The Measure of Law and Economics

by

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Abstract

When law and economics first burst upon the legal academy, its character was opaque. Some 40 years later, two distinctive enterprises have emerged. The first explains the causes and effects of law (the cause enterprise), especially its effects on the policy values of efficiency and distribution. Few legal scholars contest the usefulness of the cause enterprise, but many struggle for perspective on its methodology. The second explains the law’s content (the content enterprise). It interprets what the law requires people to do. Economic analysis explains the law’s content by raising its level of generality and showing the abstract forms of legal reasoning. By explaining law’s content, law and economics presents itself as a legal theory—a theory of law and not merely about its effects. Many lawyers reject economic interpretation as alien to law and offensive to morality. Many economists confuse legal interpretation with normative economics. Both need to measure law and economics, especially through a clear account of the content enterprise.

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The Pei Pyramid is a large glass and metal structure in the courtyard of the Louvre Palace that serves as the main entrance to the Louvre Museum. This 20th century abstraction pierces 17th century weathered elegance. Since its completion in 1989, some love it, some want to demolish it, but no one who visits the Louvre ignores it. It stands with the Eiffel Tower and Notre Dame as a landmark of the City of Paris.

Law and economics is the pyramid in the courtyard of the palace of law. This 20th abstraction pierces an inheritance of humanistic thought. Since its construction in the 1970s, some legal scholars love it, some want to demolish it, but no one who surveys legal theory can ignore it. It stands with formalism and realism as a landmark of legal theory.

The detractors of law and economics usually misunderstand it to be flawed philosophy or politics in disguise. Here’s a list of dismissals by definition that we have heard over the years (along with our own rude remarks): Law and economics is…

- The philosophy of Auschwitz (the reductio ad Hitler ploy)
• The Chicago school (Ever heard of Yale?)
• Utilitarianism (Is pleasure the same as wealth?)
• The philosophy of conservatism, libertarianism, or plutocracy. (Is economics philosophy or social science?)
• Legal realism (Is modern economic theory formal?)
• Reductivism (Don’t theories reduce complexity?)
• Scientism (Are the sciences ideologies?)

While these definitions are wrong, getting the definition right bumps into constant change. Who foresaw that economics would embrace institutions, plunge into the study of and social norms, or absorb cognitive psychology’s findings on irrational decision making?³ When creative people interact with each other, expect the unexpected. Law and economics is a scholarly community on a voyage of discovery, not an immovable rock. No one can foresee with certainty where it will go and what it will find. We cannot say what law and economics is once-and-for-all because we cannot foresee what it will become. As existentialists observed, existence precedes essence.

Defining is a philosophical activity that aims to clarify a concept and to name it correctly. Some law and economics scholars such as Katz and Kornhauser have contributed to a philosophical understanding of the subject.⁴ However, many law and economics scholars have limited patience for naming. Economists mostly deal in the hard currency of testable hypotheses, and they resist the soft currency of philosophy. They dismiss untestable philosophical propositions as useless or meaningless. Thus Richard Posner, the field’s polymath genius, dismisses the philosophy of law so sharply that he remains too far outside its traditions of argument to advance them.⁵

³ Douglas North received the Nobel Prize in 1993 research on institutions and social norms in economic development. Daniel Kahneman, a psychologist, received the Nobel prize in 2002.)
First this essay narrates the history of the explosive growth of law and economics. To explain its success, we will distinguish law and economics into two enterprises: Explaining the effects of law (“cause enterprise”) and interpreting the law in order to apply it (“interpretation enterprise”). With this distinction, we will clarify the concept of law and economics, and try to name it correctly.

**Like the Rabbit in Australia**

Most biological mutations die, most new businesses go bankrupt, and most new ideas fail. A few innovations, however, succeed spectacularly and change the world. Some scholars regard law and economics as a transformative innovation in legal education and scholarship. Professor Bruce Ackerman of the Yale Law School described the economic approach to law as “the most important development in legal scholarship of the twentieth century.” Certainly it decisively changed scholarship on business law in the U.S. and influenced many other areas of law. We will document the fact that law and economics exploded in the 1980s like the rabbit when it reached Australia, and then we will explain the hole in the intellectual ecology that it filled.

In his monumental history of economics, Joseph Schumpeter distinguished between economic thought and economic analysis. Economic thinking requires general education but not technical training. Newspapers are replete with economic thoughts that, in Schumpeter’s words, “float in the public mind.” Lawyers have always engaged in economic thinking, but not economic analysis. Law and economic thought flourished in some places in recent years, notably among progressives in the “Wisconsin School.” Ronald Coase succinctly summarized its accomplishments: "Lacking a theory, they accumulated nothing but a mass of data that was waiting for a theory or a fire."

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6 This section is based on a lecture by Robert Cooter entitled “Why Did Law and Economics Succeed?”, which was presented at the conference “Legal Education: Past, Present, and Future,” 29 April 2006, Vanderbilt Law School.
8 Cite Robert Hale and ___, and give some dates. Connect to Progressive movement.
Economic analysis, which requires training in mathematical theories and statistical methods, mostly occurs in universities and research institutes. Economics emerged in universities by separating itself from older faculties, especially law. (In a few universities such as the Catholic University of Louvain, economics did not formerly separate from the law department, although they seldom talk to each other.) Lawyers without economic training cannot understand economic analysis, just as economists without legal training cannot appreciate legal reasoning.

Some U.S. law schools have long recognized the importance of analytical economics to some areas of legal scholarship, especially taxation and antitrust. Henry Simons at Chicago and William Andrews at Harvard used economics to comprehend tax law. Much the same applies to the economic re-interpretation of antitrust law that spread from Chicago beginning in the 1970s. These subjects, however, are not the core of modern law and economics. Two of the most used textbooks on law and economics omit these topics.

Instead of taxation or monopolies, the modern economic analysis of law grew from different concerns. Figure 1 lists some key books and articles in the development of the modern economic analysis of law, whose arrangement is partly chronological and partly topical. The list begins with Coase’s classical paper, published in 1965, whose central insight is the Coase Theorem. It challenged scholars to consider more deeply the incentive effects of legal rules and the strategic responses to them, especially in property and tort law. In 1967 Demsetz proposed that private property emerge to solve the tragedy of commons. Becker’s paper used economics to reformulate the utilitarian calculus of deterrence for criminals. Becker inspired much theorizing on deterrence, and statistical research has finally matured to the point of testing these theories.

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9 George Priest discovered that Justice Stevens developed many ideas on antitrust that he wrote into Supreme Court decisions by co-teaching the subject with Aaron Director at Chicago. His lecture to Kauffman Summer Legal Institute, July 2010, is being rewritten for a law review.  
10 Tax and antitrust are omitted from the introductory textbooks by Polinsky, and also Cooter and Ulen.
Posner’s 1972 textbook offered the first comprehensive map of the new world of law and economics, like Amerigo Vespucci’s first map of America. Posner’s sketch of the mountains and rivers guided those who later walked the terrain and charted it. In 1987 Cooter and Ulen published a textbook that covered fewer topics in more detail. More explicit mathematics and consistent notation allowed economists to teach the subject without detailed legal knowledge. Polinsky’s shorter book covered much the same material as Cooter and Ulen, but Polinsky used numerical examples rather than explicit models. Each of these books provided a way for people outside of the subject to get into it.

Development of the economic analysis of tort law extended the subject into common law, which is central to American legal education. Calabresi’s 1970 book

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11 The book appeared in fall of 1987, but for reasons best know to the publisher, it was dated 1988.
defined the social costs of accidents as the sum of harm and the cost of avoiding them. In 1973 Brown's article reworked Calabresi's formulation by using simple mathematics to compare the equilibria under alternative legal rules. Shavell's book in 1987 synthesized the economic theory of accident law, including his own seminal contributions. Landes and Posner, also in 1987, applied econometrics to tort law to the extent permitted by the data available at the time.

In 1937 Coase published a paper that asked how a firm decides to make some goods and buy others. He answered using the talisman phrase “transaction costs.” Like the Rosetta Stone, Coase’s paper was lost and then rediscovered, fortunately after 30 years and not 2,000. Transaction costs guided subsequent economic formulations of the difference between markets and firms. Manne’s 1965 paper prompted reconsideration of whether markets for buying and selling companies alleviate the conflict between owners and managers. Williamson’s book and the article by Jensen and Meckling developed rival theories of how transaction costs shape the firm.

Several attempts have been made to measure the progress and success of law and economics scholarship. In 1993, William Landes and Richard Posner analyzed citations to the twenty-seven law and economics scholars at America’s elite law schools. They found that citations to these economists in law journals increased by 300 percent over fifteen years (from 2,657 citations in 1976 to 8,035 citations in 1990). The authors concluded that the citations by law review authors to these economists increased at an average rate of 17 percent each year from 1976-1990. These numbers compared favorably to the citation rates to scholars in other dominant fields of law. For example, citations to professors of critical legal studies increased at an annual rate of 13 percent and citations to political theorists in law reviews increased at an annual rate of 6 percent over the same period.

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13 Id. at 407 (see Table 7).
time period.\textsuperscript{14} Landes and Posner acknowledged that their focus on top scholars limited their ability to generalize their findings, but they hypothesized that “a new movement is likely to begin in elite schools and then percolate outward to the rest, so that penetration of the elite market may be a good ‘leading indicator’ of a field’s growth.”\textsuperscript{15}

In 2000 Robert Ellickson tested this hypothesis by measuring the frequency that economic concepts appeared in law reviews, bar journals, and handbooks for continuing legal education between 1982 and 1996.\textsuperscript{16} Ellickson searched for articles that used the economic terms “externalities,” “risk averse,” “game theory,” human capital,” and “transaction costs.” Ellickson found that the indexes for his proxies nearly doubled during the first half of the 1990s.\textsuperscript{17} (This finding contradicted Ellickson’ earlier speculation that law and economics had reached a steady-state in the 1980s.\textsuperscript{18})

In addition to citation studies, the growth of law and economics is measurable at the institutional level. Six journals exclusively devoted to law and economics were founded between 1958 and 2005. The University of Chicago is home to the two oldest: the Journal of Law and Economics established in 1958 and the Journal of Legal Studies established in 1972. The Journal of Law, Economics and Organizations grew out of a workshop at Yale Law School in the mid-1980s. As of 2007, the Journal of Law and Economics (JLE) had the highest impact factor among all law journals (21.76), the Journal of Legal Studies ranked fifth (18.58) and the Journal of Law, Economics, and Organizations ranked eighth (15.47).\textsuperscript{19} The International Review of Law and Economics was founded in 1981 and it flourished after relocating to the Berkeley Law School. The American Law

\textsuperscript{14} Id. at 412-414.
\textsuperscript{15} Id. at 391.
\textsuperscript{17} Supra note 5.
\textsuperscript{19} ScienceWatch.com, “Journals Ranked by Impact: Law.” Available at: http://sciencewatch.com/dr/sci/08/sep28-08_2/.
and Economics Review was founded in 1999, and the Review of Law and Economics was founded in 2005.

The fluorescence of research in the 1970s prompted the appointment of economists to law faculties beyond the University of Chicago in the 1980s. Figure 2 lists the appointment dates for some scholars with the PhD in economics who became notable in the field of law and economics.

