn that Carl Hausman has identified with *pragmatic evolutionary realism*.[274] It is a turn that recognizes both determinate and indeterminate logic in the human practice of exchange, and the process of meaning and value formation.[275]

Exchange is a dynamic process and within this process choice involves, not simply mathematical calculation but interpretation and representation—it involves a certain degree of freedom, creativity, and indeterminacy as well as predictability.[276] Moreover, the question of how we make choices is different from the question of how we exchange. Exchange is a continuous relationship whereas choice is a point on the continuum.

The examination of the networks and patterns of exchange involves an inquiry into the way in which we relate to each other. It involves an investigation of the way in which meanings and values are created, exchanged, and

273. *See* HAUSMAN, PEIRCE, *supra* note 30, at 194-225; PATTERSON, LAW & TRUTH, *supra* note 163. Patterson's book examines the interpretive turn from a variety of viewpoints including reference to legal positivism, legal realism, Dworkin and Fish. He gives an excellent account of the concept of "truth" in law and jurisprudence while offering his own innovative theory of the same.

274. HAUSMAN, PEIRCE, *supra* note 30, at 140-225.

275. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-135.

276. *Id.*

transformed.

We understand the meanings and values of exchange by reference to semiotic or cultural-interpretive connectors. These connectors function as important elements of an interpretive value frame and reference hierarchy, and operate as a referential lens or screen for understanding. The referent process is *indexical*,[277] to use Peirce's terminology, and involves a multi-factor set of frame and reference shifting devices. The devices described in this part of the article include *scale*, *measure*, and *position*.

In the context of complex systems, of which the social/market exchange process is one, *scaling* is important for focusing in on habit taking patterns of interaction.[278] As a dialogic process, the market exchange system needs intermittent/variable scaling in order to get at the process of meaning and value formation as well as to explore the consequences of alternative market structures and conventions. In other words, it is necessary to think beyond the scale of atomistic individuals. We must think in these terms while also making inquiry into larger units of social organization and while focusing on the dynamic elements of community(ies) to which individuals are attracted and in which they find themselves situated.

Examining groups and environments of varying dimensions raises the possibility of enhanced scaling and is important for presenting a more complete picture of the exchange process. Small groups and environments such as families, churches, clubs, work teams, and professional or

277. An index is a mode of secondness and performs a referencing function. NOTH, *supra* note 30, at 44-45. Whereas a sign is an icon if it represents its object, a sign is an index if it indicates contiguity with its object. LISZKA, *supra* note 30, at 38. Contiguity can be of three different sorts: (1) *Deictic* (referential) in the sense that there is a perception of direct continuity between the sign and its object; for example, as the way in which a pointing finger draws an imaginary line to the object it refers to; (2) *Causal* (existential) where the index is caused by the object it represents; an example would be the way in which the wind pushes a windvane into a certain pointing position; and (3) *Labeling*—this type of index has a close relationship to symbol. LISZKA, *supra* note 30, at 38. Here when a symbol becomes clearly associated with an object it takes on an indexical function because of its association with a particular object—for example my written name or signature, or the letter beneath a diagram. LISZKA, *supra* note 30, at 38-39. *See also* SHERIFF, *supra* note 30, at 31-47; HOOKWAY, PEIRCE, *supra* note 30, at 125-39; PEIRCE, WRITINGS, *supra* note 30, at 98-119.

278. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 123-24 (scaling). *See also* GLEICK, CHAOS, *supra* note 181, at 83-186; KAUFFMAN, *supra* note 181, at 17 & 248-62.

trade associations are significant because they tend to function as primary mediators for cultural-interpretive understanding. They are, therefore, central to understanding the interpretive frames and references at work in the exchange process. They are also important when thinking about economic and public policy. This is because the key to such programs as welfare reform or urban revitalization, for example, may have more to do with reaching and investing in community groups than it does in targeting individuals.[279]

In general, the process of scaling can be thought of as one similar to the work of a photographer in selecting the appropriate lens and setting for a picture. A zoom lens highlights the individuals or the two primary parties to an exchange, whereas a wide-angle lens includes third parties, externalities, and a broader community context. Changing the lens, or the scale of reference brings different information into view. By strategically changing the scale of an exchange relationship one can influence the meanings and values of interaction, and this can influence resource allocations.

A second referent device involves *measure*.[280] This device can also influence our understanding of exchange relationships as it provides strategic opportunities for manipulating meaning. The issue here is one of measurement. For example, how should one calculate damages, what discount rate should be used, and what is the appropriate time horizon for determining a reasonable investment-backed expectation? Likewise, should we make reference to pareto or kaldor-hicks efficiency, and include hedonic or contingent valuation methods in our market calculations? By strategically shifting the measuring referent one can change the meaning and value of an exchange relationship.

A third referent device involves *positioning*.[281] We can supplement our tools of scaling and measure by investigating and imagining particular market predictions and policy prescriptions from the alternative positionings of various individuals and groups within the system. If, for instance, we look at housing or mortgage markets from the point of

279. *See, e.g.*, Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1019 (1989).

280. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 124-25 (measure).

281. *Id.* at 126-27 (positioning).

view of a college educated white or Asian American we may have a different view of the market than if we position ourselves as a poor Hispanic or Bosnian female renting a government housing unit in the inner city.[282] We will also see government intervention in the marketplace quite differently. Thus, by shifting the positioning referent one can change the understanding of given networks and patterns of exchange. One can also use strategic positioning or identity references to shift or transform an interpretive hierarchy.

Mapping exchange with reference to a variety of cultural-interpretive frames and references, and using intermittent scales, measures, and positions is important because it begins the process of identifying the relational webs of exchange. This process of multi-valued analysis is significant to a Peircean type of approach because it plays a primary role in developing the skills of speculative inquiry or abductive reasoning[283], and facilitates creativity by revealing and traversing conventionalized hierarchies. More fundamentally, it directs our attention to a broad set of issues, facts, and values to be considered in developing public policy, and in advancing legal reasoning.

In the language of the popular media, the manipulation of scale, measure, and position within the context of shifting frames, references, and representations is similar to the idea of "spin." Putting a favorable "spin" on a story involves the manipulation of these cultural-interpretive devices such that a fact or story is presented in a favorable or unfavorable light in accordance with the objective of the "spin-maker."

In the two examples that follow we can see how scale, measure, and position work in our mapping model to create cultural-interpretive alternatives, or different spins, for the facts and values that are under investigation.

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282. *See* ROBIN PAUL MALLOY & JAMES C. SMITH, REAL ESTATE TRANSACTIONS 703-84 (1st ed., 1998) (reporting on studies in the mortgage and housing markets). *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (data on market access and economic distribution based on race).

283. *See* LISZKA, *supra* note 30, at 13.

B. *Two Examples*

1. *Example One: Sexual Favors*: Let us consider the question of legalizing transactions for sexual favors.[284] More specifically, consider the idea of legalizing prostitution. At first glance the exchange itself, as an iconic event in a mode of firstness, seems to be a simple two party exchange, but we can quickly show how it becomes more complex when we seek a better understanding of the exchange relationship by applying the different frames and references of scale, measure, and position. These indexical concepts involve a mode of secondness.

If we address our inquiry to only the immediate parties to the transaction, we might conclude that the seemingly voluntary and consensual nature of the exchange of money for sexual services is a wealth-maximizing move. Under such a scenario an efficiency driven legal economist, as a mode of thirdness, might argue for the legalization of prostitution. If, on the other hand, we change the *scale* of our investigation and look at the way in which these activities affect third parties we might reach a different conclusion. Assume that we include estimates of the "cost" impacts of this activity on the families and friends of the participants, the communities they live in, and the potential for extended health related consequences across multiple communities. By including these third party costs we change our efficiency calculations and, thus, we might reach a different set of conclusions. Scaling, therefore, raises the problem of what to count. Should we even worry about accounting for externalities, and if we do, then how should we decide on where to draw the line between impacts that count and those we deem too far removed from the transaction to be relevant. Depending upon how we chose to define the relevant scale, our conclusions will vary even if we profess a desire to operate at the most efficient point.

