What Do Lawyers Contribute to Law & Economics?

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What Do Lawyers Contribute to Law & Economics?

Robert E. Scott* & George G. Triantis**

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Abstract

The law and economics movement has transformed the analysis of private law in the United States and increasingly around the world. As the field developed from 1970 to the early 2000s, scholars have developed countless insights about the operation and effects of law and legal institutions. Throughout this period, the discipline of law and economics has benefited from a partnership among trained economists and academic lawyers. Yet, the tools that are used derive primarily from economics and not law. A logical question thus demands attention: what role do academic lawyers play in law and economics scholarship? In this Essay, we offer an interpretive theory of the practice of law and economics scholarship over the past 50 years that integrates both the known skills of the economist and the methodological skills of the academic lawyer. We claim that, in addition to the legal resources they provide to the economic analyst, academic lawyers have cognizable analytical skills developed both through their involvement in law as an applied discipline and their mastery of the analogical method of the common law that is deployed in normative argument. We draw on this use of analogy as argument to explicate differences in the ways that economists and lawyers analyze some of the building blocks of our economy, including the relationship between formal and informal modes of enforcement and the reasons why obsolete and inefficient terms persist in certain standardized contracts. By enriching the standard economic model with insights from other disciplines, and visualizing the connections among those disciplines, the lawyer provides skills that are critically important inputs to advancing normative claims.

I. INTRODUCTION

The law-and-economics movement transformed the analysis of private law in the United States and increasingly around the world. Starting with just a few adherents fifty years ago, it is
an established fixture in academic scholarship in fields of study as diverse as business law, contracts, torts and property. It is inconceivable today that scholars in these and other fields of law are unfamiliar with the basic tools of marginalist analysis, game theory, problems of private information and rational choice under scarcity and uncertainty. As the interdisciplinary enterprise developed from 1970 to the early 2000s, legal scholars drew on methods from economics to develop countless insights about the operation and effects of law and legal institutions thereby permitting policy makers to better understand the social order. Within the past 20 years, a new generation of lawyer/economists have applied economic methods to derive testable hypotheses that they subject to increasingly rigorous empirical analysis. Throughout this entire period, the (inter)discipline of law-and-economics has benefited from a partnership among trained economists and academic lawyers. Yet, the tools just described derive primarily from theoretical and empirical economics and not law. A logical question thus demands attention: what role do academic lawyers play in law-and-economics scholarship? We take the opportunity of this Symposium on future challenges to law-and-economics to address that question.1

We can best frame our inquiry by beginning with a few uncontroversial assumptions. First, academic lawyers know the law (whether statutes, regulations or common law doctrines) and the process by which courts and other legal institutions operate. Thus, lawyers are, at a minimum, an invaluable resource for anyone doing economic analysis of law.2 The more challenging question is whether lawyers have methodological skills beyond their knowledge of

1 In his dinner remarks after delivering the John M. Olin Lecture at the University of Virginia School of Law in 1994, Nobel Laureate Amartya Sen was asked whether and how legal academics will be useful in law-and-economics. Professor Sen related a story of a visit to Thailand where he had been invited to give a lecture. After checking into his hotel, he decided to go to the market down the street to buy some food. He asked the hotel desk clerk for rules of thumb in bargaining over the price and was told that the merchant’s starting bid is typically at least twice as expensive as his reservation price. Sen proceeded to the banana stand and asked how much he could buy for $1, and was told four. Remembering the advice of the hotel clerk, Sen countered with eight bananas. Eventually, they reached a deal of seven. Proud that he had bargained skillfully, Sen was nevertheless shocked when the merchant handed over seven bundles of bananas, rather than seven bananas. In his inimitable gracious fashion, Sen complemented lawyers for reminding economists to take care to understand the context of what they are modeling or measuring. See also Pamela S. Karlan, Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy, 65 Stan L. Rev. 1269, 1271 (2013) (“A central contribution that lawyers… have brought to scholarship on the law of democracy has been precisely their professional experience and a qualitative sensibility derived from that experience – what Karl Llewellyn long ago called ‘situation sense’.‘”).