Figure 2. Date of Appointment to Law Faculty for Some Prominent Economists

<table>
<thead>
<tr>
<th>Name</th>
<th>Law School</th>
<th>Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director, Aaron</td>
<td>Chicago</td>
<td>1947</td>
</tr>
<tr>
<td>Coase, Ronald</td>
<td>Chicago</td>
<td>1964</td>
</tr>
<tr>
<td>Manne, Henry</td>
<td>Rochester</td>
<td>1968</td>
</tr>
<tr>
<td>Komesar, Neil</td>
<td>Wisconsin</td>
<td>1971</td>
</tr>
<tr>
<td>Kleverick, Al</td>
<td>Yale</td>
<td>1973</td>
</tr>
<tr>
<td>Landes, William</td>
<td>Chicago</td>
<td>1974</td>
</tr>
<tr>
<td>Geeltz, Charles</td>
<td>Virginia</td>
<td>1975</td>
</tr>
<tr>
<td>Rubinfeld, Dan</td>
<td>Michigan</td>
<td>1977</td>
</tr>
<tr>
<td>Polinsky, Mitch</td>
<td>Stanford</td>
<td>1979</td>
</tr>
<tr>
<td>Shavell, Steve</td>
<td>Harvard</td>
<td>1980</td>
</tr>
<tr>
<td>Cooter, Robert</td>
<td>Berkeley</td>
<td>1980</td>
</tr>
<tr>
<td>Strnad, Jeff</td>
<td>USC</td>
<td>1981</td>
</tr>
<tr>
<td>Viscusi, Kip</td>
<td>Duke</td>
<td>1981</td>
</tr>
<tr>
<td>Kornhauser, Lewis</td>
<td>NYU</td>
<td>1982</td>
</tr>
<tr>
<td>McChesney, Fred</td>
<td>Emory</td>
<td>1983</td>
</tr>
<tr>
<td>Katz, Avery</td>
<td>Michigan</td>
<td>1986</td>
</tr>
<tr>
<td>Donohue, John</td>
<td>Northwestern</td>
<td>1986</td>
</tr>
<tr>
<td>Ayres, Ian</td>
<td>Northwestern</td>
<td>1987</td>
</tr>
<tr>
<td>Ulen, Tom</td>
<td>Illinois</td>
<td>1989</td>
</tr>
<tr>
<td>Haddock, David</td>
<td>Northwestern</td>
<td>1989</td>
</tr>
</tbody>
</table>

In the 1980s, few universities had more than one specialist in law and economics. Getting together to discuss specialized papers was essential to the subject’s intellectual development. A series of national conferences, mostly sponsored by the Liberty Fund and organized by Henry Manne, filled this need (Figure 3).
Also, scholars founded law and economics associations that institutionalized their networks (Figure 4).
Appointments of law and economics experts to law faculties apparently accelerated after 1990. The AALS annual survey invites law faculty to give their areas of teaching. The number of different faculty who identified themselves as teaching law and economics increased from 153 in 1995 to 247 in 2005. The proportion of AALS faculty who teach law and economics remains very small – 2% in 2000 and 2.4% in 2005, but this fact is probably misleading. Law schools feel the need for one law and economics class at most. Once that need is filled, subsequent hiring focuses on teaching substantive course in law. Law and economics is one perspective on these legal subjects. We have no way to measure how many faculty use economic analysis in teaching law.

The number of law and economics scholars in law schools declines with their rank. This is true in the top 25 law schools when the relevant measure is the number of professors with advanced degrees in law and economics, or the number of professors who describe themselves as teaching law and economics, as in Figure 5.
Most law faculty who list themselves as teaching law and economics in the AALS survey lack advanced training in economics. Conversely, a small number have advanced training in law and economics but lack a law degree. To be precise, 351 different law faculty listed themselves as teaching law and economics between 1987 (the first year that AALS began counting this category) and 2009. Of them, 12% lack the JD degree, and 30% lack any relevant graduate degree other than the JD.\textsuperscript{20}

The funding of law and economics before 1985 came mostly from private resources of universities and the Liberty Fund who paid for the conferences described in Figure 3. When the Liberty Fund began to withdraw its support after 1985, the Olin Foundation more than filled the gap. Unlike the Liberty Fund, The Olin Foundation gave grants to create law and economics programs in law

\textsuperscript{20} Ivona Josipovic of the Michigan Law Library collected the 2009 data for us. CHECK THAT THIS IS NOT 70%. 
schools (Figure 6). The recipients immediately established seminars for the presentation of working papers by inside and outside faculty. These seminars stimulated research among scholars and spread interest among students. Following the plan of its founder, the Olin Foundation closed its doors in 2005, but the law and economics programs that it stimulated continue to flourish.  

**Figure 6. Olin Programs in Law and Economics with Founding Date**

Total value of at least $15,221,730.00 for 1985-2000.

<table>
<thead>
<tr>
<th>Year</th>
<th>Law School</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>Emory University</td>
</tr>
<tr>
<td></td>
<td>Harvard University</td>
</tr>
<tr>
<td></td>
<td>University of Chicago</td>
</tr>
<tr>
<td></td>
<td>University of Miami</td>
</tr>
<tr>
<td>1986</td>
<td>George Mason University</td>
</tr>
<tr>
<td></td>
<td>University of Pennsylvania</td>
</tr>
<tr>
<td></td>
<td>Yale University</td>
</tr>
<tr>
<td>1987</td>
<td>Stanford University</td>
</tr>
<tr>
<td></td>
<td>U.C. Berkeley</td>
</tr>
<tr>
<td></td>
<td>University of Virginia</td>
</tr>
<tr>
<td>1989</td>
<td>Columbia University</td>
</tr>
<tr>
<td></td>
<td>Duke University</td>
</tr>
<tr>
<td></td>
<td>Georgetown University</td>
</tr>
<tr>
<td></td>
<td>University of Toronto</td>
</tr>
<tr>
<td>1991</td>
<td>Fordham University – short term</td>
</tr>
<tr>
<td>1992</td>
<td>Cornell University</td>
</tr>
<tr>
<td>2000</td>
<td>University of Michigan</td>
</tr>
</tbody>
</table>

Critics of law and economics like to point out that the Liberty Fund and the Olin Foundation are private, politically conservative organizations. However, the major source of public money for research in social science, the National Science Foundation, gave almost no support to law and economics research.  

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22 I called law and economics scholars to find who received NSF funding. Steve Shavell is one of the few. I enjoyed NSF funding for my research until I switched fields from public finance to law and economics.
Documenting this fact is difficult because “law and economics” is not a category in the NSF’s records of its grants – a fact that is revealing in itself.

**Two Enterprises**

Having narrated the history of law and economics, we will explain its explosive growth. When law and economics first burst upon the legal academy, it was unformed. Some 40 years later, two distinctive enterprises have emerged. The first explains the causes and effects of law (the cause enterprise). It predicts how legal rules and institution affect values that matter to people, especially efficiency and distribution. The larger part of law and economics scholarship these days consists of “models of law” that fit comfortably within the cause enterprise. The cause enterprise is like any other applied field of economics such as industrial organization or international trade. Few legal scholars contest the usefulness of the cause enterprise, but many struggle for perspective on its methodology. They struggle because economics is so different from humanistic traditions of law. Combining economics and law creates conceptual and methodological confusions, like translating poetry from Chinese to German.

The criticisms of the economic analysis of legal causes are the same as the criticisms of economics as a whole. It is too theoretical for generalists to understand, too abstract to explain things in detail, too imprecise to predict what actors need to know, too focused on rationality and materiality to be realistic about people, and so on. Non-economists often raised these objections against traditional applications of economics, say, to history, international trade, labor relations, or public finance. This essay, however, focuses on another criticism that is unique to law and economics, a criticism directed at its second enterprise.

The second enterprise explains the content of law itself (the content enterprise). Economic analysis especially clarifies the law's content by raising its level of generality and showing the abstract forms of legal reasoning. Thus the content enterprise aims to draw boundaries between harmless activity and a nuisance in property law, or between negligence and strict liability in tort law; to explain when the law gives expectation damages and specific performance as a
remedy for breach of contract; and to interpret constitutions such as the meaning of “commerce” in Article 1 section 8 of the U.S. constitution.

The content enterprise uses economics to interpret what the law requires people to do. It presents law and economics as a legal theory—a theory of law and not merely about its effects. Many lawyers reject economic interpretation as alien to law and offensive to morality, and many economists confuse legal interpretation with normative economics. Both need a clear account of the content enterprise, which has never been produced.

Economists often confuse legal interpretation with normative economics. Normative economics predicts the consequences of polices on social values, especially efficiency and distribution. Almost all economists think that their role as scientists includes identifying efficient policies and predicting their distributive consequences. Having done so, many economists think that their scientific task is over and they resist making recommendations. They think that they merely give information to officials, albeit in evaluative language. Stopping short of a recommendation makes sense when an economist advises about a choice that implicates values different from her expertise. In other circumstances, however, identifying the efficient or egalitarian policy amounts to recommending it, like identifying the medicine to cure a patient’s disease amounts to the doctor recommending that the patient take it. In many circumstances, it is odd to say, “My research concludes that policy A is more efficient and egalitarian than policy B, and I do not recommend doing A instead of B.” Economists who think that science cannot recommend because it is value-free apparently have physics as their model of science, not medicine. Other economists, however, see policy advocacy as part of their professional role.

In any case, the job of law and economics is not done after identifying the effects of a law, including the effects on efficiency and distribution. The remaining task is to interpret the law in light of its effects. Some laws have

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23 Welfare, wealth, and efficiency are central to economics like health, longevity, and painless are central to medicine. No such value seems central to physics. Economic positivists often think that economics is value free. An extreme example is Milton Friedman, *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953).
efficient consequences and some have inefficient consequences. The content enterprise requires showing that the efficient interpretation is the correct interpretation of important laws, under some circumstances. The need to interpret the law and apply it to particular circumstances distinguishes law and economics from applied fields of economics such as industrial organization or international trade.

Economists who have not studied law cannot imagine the complications and subtleties in moving from socially best to legal required. Do legal precedents allow or require the courts to adopt the efficient interpretation? Does the applicable statute intend to achieve efficiency? Does the economic interpretation collide or coincide with morality? To attempt answers, economic analysis must approach the law from inside its interpretative traditions, intertwining legal interpretation and normative economics.

Applied fields of economics such as industrial organization or international trade can stick to causal models and leave the interpretation of law to lawyers. But law and economics aims higher – to become a theory of law, not merely a theory about law’s consequences. A theory of law must supply reasons why one interpretation of a law is correct and another is incorrect. The correctness of an interpretation requires justification by lawful reasons.

Lawyers mostly reject economic interpretations as alien to law and offensive to morality. They regard legal reasoning as their own, and they think that the correct interpretation of the law seldom conforms to the recommendations of normative economics. The content enterprise aims to prove them wrong. Much of the excitement about law and economics comes from its claim to improve legal interpretation. Controversies about law and economics derive especially from the content enterprise, not the cause enterprise. Accusations crackle when someone suggests that economic analysis will eventually crowd out humanistic theories of law, like physics crowded out metaphysics.
Immanent Economics

How can economics contribute to legal interpretation when judges who interpret law seldom mention economics? Justice Eliezer Rivlin of the Israeli Supreme Court recently explained that his court weighs costs and benefits when interpreting the right of free speech.\(^{24}\) Balancing them is an accepted principle of interpretation, according to Justice Rivlin. When the Israeli Supreme Court applies a balancing test in free speech cases, the form of reasoning corresponds to cost-benefit analysis, which is a sub-discipline of normative economics.