Still further problems can be raised when we consider alternative ways to *measure* the third party impacts of these exchanges. How should we quantify such things as health, emotional, esthetic, and family values, for instance? Slight variations in pricing estimates, or in assessing dis-

284. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 140-41 (citing a less developed example than the one in this article).

tributive implications, may lead to significantly different outcomes.

Similarly, we can introduce *positioning* problems to our investigation if we relax the presumption that consent is evident in the exchanges being observed. Perhaps the market under investigation reveals that actions of the parties are not based on consent. Maybe there is historical, cultural, or institutional bias in the exchange, or some personal considerations that result in the woman feeling compelled to participate. Seen from the position of the woman, this transaction may have very different dynamics from those presumed under an assumption of rational consent theory. A change in positioning might, once again, change our conclusion.

An important point here is to appreciate the power of being able to influence the interpretive referents, the indexical mode of secondness, used to analyze this exchange relationship. The authority to set the legally applied scale, measure, and positioning determines the meaning and value of the exchange. For example, from a masculine point of view the transaction might be considered consensual, but from a feminine point of view it may be viewed as socially coerced. Likewise, viewed as a two party voluntary exchange it might be considered efficient, but viewed in terms of third party costs and externalities it might be considered otherwise. Furthermore, these alternative references may be grounded in potentially contestable ideas with respect to the meaning of "appropriate" female sexual behavior or "family values," and externalities may be positive or negative.

In a complex system like the market exchange process, factors of scale, measure, and position involve degrees of freedom and they suggest, as illustrated above, a number of transactional influences. Consequently, we need to focus more attention on the dynamic nature of the networks and patterns of exchange that are being observed. We need to develop a better understanding, for example, of the way in which men, women, families and communities interact. We need to transform our point of reference from one of concern for calculating economic efficiency to one that investigates the nature, scope, dynamics, and consequences of particular exchange relationships.

We need, in other words, to inquire as to the manner in which prostitution affects the social/market exchange *proc-*

ess and not merely as to the efficiency of making it legal. We also need to ask about other ways of understanding these exchange relationships, and the ways in which they can best advance positive ethical and esthetic values. This involves a process of mapping—a process of seeking to understand the exchange relationship from multiple frames and references, as illustrated in the above example. This process facilitates a better basis for pragmatic and informed decision-making.

2. *Example Two: Car Sales.* As a second example let us consider the market for automobile sales.[285] This example also illustrates the use of shifting interpretive frames and references. First, assume that we have collected basic data about the market for automobile sales, a mode of firstness. Our data indicates that product offerings are essentially the same across brands, prices for similar products by different manufactures are close to identical, and purchase or lease terms are virtually the same. The raw data that has been collected makes up a Peircean mode of firstness—it is basic information about the nature of the thing or product itself. In the process of interpreting the data so that we can draw a conclusion or response, we make a reference to an interpretive or indexical mediator that functions as a Peircean mode of secondness. The mediating point of interpretive reference is important because it shapes our economic and legal conclusion in a mode of thirdness. For instance, if one reviews the data through a "Chicago School" lens of neoclassical economics he may very well conclude that the data reveals the presence of a perfectly competitive market.[286] In such a market no seller has the power to set terms but must, instead, take its terms from the marketplace, and as a consequence we would expect to find close similarity between product lines, prices, and sales terms. Such a competitive market makes the consumer the "king" or "queen" while the producer acts as servant. The conclusion, as to the meaning of the data, functions as a Peircean mode of thirdness and further informs our interpretation of the market as we use it to reexamine the data in light of our newly achieved understanding.

285. *Id.* at 40-41 (drawing on a less developed example from the book).

286. *See* MERCURO & MEDEMA, *supra* note 6, at 51-83 (discussing the Chicago School approach).

Now, to better understand this process, imagine reviewing the data through an alternative interpretive referent or frame of reference. From the point of view of some positions in critical theory, for example, one might conclude that the data reveals strong corporate power in a market where sellers band together to set terms of exchange in a way that leaves the consumer helpless.[287] The signs of uniformity between products, prices, and terms, are interpreted as evidence of market power rather than as indications of market constraints. In other words, rather than concluding that there is a competitive market, one might readily conclude just the opposite.

Interpretation of the data, in a mode of thirdness, is important because our conclusions about the meaning of the exchange process will implicate particular responses. If we believe, for instance, the Chicago School interpretation we have no need for concern because we have a voluntary and consensual exchange process in which consumers are protected by competition. In such a setting, consumers receive exactly what they want. Therefore, we would reject any proposed intrusion by government into the marketplace. On the other hand, if we reach the opposite conclusion based upon the use of an alternative interpretive frame or reference, we may advocate a need for government regulation to protect consumers and to break up the power of corporate dominance in the marketplace. Importantly, the point is that the facts themselves (the raw data as a mode of firstness) tell us little without the mediation of those facts through an interpretive frame of reference (a mode of secondness). The conclusions drawn from this indexical mediation process function as a mode of thirdness and implicate a course of action or inaction. They also serve as a "touch stone" for further investigation and analysis of the "facts." In this way they effect the continuity of semiosis in moving from firstness to secondness and thirdness, and back to firstness in an on going process. Moreover, we see that the conclusions reached in the mode of thirdness shape and influence the allocation or resources between producers and consumers.

The point of this example is not to show the real world of exchange as unknowable or completely indeterminate. It is to illustrate the process of mapping the exchange rela-

287. *Id.* at 157-70 (discussing critical theory).

tionship, and to show that people positioned in alternative interpretive communities use different interpretive frames and references. Thus, different people understand the world in different and sometimes conflicting ways. Therefore, we must be aware of a variety of cultural-interpretive perspectives as they influence the direction of law and social policy. Consequently, we must understand the relationship between law, markets and culture, and we must realize that by shifting interpretive perspectives we can alter authoritative influence over the interpretation process. Furthermore, we must appreciate the need to develop and address comparative sources of information that will advance legal mediation of conflicts between people situated in competing interpretive communities.

IV. PEIRCE'S INTERPRETIVE MODEL: A FURTHER EXAMINATION

This part of the article presents a further examination of Peirce's interpretive model of semiotics. The purpose is to provide additional theoretical background and support for understanding the interpretive approach to law, markets, and culture. Beyond clarifying some basic semiotic terms and concepts, there are three main objectives to this part of the article. The first objective involves explaining Peirce's understanding of meaning in the relationship between the real world of exchange and the cultural-interpretive signs we use to understand the real. It is here that we explore Peirce's idea of *abductive logic* and *speculative rhetoric*.[288] It is here that we also address Peirce as a pragmatic evolutionary realist and examine the limits of interpretation. The second objective involves an explanation of the connection between *esthetics*, *ethics*, and *logic* in law and market economy.[289] It is here that we identify a need for an implicit, if not express, reference to the normative sciences of esthetics, ethics and logic when using market concepts in legal reasoning. The third and final objective involves explaining the community context of meaning and value formation.

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288. *See* LISZKA, *supra* note 30 at 53-77; 2 THE ESSENTIAL PEIRCE, *supra* note 30, at 299 (abduction described).

289. *See* KEVELSON, PEIRCE AND FREEDOM, *supra* note 30 (explaining Peirce's idea of freedom as related to esthetics); POTTER, NORMS & IDEALS, *supra* note 30, at 19-20.

A. *Exchange and the Limits of Interpretation*

In order to understand better Peirce's idea of firstness, secondness, and thirdness we need a more detailed discussion of social meaning in exchange. According to the Peircean semiotics that influences my work, social meaning in the exchange process emerges out of an original state of chaos or indeterminacy.[290] This is a state of pure chance, nothingness, or ambiguity that becomes real with the emergence of a habit or formation of a pattern(s) of regularity.[291] The tendency toward habit and pattern formation is normal according to Peirce and, thus, potentiality always gives rise to an actuality.[292] Peirce's notion of the original state, and the tendency toward habit formation based on conventionalized patterns, is consistent with the idea of a "strange attractor" in chaos and complex systems theory,[293] and with the role Adam Smith ascribed to the Deity in his model of evolutionary transformation.[294] One need not debate this understanding of the original position, however, in order to benefit from Peirce's insights on the transformation of value and meaning in the process of exchange.