2 We note here the distinction drawn by Judge Guido Calabresi between the “economic analysis of law” and “law-and-economics,” to which we will return. GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION (2016). Infra text at notes 27-31.
the law that add value to the scholarly project. Second, law is not an autonomous academic
discipline. Law is to the social sciences and the humanities what engineering is to the natural
sciences: like engineering, law is an applied or translational discipline, in both its normative and
positive modes of analysis. Many of the analytic methods used by a prototypical academic
lawyer are borrowed from other disciplines, including psychology, history, sociology and
philosophy, as well as economics.

While several leading law-and-economists have written that law-and-economics is simply
the trade of applying economic methods to legal knowledge, we set out in this Essay to
elaborate an alternative claim that legal academics make significant methodological
contributions to law and economics scholarship. On its face, that may not seem a very
controversial claim. Many would agree today that academic lawyers contribute more to this
enterprise than their deep knowledge of law and the institutions within which law functions. In
doing so, these observers may remark, for example, that lawyers "ask the right questions," or
"solve difficult problems," "better understand policy goals," or "add complexity to the
economist's simplifying assumptions." Yet, underneath these largely conclusory observations is
the realization that identifying the specific skills that are part of the toolkit of the contemporary
academic lawyer is a difficult enterprise. A more articulate description of the methods and
capacities may be elusive because legal skill has so much of the character of tacit knowledge.

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4 A number of scholars have advanced this thesis. See e.g., George L. Priest, Social Science Theory and Legal
Education: The Law School as University, 33 J. Leg. Ed. 437, 439 (1983). Priest argued that "[t]he lawyer-
economists’ education teaches him his training is obsolete and that the more he develops his scientific interest, the
more obsolete his basic training—legal training—will become." He concluded "[n]ot only do lawyers only bring
doctral expertise, but their expertise is not actually useful." Id. Henry Hansmann has offered a similar, albeit less
trenchant view of the similarity between economics scholarship and law-and-economics scholarship. He sees law
and economics as simply economics written by or for lawyers—no different in substantive or methodological
difference, only in audience and impact. Henry Hansmann, The Current State of Law-and-Economics Scholarship,
33 J. Legal Ed. 217, 218 (1983)("Law-and-economics does not stand out from the rest of economics scholarship in
terms of either methodology or subject matter." Id.) In fairness to Priest and Hansmann, their perceptions of law-
and-economics were offered nearly 40 years ago and the field (and the lawyer's role) has advanced since then. We
do not know if they would still challenge the argument that we offer in this Essay.

5 Each of these statements attempting to describe the contributions of academic lawyers were offered by participants
at the Conference on New Challenges in Law and Economics on September 11-12, 2020.
We set out in this Essay to unpack the tacit knowledge that undergirds the foregoing characterizations of the lawyers’ skills. We offer an interpretive theory of the practice of law and economics scholarship over the past 50 years that integrates both the known skills of the economist and the methodological skills of the academic lawyer. Our central claim is that, in addition to the legal resources they provide to the economic analyst, academic lawyers also contribute cognizable analytical skills developed both through their involvement in law as an applied discipline and their mastery of the analogical method of the common law that is deployed in normative argument. Whether used singly or in combination with economic methods, these skills add value to our understanding of the world that a talented economist per se could not provide herself.

Law schools have long been the primary home in universities for multidisciplinary analysis. Legal academics, particularly those trained in the legal realist tradition, have long adapted tools from a number of social sciences – economics, political science, psychology and sociology, to name four – and the humanities – history, philosophy and literary analysis. So, when legal academics have applied economics to law, they have done so against a backdrop that is much more ecumenical than that of their economist counterparts. In law schools, the norms of economic analysis are constantly challenged from the perspectives of other disciplines, and exposure to this tension often distinguishes the law-and-economics works authored by legal academics.

In addition, and admittedly more complex to describe, law-and-economics scholarship is influenced by the common law training of legal academics, at least in the Anglo-American jurisdictions. The common law method is essentially inductive in extracting from legal cases and opinions the set of factors that are essential to a legal result. This process of generalizing from the particular in order to find similarity across cases requires a sophisticated form of analogical reasoning in order to determine what similarities would be justified in producing the same legal outcome. As generations of legal realists have noted, however, there is a looseness to

6 Other essays in this volume address empirical legal studies, so we focus primarily on the non-empirical vein of law-and-economics.