The Israeli Supreme Court must supply a justification for interpreting its constitution as requiring a balancing test for free speech. The legal justification for the balancing test must be found in the practices and principles of the Israeli Supreme Court, not in economics. Normative economics is not explicitly recognized in the constitutional law of Israeli. Consequently, the Israeli Supreme Court does not need to mention normative economics to justify its balancing test. Normative economics seldom enjoys legal recognition, so it seldom conveys authority on the interpretation of laws.

Understanding the economics of cost-benefit analysis, however, can help judges to think clearly and use a balancing test correctly. Such a test often balances uncertain future payoffs, which confuses lawyers and most other people. Economists have spent decades straightening out reasoning about uncertain future payoffs. Here economists have the advantage of dealing in mathematical generalities, whereas courts wrestle with particularity. Knowing law and economics can save courts from mistakes in balancing uncertain future payoffs.\(^{25}\) To illustrate, in U.S. v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947), Judge Hand proclaimed his rule for determining negligence. According to the Hand Rule, in

\(^{24}\) Eliezer Rivlin, “Law and Economics in the Israeli Legal System: Why Learned Hand Never Made it to Jerusalem,” in Berkeley Law and Economics Workshop, 2011. According to Justice Rivlin, the Israeli Supreme Court accepted the weighing of costs and benefits in freedom of speech cases more readily than in torts cases. His explanation is that the justices under Chief Justice Barach wanted complete discretion in deciding cases. They thought that weighing costs and benefits in free speech cases gave them full discretion to decide as they wished, whereas weighing costs and benefits in torts cases might constrain what they could decide.

\(^{25}\) Examples about with respect to the Hand Formula for negligence, which we discuss later.
the absence of a community standard, an injurer is negligent if the burden of precaution $B$ that would have avoided the accident is less than its probability $P$ multiplied by the liability $L$ for the harm it causes, or $B<PL$. Thus an injurer is negligent who fails to spend 5 to avoid an accident that occurs with probability .10 and harm 100. The Hand Rule became the most celebrated example of cost-benefit reasoning by a judge.

The content enterprise aims to show that economics is the general form of much legal reasoning. Judges’ reasoning is particular and concrete, not general and abstract like economic models, so they may be unaware of using economic forms of reasoning. Aware or unaware, their decisions need not cite economics because it has no legal authority. Economics is “immanent” in law -- pervasive but not necessarily noticed or mentioned.

When a court weighs the benefits and costs of alternative interpretations of, say, the right of free speech, the correct interpretation often depends on the consequences of its adoption. This fact connects the content and cause enterprises. The content enterprise seeks to show that balancing costs and benefits is a principle of legal interpretation, and the cause enterprise predicts the cost and benefits of adopting different interpretations of a law. Figure 7 depicts these two enterprises. Law and economics mostly aims to determine the causes and effects of law, so the cause enterprise forms the base of the law and economics pyramid. A smaller quantity of activity, located at the pyramid’s peak, concerns the content of laws.
The Cause Enterprise

When law and economics grew explosively like the rabbit in Australia, what was the hole in the intellectual ecology that it filled? Law lacked a scientific theory to predict how people respond to laws. A social scientist might predict the effects of liability law on automobile accidents, compulsory school integration on students’ educational achievement, prohibiting retail price maintenance on book prices, corporate law on national income, or progressive taxes on income distribution. Here the social scientist treats laws as causes and explains their effects. The superior ability of law and economics to make such predictions prompted its explosive growth in the 1980s. We will discuss the elements in models used to make successful predictions.

The Code of Hammurabi, which was promulgated in Babylon in roughly 1790 BC, attaches sanctions to wrongdoing. The deterrence hypothesis in criminal law predicts that criminals commit fewer crimes when the expected sanction increases. In 1790 BC people presumably wondered how much

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26 Less important is the attempt of economics to treat laws as effects and explain their causes. The methods of economics and other social sciences have been used to explain the voting pattern of Supreme Court Justices, the timing of a new precedent, and the pace of new legislation.
wrongdoing a particular sanction deters. The available method for answering this question in 1790 BC was intuitive reasoning, which is all that was available in law before social science developed in the 20th century.

The demand curve slopes down in economic theory because people buy less of a good when its price increases. This is the “first law of demand.” Similarly, the deterrence hypothesis predicts that a more severe sanction causes less of the sanctioned act. Sanctions and prices look alike to economists, who presume that people respond much the same to them. Specifically, people respond to higher prices by consuming less of a more expensive good, and they respond to more severe sanctions by doing less of the sanctioned activity. Thus higher liability causes fewer accidents in tort law, fewer breaches in contract law, and less trespassing in property law. The assimilation of sanctions in law to prices in markets enabled economics to replace intuition with mathematical reasoning and statistical testing. The gain in precision resembles replacing a clock’s wheels with a quartz crystal.

The downward slope of the demand curve is so fundamental that economists struggled mightily for its best explanation. The best answer was found in utility maximization. In the general economic model, an individual’s ends can be almost anything such as wealth, power, pleasure, social status, self-realization, kindness, fairness, energy conservation, fast automobiles, violent movies, suede shoes, fine wine, or marshmallow peeps. A consumer must choose among bundles of goods -- violent movies and suede shoes, or fine wine and marshmallow peeps. A university student must choose between careers -- accounting that promises wealth and music classes that give pleasure.

An individual can often combine goods into bundles and make overall judgments about whether one is better than another. The ranking of bundles of goods from better to worse is all that modern economists mean by the individual’s “utility.”27 Given ranked alternatives and limited resources, the rational individual

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27 Transitivity is the essential condition for an ordering. Thus relation R among states of the world x,y, and z is transitive if Ry and yRz implies xRz. When economists stop analyzing individual choices and turn to social welfare, “utility” acquires new meaning, as discussed later. Transitivity
makes the choices that most realizes his overall goal. That is all that modern economists mean by an individual “maximizing utility.” The demand curve slopes down because the desire for more falls as a person gets more. Each additional unit of the good adds utility at a decreasing rate (declining marginal utility). The collision between boundless ends and limited means defines the circumstances of economic choice. The most famous definition of economics in the 20th century reads:

“Economics is the science which studies human behavior as a relationship between given ends and scarce means which have alternative uses.”

By restricting individual values to ranked alternatives, economists can deploy models of maximization that they have painstakingly constructed for more than a century. The mathematics of maximizing prompted the most useful insight in economics: Maximization requires equating marginal benefits and costs, not average or total benefits and costs. Marginalism, which economic theorists developed in the 19th century, continues to improve our understanding of issues that confound lawyers who rely on common sense alone.

To illustrate, we already explained Judge Hand’s formula for determining negligence: $B<PL$. Like early 19th century economists, however, Hand’s reasoning was imprecise because he failed to distinguish between marginal, average, and total values of the variables in his rule. The “marginal Hand Rule” is the correct understanding of this principle, which unlocked puzzles in accident law like the combination unlocks a safe.

**Austerity in Economic Theory**

As explained, the most general economic models of rational behavior assume nothing more about values than that an individual can rank outcomes from worse to better, and that his choices are limited. When outcomes are ranked and resources are scarce, a rational person aims for the best result that is feasible

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-- he “maximizes utility”. These two austere assumptions -- ordered values and scarce resources – propel many economic models.

When a model allows any ordered ends, almost any behavior can happen in principle. Simplification of motives leads to definite predictions of effects. Compared to complex motives, a simple motive allows relatively long chains of causal reasoning to remote effects. Everyone is altruistic some of the time and some are altruistic most of the time. However economists often assume that consumers are purely self-interested. For example, economists usually assume that consumers get utility from their own consumption of goods, not from consumption by others.29

After self-interest, another typical simplification concerns wealth. Economists often assume that only care about their own wealth. This is a good simplification for predicting aggregate behavior in markets, even though the motives of real people are more complicated. In fact, many people who care about their own wealth also sacrifice some wealth for other values like leisure, donate to others, and care about their relative wealth compared to other.30

Figure 8 depicts this order of simplification in economics. Much progress in economics concerns when and how to simplify assumptions about motives. To illustrate, economic models of labor markets usually assume that workers pursue their narrow self-interest, which is a good simplification most of the time but not always. Thus self-interest fails to explain the determination of the wages of waiters. A waiter at a restaurant along the highway works partly for tips. People who seldom visit a restaurant gain no advantage from tipping, but they may tip anyway because of altruism or similar normative commitments. To make true predictions about wages of waiters, a model must make accurate assumptions about altruism. In a specific domain of behavior such as tipping waiters, some people are more generous than others. Thus the best model of wage determination for waiters makes an accurate assumption about the distribution of

29 Many proofs in economic theory assume “separable utility functions”.
30 An alternative simplification is that self-interested people only care about power. This is a good simplification for predicting aggregate behavior in politics, even though some people in politics have noble motives.
altruism. Similar arguments apply to other domains of behavior affected by morality, such as compliance with tax laws.\textsuperscript{31}

**Figure 8  Simplification of Motives**

**Behavior or Reasons?**

Narrow self-interest remains the operative assumption in most all areas of applied economics, such as international trade, industrial organization, and finance. Similarly, the assumption of narrow self-interest works well in some areas of law, such as corporations, finance, and bankruptcy. In other areas of law, this austere simplification of motives fails to predict behavior. Law and economics is more like the market for soybean futures. Narrow assumptions of self-interest fail in more legal domains than markets.

Explaining and predicting the effects of legal rules and institutions often requires realistic assumptions about normative commitments, not the unrealistic

\textsuperscript{31} A model to taxation must acknowledge that tax evasion occurs much less frequently in the United States or Switzerland than models of pure self-interest would predict.
assumption that everyone is narrowly self-interested, as illustrated by Holmes’ famous “bad man” theory of law. According to this theory, law is, and should be, written for the “bad man” who obeys from fear of legal sanctions, not the “good man” who obeys the law for internal reasons. In reality, however, the cooperation of good people – altruistic and morally committed – makes the state’s deterrence of bad people effective. To coerce bad people, the state needs citizens who seek no personal gains when they report crimes to the police, testify in court on behalf of an injured plaintiff, or blow the whistle on corporate wrongdoing. Furthermore, the state needs fair judges and brave policeman who take pride in doing what is right. People do not automatically internalize respect for law. Rather, law has to elicit respect. Laws should be designed to coerce bad people and also elicit respect from good people.

The language of law reflects this fact. Whereas “rational” is a key word in economics, “reasonable” is a key word in law. The difference concerns the socialization of ends. A person can pursue immoral ends rationally, like Don Giovanni pursued women. In contrast, a reasonable person constrains the pursuit of his self-interest out of consideration for others. Instead of assuming that people rationally pursue their narrow self-interest, the law assumes that most people behave reasonably and, when they don’t, the law often imposes liability for the resulting harm.