> Peirce's point is that signs are... anything we know or claim to know we know because it *is* a sign and interpretable. Persons, places, things, systems—are all signs. Peirce's argument is that signs interpret signs. It is only through the methods of semiotics—the method of methods—that we are able to account for the process whereby our system of signs interprets another system of signs and thus grows, and give birth to new signs.[295]

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290. SHERIFF, *supra* note 30, at 8-16.

291. *Id.*; KAUFFMAN, *supra* note 181, at 277-79. (explaining that complex systems have a tendency to move from chaos to sets, patterns, habits, redundancy, and replication. This tendency is similar to that ascribed to Peirce's theory of signs).

292. SHERIFF, *supra* note 30, at 9. "[T]he possibility evolves the actuality." *Id.*

293. *See* GLEICK, CHAOS, *supra* note 181, at 121-53 (discussing the case of strange attractors).

294. *See* Jerry Evensky, *Setting The Scene: Adam Smith's Moral Philosophy in* ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS 7-29 (R. P. Malloy & J. Evensky eds. 1994); GLEICK, CHAOS, *supra* note 181, at 121-53 (a strange attractor causes infinite possibility to inevitably become patterned in the sense of spontaneous organization).

295. KEVELSON, LAW, *supra* note 30, at 239. Importantly, these new signs are the product of exchange and substitution, and thus continually give rise to

Meaning, according to Peirce, arises from a continuous process of relational exchange operating within an environment of chance/indeterminacy and habit/continuity.[296] It is an evolutionary and dynamic process in which meaning and value continually evolve in a synthesis of indeterminacy and continuity.[297]

In market theory we can see this connection when we think in terms of simple cost and benefit analysis.[298] From the chaotic activities of numerous independent market actors emerges a set of patterns that formulate a habit and results in a temporary equilibrium.[299] The information provided by the equilibrium is useful and influential in thinking about extending the meaning/consequences of that relationship to the next exchange. For instance, current prices influence, or inform, thinking about alternative investment trade-offs. At the same time, new information is constantly emerging in the marketplace, and chance, surprise and other factors all play a part in destabilizing the observed equilibrium. As a consequence, a new pattern emerges and a new equilibrium is located. This new equilibrium once again provides meaning for market actors and once again stands ready for revision in the dynamic interplay between

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new meanings and values. Peirce has a theory of how everything began, but for our purposes the more appropriate focus is in the understanding of meaning and value that emerges from his understanding of relational exchange. SHERIFF, *supra* note 30, at 8-16. "[P]eirce reminds us that the beginning of all ideas—all sign systems—come to us by chance. But then, a kind of 'welding process' takes place, according to the 'law of association'. . . ." KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 164.

296. *See* SHERIFF, *supra* note 30, at 9-16. Relational exchange "is the basic unit of meaning in a legal semiotics." KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 154.

297. SHERIFF, *supra* note 30, at 8-59; Kevelson, *Rhetoric, supra* note 33; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 1-47.

298. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 32-33.

299. SHERIFF, *supra* note 30, at 9-59. Also note how this idea of a pattern arising out of chaos corresponds to chaos theory. *See* GLEICK, CHAOS, *supra* note 181; KAUFFMAN, *supra* note 181. Furthermore, it also corresponds to Hayek's theory of spontaneous social order. *See* KEVELSON, LAW, *supra* note 30, at 168 ("The freedom to interpret and reinterpret leading principles is antithetical to closed societies, but such indeterminate review constitutes the basis of a free marketplace, in the context of what Hayek refers to as the 'spontaneous order' of the open society."); F. A. HAYEK I. LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 35-54 (1973) (discussing spontaneous social order related to law and social cooperation); ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT 1-60 (1991) (general rules and spontaneous social order with reference to Hayek).

conventionalized regularity and chaotic indeterminacy. The same process happens in law. The common law, for example, with its case-by-case analysis continually revises the meaning of legal rules. Continuity is preserved by reference to precedent and legal doctrine, yet endlessly variable fact patterns give rise to constant extensions and revisions of meaning.[300] Chance and indeterminacy work toward diversity and freedom, while regularity and habit work toward continuity and convention.[301] The synthesis of these states, or modes of being, results in the continuous creation and recreation of meanings and values in an infinite process of referential and substitutional exchange.

In Peirce's semiotics there are three modes of being as described in an earlier part of this article; firstness, secondness, and thirdness.[302]

All logical thought consists of these modes and thus all semiotics involves a triadic relationship between these modes.[303] The semiotic synthesis between firstness and secondness gives rise to a new meaning or value that stands in the position of a third.[304] This continuous synthesis is referred to as the process of *semiosis* and it is present in all systems of exchange.

> Since every sign creates an interpretant which in turn is the representamen of a second sign, semiosis results in a series of successive interpretants *ad infinitum*. There is no "first" nor "last" sign in this process of unlimited semiosis. . . thinking always proceeds in the form of dialogue. . . "every thought must [adhere] itself to

300. *See generally,* GLEICK, CHAOS, *supra* note 181, at 140 (complex systems raise the prospect of infinite points of possibility within a limited space).

301. SHERIFF, *supra* note 30, at 9.

302. NOTH, *supra* note 30, at 39-47; SHERIFF, *supra* note 30, at 14, 31-47; LISZKA, *supra* note 30, at 18-52; PEIRCE-REASONING, *supra* note 30 at 68-102; HOOKWAY, PEIRCE, *supra* note 30, at 106-18, 121, 151, 166-80; PEIRCE, WRITINGS, *supra* note 30, at 75-93, 101-19; APEL, PEIRCE, PRAGMATISM, *supra* note 30, at 23.

303. *See* references, *supra* note 302. Also note that this triadic relationship is a key distinguishing factor from Saussure. Saussure focused on detection of oppositions in a dyadic relationship of signifier and signified whereas Peirce seeks to disclose trichotomies, in a triadic relationship of object, sign, and interpretant. *See* COLAPIETRO, PEIRCE-SELF, *supra* note 30, at 5; SHERIFF, *supra* note 30, at 41.

304. *See* references, *supra* note 302. "Our only experience of Firstness or Secondness is mediated by Thirdness. That is we experience only *signs* (which are already triadic relations) of Firstness, Secondness, and Thirdness." SHERIFF, *supra* note 30, at 32.

> some other". . . "this endless series is essentially a *potential* one. Peirce's point is that any actual interpretant of a given sign *can* theoretically be interpreted in some further sign, and that in another without any necessary end being reached. The exigencies of practical life inevitably cut short such potentially endless development.[305]

Importantly, depending upon the point of inquiry, the positional designation of firstness, secondness, and thirdness may change or shift.

> [T]herefore a part of every thought continues in the succeeding thoughts. Every sign is interpreted by a subsequent sign or thought in which the-relation-of-the-sign-to-its-object becomes the object of the new sign. Not only does a sign refer to a subsequent thought—sign that interprets it, it also stands *for* some object through a previous thought-sign . . . . Meaning, then, "lies not in what is actually thought [immediately present], but in what this thought may be connected with in representation by subsequent thoughts; so that the meaning of a thought is altogether something virtual." Meaning exists only as the dynamic relation of signs. To the degree that life has meaning, it is a train of thought.[306]

In the simplest of terms, this idea can be expressed with reference to the age-old question of the chicken and the egg. As such, one might understand this semiotic approach as not so much concerned with determining whether the chicken or the egg came first but rather with investigating the relationship between chickens and eggs in an on going process of evolutionary change.

Focusing on dynamic relationships over time does not mean that meanings and values are completely indeterminate. For example, Umberto Eco explains that Peirce's idea

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305. NOTH, *supra* note 30, at 43 (defining the idea of unlimited semiosis). *See also* references, *supra* note 302.