7 In this respect, we build on arguments previously made by Calabresi, supra note 2, and infra, notes 27-31.
such analogical reasoning, often driven by normative goals. Importantly, lawyers use analogy in a particular way -- as part of an adversarial process in which one analogy is always contrasted with another in opposition. This contestation refines the skill of using analogies as tools to harness different perspectives and policy goals. We conjecture that this analogical optionality works synergistically with the tight logical rigor of economic analysis, whether in the framing of theoretical models or in strict causal inference in econometrics.

In sum, the legal academics’ methodological contribution to law-and-economics is a toolbox that combines analogical argument with the perspectives gained from the range of social sciences and humanities, and these tools are used to enrich explanatory and normative theories of observed legal phenomena. The task of demonstrating – let alone proving – that lawyers have contributed these skills to law-and-economics scholarship over the past half-century is a challenge, but we press on nevertheless. We begin in Part II of the Essay by advancing a brief descriptive account of the differences between the disciplines of economics and academic law, and then outline how one might expect these comparative advantages to meld in collaborations between the disciplines. In Part III we set out the essence of our claim: the academic lawyer's contribution is to take insights from multiple disciplines and, by using the skills of analogical argument, apply them in ways that expand the boundaries of economic thinking. Part IV sets out several examples of past law-and-economics scholarship that support our claim. We speculate in Part V that lawyers may not continue play as significant a role in the next generation of law-and-economics scholarship. Whether this is seen as a loss or as the healthy maturation of the field turns on the question we pose: are lawyers more than a resource for economists studying the law? While we will be unable to prove the affirmative – either by legal burdens of proof or by statistical significance -- we do hope to shift the intellectual burden of proof going forward.

II. The Separate Disciplines of Economics and Law

Multidisciplinary research exists because the academy has been partitioned into disciplines, departments and schools. Distinctions between academic disciplines result more from history, economic forces, and incremental decisions of individual institutions than from
deliberate, collective boundary-setting. The concept of disciplines arose when research universities were established in the U.S. in the 1800s, after which professional associations and journals soon followed. Most traditional disciplines have remained relatively constant since then, even as fields emerged to focus on a newly important topic (such as gender), a new medium (such as film) or a new approach across disciplines (such as statistics or data science). There is thus a path-dependency to disciplinary boundaries that may not map onto what would be an efficient organization of the research enterprise.

Fundamentally, disciplines form distinctive ways of thinking, communicating, and operating. Each discipline develops its own discourse—for example, ‘positivism’ means something different for a legal academic than for a philosopher or an economist. For these reasons, it has been difficult for universities to develop and even more difficult to maintain a true interdisciplinary scholarly tradition. Moreover, a given melded discipline is seen quite differently by adherents of the parent disciplines. In light of these challenges, at least, the law-and-economics movement has been a great success.

Scholars have created various taxonomies of academic disciplines. Anthony Biglan’s framework usefully divides academic disciplines along two dimensions: (1) ‘hard’ or ‘paradigmatic’ disciplines that specify problems for study and methods to be used (e.g., physics) versus ‘soft’ or ‘pre-paradigmatic’ disciplines where paradigms aren’t clearly delineated (e.g., most of the social sciences); and (2) pure or theoretical disciplines (e.g., math, philosophy) versus ‘applied’ disciplines (e.g. engineering, finance). Using these criteria, and making binary

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9 Anthony Biglan, *The Characteristics of Subject Matter in Different Academic Areas*, 57 J. Applied Psych. 195 (1973); Anthony Biglan, *Relationships between Subject Matter Characteristics and the Structure and Output of University Departments*, 57 J. Applied Psych. 204 (1973). Biglan places economics near the middle of the spectrum, but closer towards pure --engaging with ‘living systems’ (e.g. biology) v. ‘non-living systems’ (e.g. history). Law is not discussed in his article. but plausibly it falls toward the soft and pre-paradigmatic and leans towards applied on the theoretical/applied dimension. Another framework is proposed by David Kolb. David A. Kolb, *Learning Styles and Disciplinary Differences* in *The Modern American College* 232 (1981). Kolb categorizes disciplines as abstract/concrete and active/reflective: Abstract disciplines emphasize concepts and logically-sound theories; Concrete disciplines involve themselves in “experiences”; Active disciplines revolve around experimentation; Reflective disciplines more often make general observations about the world.
distinctions, we could begin by characterizing economics as fundamentally a hard and theoretical discipline while law would be set in opposition as soft and applied. At a more basic level, some scholars view economics as an approach or set of tools, while law is a discipline defined by its subject matter. According to this view, the marriage of the two is therefore the application of economic tools to the subject matter of law. A more granular analysis results, however, from a brief review of the intellectual histories of both economics and law over the past one hundred years.