The need to study reasonableness extends economic analysis in an unfamiliar way. In most areas of study, economists focus on what people do, not what they say. Economists mostly study decisions and choices, not the reasons for making them. Focusing on consumer choices instead of reasons makes sense in order to predict the price of coffee or tea. To develop the theory of consumer demand, economics does not have to explain the reasons why a person prefers coffee to tea. Instead, the economist can refer to unexplained “tastes” that characterize the consumer’s tradeoffs. Indeed, economists inflate the concept of “tastes” to encompass all manner of values, as if a preference for coffee is the same as, say, a commitment to equality. The inflationary research strategy has proved fruitful over and again in economics, but, as we soon discuss, it hits its limits in law when economic analysis tries to determine the law’s content.
A good way to begin analyzing the consequences of a law is to assume rationality and investigate incentive effects. In many legal domains, this is a good way to begin and a bad way to end. People are psychological as well as logical, especially when they escape the disciplining pressure of competition. The fluorescence of behavioral economics has addressed this deficiency in economic theory by assimilating much of cognitive psychology. Indeed, the enthusiasm with which economists embraced cognitive psychology, including awarding the Nobel prize in economics to the psychologist Daniel Kahneman in 2002, shows their openness to theories outside of their own tradition that satisfy its standards of rigor.

The cause enterprise generally predicts the consequences of alternative legal rules and institutions for behavior. It makes predictions especially by characterizing incentives created by law and deducing the response to them by rational people. The deductions are tested statistically to confirm, disconfirm, and refine the model. The predictions often concern efficiency and distribution. Since all laws affect incentives, the analysis of incentive effects applies to every area of law from contracts to constitutions. In a famous essay, Calabresi and Melamed describe economic analysis as “one view of the cathedral” of law. A better metaphor for the cause enterprise is “the mortar between the stones.”

Predicting Policy Values: Efficiency and Distribution

As discussed, economics uses a theory of rational incentives to explain and predict the causes and effects of law. Some predictions concern variables that are not inherently good or bad, such as how fast motorists drive, whether the police patrol more on the east or west side of town, how many partnerships reorganize as corporations, and whether manufacturers raise prices to pay the cost of safer goods. However, the most useful predictions for law concern its effects on policy variables with social and political importance.

In the economics tradition, two policy variables are discussed more than any others: efficiency and distribution. State officials never publicly advocate

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wasting money. The fact that one law achieves the same end as another at less cost is an argument for it in every public forum. Efficiency is a widely recognized policy value, although commentators debate the importance of efficiency, including the weight it should receive in policy making. ³³ (For this essay, we do not need to distinguish efficiency into types. ³⁴)

As with efficiency, many people favor more economic equality. Thus if law A and law B yield the same net benefits, and law A distributes more of them to the poor than B, then many people count this fact as a reason to prefer A over B. However, people who favor economic equality disagree about how much national wealth a country should sacrifice to achieve it. Also, some libertarians argue that a fair state does not favor any particular distribution of income. ³⁵

Some economists enter these debates with gusto, usually advocating the promotion of equality. However, many economists reject the role of advocate and prefer the role of neutral technician. Neutral technicians parameterize equality, which means that the weight given to pursuing equality is a variable of choice made by others. Thus a decision maker might favor a tax system that gives all weight to the income of the poorest class of people (maximin), or a decision maker might favor a tax system that gives most weight to the richest class of people (maximax). Once the decision maker chooses the distributional weight, the economic model yields the optimal tax system.

Many economic predictions about distribution concern groups of people, not equality in the nation. To illustrate, the abolition of import duties on wheat (“repeal of the corn laws”) was a traumatic event in 19th century English politics. In public debates, economists played an important role by predicting its consequences for various classes of people in England, notably the aristocrats who owned the land where wheat grew, the rural laborers who did the work of

³⁴The three main types are Pareto, cost-benefit (also called “Kaldor-Hicks”), and social welfare. Many other distinctions can be made – ex ante efficiency v. ex post efficiency, productive efficiency, efficient exchange, and so on.
³⁵In this view, the equality of the end does not count in its favor, but the means of achieving it could count for or against. More equality from protecting the poor against predation by the rich is a plus, whereas more equality from redistributive taxes counts as a minus.
growing it, the city workers who bought it, and the industrialist who employed the city workers. Thus economists parameterized the problem by predicting that repealing the duties on wheat would diminish the incomes of aristocrats and increase the incomes of industrialists, which counted as a minus for Tories and a plus for Whigs.

Generalizing, we can say that economics provides a behavioral theory to explain and predict how people respond to the incentives created by legal rules and institutions. This theory surpasses intuition just as social science surpasses common sense. These predictions often concern the important policy values of efficiency and distribution. Efficiency is relevant to law because it is always better to achieve the law’s purpose at lower cost than at higher cost. Distribution is also relevant to law, but people evaluate it differently. Parameterizing the effects of laws on distribution provides useful information to people who disagree about equality.

The strength of the cause enterprise comes from making prediction about the effects of law on policy values that people care about. Do such predictions imply commitment to particular moral or political values? Efficiency is always relevant and seldom dispositive to decision-making. The fact that one law achieves a goal more efficiently than another is almost always an argument in its favor. Efficiency does not seem to be a value that aligns with any particular moral or political belief. In contrast, equality is a value that aligns with definite moral and political beliefs. To remain morally or politically neutral in analyzing distribution, a scholar must parameterize distribution and advocate nothing. Some law and economics scholars prefer a stance of technocratic neutrality and others commit to advancing equality. There is no necessary connection between the economic analysis of law and particular moral or political theories, but there is ample scope for economic analysts to make such commitments.

Prolonged study of markets makes economists admire their successes and comprehend their failures. The effect of such study may explain why few
The Measure of Law and Economics

economists identify with the far left. However, the history of economics refutes the claim that the subject is inherently right-wing. Many early 20th century economists were Fabian socialists. President Reagan apparently distrusted economists for being Keynesian liberals who thought that budget deficits don’t matter. Economic analysis inspired the deregulation movement in the 1980s. More recently, the financial meltdown in 2009 has inspired prominent liberal economists like Paul Krugman and Joe Stiglitz to advocate reregulation.

The logical foundations of law and economics are presumably not skewed to the right any more than the logical foundations of economics. The membership of the American Law and Economics Association spans the full political spectrum from right to left. However, law and economics generally has a reputation for being conservative and pro-market. This fact may be an historical accident. At its first meeting, the American Law and Economics Associated recognized four scholars as founders of the subject. Three of them were conservatives with Chicago connections and one was a left-liberal from Yale. The reputation of law and economics for being conservative probably has more to do with its historical origins at the University of Chicago than anything else.

Method: Abstraction, Math, and Statistics

Economic methods especially rely on abstract mathematical models and statistics. These characteristics differ dramatically from legal theory and moderately from other social sciences. However, these methods are the same ones used in all fields of applied economics -- international trade, industrial organization, economic development, etc. Many criticisms made against law and economics apply to economics in general, or to law and social science in general. In all fields, economic methods raise questions about stylized assumptions, the scientific status of results, and the difference between normative and positive

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36 A Berkeley activist once complained to Cooter that he could not find a single economist, even among liberal democrats, who would testify in favor of rent control. He concluded that something is wrong with economists, not with rent control.

claims. You can read those debates in the philosophy of economics. Instead of rehashing these disputes, we only remark briefly on them.

Most economic explanations start with individual behavior and end with remote effects such as the rate of inflation, the price of electricity, or formation of startup companies in Silicon Valley. Simple assumptions about behavior enable theorists to follow long chains of reasoning to remote effects. In contrast, more complex and realistic assumptions about the ends of people make all causal inferences indeterminate except the most immediate. The main reason to simplify assumptions about the complicated ends of people is to explain and predict remote effects of their behavior. In 1844 this fact was recognized and explained brilliantly by Mill in his defense of economic methodology.

Almost every significant proposition in law and economics can be explained in ordinary language without math, and math can deepen our understanding of almost every significant proposition in law and economics. Explanations in ordinary language sound simple, but behind simplicity lies technical meanings that elude non-lawyers. Like economics, law gives technical meaning to many ordinary words. Consider the word “consideration” in the proposition, “You should show consideration to your grandmother.” The law takes this word and stretches it into a theory of contract formation. To understand “consideration” in contract law, you have to study the law, not just master its use in ordinary speech.

Similarly, economics takes a work like “preference” in the proposition, “My preference is for coffee, not tea,” and stretches it into a mathematical theory of decision making. To understand “preference” in economics, you have to study economics (preferably with the help of some math), not just master its use in

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ordinary speech. Ordinary words with specialized meaning are like a calm sea with treacherous shoals beneath the surface. They seem safe, but actually you need an experienced navigator to get through. Once you learn economics, you can “see” the complexity behind a single equation, like a navigator can “see” the shoals from movement on the sea’s surface. The right word placed in an equation can prompt consistent reasoning about a complicated concept. Thus single equation expressing the “numéraire good” tells more about the meaning of “price” than several labored pages in Marx’s first volume of Capital.

Data figures more prominently in law and economics than in some other approaches to law. Generalizations from imperfect data discomfort some legal scholars who are comfortable with generalizations from no data at all. In reality, data is necessary to making law or policy because no one can be sure that his or her experience is representative. What is best in your experience may be worst in general. However, the intuitive approach that lawyers often take and economists often reject is sometimes unavoidable. Life is a game of strategy in which people constantly innovate to advance their ends. As people innovate, social life mutates. The collection of statistics lags behind the mutations. Legal decisions have to be made before the data is in. For example, to understand the financial meltdown of 2009 when it occurred, one needed to read the contracts on financial instruments involving mortgages. The terms in these contracts were not reduced to statistics. No one who studied the statistics alone could understand the socially disastrous incentives created by innovations in financial instruments. It is not surprising that economists, who focus on statistics, did not foresee the financial meltdown.

The Content Enterprise

The cause enterprise filled the hole in the ecology of legal ideas left by the absence of a social scientific theory to predict how people respond to laws. The cause enterprise, however, did not provoke the sensation of the initial reception of law and economics in the 1970s and 1980. Rather, the controversy especially concerned the claim that economic analysis explains what court decisions are really about – a claim of the content enterprise.
Why did scholars in the American legal academy engage this claim rather than dismissing it? A theory of law should give definite answers about the law’s content, especially in hard cases where the law’s language is indeterminate. Law and economics provides a method and a theory to find the law’s content in hard cases. Sometimes (but not always), the method reduces to this algorithm: “The law’s correct interpretation is the one that gives incentives for efficient behavior.”

The efficiency algorithm gives a definite legal interpretation when the relevant facts are known, or it identifies the decisive facts to be researched in order to get a definite interpretation. Most legal scholars rejected the efficiency algorithm as a guide to law’s content. A definite proposition that is wrong, however, can make a good argument, and most American law professors like a good argument, especially in class. The efficiency algorithm provided a foil for its critics and a guide to its believers. The content enterprise was widely discussed and narrowly endorsed.

Unfortunately, the account of the content enterprise offered by its proponents lacked philosophical sophistication, and philosophers replied with a devastating critique. As more legal scholars became acquainted with the economic analysis, many of them identified the content project with the unsophisticated account of it. They mostly rejected economic interpretations of law as alien and offensive to morality. Even as interest waned in the content enterprise in the 1990s, the cause enterprise gained acceptance in the legal academy. This is the story that we will tell in more detail.

[The following sections will be revised.]