306. SHERIFF, *supra* note 30, at 37. *See also* references, *supra* note 302. This idea is fully explained and diagrammed in SHERIFF, *supra* note 30, at 33-47. Eco provides a similar interpretation of Peirce. *See,* ECO, LIMITS OF INTERPRETATION, *supra* note 36, at 28-30, 60.

> The idea of interpretation requires that a "piece" of ordinary language be used as the "interpretant" (in a Peircean sense) of another "piece" of ordinary language. When one says that/man/means "human male adult," one is interpreting ordinary language through ordinary language, and the second sign is the interpretant of the first one, as well as the first can become interpretant of the second.

ECO, LIMITS OF INTERPRETATION, *supra* note 36, at 60.

of unlimited semiosis does not mean that there are unlimited meanings to a text or a sign.[307] While there are multiple ways to interpret a sign it does not follow that a sign or a text can mean anything a reader wants it to mean.[308] To a certain extent signs, like texts, are anchored in convention, and the community constrains the individual's ability to interpret meaning.[309]

Carl R. Hausman elaborates on Eco's point. Hausman argues that Peirce believed in real dynamical objects that existed independently of our opinion about them, and that Peirce was concerned with a search for an external permanency that was discoverable in the reality of science.[310] In other words, the world is not only what we can describe or understand in our language. Our language may be unable to describe the real that surrounds us, but that does not simply make everything purely subjective or indeterminate.[311] Thus, signs cannot simply mean whatever one wants them to mean because there is ultimately a real

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307. Eco explains that Peirce's idea of unlimited semiosis does not mean that there are unlimited meanings of a text or a sign. ECO, LIMITS OF INTERPRETATION, *supra* note 36, at 57. Peirce's semiosis is constrained by a community of inquiries and a final judgment of meaning emerges as habit or convention. *See id.* at 37-42. There is an objective meaning in a contextual, fallible, dynamic and revisionary sense. *See id.* Unlimited semiosis is not, therefore, the same as hermetic drift. *See id.* at 27-32. Unlimited semiosis means that there are multiple ways to *read* a text but not that a text can mean anything a reader wants it to mean. *See id.* at 148-49

308. *See id. See also* 1 THE ESSENTIAL PEIRCE, *supra* note 30, at 63.

309. *See supra* text accompanying note 307.

310. *See* HAUSMAN, PEIRCE, *supra* note 30, at 140-225.

311. Kevelson describes Peirce' thoughts in this regard by saying:

> Peirce insists that our ideas . . . in law must also be an evolving process which begins and concludes with reference to the experiential world, i.e. that world which we acknowledge as the basis for our ideas of the Real but which we can never know in entirety. The Real is always greater than our knowledge, our understanding. It is represented in sign-relations, and it is more approximate. In this respect every sign process must have as its object some aspect of a world which is not confined to ideational strata but which has a locative aspect, and is contingent upon something which exists.

Kevelson, *Rhetoric, supra* note 33, at 197.

Semiotics is not concerned so much with *what* is true as with establishing the conditions for what is to count as true. LISZKA, *supra* note 30, at 5. Our theories and models represent ideas that we construct as a way of getting at a real or provisional truth value. But since truth and the real are future oriented, we can only really construct logical methods of inquiry for approaching and getting at the truth or the real. *See* SHERIFF, *supra* note 30, at 48-59. *See generally*, PATTERSON, *supra* note 163.

world constraint on interpretation. In the law and market economy context, this means that we can have some deliberate influence on the market process in which we are embedded, but we are not separate and independent of the market.

In making his argument Hausman suggests that Peirce was a *pragmatic evolutionary realist*.[312] By this term he means that Peirce was committed to a belief in an independent reality as a semiotic sign or cultural-interpretive idea, but he also understood that this reality was itself dynamic and evolutionary, and thus unattainable.[313] The idea of the real, however, is important. This is because the idea of the real constrains us even if it is dynamic and evolutionary. Likewise, the idea of the real causes us to question and doubt our theories, models, and interpretive frame and reference hierarchies as we continually measure our own actions and experiences with reference to various conventionalized interpretive referents. We come to doubt, for instance, theories of rational choice, or theories of creationism when our experiences diverge from the expectations generated by these beliefs. Our experiential encounter with the factual world (firstness), diverges from the expectations of our indexical referent (secondness), and causes us to have doubt (thirdness). This doubt leads to a need for revision.[314]

The idea of an external and independent reality drives Peirce's pragmatic understanding of the sciences, and it serves an important semiotic function by continually promoting doubt in the face of belief. For Peirce, value arises from doubt and from the process of fine-tuning through question and answer. Value arises from alertness to doubt and the mediation or reformation of belief. This involves a process of creative discovery and the revision of convention.[315] When experience causes us to doubt convention—

312. *See* HAUSMAN, PEIRCE, *supra* note 30, at 140-225.

313. *See id.* at 194-224.

314. Charles Sanders Peirce believed that our experience with doubt, inquiry and interactive exchange in community could cause a shift in view and reframe our interpretive reference points or *ground*. *See* HOOKWAY, PEIRCE, *supra* note 30, at 119-25 (experience as a subjective ground); *See also* PEIRCE-WRITINGS, *supra* note 30 at 8-12 (on shifting views); 2 THE ESSENTIAL PEIRCE, *supra* note 30, at 336 (doubt is the starting point for critical inquiry). *See also*, LISZKA, *supra* note 30, at 53-77; HAUSMAN, PEIRCE, *supra* note 30, at 194-225 (arguing that the contexts of interpretive schemes shift).

315. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 78-153. *See also* KIRZNER, MEANING, *supra* note 26, at 1-54. Kirzner's point is that a dy-

when we identify divergence between conventional referents, models or theories and our own experience, we begin to doubt.[316] This doubt creates *semiotic resistance* to conventionality and this resistance facilitates the potential for creativity.[317] This is why extensive, diverse, and accessible networks and patterns of exchange are valuable. The more and different types of information we are confronted with, the more likely we are to confront divergence between convention and experience, and the greater the semiotic resistance and the potential for value enhancement will be.

In seeking to mediate this semiotic resistance or cultural-interpretive dissonance, we engage in a form of reasoning that Peirce identified as *abductive reasoning* or *speculative rhetoric or logic.*[318] Abductive reasoning involves the development of new theories and explanations in an effort to mediate resistance and reclaim convergence between our experience of the real, and our idea or semiotic representation of the real.[319] This process of abductive reasoning

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namic and complex market system can not be captured in static equilibrium models - creativity is important yet it escapes proper study in traditional neoclassical economics. KIRZNER, MEANING, *supra* note 26, at 1-54. *See also*, KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 1-47; SHERIFF, *supra* note 30, at xii-1, 9-16, 31-49.

316. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 165-78; Denis J. Brion, *Naming and Forgetting,* in SEMIOTICS (C.W. Spinks & John Deely eds., 1996). Furthermore, the general rules, conventions, and codes that define our models are grounded in experience. Peirce argued that we learn through experience. *See* HOOKWAY, PEIRCE, *supra* note 30, at 119-25 (discussing how experience is subjective). Experience is subjective and serves as a *ground* for inquiry, reasoning, and interpretive meaning. *See* KEVELSON, LAW, *supra* note 30, at 81-87. These views can shift as a result of an ongoing response to doubt, inquiry, and proceeding to a new belief based on the interactive exchange and dialogue between individuals and their community. *See* PEIRCE, WRITINGS, *supra* note 30, at 8-12. Adam Smith made a similar point with respect to the formation of general rules of morality, ethics, and social conduct when he said they were:

> Ultimately founded upon experience of what, in particular instances, our moral faculties, our natural sense of merit and propriety, approve or disapprove of. We do not originally approve or condemn particular actions, because, upon examination, they appear to be agreeable or inconsistent with a certain general rule. The general rule, on the contrary, is formed by finding from experience that all actions of a certain kind, or circumstanced in a certain manner, are approved or disapproved of.