A. What is Economics?

The progression of economic thought has been much discussed and documented in many volumes; we certainly cannot do it justice in a page or two. For our purposes, it may be useful to outline in very broad strokes a few of the distinctive stages of its history. “Classical” economics first emerged in 1776 with Adam Smith’s Wealth of Nations which studied the genesis of wealth and its distribution. But over the next century, “political economy” remained less than a full discipline. Most academic institutions (especially American) offered little instruction, partly due to perceived tensions with certain contemporary principles of theology and moral philosophy. Thus, economics was often treated as a subdivision of history, law, mathematics, or even literature. Research was neither abundant nor specialized, and the discipline’s boundaries were vague.

Economics found its place as a discipline in the late 19th century, when Alfred Marshall and marginalist theory produced the neoclassical paradigm, which soon predominated. The new theories shifted focus from economic growth and capital to efficiency and price. This coincided with a surge in societal interest in economic theory as the expansion of industrial capitalism presented new problems and new universities opened free of ecclesiastical control and the rigidity of a “classical” education. During this period, economics became more generalized and rigorous and gained respect as a science.

10 Nobel Laureate, Gary Becker, wrote, for example, that “what most distinguishes economics as a discipline from other disciplines in the social sciences is not its subject matter but its approach.” GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5 (1976).
After World War I, institutional economics flourished as an alternative to the neoclassical model. It rejected standard abstract theory and emphasized that social and legal institutions influence economic behaviors through constraints and incentives; that existing institutions did not work to societal advantage and caused market failures; and that these deficiencies were the product of policy choices. But institutionalism seemed to fall short of developing a systematic theoretical core or generalized insights. Its expansion was limited by a lack of theory and because it was perceived as less technically rigorous and thus inferior to mathematical economics which emerged soon thereafter.

Mathematical economics developed in the 1930s due to the work of influential American economists (including Fisher, Friedman and Samuelson) and a similar group at the London School of Economics. Their research was revolutionary in two ways: First, it transformed Marshallian insights into a mathematical model, which defined economics as a science of rational resource allocation that utilized basic maximization and minimization under constraints; and, second, it developed a general equilibrium theory (previously, each market had been studied separately). The mathematical school then allied themselves with scholars in econometrics. It was then that economics adopted the character of a “hard” discipline.\footnote{By “hard”, we refer to the earlier discussion of the categorization of disciplines in the text accompanying note 7 supra.}

Next, Keynes’ work on monetary theory and business cycles revolutionized macroeconomics, which otherwise had not changed since marginalist theory. He, too, was inspired by his times: the 1930s economy was incompatible with orthodox thinking and called for new theories. Keynes opposed mathematical economics/econometrics, but those scholars mathematized his theories nevertheless, and by integrating microeconomic insights they created the “winning” neoclassical-Keynesian synthesis. At the end of the day, the developments that ultimately survived to make up the core of modern economics were: (1) mathematical modeling in microeconomics, (2) “Keynesian” discourse in macroeconomics, and (3) econometrics as the
empirical arm of both. Beginning in the 1960s and 1970s, economics brought these three tools to the study of law and legal institutions.

B. What is Academic Law?

Academic law is a much younger discipline than economics, having reached maturity (and fully separated from the practicing bar) only in the past 50 years. Though English universities first taught law in the mid-1700s, the apprenticeship model predominated until the law became an established program of university training in the latter part of the nineteenth century. Once established within the university, academic law began to assert itself as a respected discipline. To do so, law reframed itself as a formal ‘science’ with unique methods and a defined object of inquiry: the positive law of a nation-state. This effort began at the Harvard Law School and was spearheaded by Christopher Columbus Langdell who served as Dean from 1870 to 1895. Langdell and his formalist colleagues championed the case method of legal study: they purported to derive first principles inductively from an analysis of judicial opinions that were deemed to be correctly decided. The key premise of using decided cases as the unit of analysis was the belief that courts reasoned from categories, using doctrines such as "consideration" in the law of contracts to reach correct results. The formalists thus sought to elevate the study of law as a fully autonomous discipline with distinctive methods that generated predictable outcomes.