Reception of Law and Economics

The economic analysis of legal content is the key to understanding the initial success of law and economics in the legal academy. Unlike the economic analysis of legal causes, the economic analysis of legal content claims to provide a theory of what particular laws require of individuals who are bound to follow or apply them. For example, the economic analysis of legal content purports to tell a judge how to decide a case according to existing law. As initially championed by
Richard Posner, the economic analysis of legal content claims that certain bodies of law are best explained, justified and interpreted as embodying the principle of efficiency. The least controversial example is the economic analysis of antitrust law. Original interpretations of the Sherman Antitrust Act understood it to embody principles requiring, for example, fair competition, pure transfers from producers to consumers, protection of producer welfare and small businesses, and prevention of abuse of governmental power. The economic analysis held that the Act (and the subsequent Clayton and Federal Trade Commission Acts) should be understood to require courts to promote efficiency, understood as the maximization of consumer welfare. By the 1960’s, the economic analysis of antitrust law had won widespread acceptance in legal and political circles,

Antitrust law is self-evidently concerned with market regulation, so the economic analysis of antitrust met with little resistance once alternative interpretations of antitrust law were debunked. This first and lasting contribution of the economic analysis of law, however, did little to pave the way for its wider acceptance as a legitimate theory of other areas of law.

Unlike antitrust law, the doctrines in most other areas of law are not cast in economic terms nor self-evidently designed to regulate market activity. The common law, which forms the legal foundation for American markets, consists of core doctrines predominantly cast in moralistic, rather than economic, language. Even so, the common law is where economic analysis achieved the successes that launched its prominence.

Ever since Langdell taught his first contracts course at Harvard Law School in 1891, and the great legal academics of the early 20th century sanctified common law doctrine in authoritative Restatements, American legal education has given pride of place to the common law courses of torts, contracts, and property. To this day, these courses constitute the core of the required first-year curriculum in American law schools. The long-standing consensus underwriting this practice stems from the belief that substantive mastery of these subjects is necessary to

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competent practice in any area of law, and the belief that the kind of reasoning found in the common law is the quintessence of legal reasoning itself. That first-year law students learn to “think like a lawyer” would be cliché but for the common law curriculum. To learn the common law is to learn the language of the law.

The foundational role of the common law curriculum has significant institutional consequences in the legal academy. First, because torts, contracts, and property are mandatory courses, many faculty members must be enlisted to teach them, even if they do not specialize in them. Second, pedagogical excellence for these courses is especially prized for two reasons. Students enrolled in required courses are more likely to complain about poor teaching than students in classes they chose, and law school faculties believe that effective teaching in these subjects is critical to future success as a law student and lawyer. Deans charged with staffing the first-year curriculum therefore tries to reserve these courses for the law school’s best teachers. Third, every law professor internalizes the importance of the common law courses during their own formative experience as a first-year law student. When they take their place in the academy, new law professors already have an engrained sense of the foundational role of the common law courses in legal education. In sum, both law students and professors believe that the common law embodies the essence of legal reasoning and that common law courses are indispensable to teaching the fundamentals of legal reasoning.

As a result, the common law courses provide the ideal breeding ground for new ideas in the legal academy. They provide the most direct and powerful medium for transmitting, and therefore transforming, norms over time in the legal academy. The methods used and substance conveyed in these courses makes a lasting impression on the highly motivated and receptive mind of the first-year law student. A foreign approach to the law can be quickly domesticated in the legal academy by achieving pedagogical success in the first-year curriculum. Ideas and methods that seasoned academics might reject as unconventional or heretical have a fair chance to persuade first-year law students on their merits alone. If they make a favorable impression on first-year students, then they stand
a good chance of being adopted by any of those students who eventually become law professors.

**From Forms of Action to Legal Realism**

Before the economic analysis of law, the pedagogy of common law courses was a product of the evolution of legal theory, in both American legal practice and the legal academy, from legal doctrinalism through legal formalism, legal realism and legal process theories. The age of the legal treatise inaugurated the legal doctrinalist movement, which for our purposes began in the early 19th-century.41

Before 19th century, common law practice had been dominated by the forms of action, an antiquated institution of legal procedure that dates back to the origins of English common law in the 12th century. At that time, the King of England first began the practice of formally adjudicating and enforcing legal claims under specified circumstances. Those circumstances were described in various writs (formal orders) the King would issue, directing his courts to hear the specified claims and to provide a particular kind of relief. Eventually, the number and form of these writs became standardized and the King stopped issuing any further writs. As a result, those in search of governmental adjudication of claims and specific forms of enforcement of judgments were required to state their claims in terms that could be accommodated by the existing forms of action that provided the relief they sought.

As demand for government resolution of disputes rose, the success of a claim increasingly turned on which form of action was used to bring the claim and whether the claim could be made comfortably to fit the form’s requirements. Over time, the rising demand for state adjudication of an ever-expanding set of different kinds of claims put enormous pressure on lawyers and courts to fit many substantive square pegs into a few procedural round holes. The ossified forms of action soon came to bear little relation to the claims they permitted courts to adjudicate. By the early 19th century, a common law practice required mastery of the arcane pleading requirements and accumulated practices under the forms of

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action. Rather than analyzing the theory or principle of recovery underlying a case, the lawyer’s principal job consisted of conforming the claim to the available legal procedure for bringing it.

That all changed when the forms of action were formally abolished in the first half of the 19th century. A several decade period ensued in which lawyers, judges, and legal scholars struggled to define the substance of the common law itself. Because the procedural requirements of bringing a claim no longer overwhelmed common law practice, claims had to be adjudicated on the basis of substantive law. To flesh out the substantive content of the common law, distinguished practitioners and scholars began writing legal treatises that organized the common law by describing the categories and substantive requirements of the legal rules that defined it. These first efforts largely borrowed categories and sub-categories of law from legal practice.

Treatises were designed to be “how to” manuals for bringing, defending, and adjudicating different kinds of legal claims, and they provided their advice by cataloging discreet categories of legal doctrines that could be stated simply, decomposed into elements, and used to structure the legal analysis of various factual circumstances. This “age of the treatise” ushered in the modern idea of law as legal doctrine. But the treatises made little if any effort to identify general principles that might underwrite a particular area of law and unify the categories of doctrines within it, let alone to revise or create new categories that aligned the law with deeper principles that rendered it internally coherent.

To Langdell, the catalogue account of contract law provided by existing treatises falsely presented contract law as an unprincipled, and therefore scientifically disreputable, area of law. When he prepared his first contracts course in 1891, he was determined to reveal the deep principles that vindicated his conception of the common law as a scientifically respectable institution. Because he associated scientific rigor with the formal structure of geometry, he sought to identify fundamental principles, or axioms, of contract law from which a

42 But see Catherine Wells, Langdell and the Invention of Legal Doctrine (rejecting Grey’s claim that Langdell’s approach used demonstrative reasoning and arguing instead that Langdell conceived of his approach as a predictive legal science).
formal system of rules could be derived and applied in a systematic and mechanical fashion. Rather than conceive of contract law as a collection of unintegrated doctrines that, for largely historical-procedural reasons, happened to be filed in the “contracts” filing cabinet, Langdell believed there were far more basic principles underlying the cases from which those doctrinal statements had been taken. Sometimes Langdell found direct evidence of those principles in the express reasoning of contracts cases, but more often he looked at the results of contracts cases and induced from them basic principles not articulated in the express reasoning of the judges who decided them.

Langdell’s was a search for the immanent legal truths that lie beneath the surface of the express reasoning of the cases, in much the same way that physical scientists seek fundamental principles that lie beneath the folk understandings of physical phenomena. Langdell surveyed the existing case law (the legal scientist’s analogue to empirical data) and identified fundamental principles that he thought explained them. He then chose “leading cases” to scientifically substantiate their existence and to illustrate their specific application in cases. Langdell’s approach, which came to be known as legal formalism, had a profound impact not only on the structure and content of contract law, but on theorizing about the common law in particular and the law in general. It is fair to say that the first and highly influential restatements of the common law, produced in the first half of the 20th century, were inspired in large measure by Langdell’s conception of law as an organized, coherent, principled body of rules. Certainly, the first Restatement of Contracts aspired to this Langdellian ideal, and not by accident—its Reporter, Samuel Williston, was Langdell’s student.

Although legal formalism rejected the unprincipled conception of law in pure doctrinalism, it shared the premise that law consisted of reasons. Legal doctrinalism and legal formalism, therefore, both took legal reasoning seriously. By the time the restatement projects were underway, however, legal formalism had succumb to legal realism. Legal realism rejected legal formalism as conceptually incoherent and logically impossible— a misguided and misconceived attempt to bring scientific rigor to law. But even more fundamentally, legal realism rejected the premise that law consists of reasons. Hoisting legal formalism on its
own petard, legal realism argued that, if anything, a scientific understanding of law required an explanation of the psychological, political, and personal motives of the judges applying it, not an analysis of the principles and rules that best rendered judicial decisions formally coherent. Thus, if legal doctrinalism largely identified the law with the express judicial reasoning of decided cases, and legal formalism identified law with the most principled and coherent explanation of the outcomes of decided cases, legal realism embraced something approaching legal nihilism—reducing law itself to the by-product of causal factors external to the law’s conception and representation of itself, and denying the claim that law is fundamentally the reason-based practice it claims to be.

Legal realism’s attack thoroughly discredited legal formalism in the academy but did not dislodge the fundamental belief that law is a reason-based practice. Instead, scholars sought to provide reasoned explanations and justifications of the processes that produce law and the processes that law provides. Legal process theory thus rejected legal formalism’s aspiration to reduce law to a coherent system of rules, but embraced the aspiration to use reason to explain and justify legal institutions. Rather than seeking to explain the substantive reasons underlying judicial reasoning directly, legal process theorists used reasons to explain the procedural aspects of law. Because the substantive doctrines ultimately derived from legal processes, by explaining and evaluating those processes, legal process theory appeared indirectly to explain and evaluate the substantive doctrines they generated. Moreover, legal process theory shared legal formalism’s conviction that science could be used to explain and evaluate the law. But rather than seeking to explain the content of law by providing a scientific theory of what the law is (as Langdell did by reducing law to an axiomatic system of reasoning), legal process theory instead used available scientific methods to understand the effects of various actual and possible legal processes on procedural values it identified as normative significant. It used science to understand the causes and effects of legal procedures and institutions, not the content of substantive legal doctrines. Its only substantive commitment was to confine its evaluation and construction of the law to substantively “neutral principles.” And it reoriented legal theory to focus on the question of institutional
competence and expertise, viewing the judiciary’s expertise as the adjudication of particular cases.

Legal process theory promised to bear fruit especially when applied to those areas of law concerned with procedure (such as civil and criminal procedure) or with open-textured substantive doctrines (such as constitutional law). In both cases, reasoned-based analysis of procedures and procedural values appeared to explain and evaluate the law. The chief critics of legal process theory, however, rejected as conceptually impossible the aspiration to identify and apply reasons based on substantively neutral principles. But at bottom, by locating the judicial expertise in deciding cases but failing to identify the substantive principles and rules judges do or should use to decide cases, legal process theory failed to fill the theoretical vacuum left by legal realism—it did not take a position on the fundamental question of what law is and how its content is determined. In particular, it did not explain the role reason played, if any, in identifying the content of the law and explaining judicial decisions applying the law.