SMITH, MORAL SENTIMENTS, supra note 37, at 264.

317. *See* HAUSMAN, PEIRCE , *supra* note 30, at 198-201 (discussing resistance in the semiotic process developed by Peirce).

318. *See* LISZKA, *supra* note 30.

319. Market theory stands in reference to, and as an interpretive sign of, the

or speculative logic is very important to the concept of law and market economy because the idea of examining contested interpretations of the market, and mapping alternative value frames and references, is to identify value enhancing opportunities for interpretive exchange.

It is, therefore useful to examine one of Hausman's examples for understanding the relationship between the constraints of the real and the implications of speculative, deliberative, or thoughtful action. In the example, Hausman makes reference to C. G. Prado in explaining the idea of a reality independent of language.[320] He does this to explain Peirce in relation to radical anti-realists.[321] The point is to explain that while language may not be able to fully capture the real, and may constrain our ability to understand the real, it does not follow, in a Peircean sense, that there is no real beyond our language or opinion.

This point is important because it tells us that even if our models, theories, and representations of the market are incomplete, partial, or problematic, it does not mean that they are useless or purely the product of social construction. Similarly, the idea that we can take deliberative and thoughtful action to influence the market exchange process does not mean that the market can simply take any form or meaning that we desire. The market is neither the purely subjective and biased construction of social organization as suggested by some critical theorists, nor is it the objective, neutral, and scientific process suggested by some tradi-

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real world but it is not, itself, real. "Ultimately we do not know this phenomenal world of which we are part. But we do know or are capable of knowing that which we construct as a means of knowing better and more fully the unknowable, everchanging circumstances of existence." KEVELSON, LAW, *supra* note 30, at 269. In this respect the market, as idea, stands as a referential mode of secondness. It helps us to interpret the real world that *is*, in all its evolving potentiality, which is positioned as a mode of firstness. The conclusions and meanings to be drawn from this relationship are, in the process of semiosis, a mode of thirdness. *See also* HAYAKAWA, *supra* note 218, at 13-21. Likewise, our market models and theories are symbols and sign systems *of* but are not the real social/market exchange process. Adam Smith made a similar observation with his metaphor of a clock. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 41-42. Adam Smith describes the face of the clock as attracting our attention but its internal structure remains hidden, remains invisible and the subject of speculation. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 41-42. This, he said, was also true of the universe in general. MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 41-42. My point is similar to Smith's metaphor.

320. *See* HAUSMAN, PEIRCE, *supra* note 30, at 198-200.

321. *See id.* at 140-225.

tional advocates of law and economics. There is both regularity and irregularity in a complex system such as the market. Reaching a deeper understanding of these relationships requires an ability to use interpretation theory as one way of approaching the connection between law, markets, and culture.

Turning to Hausman's example, he explains:

> In explaining the "linguistic turn" in philosophy, C. G. Prado argues that the pre-Copernican seamen who found that they did not fall off the earth where its flat surface was supposed to end could have revised the way they were willing to talk and believe. And they could have continued to insist that the world is flat if they had "readjusted their beliefs to allow for odd events."; It must be kept in mind, however, that the initial condition that supposedly prompted the seamen to change or adjust their ways of speaking was not itself a change in the language, or in belief. The initial condition that they encountered was expressed as a resistance to their accepted language and belief. It was a resistance to expectations. The initial condition of their resistance was not language, even if its interpretation takes place in inescapable language or vocabularies. The seamen would have found it increasingly difficult to stick by their adjusted beliefs as they gained more experience. Their adjustments would not have been arbitrary.
>
> The constraints given with resistances (the surprises and discoveries) do not guarantee that specific sentences are true or false, although they do function negatively to prompt the abandonment or modification of what were regarded as "true," or as justifiable and acceptable. What such constraints do is prompt changes that bring about evolution in thinking and language. What justifies the kind of changes is continued growing agreement, or at least the expectation that if the changes seem to be anomalies, they will eventually be reconciled — in future situations in which networks of beliefs or sentences fit together.[322]

Hausman's example of the relationship between experience and constraint has useful applications for taking an interpretive turn in law and market economy. Law and market economy adopts Peirce's notion of constraint and of infinite potentiality (present in the dynamic nature of the real).[323] It does not purport to function as an objective and neutral model of exchange. It functions as a *complex sign.*

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322. *Id.* at 199.

323. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 29-50, 57-78, 84-90

In this sense it is a *representation* of the real world, or dynamical object of exchange, but it is not, itself, the real to which it refers.[324] This means that it is a dynamic and interpretive representation of exchange relationships, and that the market is an idea open to deliberate and thoughtful influence while being simultaneously constrained by real boundaries—boundaries that are more than mere social constructions.

By working through the mapping of exchange, as depicted in Diagram 3 in an earlier part of the article,[325] law and market economy affirms a need to take an interpretive turn away from the "objective" and heroic spectator view of traditional economic approaches to law and market theory. At the same time it acknowledges a constraint on individual and communal subjectivity.[326] Market exchange can be viewed from a variety of perspectives and subject to alternative scales, measures, and positions, but the meanings and values of these relationships are not purely self-referencing, nor are they without an anchor in the real world.

Furthermore, in making an indexical reference to multi-factor referents and intermittent framing variables, law and market economy forces us to imagine alternative points of cultural-interpretive reference, and this brings new information into view. In this way, the continuous shift in focus and refining of the mapping process creates the potential for resistance, giving rise to doubt, and the need for abductive reasoning. Thus, the mapping process is valuable because it continually repositions the tension between belief and doubt, and between conventionalized interpretive hierarchy and the shifting sands of authority over semiotic space. More importantly, these interpretive processes, in themselves, generate substantive consequences for meaning and value formation, and for the distribution and allocation of resources.

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324. *See id.*

325. *See* text of this article, *supra* at Part II. C. (diagram 3 in the text).

326. *See* HAUSMAN, PEIRCE, *supra* note 30, at 224.

> Peirce's picture recognizes what is vital to those who have taken the linguistic turn. . . It affirms the need to turn away from a spectator view, but without abandoning something valuable in that view: the acknowledgment of constraints on our communal and individual habits, constraints that "we" do not make.

Id. at 224

In thinking about market concepts with reference to Peirce's three modes of logic, therefore, law and market economy theory draws attention to the embedded meanings and values of social/market exchange. This is important because it helps us to better understand the conventionalized interpretive hierarchy of a given market exchange community, and because it alerts us to the potential for change. In doing this it also expands and transforms ideas, and this creates real value.

B. *The Connection to Esthetics, Ethics, and Logic*

Interpretation theory helps us to understand the limitations of using economic science to solve complex legal problems. Economic concepts are useful in legal reasoning but the market exchange process can not be fully captured by an economic calculus. More importantly, while economics may provide a useful logic for promoting a particular end, it is ill equipped to address fundamental questions regarding the choice of value framing and of interpretive or indexical reference. Selecting the appropriate interpretive frame and reference involves normative analysis outside of the scope of traditional economics. The questions of interpretive framing and reference are normative ones that would come within Peirce's notion of the relationship between esthetics, ethics, and logic.[327] Therefore, this section of the article provides a brief definition of Peirce's use of the terms esthetics, ethics and logic. It then explains the relationship between these concepts and the idea of law and market economy.

Peirce developed a theory for normative analysis that made reference to the traditionally recognized categories of esthetics, ethics, and logic.[328] The meaning he ascribed to these categories was not, however, completely traditional.[329] In general, Peirce's categories can be briefly defined. For

327. *See* POTTER, NORMS & IDEALS, *supra* note 30; 2 THE ESSENTIAL PEIRCE, *supra* note 30, at 196-207 (discussing the normative sciences as including esthetics, ethics, and logic).

328. *See* POTTER, NORMS & IDEALS, *supra* note 30, at 8-51. In Peirce's triadic theory of signs esthetics is of feelings and is a mode of firstness; ethics is of action and is a mode of secondness; logic is of thought and is a mode of thirdness. *See id.* at 19.