12 Prior to 1970, most American law faculties were recruited from the practicing bar and their scholarly pursuits were largely directed at issues of immediate interest to the bar. Though there have long been scholars of academic law, their numbers prior to this time were far smaller than the number of professors drawn from practice. Today, in virtually every accredited law school the faculty is largely if not exclusively recruited from aspiring academics whose scholarship is principally directed to an academic audience.

13 There are exceptions of course. Harvard and William & Mary date their law schools to the latter part of the 18th century and law was one of the original academic disciplines Jefferson established at the University of Virginia in 1819.

14 Cases that did not fit within the first principles that emerged from this inquiry were thus "wrongly decided." The formalists dominated legal academic thought for nearly 50 years and during that time produced the great treatises of American law, but the artificiality of the legal fictions created to sustain a system of inflexible rules ultimately led to the rejection of formalism and the emergence of Legal Realism. See Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 W&M L. Rev. 329, 337 (1993).

15 The prevailing philosophy of the formalist movement was positivism. The law was a deductive system with fundamental premises leading to inevitable conclusions. See Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 Va. L. Rev. 451, 453 (1974).
The distance between the law as conceived by the formalists and the effects of law in society generated a revolution in legal thought in the 1930s culminating in the Legal Realist movement. The Realists advanced a radical theory in opposition to the formalist understanding: Law is an instrument of social policy and its meaning cannot be found in the relatively sterile analysis of legal texts alone. Courts, they asserted, do not reason from categories, they reason from justification -- principles grounded in social policy-- to the outcome of case disputes. The resulting legal doctrine was the rationale offered by courts once governing policy principles had directed the outcome of the dispute. Realists turned attention away from close analysis of cases and doctrine to empirical investigations of how the law worked in action, thus marking a turn to the social sciences.16

The Legal Realist movement began to wane after the Second World War and the Legal Process theory began to take hold. Here, scholars turned away from normative policy analysis to a descriptive account of the processes by which law is made. By focusing on the difference between courts and legislatures and other law-making institutions, process scholars developed a set of "neutral principles" designed to direct lawmaking to the body best able to resolve a particular issue.17 But once again, a countermovement developed in the 1970s and 80s, growing from the groundwork laid by the legal realists and led by scholars eager to borrow insights from other disciplines to better understand law and its institutions. Law-and-economics began here with the landmark work of Calabresi at Yale and Ronald Coase at Chicago, and followed quickly by the magisterial efforts of Richard Posner.18 But law-and-economics was only one perspective imported from the university during this period: Interdisciplinary studies transformed legal studies into a true applied discipline, one that used the insights from multiple disciplines to study the law, including psychology, philosophy, sociology, history and critical theory.


Many of these other "law and" approaches developed in opposition to the purported explanatory power of the economic analysis of law. While insights from psychology, philosophy and history have continued to shape legal thought into the twenty-first century, law-and-economics has remained as the most influential of the borrowed disciplines that have shaped legal thinking in the new century.

This brief history demonstrates both the tension and the oscillation between the internal and external perspectives that has long characterized the academic study of law. Academic lawyers are committed to an analytic method that categorizes and organizes disparate legal doctrines while, at the same time, using the perspective of a number of borrowed disciplines --- economics, philosophy, psychology or philosophy -- to build theories that inform and interpret those doctrines. As such, academic law is more than just a "soft and applied" discipline in Biglan's typology. Academic lawyers build taxonomies that organize legal phenomena and then use the techniques of normative argument to propose interpretive theories that explain the function and logic of those institutions that are influenced by legal doctrine.