To the extent that it presupposed judicial expertise to decide particular cases but supplied no theory of what that expertise was, legal process theory simply avoided addressing the subject of what the law is—how the content of the law is identified or determined. To the extent it did take a position on what judicial expertise consisted of, legal process theory embraced the view championed by Karl Llewellyn, a legal realist, that judges correctly identified the content of the law in a particular case by using their “situation sense:” an intuitive faculty born of experience that results in wisdom. Llewellyn’s “wise man” theory of adjudication, however, simply asserts that, to paraphrase Justice Potter Stewart, judges know what the law is in hard cases when they see it. Legal process theory, so understood, treats the concept of wisdom as a theoretically primitive concept, one that provides an ultimate explanation of judicial decision-making but itself cannot be explained. It therefore rejects the demand to explain how wisdom identifies the law in hard cases.
Thus, the great 19th century project of providing a theoretical explanation of the substantive doctrines of the common law ended with legal realism’s critique of legal formalism in the first half of the 20th century. But the legacy of legal doctrinalism, and to some extent legal formalism, is deeply engrained in the 20th century practice of producing restatements and treatises. That practice perpetuated the conception that the common law consisted of reasoning based on substantive doctrines that could be at least organized systematically, if not made internally coherent by a set of fundamental legal principles from which they could be derived.

By the time Richard Posner wrote The Economic Analysis of Law, the common law presented in a first-year law school class consisted in the doctrines organized in restatements, treatises and the cases that articulated those doctrines. Their methodology and content reflected an amalgam of legal doctrinalism, formalism, and realism. Like legal doctrinalism, their goal was to distill the principles of numerous cases into a structured set of distinct doctrines. For the most part, they relied on the express judicial reasoning in those cases—their doctrinal formulations tracked formulations common in the case law. Like legal formalism, they sometimes attempted to identify more basic principles underlying, though not necessarily expressly stated, in a line of cases. Like legal realism, they insisted on including all doctrines as they appeared in the case law, whether or not they were inconsistent with other doctrines or principles that otherwise rendered a doctrinal area coherent.  

Professors who taught common law courses covered the classic “chestnut” cases that illustrated the “core” doctrines of contracts, torts, or property—again embracing Langdell’s leading case approach to legal pedagogy. The key doctrinal language in these cases, typically mirrored in the restatements and treatises, is notoriously vague. All law students learned that common law liability, for example, often turned on the “reasonableness” of the defendant’s behavior, the “fairness” of a contract term, the “equities” between the parties, the “justness”

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43 A prime example is Arthur Corbin’s insistence that the Restatement (Second) of Contracts recognize the principle of promissory estoppel, notwithstanding its apparent inconsistency with the bargain theory of consideration.
of an outcome, or the “negligence” of the defendant. Though typically cast in rigorously structured doctrinal language, and often sorted into distinct, formal elements of analysis (e.g., duty, breach, causation, and injury for torts), doctrinal analysis could not determine the result in hard cases without resort to some additional theoretical resources. Deciding the question at bar required the application of doctrinal elements to particular facts: e.g., what was the defendant’s duty in this case? Was his conduct negligent? Would it be unjust to enforce this particular promise made in these particular circumstances?

Professors teaching a common law course had several pedagogical options. They could avoid hard cases by using the class materials to teach the basics of legal institutions, such as pleading and procedure, basic legal argument techniques such as analogical reasoning and technical terminology. And they could also use the cases, restatements, and treatises to drill doctrinal formulations. But when applying the doctrinal language to the facts of a hard case, the plain language of key doctrinal terms failed to determine the outcome.

Absent a theory to bridge the gap between the plain meaning of a doctrine and the facts of hard cases, the standard approach was, at least implicitly, to fall back on Llewellyn’s “wise man.” But even professors who believed in the wise man approach to adjudication were likely to find it pedagogically troubling. In effect, it left the professor to tell students that only age and experience would enable them to discern the right answer in a hard case, even though the exam would surely require them to analyze hard cases, as would the first many years of their professional life as lawyers. It made a mockery of Socratic dialogue in class, making it clear that students had no basis for figuring out the answers on their own, the best they could do was to marshal inconclusive arguments pro and con, the professor’s answer was based on internal wisdom that they could neither access directly nor evaluate independently, and that by asking them questions about hard cases the professor was engaged in a pointless and painful exercise of “hiding the ball.” Ultimately, the wise man approach reinforced the suspicion that doctrinal language, at least in hard cases, was legal mumbo jumbo, that legal reasoning itself was superfluous, and that therefore the law was not a reasoned-based practice, as legal realism had concluded years ago. The wise man view
removed the fig leaf of reason from the core issues raised in the classroom, the case book, the restatements, and the treatises.\textsuperscript{44}

Richard Posner’s economic analysis of law provided an attractive alternative to wise man pedagogy. Like the formalists, Posner claimed to be identifying basic principles that logically unified the otherwise disparate doctrines of the common law. But where formalism claimed case outcomes were determined by mechanical application of abstract formal principles, which had no necessary relationship to human welfare, Posner claimed common law case outcomes were determined by application of the welfare-based principle of efficiency developed in the social science of economics.

Indeed, his objective was to demystify and restore scientific respectability to common law reasoning by explaining it in economic terms that could be applied directly to the facts of a case. Although Posner implicitly adopted the formalist practice of treating case outcomes as his legal data while paying relatively little attention to express judicial reasoning, his enterprise took the conception of law as reasoning very seriously.

Posner provided an economic analysis of each of the core common law doctrines. Professors who invested in economic analysis could then use it to structure a reasoned analysis of the application of the common law in hard cases. How much precaution must a defendant take to avoid liability for negligence in torts? He must take all cost-effective precautions. Who should bear the risk of unanticipated soft soil in a construction contract? The contractor bears the risk because it can do so at least cost.

Under the economic analysis of law, what makes a case hard is not the problem of bridging the gap between vague doctrinal language and the facts of a case, but rather undertaking the difficult formal and empirical analyses necessary to determine the efficiency effects of various possible rules for resolving it. The

\textsuperscript{44} “[T]he realist movement . . . involved a skepticism and even a cynicism about the significance of legal doctrine in the determination of cases, and it has profoundly affected the attitudes of both those who practice law and adjudicate, and many of those who teach at American law schools. Judicial opinions cease to be regarded as the expression of some rational scheme of principles, but rather as material to be used to justify and cover with a veneer of respectability arguments or conclusions reached on other grounds.” Simpson at 678.
common law’s vague questions of whether a defendant took reasonable precautions or whether it would be fair to allocate a particular risk to the promisor or promisee are converted into well-formed questions within the formal structure of economic theory. The economic analysis of the content of the common law, like legal formalism, not only vindicates the conception of law as legal reasoning, but also the conception of legal reasoning (and therefore law) as a scientifically respectable enterprise. For professors searching for a reasoned-based approach to teaching her common law course, the economic analysis offered a new, clear, and compelling alternative to legal nihilism or the wise man theory prevailing in the legal academy of the mid-20th century.

**Scholarly Success and Philosophical Failure**

Law and economics did not receive a warm welcome from legal philosophers. Most of their early efforts were devoted to criticizing the normative branch of the economic analysis of law. They claimed that the various definitions of efficiency used in economic analysis were either irrelevant to evaluating law or normatively indefensible as a single criterion of evaluation. The use of Pareto efficiency was, they argued, normatively irrelevant because no possible changes in law were Pareto efficient—every possible change necessarily made at least one person worse off. The use of cost-benefit efficiency (“Kaldor-Hicks”) was normatively indefensible because it justified a decision imposing actual losses on some individuals provided others could net a gain even after hypothetically paying full compensation to the losers. Merely hypothetical compensation could not transform unfair losses into fair ones. Finally, wealth maximization was normatively indefensible as the sole criterion of evaluation because wealth has no intrinsic value and its maximization is a poor means of achieving normatively defensible ends, such as welfare maximization or equality.

Initially, philosophers also criticized the explanatory branch of the economic analysis of law, but they developed these criticisms less extensively. Many supposed that their critique of normative economic analysis was by itself sufficient to undermine explanatory economic analysis. If explanatory economic analysis is interpreted as a claim about the motivations of judges deciding common law
cases, it seems particularly difficult to defend. Given that efficiency is either normatively objectionable or irrelevant to law, it seems highly implausible, even perverse, to claim that common law judges are nonetheless motivated to maximize it exclusively, especially given that they rarely, and never solely, invoke efficiency to explain or justify their decisions. From the philosopher’s point of view, to discredit efficiency as a univocal normative goal was to discredit the normative and explanatory enterprises of the economic analysis of law.

Efficiency might have a place in explaining and evaluating areas of law expressly and exclusively devoted to market regulation, such as antitrust, securities regulation, or corporate law, but it has no place in most areas of law, in which other many other values are at stake. In particular, it seemed plain to the philosophers that the economic analysis badly misunderstood the structure and content of the common law. To reduce the common law to an engine of wealth maximization, as Posner aspired to do, was to impose a foreign and antithetical value on an institution that was, like most of law, structured by morality, not efficiency.

Despite their convictions and much to their dismay, acceptance of explanatory economic analysis of law, and of the common law in particular, continued to grow throughout the legal academy. And it did so despite the clear failure of its practitioners even to attempt a satisfactory response to the serious philosophical critique of its foundations. Casebooks adopting it were published alongside a sizeable and growing body of scholarship that offered ever expanding and more nuanced economic explanations of common law doctrines.

While its comparative pedagogical efficacy explained its success in the classroom, its algorithmic character explained its success in scholarship. The same professors that had struggled in the classroom to gain pedagogical purchase on hard cases had similarly struggled in their scholarship. Before the economic analysis of the law, scholarship could bring other disciplines to bear on legal questions, but not on the question of what current law required in hard cases. The economic analysis of law provided an easily replicable formula, or algorithm, for deciding hard cases. All that was required was an elementary grasp
of basic microeconomic theory and informed empirical speculations on the likely incentive effects of adopting various doctrinal possibilities for resolving a hard case.

It took no great facility in economics to understand, for example, that contracting parties would, if they considered it, allocate any given risk to the party that could bear it at least cost. And it took no knowledge of sophisticated empirical techniques to wager that the builder can bear the risk of unanticipated soft soil at lower cost than the owner. Similarly, advanced economic modeling was not necessary to demonstrate that, unlike a rule of strict liability, a rule of negligence provided the tortfeasor with an incentive to take efficient precautions without undermining the tort victim’s incentives to do the same. At the dawn of the economic analysis of law, low hanging fruit was abundant.

Moreover, as the years progressed, and the economic analysis of law became a staple in the legal academy, formally trained economists devoted their energies and talents to creating more sophisticated formal models and empirical studies of the incentive effects of particular legal doctrines. Eventually, students aspiring to teach law pursued a Ph.D. in economics, typically in a joint program granting a J.D. as well, solely for the purpose of joining a law faculty in order to teach and write about the economic analysis of law.

Once it became clear that legal scholarship devoted to the economic analysis of law could qualify a candidate for a tenure track, or tenured position, at a top law school, economic analysis scholarship proliferated at an astonishing rate. And once sufficiently many faculty members at highly respected law schools produced or at least read and respected such scholarship, it achieved the critical mass necessary to be self-sustaining.