329. *See id.* at 31-46. Peirce used these terms because they were close enough to what he wanted to discuss and it was useful in terms of directing the attention of his audience. *See id.* at 31.

Peirce, *esthetics* was not to be understood in terms of beauty because the beautiful and the ugly were categories within esthetics.[330] Instead, esthetics has to do with establishing the criteria for determining that something is either beautiful or ugly.[331] Esthetics is, thus, about the normative justification for identifying something as worthy of admiration. It is the basis for justifying the use of a particular interpretive value frame or indexical reference. In a similar way, Peirce did not believe that *ethics* was about what is right.[332] Instead he defined ethics as related to what one would deliberately aim to accomplish as an end.[333] Ethics, therefore, involves the deliberate selection of a particular course of action designed to promote an admirable or esthetic end. Finally, for Peirce, *logic* involved thinking as a deliberate activity, and this activity was directed at evaluating ways to achieve an end—an end that is admirable.[334] Thus, logic concerns the process of working through the various ways to accomplish an end. It involves mapping the plausibly good and useful alternatives for achieving an end.

This process relates directly to understanding the relationship between law, markets and culture, and to the subject that I have identified as law and market economy. At the outset esthetics is involved. This is because any such analysis must make a normative justification for its interpretive value frame and reference. It must identify, for example, the reasons for why a legal system should promote creativity, a process of sustainable wealth formation, efficiency, wealth maximization, or any other value. One should not merely assume that a legal or economic system should promote a given aim. To the contrary, one must persuade a given cultural-interpretive community of the grounds for making such aims the basis or criteria for judging the goodness of a given socio-legal order. Establishing these interpretive frames and references requires an appeal to the humanities, and to the experiences of others.

Ethics and logic come into play as one attempts to implement strategies for achieving a desirable end. As I argued previously, the market exchange process is a complex

330. *See id.* at 32-33.
331. *See id.*
332. *See id.* at 31-34.
333. *See id.*
334. *See id.* at 32-41.

system in which it is impossible to calculate an optimal course of action. This results from the fact that there are multiple ways for determining efficiency, and from the fact that different results emerge as one changes the scale, measure, or position of any particular exchange relationship. Consequently, the best that can be done is to identify "sets" of plausible good, useful, and wealth promoting courses of action. This means that we can map plausibly useful ways of approaching and mediating a dispute but that we must also recognize the ambiguity present in any given economic solution. In this context, logic involves the mapping of alternative ways of understanding and mediating the dispute—of understanding the dispute from alternative cultural-interpretive positions. Ethics involves selecting and justifying a given course of action or a particular legal strategy from the identified set of options.

The ultimate importance of this analysis is to point out that even though we are all part of the market process of exchange, we are also capable of shaping and influencing market outcomes. We are fully embedded within the market, but we are not completely subject to it. Consequently, we must be engaged in a logical, ethical, and esthetic evaluation of our aims, our ends, and our choices within the market. Economics can not adequately assist us in these normative and interpretive areas. We must identify the appropriate interpretive frame and reference. Only after the interpretive frame and reference are selected can economics be used to assist in the evaluation of the consequences.

Arguing that economic analysis eliminates the problem of value conflicts or contested philosophical viewpoints is simply unpersuasive. As interpretive beings we are always subject to these problems. The real question is one of deciding on the best way to be an active participant in the debates over the interpretive frames and references of legal reasoning. One can use economics and market analysis to further one's position in the debate, but one can not avoid the circumstances that every alternative frame or reference is grounded upon a particular set of meanings and values. Thus, if one accepts the idea that the reference to positive economics avoids the need to engage in normative and philosophical discourse in legal reasoning, one simply defaults to the acceptance of the normative and interpretive hierarchy of positive economics.

There is, in other words, no meaningful escape from the need to engage in an ethical and esthetic discourse. Even Richard Posner, in his recent book, *The Problematics of Moral and Legal Theory*, engages in such a discourse as he attempts to persuade the reader to shift from one set of ethical and esthetic frames and references to another.[335] The very structure of his argument is an application of Peirce's pragmatic theory of signs.[336] For example, Posner's book is written in the style of an appellate brief for his particular point of view—for his particular value frames and references. He makes an appeal to the *esthetic* by suggesting criteria for admiring his economic and social science approach to law and legal reasoning. He appeals to *ethics* in mapping out a particular course of action for improving legal reasoning to achieve his objective (esthetic goal), and he uses *logic* to present the argument (justification) for selecting his given approach. Posner's argument falls flat, in a Peircean sense however, because its entire structure is based on the use of normative elements while he simultaneously argues against the use of normative analysis.

Moreover, Posner's analysis is confusing because he cites and favorably discusses Peirce in this book as well as in his earlier book on *The Problems of Jurisprudence*.[337] In some respects, however, Posner's analysis is hampered by his failure to develop a fuller appreciation of Peirce's cultural-interpretive theory of pragmatics.[338] This prevents

335. *See* POSNER, MORAL & LEGAL THEORY, *supra* note 5. *See also*, Guyora Binder, *The Poetics of the Pragmatic: What Literary Criticism of Law Offers Posner*, 53 STAN. L. REV. 1509, 1510 (2001) ("Pragmatism has benefited Judge Posner in many respects, but it has not overcome one disabling idiosyncrasy: His persistent antipathy toward the humanities seems to blind Judge Posner to the role of aesthetic value in practical judgment and justification."); Brian E. Butler, *Posner's Problem with Moral Philosophy*, 7 U. CHI. L. SCHOOL ROUND TABLE 325, 343 (2000) ("The real problem with *The Problematics of Moral and Legal Theory*, though, is that it is a book where Posner confuses an attack upon one academic field (moral philosophy) with the completely different project of the legitimization of another type of investigation (social science).").

336. *See* POSNER, MORAL & LEGAL THEORY, *supra* note 5.

337. *See*, POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 5.

338. Judge Posner cites to Peirce in each of POSNER, MORAL & LEGAL THEORY, *supra* note 5, and POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 5, but his writing fails to demonstrate a depth of knowledge about Peirce's complex theory of pragmatism and its relationship to Peirce's theory of semiotics. In fact, Posner demonstrates little more than a passing knowledge of Peirce as a figure who is referenced as a founder of "American Pragmatism." Posner rejects philosophical pragmatism and expresses his desire to "ground policy judgments

Posner from fully appreciating the role of ethical and esthetic discourse in law and market theory, and makes it difficult for him to understand the significant value of the humanities in setting the frames and references that inform and shape his search for "facts" in legal decision making. This lack of a fuller understanding of Peirce's theory of pragmatics also makes a number of Posner's criticisms of other legal scholars confused and confusing.[339]

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on facts and consequences rather than on conceptualism and generalities." POSNER, MORAL & LEGAL THEORY, *supra* note 5, at 227.

Peirce, on the other hand, was very concerned with philosophy and metaphysics as the basis of his pragmatics. He understood pragmatism as emerging from the normative sciences, which he identified as esthetics, ethics, and logic, and his semiotics was about discovering generalities. *See* POTTER, NORMS & IDEALS, *supra* note 30, at 1-7. Posner's work does not seem to recognize that Peirce spilt with both William James and John Dewey over the philosophical foundations of pragmatism. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at xix - 18. To Peirce pragmatism is linked to a more general theory of language and signification, and his work has been looked to for guidance in developing a new dialectical synthesis. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at xxii. Peirce has become increasingly relevant to those people exploring the "linguistic turn" or interpretive turn. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at xxi. Peirce's work denies the ability to sustain a theory, such as the one offered by Posner, which is based on a fact and value distinction. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at xx-xxi. Values, and moral and normative issues are and ought to be part of the pragmatic focus. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at ix–xxiii, 1-67. "Other pragmatic positions. . . are only fragmentary. . . [t]hey lack the unity provided by a theory of the normative sciences, and this deficiency has led those positions into error. . ." POTTER, NORMS & IDEALS, *supra* note 30, at 4. *See also* 2 THE ESSENTIAL PEIRCE, *supra* note 30, at 133-144, 331-433 (discussing some elements of his ideas about pragmatism).