C. Differentiating the "Lawyer" and the "Economist."

Although the foregoing illuminates the historical differences in the methods of economics and law, definitions bog down the exercise of identifying the “lawyer's” or “legal academic's” contribution to law-and-economics. Should we speak of a researcher’s formal academic training (JD or PhD), her home school or department within a university (law or economics), where she publishes outside of interdisciplinary outlets (law reviews or economics journals), or characteristics of her scholarship (such as quantitative or qualitative)? We have chosen to focus on demonstrated skills, while appreciating that this may lead us perilously close to tautologies.

19 Particularly trenchant was the Critical Legal Studies movement that drew on continental philosophy in asserting that law was naked politics used by those in power to persuade the powerless that the status quo was a natural order of society. Critical legal scholars sought to deconstruct legal doctrine so as to unmask the contradictions and incoherence of law and thus reveal that law was not separate from ordinary political debate. Mark Tushnet, Critical Legal Studies: A Political History, 100 Yale L.J. 1515, 1516 (1991). But the half-life of critical theory was short and after less than 15 years it receded owing to its inability to offer a better vision of the society that would replace the current one.
In doing so, we recognize that some formal economists have brought lawyerly skills to law-and-economics. Many believe that Ronald Coase fits that definition, as would other economists without formal legal training, especially after undergoing an apprenticeship in a law school.\textsuperscript{20} Similarly, there are a number of lawyers without formal credentials in economics who are self-taught economists. Moreover, there are today many academics with formal training in both disciplines, the best of whose work is a fusion of both.\textsuperscript{21}

If we eschew credentials in favor of skills in categorizing approaches as “lawyer-like” or “economic,” can we then sharpen our definition of the methodological skills of legal academics? The work of legal academics is often akin to that of institutional economics in the focus on the internal structure and operations of institutions, such as courts, administrative agencies, and so on. As we previewed in the Introduction, we present and develop two types of skills that we suggest distinguish the legal academics even from institutional economists: multidisciplinary analysis and the common-law method of normative argument. We also suggest that the two are interrelated, perhaps explaining why legal realism and law-and-economics in particular flourished in the U.S. before civil law jurisdictions. In Part III of this Essay, we elaborate on the significance of multidisciplinarity in law school culture and what we mean by the common law method as an analytical tool. Then, in Part IV, we explore several examples where law-and-economics analysis has been informed by these two uniquely legal skills, as well as by economic theory and/or econometrics.

\textsuperscript{20} Charles Goetz and William Landes are two economists who developed into fine lawyers and there are doubtless others as well.

\textsuperscript{21} Because the newer generation of JD/PhD (Econ) often combine the conventional skill sets of legal academics and economists, and because their numbers have grown significantly in the past decade, we set them aside in this Essay, particularly because most of these scholars focus largely on empirical projects rather than legal or economic theory and thus are properly characterized as belonging to the sub-field that Calabresi designates as "the economic analysis of law." See text and notes 24-30 infra.
III. THE SKILLS OF THE ACADEMIC LAWYER

A. How do Leading Practitioners of Law-and-Economics Characterize their Methodology?

Henry Manne expressed the conventional view when he described law-and-economics as the application of economic tools and methods to legal topics. Those tools formally model the legal subject matter based on the axioms of economic theory in order to frame hypotheses about the effect of law on human behavior, and then might rigorously test those hypotheses with econometric techniques. Unsurprisingly, advocates of this view have often been skeptical about the methodological contribution of academic lawyers to the enterprise. Manne, for example, argued that economics faculties are “better situated to do the economics of law than law professors.” Were lawyers and economists to collaborate in research, he contended that the contribution of lawyers would only be in “largely explaining to the empiricists factual issues . . . and legal implications” that they might otherwise miss.

George Priest similarly observed that “[t]he lawyer-economists’ education teaches him his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training – legal training – will become.” He writes that social scientists studying law have an advantage over lawyers because they “are not burdened by the mastery of the legal system’s details,” thus “proceed at a much faster pace and with a much greater range than lawyers.” Richard Posner and Henry Hansmann each have articulated a substantially similar view of law-and-economics as applying economic tools to legal knowledge. The lawyer’s role under this view is limited to providing (and correcting) the economists’ understanding of the relevant institutional facts.

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23 Id.at 24.

