WHAT IS THE ECONOMIC ANALYSIS OF LAW?
[Adapted from D. Friedman’s articles and course notes]

• A. Economic reasoning helps forecasting and understanding (ex ante and ex post) the socio-economic consequences of legal rules. (3 examples)
  o 1. A law raises the penalty for armed robbery to the highest level:
    ▪ A legal philosopher would ask "is this just?"
    ▪ An economist would ask "do we want armed robbers to routinely kill the witnesses?" In fact, the change eliminate the penalty for murder--if you are already committing a robbery.
  o 2. A law reduce freedom of contract by fixing some term of a contract to benefit one party (e.g. tenants) at the cost of another (e.g. landlords):
    ▪ But fixing that term will affect other terms (e.g. market rents rise), hence the net effect may well be to make all worse off,
    ▪ By including inefficient terms in their contract - which the "benefitted" party ends up paying more for than they are worth.
    ▪ General presumption in favor of the principle of freedom of contract - let the courts enforce contracts as written, rather than deciding what terms the parties ought to have agreed to.
  o 3. A criminal accept plea bargaining if he prefers it to the punishment lottery (some probability of some punishment) that he faces if he goes to trial, so it looks as it reduces average punishment but:
    ▪ A prosecutor who settles many of his cases by plea bargaining has more resources left to prosecute the other cases, raising the probability of conviction...
    ▪ This in turn makes people willing to accept harsher plea bargains, so it might increase average punishment.

• B. Using economics to predict and understand rules. Testing economic conjecture played a major role in developing economic analysis of law
  o 1. The Italian tradition hypothesis and special interest politics
    ▪ Maffeo Pantaleoni and the average intelligence of Parliament members. Comparison of marginal costs and benefits.
• **De Viti De Marco** and the convergence of ruling class and ruled ones in a perfect democratic system. A law is eventually changed if it brings net losses.

• Special interest politics, arising from Montemartini’s analysis, is an alternative theory for explaining laws, especially when made by legislatures
  o 2. The **Posner Thesis**: common law (judge made) legal rules tend to be economically efficient.

• **C. Economics may be used to choose legal rules and whether to allow individual behaviours.**
  o 1. Designing efficient rules. You may increase social welfare.
  o 2. With the economic analysis of law you can get out more than you put in.
    - We start by assuming that values to thieves and murderers count just like values to anyone else. We conclude that theft and murder ought to be illegal--because even counting their benefits, permitting crimes still turns out to be inefficient.

• **D. It may provide a theoretical foundation for the whole legal system.**
  o 1. Conventional legal theory isn't unifying theory that makes sense of the whole legal system -- it is just the theory of property law, of tort law, of ... ,.
  o 2. Economic analysis of law apply across all of law branches applying the very same analysis, using similar concepts, showing similar problems, ....