339. Because Posner seems to use a mixed language of pragmatism with no clear philosophical ground to his position, I find his critique of other views at times confusing. This to me is the product of his failure to clearly define a workable and sound understanding of pragmatism. In the place of a theory that deals with both facts and values he offers a prolonged justification for supporting his own value frames and references as pragmatic, and then uses this position to reject, in a fragmented way, the cultural-interpretive positions of others. For a useful example of the application of a Peircean approach to pragmatism and constitutional interpretation see Brion, *supra* note 66. A much more useful analysis of such people as Rawls, Fish, Hart, Dworkin, and others is found, for instance, in the recent book LAW & TRUTH by Dennis Patterson. PATTERSON, *supra* note 163. Patterson grounds his work in that of Wittgenstein but there are many similarities between this approach and that of Peirce. Much about language, practice and experience are similar. Patterson offers a real theory to ground his analysis and this makes his work much more coherent and meaningful than that offered by Posner. In contrast to Patterson, I think Posner reduces pragmatism to a theory of his own personal and subjective preferences. The frames and references that he likes (value choices that he passes off as fact distinctions) are presented as reasonable and pragmatic while others (that he dis-

The need for esthetic and ethical references can be made more understandable, and linked to our earlier discussion of the limits to interpretation, with an example. Therefore, let us assume that we work in a large hotel. Imagine that we have been instructed by the hotel manager to prepare a large ballroom for a meeting that will be taking place later in the day.[340] We are instructed to go to the room, examine the various pieces of furniture in the room, and to arrange the room in the most efficient manner. When we get to the room we are confronted with a space of a given size and shape, with particular lighting fixtures, and other characteristics. We also take note of a variety of furniture including chairs and tables of various styles and shapes. The physical characteristics of the room can not be changed (size, shape, etc.) and we are instructed that none of the furniture can be taken from the room.

In this situation the nature and characteristics of the room and the furniture operate as constraints on the ways in which the room can be arranged. In other words, there are real world constraints to the way we can "socially construct" the relationships within this particular room. At the same time, however, there are also numerous ways in which we might exercise some influence over relationships in the room by virtue of our authority to re-arrange the furniture. The arrangement of the furniture by itself may signal important meanings, as in identifying important people with a head table, or it might shape conversation or influence physical movement based the spacing we use around and between tables. An important problem from the outset, however, involves our ability to determine the most efficient arrangement of the furniture in the absence of a predetermined use for the room. If the room is to be used for a lecture we may want to arrange a head table or podium with

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likes) are cast aside. This style of argument is similar to that which he used in his latest book to dismiss countless public intellectuals as unpersuasive, inept, and generally useless. *See* RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001). *See also*, David Brooks, *Notes From a Hanging Judge*, N.Y. TIMES, Jan. 13, 2002, Sec. 7, page 9 (book review of RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2002), saying that argumentation is poor).

340. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 147–48 (in this article I use a much more developed version of the example); DEELY, *supra* note 35, at 42 (1990) (using a home furnishings example to discuss semiotic relationships signaling different meanings even as the contents of the room remain constant).

all the other tables or just the chairs facing the "front." If, on the other hand, the room is to be used for a round table discussion, or for a job fair, we might arrange the room differently. Likewise, if the room will be used for dancing we will need to push tables and chairs to the side so that ample space can be left open for the activity. In short, the idea of efficiency can be ambiguous in the absence of a predetermined goal or objective. Once we are clear about the use of the room we can begin to make progress at identifying plausibly good alternatives for arranging the room in a useful way. Once a normative decision is made with respect to our given objective we can then seek to achieve that goal in a more cost-effective manner.

The point of this example is that efficiency analysis and much of what we can learn from using market theory in law, presupposes a normative frame and reference. Organizing the room in an efficient manner requires a value determination with respect to how the room is, or might, be used. Likewise, determining the best way to organize law and legal institutions requires an implicit, if not express, reference to normative consideration of the social, political, legal, and market objective(s) to be achieved. Economics and other social sciences can not eliminate the need to engage in the exploration of the meanings and values of worthy human objectives. And, even though we operate and make decisions within a world of constraints, we also have an ability to influence and facilitate the values and meanings of social organization. Thus, we can improve legal reasoning and public policy by paying more attention to the human experience of exchange, and by expressly recognizing the need for esthetic and ethical references in legal decision-making. As lawyers and legal actors we have an obligation to participate in this normative discourse and to work for a more informed and inclusive process of decision-making.

C. *Exchange Communities: Beyond Methodological Individualism*

Finally, it must be noted that law and market economy, using the *method* of semiotic interpretation theory, does not focus on the idea of an autonomous individual engaged in a

science of choice.[341] Law and market economy examines the exchange process by positioning the individual within a deliberative community.[342] An interpretive approach, in other words, considers methodological individualism as only one of several frames and references available for market analysis. Rather than looking at the atomistic calculus of choice, it seeks to understand the human practice of exchange. Thus, law and market economy involves the study of decision-making based on the relationship between an individual and her point(s) of community reference.[343] As Roberta Kevelson explains it:

> . . .although Freedom is the key term, or value, from which semiotic method derives its basic principles, Peirce is not concerned with the notion of "free individuals" but rather with freedom of individuals in community. The Peircean method of methods is an overt rejection of Cartesian principles of inquiry, and therefore it rejects implicitly the notion of the individual as a referential model, or sign. It supports, instead, the kind of model which represents communal or dialogic inquiry.[344]

In this context the exchange process is one of relational substitution, and it is an experience in which the individu-

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341. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 57-70. (Discussing the problem of methodological individualism. Also making reference to an example of a castaway on an island who is later joined by a second person. While traditional approaches to an economic analysis of law focus on the science of rational choice as exercised by one individual, law and market economy is interested in exploring the networks and patterns of exchange as they arise between people. This is a different focus and it asks different questions while revealing different insights.)

342. *Id.*

343. In this sense Peirce rejects Buchanan's notion of methodological individualism and instead focuses on dialogue, community, and habit. PEIRCE, WRITINGS, *supra* note 30, at xiv. Science requires a community of inquirers to work continuously toward agreement. *Id.* But Peirce is not anti-individual - the individual is understandable only as a relate, in relation to community. *Id.*

344. KEVELSON, METHOD, *supra* note 30, at 11. Peirce tells us that meaning only arises within community. It emerges from a dialogue in which the individual is not the key referential sign. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 1, 60, 88-90; KEVELSON, PEIRCE AND FREEDOM, *supra* note 30, at 140. "Peirce sees the individual as partisan only, as a relate in precisely the same sense that the words "father," "son," "teacher," "student" are relates since what they represent is linked with another." KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 28. Meaning comes from the interaction of individuals within community. KEVELSON, LAW, *supra* note 30, at 147, 208. *See also* HAUSMAN, PEIRCE, *supra* note 30, at 60-66 (explaining the anti-Cartesian basis of Peirce's pragmatism).

als simultaneously leave their imprint on, and are imprinted by the drama in which they participate.[345]

> The upshot is that there is no pure, absolutely autonomous "I" or self. No sign-or self- is an island, an entity unto itself and absolutely autonomous. We, all signs, are thoroughly socialized. The "I" addresses itself to its otherness, its social other as well as the other of physical "reality," both of which are "out there" in contrast to the self's own "inner" other. Part of that social otherness is that which is emerging and that into which the "I" is merging: the "I" is incessantly flowing into the otherness of which it is a *part of* and at the same time *apart from*. For, to repeat Peirce's words, "a person is not absolutely an individual," and at the same time, a person's "circle of society" is a sort of "loosely compacted person."[346]

By exploring a semiotic approach to law, markets, and culture, therefore, we begin to focus more clearly upon the complex meanings and values embedded within market concepts, and we begin to address a new set of questions and challenges. We begin to understand the way in which exchange informs us about the meaning and value formation process, and since there are no perfect substitutes, we

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345. In this context, it is important to remember that the rational allocative "individual" of traditional law and economics is, itself, merely an idea or sign and the idea of "individual" stands in reference to a real person but it is not the person to which it refers. Real people are affected by the environments in which they participate. The idea of the individual, therefore, like that of "person," "alien," "family member," or "refugee" is continually evolving within the market context and is given coherence by its reference to a real person and also by reference to a particular legal framework. When we forget the distinction between the idea of the individual and the real person to whom it refers we collapse an essential element of their semiotic relationship and fall prey to the constraints of habitually blinding conventionalism that can deny us the possibility of envisioning further substitutional interpretation or change. *See* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 165-178. Peirce said that man not only uses signs but that he himself is a sign. APEL, PEIRCE-PRAGMATICISM, *supra* note 30, at xxii. *See also* KEVELSON, PEIRCE AND SCIENCE, *supra* note 30, at 165-178; MERRELL, PEIRCE-MEANING, *supra* note 30, at 52-68.