24 Priest, supra note 4.

25 Supra notes 3 and 4.

26 See Michael Klausner, Fact and Fiction in Corporate Law and Governance, 65 Stan. L. Rev. 1325, 1370 (2013) (explaining “the failure of both [economic] theorists and empiricists to pay sufficient attention to institutional facts”),
In a recent book, Guido Calabresi provides an alternative framework.\textsuperscript{27} He begins by drawing a sharp distinction between what he labels as the "economic analysis of law" and "law-and-economics." Calabresi observes that, of the two approaches, the former has been central, even dominant. Practitioners of the former use economic tools to either confirm or cast doubt upon the legal world and then seek to reform that legal reality.\textsuperscript{28} In contrast, Calabresi identifies law-and-economics as a bilateral relationship between the two disciplines within which not only is law illuminated by economic insights but economics itself is challenged by the observations of lawyers. Law-and-economics, on this view, begins with an agnostic acceptance of the world as the lawyer describes it to be, looks at that world from an economic perspective and asks whether the lawyer is describing the world accurately. If so, and economic analysis cannot explain the world, the lawyer can guide economic theory to make it more subtle or broader to accommodate the world as it is.\textsuperscript{29}

Calabresi cites the work of Ronald Coase\textsuperscript{30} as an early example of the symbiotic relationship between the two disciplines in which the analyst identifies an inconsistency between the predictions of economic theory and the real world, and works to revise the theory in that light. In his other examples, Calabresi illuminates the significance of scholars of law-and-economics introducing behavioral insights into economics as well as their recognition of the essential questions of values and taste. More generally, Calabresi suggests that the lawyer, once observing such inconsistencies, can turn to other disciplines for explanation or normative

\textsuperscript{27} GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION (2016).

\textsuperscript{28} Id. at--. Calabresi can be even more trenchant in his view of the economic analysis of law: its most aggressive adherents, he suggests, look at the legal world from the standpoint of economic theory and upon finding that "the legal world does not fit, proclaim the world to be "irrational."

\textsuperscript{29} Id. at --.

reform. He adds that the lawyer’s understanding of legal structures – akin to institutional economics -- is essential in shaping the best available or most feasible route for any normative reform.

The distinction Calabresi draws between the economic analysis of law and law-and-economics usefully separates the field on the basis of the lawyer's contribution to the intellectual project. The economic analysis of law, thus understood, aptly describes a sub-field of law-and-economics that fits the conventional views of the lawyer's role as expressed by Manne, Priest, Hansmann and others. Indeed, there have been notable contributions to our understanding of the effects of legal rules on the social order made by scholars using economic tools largely unaided by any methodological contributions from lawyers. Here, the lawyer serves primarily as a resource for the economic models and the empirical tests that they generate.

To be sure, the lawyers' foundational contribution of legal knowledge should not be undervalued. In a number of respects, legal scholars have significantly advanced the economic analysis of law by correcting and refining the economists’ understanding of law. In their models, economists assume or invoke highly stylized characterizations of concepts such as property, corporation or adjudication. For example, some economist contract theorists define a property right as the residual right of control over the subject asset. Yet, the common law does not see this as a distinctive feature of property because such right can be given by contract. Lawyers focus instead on the more accurate distinction that contract rights are in personam (enforceable only against parties who consent to the contract) while property rights are in rem (enforceable against the world). In another vein of scholarship, some economists see a corporation (or “the

31 Coase refers, as example, to the occasional use of anthropology in his book Tragic Choices, with Philip Bobbitt.. In a different context, Kathleen Sullivan wrote that “the regulation of social order through a variety of authoritative texts necessarily interacts in a complex and dialectical fashion with the content and techniques of the social sciences and humanities.” Kathleen M. Sullivan, Foreword: Interdisciplinarity, 100 Mich. L. Rev. 1217 (2002).

32 Many of the new generation of JD/PHD(Econ) researchers fall into this category.


34 E.g., Thomas Merrill & Henry Smith, What Happened to Property in Law and Economics, 111 Yale L.J. 357, 357-59 (2001)(examining the range – and deficiency - of conceptions of property in law and economics).
firm”) as a hierarchy that gives owners and their agents the residual discretion over a group of assets, while others see the firm as a nexus of contracts. Each group misses the important legal characterization of a corporation as a person, with rights to sue and be sued. The appreciation of this aspect of a firm permits the lawyer to distinguish between a single firm and a corporate group controlled by a parent holding company, giving rise to the theories of each firm as distinct legal entities. As a final example, economists studying contract theory typically model the central feature of verifiability as a binary characteristic – facts are verifiable or they are not. Lawyers, in contrast, armed with a more detailed understanding of litigation, view verification as a function of cost and error, taking into account burdens of proof and opportunities for summary judgments.