Though most members of most law school faculties today remain guarded and skeptical toward, if not entirely alienated by, the economic analysis of law, its practitioners probably constitute one of the largest, most unified, and most productive groups of scholars in the legal academy as a whole. The enterprise of the economic analysis of law is systematic, programmatic, and, as we have said, algorithmic. In the business of theoretical legal scholarship, the economic analysis
of law was its first great franchise. Once the fundamentals of the approach were worked out by its founders, any determined and diligent scholar could put it to good use. And they did.

Since its initial period of reception in the academy, law and economics scholarship has moved away from the Posner-style explanatory enterprise in favor of explicitly analytic and normative work. The economic analysis of the causes and effects of law is now predominant in the literature, with relatively fewer scholars offering explicitly explanatory analyses of the content of actual legal doctrines. At the same time, philosophical consideration of the economic analysis of law has shifted away from the initial critique of its normative enterprise and developed instead an extensive critique of explanatory law and economics.

The shift to explicitly normative and analytic economic analysis is, however, far less a function of any acknowledgement of the philosophical difficulties confronting explanatory economic analysis than it is the result of a growing appreciation of the modeling and measurement complexities that any economic analysis must surmount to reach a determinant result. Economic analysts of law now regard the determinacy of many first generation economic analyses as illusory—a function of an overly simplistic economic model that prescinded from crucial and confounding theoretical and empirical difficulties. Once those complexities are taken into account, many of the claims of earlier analyses to have explained the results of particular cases no longer can be sustained. It is, then, the perception by some economic analysts that that the theoretical tools and empirical methodologies of economics itself provides the most serious obstacle to its explanatory agenda.

For their part, philosophers seem to have given a pass to the normative/analytic claims of contemporary economic analysis. For to the extent that these analyses make their normative claims clear at all, they are clearly modest. Rather than claiming to evaluate all of law, or even all of the common law, by means of the single metric of efficiency, they claim only that the efficiency properties their analyses reveal are merely relevant to the evaluation of the legal doctrines or regimes they consider. Although philosophers mounted compelling
arguments against the view that efficiency is a normatively dispositive criterion of evaluation for law, they did not deny the mere normative relevance of, for example, the effect of a legal rule on aggregate wealth. Even the strongest critic of economic analysis allows that, all else equal, a legal rule that increases wealth is better than one that decreases it. They just claim that all else is rarely equal in most areas of law, especially those not explicitly devoted to regulating the market.

The result is a tenuous détente between economic analysts and legal philosophers. As long as the economic analysts forego their explanatory pretensions and confine their modest normative claims to areas of law that explicitly regulate markets, the legal philosophers will not object. But the early economic analyses of the common law, coupled with later developments in economic theory, continue to inform the teaching and scholarly understanding of the content of the common law, even if it is not central to the current agenda of law and economics scholarship today. The economic analysis of the common law remains the historical gateway to its reception in the academy and still explains much of its deep-seated appeal for many legal academics. Despite model-theoretic and empirical complexities, the economic analysis still represents the most compelling prima facie explanation of the reasoning that determines the content of the common law in hard cases. Law reform is important and understanding the causes and effects of law is valuable. But if the explanatory enterprise of the economic analysis of law has no philosophical foundation, as philosophers now claim, it can no longer be regarded as central to the core enterprise of the legal academy: understanding and teaching the content of American law.

**Jurisprudence**

At bottom, the question of what determines the content of a particular area of law is jurisprudential. The field of analytic jurisprudence is devoted to understanding the fundamental nature of law. It answers the question of what law is by providing a theory of legality—a theory that explains what distinguishes legal
rules from non-legal rules. Any theory of the content of the law in a particular area necessarily presupposes a theory of legality. Such a theory explains what facts ultimately determine the existence and content of law.

Legal positivism holds that “all legal facts are ultimately determined by social facts alone. For those who endorse this answer, claims about the existence or content of a legal system must ultimately be established by referring to what people think, intend, claim, say or do.” In contrast, natural law theory holds that “legal facts are ultimately determined by moral and social facts. For those who hold this position, claims of legal authority and proper interpretation must in the end be justified through morally sound reasoning.”

Legal positivism and natural law theory have profound implications for debates over the content of the law. In particular, they require different defenses of the claim that the economic analysis determines the content of the common law. According to legal positivism, defense of this claim requires a theory of what kinds of social facts determine the content of law. The view that the intentions of legal actors in general, and judges in particular, determine the content of the law.

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45 Legality is “the property of being law. . . . which can be instantiated by rules, organizations, officials, texts, concepts, statements, judgments and so on.” Scott Shapiro, Legality, 9.

46 As Shapiro explains, “[i]t is important to distinguish the question “What is law?” from the similar sounding question “What is the law?” The latter is of course a familiar, garden variety legal question. It reflects a desire to understand what the law is on a particular matter and is the kind of question a client would be likely to ask his or her lawyer. The former question, by contrast, does not concern the current state of the law. It reflects a philosophical effort to understand the nature of law in general. . . . [I]n order to prove conclusively that the law is thus-and-so in a particular jurisdiction, it is not enough to know who has authority within the jurisdiction, which texts they have approved and how to interpret them. One must also know a general philosophical truth, namely, how legal authority and proper interpretive methodology are established in general. In other words, one must know which facts ultimately determine the existence and content of legal systems. For without this information it is not possible to show definitively that a given person has legal authority in a particular jurisdiction and how their texts ought to be interpreted. In short, if one wants to demonstrate conclusively that the law is thus-and-so in any particular case, one must know certain philosophical truths about the nature of law in general—precisely the information that analytic jurisprudence seeks to provide. . . . [O]ur ability to answer the legal question “What is the law?” depends on our ability to answer the philosophical question “What is law?” Shapiro, Legality, 9, 24.

47 Shapiro, 26.

48 Shapiro, 26.
is a common version of a positivist theory of law.\textsuperscript{49} On this view, defense of the economic analysis of the content of the common law requires a demonstration that common law judges intend to decide cases in accordance with the goal of maximizing efficiency.

According to natural law theory, this defense would require at least an assessment, if not a justification, of the moral status of efficiency. For example, a simple natural law theory that held that law is necessarily moral could accept the economic analysis of the law’s content only if the pursuit of efficiency was morally permissible. If pursuit of efficiency were immoral, then any rule requiring it would be disqualified from counting as law at all, let alone as the correct interpretation of the content of a particular law.

Alternatively, Ronald Dworkin’s version of natural law theory holds that the law’s content is given by its best interpretation. The best interpretation is one that sufficiently “fits” the legal data (such as precedents) and casts the law in its best moral light. On this view, in order to determine whether the economic analysis provides the best interpretation of the content of the common law, one would need to assess the moral value of maximizing efficiency.

Relying implicitly on his natural law theory, Ronald Dworkin rejects the economic analysis of the content of the common law because he rejects any view that interprets legal content to require wealth or utility maximization. As Dworkin explains, “[a] successful theory must not only fit but justify the practice it interprets.”\textsuperscript{50}

Although he concedes the economic analysis might reasonably be shown to have an acceptable level of fit with common law cases, Dworkin argues that it provides a far inferior justification of the law than competing moral theories. Individuals do not, he argues, have a moral duty to act in accordance with laws designed to maximize social wealth because increasing the aggregate wealth of the community does not necessarily make the community better off. Neither, he

\textsuperscript{49} Shapiro’s version of positivism, the planning theory of law, is one example. The intention of legal actors, such as judges, is also central to determining the content of the law on H.L.A. Hart’s version of positivism in The Concept of Law.

\textsuperscript{50} Ronald Dworkin, Law’s Empire, 285.
argues, can a legal duty to comply with wealth maximizing laws be justified on utilitarian grounds because of the well known and forceful objections to utilitarianism. Dworkin argues that utilitarian moral theory runs afoul of the familiar objections to it as a theory of personal moral responsibility—that it fails to take the distinction between persons seriously and yields results at odds with fundamental moral intuitions about individual rights.

The Dworkinian critique requires the economic analysis either to defend efficiency as a plausible moral justification of an area of law or reject (Dworkin’s version of) natural law theory. Taking the first strategy, the economic analysis might maintain that efficiency justifies the common law in spite of the fact that it does not provide a plausible reconstruction of the moral rights and duties of personal responsibility. Dworkin’s argument presupposes that the common law must be justified on the ground that it enforces personal moral responsibility, yet the economic analysis can maintain that it serves instead as a means of maximizing social utility (by maximizing social wealth), which is then redistributed elsewhere in the law (outside of the common law) in accordance with principles of justice.

Rather than faulting the economic analysis for failing to enforce legal rights and duties that correspond to personal morality, the economic analysis views the common law as a wealth maximizing component of an overall legal system. The overall system, which encompasses a larger set of social and legal institutions, might maximize utility or conform with the principles of justice. This strategy simply denies the inference, implicit in Dworkin’s argument, that legal institutions assigning rights and duties to individual citizens are morally justified only if they correspond to the rights and duties of personal responsibility. The justification of the state can instead proceed by defending principles of justice, as Rawls has done, that do not require the law to map onto personal morality and permit discreet bodies of law within the state to pursue a single value that would not be morally permissible as a singular goal for the state.

The second strategy is, however, the economic analyst’s most natural response to Dworkin’s argument. There is little question that economic training
inclinates legal economists towards legal positivism. Economics traditionally conceives of itself as committed to the same cannons of scientific inquiry that govern the physical sciences. It therefore does not regard morality as a proper object of scientific inquiry. But the philosophical commitments of the methodology of economics, and especially a nearly dogmatic embrace of logical positivism (itself discredited as an epistemological view in philosophy), hardly constitutes an argument on behalf of legal positivism as against natural law theory. Although it would be convenient for economists if law constituted a proper object of inquiry according to its own methodological pre-commitments, that hardly makes it so. Just because economics is a hammer, that doesn’t make law a nail.

Moreover, embracing legal positivism is no panacea. First, although legal positivism denies any necessary connection between law and morality, so called “inclusive” positivism holds that it is nonetheless possible for morality to play a role in determining the content of the law in some legal systems. If inclusive positivism is defensible, then even presuming the truth of legal positivism will not ensure that the moral status of efficiency are irrelevant to vindicating the claim that economic analysis determines the content of the law. Inclusive legal positivists could still insist that morality is relevant to determining the content of American law. Second, and more importantly, the chief architect of the most trenchant and extensive critique of the economic analysis of the content of the common law is Jules Coleman, a legal positivist.

Unlike Dworkin, Coleman argues that the economic analysis of the common law’s content fails to fit two central institutional facts about the common law. The first is that it explains the reasoning of the common law in terms that appear to contradict, rather than elaborate, the terms common law judges routinely use to explain and justify their reasoning. Instead of expressing consequentialist reasoning that embraces the goal of maximizing efficiency,

51 “Within economic culture, it generally is accepted that one must distinguish between ‘is’ and ‘ought’ in order to have any scientific inquiry at all. Many economists would follow the logical positivists in saying that this is required on philosophical grounds. A majority probably would endorse the proposition that fact and value are fundamentally incommensurable. Both these propositions are even more the conventional wisdom in law and economics.” Avery Katz, Positivism and the Separation of Law and Economics, 94 Mich. L. Rev. 2229, at 2240.
common law judges routinely invoke deontic reasoning and use terms with a deontic plain meaning. Typical key language includes terms such as “fairness,” “equity,” “reasonableness,” “negligence,” “justice,” “wrongful” and the like, all of which have been understood, both historically and currently in English and American legal culture, to have meanings within a deontic moral theory—the category of moral theory defined by its rejection of purely consequentialist morality.