> For, as the fact that every thought is a sign, taken in conjunction with the fact that life is a train of thought, proves that man is a sign; so that every thought is an external sign, proves that man is an external sign. . . . Thus my language is the sum total of myself; for the man is the thought.

MERRELL, PEIRCE-MEANING, *supra* note 30, at 62 (quoting Peirce). *See also* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 57-70.

346. MERRELL, PEIRCE-MEANING, *supra* note 30, at 61. *See also* Malloy, *Longhouse*, *supra* note 246 (concerning how one imprints and is imprinted by an environment).

come to know that with every exchange there is some element of expansion or transformation of value.[347]

Moreover, in focusing on the process of exchange, rather than the calculus of choice, a law and market economy approach embraces a fundamental role in the marketplace for judicial, legislative, and administrative institutions. These institutions do not stand in opposition to the market; they function as the mediating and conventionalizing infrastructure that facilitates the market. These institutions assist in allowing individuals to transcend the frames and references of various and competing cultural-interpretive boundaries.

Successful market economies connect individuals to each other through institutions capable of mediating and transforming meanings and values across cultural-interpretive boundaries. Individuals are given meaning and transactions are given value by reference to their connection to others. Thus, the counter intuitive conclusion may be that successful market economies achieve success precisely because they implicitly understand and construct institutions that support an "other regarding," or public interest rather than relying on the fragmented and disconnected actions of innumerable individuals.[348] This, at least, forms a basis for future study and inquiry.

CONCLUDING THOUGHTS

Semiotic interpretation theory, as used in law and market economy, gives us a new way to understand the markets in which we are embedded. It is a theory that is receptive to

347. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 29-31 (no perfect substitutes), 41-48, 70-71, 83-90 (substitution), 161-62 (discussing the impossibility of sustaining an "equality of outcome" because equality of outcome assumes an ability to repeatedly "pass through the same point"); SMITH, ESSAYS, *supra* note 37, at 155 (we never see the same thing twice). *See generally* KAUFFMAN, *supra* note 181; GLEICK, CHAOS, *supra* note 181 (the idea applied to complex systems which are dynamic and out of equilibrium - you never pass through the same point twice).

348. For example, recording acts with respect to real property, and disclosure rules with respect to securities offerings are designed to enhance transactional exchange by protecting potential third party interests. Likewise, "Takings" cases involving issues of a regulatory taking focus on the implications for exchange and for exchange value as reflected in a concern for a property owner's reasonable investment backed expectations. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 110 (1978).

a variety of political and legal approaches and it provides a means for investigating a variety of interpretive contexts or environments. Thus, we can use it to discuss law in general or to look at particular institutions such as courts, the legislature, or various formal and informal organizations. We can also use it in trying to address issues of globalization, when market activities extend across an increasingly diverse set of cultural-interpretive boundaries.

In writing this article, I hope that I have established a foundation, or as Peirce might say a *ground*, for thinking about the *meanings and values* of law and market economy. I believe that an important part of understanding law, culture, and market theory involves the consideration of social relationships as *meaningful* relationships, and not merely as economically efficient positioning. In this regard, it is important for us to understand what we exchange, with whom, and on what terms. Rather than focusing on the problems of efficiency and economic calculation, we need to study the networks and patterns of exchange in society. We need to study problems of market access, distributional inequality, and entrepreneurial opportunity as affected by such variables as race, gender, age, education level, income, geographic location, ethnicity, class, and culture.

In this process we can look at representations of meaning and value in a variety of areas such as property, contracts, and civil rights. We do this by mapping the networks and patterns of exchange using multiple frames and references. Our interest in mapping exchange is not driven by a need to simply advance more efficient relationships, but by a desire to equalize and enhance authoritative access to the cultural-interpretive process.

A cultural-interpretive approach to law and market economy recognizes that law operates in a market context, just as it acknowledges that markets operate in a legal context. It also recognizes that the role of the lawyer or legal actor is different from that of an economist.[349] Legal actors, unlike economists, have to mediate tensions and disputes between parties from different cultural-interpretive communities.[350] Legal actors and legal institutions need to address a variety of values, assumptions, and worldviews.

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349. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 9, at 9-10 (explaining the very different nature of the legal actor from that of the economist).

350. *See id.* at 10.

A law and market economy approach permits us to understand the interpretive and subjective elements of the market exchange process. It informs us about the lack of universality in borrowing economic concepts for legal reasoning. It indicates that there are value-enhancing opportunities from segmenting the market into different interpretive communities, from gaining authoritative influence over the interpretive frames and references of market choice, and from generating and transforming legal representations. It also demonstrates that references to market theory in legal reasoning need to go beyond simple notions of efficiency and wealth maximization. Such concepts are ambiguous and highly contested. Consequently, improved legal reasoning and public policy making require reference to normative theory including esthetics, ethics, and logic. Furthermore, extending market relationships beyond narrow cultural-interpretive communities requires use of legal institutions that can transcend interpretive boundaries and conventionalize extensive networks of interconnected space. This may require legal institutions to represent an "other regarding" interest that is not necessarily advanced by the pursuit of fragmented notions of self-interest.

In the final analysis, an interpretive approach to law and economics is not a rejection of market theory, but a new way of understanding the meaning of law in a market context. In considering the interpretive aspects of exchange, it suggests that important insights can be gained, and it offers a new and analytically useful way of referencing the humanities for purposes of gaining a better understanding of the relationship between law and market theory. Using this improved understanding, we can begin to carefully reconsider a variety of legal and policy conclusions.[351] This in-

351. *See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (forthcoming 2003, Cambridge University Press). In this book I build on of the theory set out in this article. This article forms the basis for the approach taken in the book. The book provides a basic introduction to economic terms and concepts, explains how they work, and how they can be used in legal argument. It also provides numerous examples of case analysis, and has problems that direct attention to the way in which these ideas work in law and in legal reasoning. The book offers a complete and non-quantitative guide to using ideas of law and market economy in legal argument. It addresses such concepts as the Coase theorem, prisoner's dilemma, transactions' costs, public choice, cost and benefit analysis, the tragedy of the commons, efficient breach, and multiple definitions of efficiency, among others. It is designed for the reader that is looking for *a very different* approach from that

cludes beginning to reform and transform practices that have been imperfectly shaped and influenced by a traditional economic analysis of law—an economic analysis of law that has generally been uninformed as to interpretation theory, and as to the relationship between law, markets, and culture.[352]

found in traditional work on the economic analysis of law. The book is for people interested in jurisprudence, Law & Society; Law, Culture and the Humanities; and in a humanities based approach to the relationship between law, markets, and culture.

352. *See* Emily Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith and Fair Dealing in Contract Law*, 88 CORNELL L. REV. (forthcoming 2003). In this excellent article the author reconsiders the good faith rule in contract law. With specific reference to race and employment matters, she uses critical theory and law and market economy theory to rethink and restructure the established approach in the area. In integrating her approach she reforms our think about the good faith rule in contract law and develops a new cultural-interpretive pattern of legal argument.