The economic analysis of the law, however, maintains that the content of the common law is determined by the purely consequentialist reasoning of wealth maximization. Coleman argues that the economic analysis therefore does not appear to fit an essential fact about the common law—it fails to satisfy the transparency criterion for legal explanations. That criterion requires a theory of the content of the law to explain the law in terms that are consistent with the reasons judges use to explain and justify their decisions. Failing this explanation, transparency requires a theory of law to provide an adequate account of why the explanations common law judges express should systematically and dramatically differ from the actual reasoning they use to decide cases, and thus the actual content of the law they are applying.

In other words, the economic analysis of the common law must provide a plausible explanation for why the express judicial reasoning of common law decisions is opaque, rather than transparent, to the actual reasoning of common law judges and the actual content of the common law itself. The failure to provide such an account provides grounds for rejecting economic analysis as a theory of the common law’s content. Coleman argues that the economic analysis has only two possible accounts available. The first is that common law judges are systematically deluded about their own actual reasoning. The second is that they are engaged in a mass conspiracy to mislead the public about their actual reasoning. Dismissing both accounts as absurd, Coleman concludes that the economic analysis of the content of the common law fails to satisfy the transparency criterion.
Coleman also faults the economic analysis for failing to explain why the common law has a bilateral structure, which limits plaintiffs to recovery only against the person that wrongfully harmed them and holds defendants legally accountable only to their victims. In principle, the economic analysis of torts, for example, has no reason to restrict tort law in this way, given that its objective is to provide individuals with legal incentives to take efficient precautions. Thus, the economic analysis has no grounds, in principle, for restricting an individual’s liability for negligent behavior (a failure to take efficient precautions) to the person harmed by his negligence. Nor does it require in principle that wrongful injurers pay their victims, rather than, for example, paying a governmental fine calibrated to induce efficient precaution-taking.

Economic analysts have argued that the bilateral structure of tort adjudication is a second-best solution that economizes on the costs of identifying, or searching, for individuals who are failing to take cost-effective precautions. But they concede that under other circumstances, it might be more efficient to substitute a regulatory system or social insurance scheme to secure the same efficiency objectives currently pursued by tort law. Coleman claims that this explanation treats as merely contingent a “core” feature of tort law—one that is essential or constitutive of the practice. For that reason, he claims the economic analysis of tort law’s content fails to explain the institution of tort law. Coleman then argues that his own corrective justify theory of tort law satisfies the transparency criterion and explains why bilateralism is an essential feature of tort law.

The transparency and bilateralism objections are deep philosophical challenges to the economic analysis of the content of the common law. They raise important questions about the nature of explanation of social practices in general and the law in particular. And Coleman rightly emphasizes that proponents of the economic analysis of the common law’s content have failed to acknowledge, let alone discharge, the serious philosophical burdens its claim entails. In fact, many economic analysts act as if there is often no significant distinction between offering an economic analysis as an explanation of current law or as a normative suggestion for legal improvement. They seem to take it as self-
evident that an interpretation of the content of an actual law should be preferred as the legally correct interpretation if under that interpretation the law is more efficient than competing interpretations.

Coleman has surely demonstrated that jurisprudential matters are far more complicated than this simple ipse dixit. But the economic analysis of the content of the common law cannot be dismissed quite as easily as Coleman suggests either. While its philosophical foundations are far from clear, it is also far from clear that such foundations cannot be supplied.

To begin, the economic analysis has a plausible response to the objection that it fails to satisfy the transparency criterion. The premise of that objection is that the plain meaning of the terms in which the judicial reasoning of common law decisions is cast are inconsistent with the interpretation suggested by the economic analysis. Thus, the economic analysis has the burden of explaining why judges would explain their reasoning in terms that are inconsistent with their actual reasoning.

The hidden assumption of this argument, however, is that the meaning of the terms common law judges use in their express reasoning is inconsistent with the interpretation offered by the economic analysis. The economic analysis can concede that the plain meaning of those terms is inconsistent with actual judicial reasoning but insist that those terms are understood, by judges and other participants in legal practice, according to their contextual meaning within the common law.

The strategy of this response is logically impeccable, but requires considerable elaboration to establish its plausibility. Why is it reasonable to suppose that terms with a deontic plain meaning have a consequentialist meaning when used by common law judges? It is not possible here to do more than sketch an answer to this question. But a sketch is all that is required to suggest that efforts to make good on the challenge should be fruitful. And as it happens, this sketch also provides an effective response to the bilateralism objection. It explains why an institution that bears the hallmark structures of a system designed to vindicate deontic rights in the course of ex post adjudication can be
properly interpreted now as an institution that instead treats adjudication as an occasion for prospective regulation to promote consequentialist ends.

One key insight makes this result plausible: the purpose of institutions and meanings of terms will evolve over time to suit the demands placed on them. Indeed, the meaning of terms used within an institution will change to suit the demands placed on the institution. Such an evolutionary dynamic seems not only possible but almost inevitable for the institution of the common law. The common law quite likely initially emerged as a vehicle for resolving disputes according to norms that we now understand to be deontic in character. This would explain why common law doctrines are cast in deontic terms and the claims it adjudicates are treated as bilateral in nature.

But early in its evolution, two facts likely put it on course to a future purpose at odds with its initial conception. First, the common law practice adopted the doctrine of stare decisis, which introduced a crucial prospective regulatory component into a process initially conceived to be exclusively ex post. By holding that the legal effect of a common law case was not only to resolve a dispute but to set a precedent, the common law necessarily divided the judge’s attention and concern between doing justice between the parties and producing sensible rules that will govern all members of society in the future. Although it surely did not fit comfortably within the common law’s own purely retrospective self-conception, stare decisis forced judges to understand themselves as both ex post dispute resolvers and ex ante legislators. Any judge who took his role seriously would accord at least as much normative weight, if not the lion’s share of it, to his legislative role as his adjudicative role. For the precedential stakes in a case, in aggregate effect, swamp its stakes for the parties to the case.

Second, most of the cases that come before appeals courts are so-called “hard” cases. Thus, most appealed cases present a question that cannot be decided by simple application of the plain meaning of a doctrine. The plain meaning necessarily does not resolve the dispute. Moreover, the capacity of terms with a deontic plain meaning to determine results in particular cases is notoriously limited. While it is easy to insist that a dispute be resolved fairly and
equitably, and to hold individuals accountable for behaving unreasonably and unjustly, it is often difficult to determine whether specific conduct is fair, equitable, reasonable, or just—especially when the conduct itself and the circumstances surrounding it are novel. Judges confronted with the necessity of deciding such cases, governed by doctrines whose terms do not determine the result, would naturally focus on the concrete consequences of the precedent they would set by deciding the case one way or another.

Though they would confine themselves to the forms of reasoning at home in the common law, such as analogy and distinction, judges would over time gravitate toward results that set precedents that served the social interests at stake in any regulation governing the conduct in the case before them. Given that the common law is foundational to market activity, it would be unsurprising if judges developed a sensibility for the efficiency effects of their decisions. Though the concept of efficiency surely did not exist throughout much of the history of the common law, and judges surely used non-economic forms of reasoning and concepts to reach their results, the economic analysis can maintain that it nonetheless provides the theoretical foundation for their instincts and a deeper reconstruction of their reasoning. This can be so even though judges themselves might neither understand nor agree with the tenets of economic theory. Just as it is possible to speak a language fluently without knowing or understanding the compositional semantics that explains how the language works, it is possible for judges to know how to decide cases without knowing what theory explains and displays the deeper structure that underlies their reasoning. Thus, the economic analysis maintains that judges would be instinctively attracted to enhancing efficiency because it provides a normatively attractive criterion for determining results in cases that are underdetermined by the plain meaning of the deontic terms of the controlling doctrines.

The claim that setting precedents that enhance efficiency is normatively attractive does not require that efficiency alone provides a morally sufficient reason for the threat of political coercion that implicitly backs their decisions. Rather, it requires only that it provides an morally permissible ground for deciding common law cases given the overall scheme of rights and responsibilities ensured
by the principles of justice that structure the entire legal system of which the common law is but one component.

The scenario described above holds that the meaning of the key terms of the common law doctrines evolved over time from their plain meaning outside of the law to a consequentialist contextual meaning within the common law. For a judge, the same term means something different when he is applying it inside the context of common law adjudication. No secret conspiracy or delusion need be ascribed to the judges who use these terms to describe their reasoning. Although the plain meaning suggests the more precise contextual meaning, the speaker may be use the words intuitively, without understanding that the plain meaning is in tension with the theory underlying the contextual meaning.

This is no more remarkable than the commonplace observation that law school teaches students to think like a lawyer. Lawyers use the same words as everyone else, but they understand that those words have a legal contextual meaning given by the structure of legal reasoning in which they play a role. It is unremarkable to observe that many terms acquire a more precise meaning in legal contexts. The claim that the moral terminology the common inherited from its deontic origins eventually acquired a consequentialist contextualist meaning is a case in point. Demonstrating that this is in fact the case would require a far more detailed account of the language used and results reached in the course of the evolution of the common law. But demonstrating the logical possibility and historical plausibility is not so difficult. A common sense narrative of the evolution of common law adjudication suffices as reasonable start. Instead of dismissing the economic analysis of the common law’s content by questioning its philosophical foundations, it makes the question not just worth asking, but worth answering as well.

The economic analysis of the content of the common law, therefore, implicates the most fundamental jurisprudential questions in legal philosophy. Its defense turns crucially on whether one subscribes to legal positivism or natural law theory, and further on how the institutional facts that characterize the common law can be reconciled with the apparently inconsistent explanation offered by the
economic analysis. At its foundation, the economic analysis of the content of the common law turns on questions in philosophy and legal theory, not economics. That does not mean that economics does not have an important role to play in understanding the content of the common law or any other area of law. It just means that its importance turns on philosophical and legal theoretic questions that economic analysts have no comparative advantage in answering. If economic analysts wish to contribute to debates over the content of the law, their role is to offer economic analyses that might be considered plausible interpretations of the law in light of a particular jurisprudential view of what law is, how its content is determined, and the constraints governing legal interpretation.

Conclusion

When law and economics burst into the awareness of the legal academy in the 1970s and 1980s by making strong claims about what judicial decisions are really about. Legal scholars mostly rejected these claims, but they engaged with them because law and economics gave definite answers to hard cases. The claims of law and economics about the law's content depended on propositions about law's effects. These propositions were derived from economic models that treated laws as incentives. Economic models of incentives became central to positive claims of social science about the behavioral consequences of law. The cause enterprise has entered an especially attractive phase in recent years through the rapprochement among the social science. There is so much commerce among economics, psychology, political science, and sociology that we may even see something like the emergence of a unified social science of law. Still, if economists and other social scientists aspire to a central place in legal scholarship, they must return to the content enterprise. They must show that interpreting the law and applying it to cases needs economics and other social sciences. Unlike the past, this time they must get the content enterprise right if they are to produce a theory of law, not just a theory about law.