While lawyers have made very significant contributions through their specialized knowledge of the law, the more interesting phenomenon is the sub-field that Calabresi described as "law-and-economics," where lawyers also contribute their methodological skills. We agree with Calabresi that he and other lawyers have expanded the reach of economic thinking into areas that were traditionally excluded by the strict axioms of rational choice. But beyond that, we claim that the lawyer's contribution to law-and-economics is even broader and more lasting than in Calabresi’s description. Our challenge is to show that the analytic and methodological skills of lawyers have been instrumental in tandem with economic theory both to explain the law and to offer normative theories that rationalize it. It is that challenge that we take up next.


38 Calabresi’s focus is naturally on the areas of law in which he wrote, as ours is on the areas in which we are most familiar: contracts, business organizations and commercial law.
B. Multidisciplinarity in the Legal Academy

The emergence in the 1970s of the law-and-[ ] movements from legal realism made law schools the hub of multidisciplinary research in universities. Law-and-economics is arguably the most successful strain but many other disciplines produced influential scholarship and became part of law school pedagogy: law-and-history, law-and-psychology, law-and-sociology, law-and-literature, all developed sub-fields with impressive scholarship, specialized journals and academic organizations that mentored young scholars and convened conferences and conventions. Coexisting with the other multidisciplinary approaches in law schools, the methodology, premises and findings of law-and-economics were constantly being challenged and revised by other law-and- perspectives. The fact that law schools with prominent law-and-economics faculty continued to have unified faculty workshops, among other events, ensured that the law-and-economists not only needed to justify the value of their perspective but also were motivated to incorporate the insights of other disciplines into their work. Rational choice assumptions of neo-classical economics, for example, came under attack in law schools earlier and more vociferously than in economics departments. As Kathleen Sullivan observed about law in a different context, “the regulation of social order through a variety of authoritative texts necessarily interacts in a complex and dialectical fashion with the content and techniques of the social sciences and humanities.” (emphasis added)39

The dialectical process that Professor Sullivan envisaged is evident in some of the leading collaborations between legal academics and economists. In Part IV.B below, we discuss the multidisciplinary study of sovereign debt contracts where the pure application of economic theory would have missed explanations for some of the boilerplate contract provisions that exist. The legal academic contribution to that work was to bridge the predictions of economic theory with the practice, by drawing on methods from other social sciences, particularly from both sociology and linguistic theory.

39 Sullivan, note 31, supra.
C. The Common-law Method in Legal Argument

The common law is a dynamic system that classifies behavior and associates it with legal consequences: actions, for example, that either do or do not constitute breach, trespass and negligence. Although the development of classifications comes from adjudications in specific cases, the courts are influenced by insights from other disciplines. The value of learning from other disciplines depends on the lawyer's ability to then use analogical reasoning to discover relevant connections between the problem under study and seemingly disparate excursions into sociology and political theory. Often captured in the phrase "thinking like a lawyer," this skill embodies the essence of the common law method: it is the ability to extract from particular facts the necessary and sufficient general elements and apply those generalities to other particular facts and declare a correspondence. The key is reasoning by example using the opposing pairs of similarity and difference. But since any two discrete events, A and B, are both similar to and different from each other, a successful analogy requires a finding of relevance. The lawyer needs to show that A and B are relevantly similar and not relevantly different. The relevance of any similarity turns on its generality; the claim that it applies to this case and to others as well. Relevance thus requires access to a governing principle.

40 See, e.g., Gillian K. Hadfield & Barry R. Weingast, What is Law? A Coordination Model of the Characteristics of Legal Order, 4 J. Legal Analysis 471, 472-74 (2012) (the common law provides a normative classification scheme that acts as "common logic" under which contracting parties can coordinate their expectations).

41 To be sure, there are many aspects to what is generally labeled as "legal reasoning." They include making decisions according to rules, treating certain sources as authoritative, respecting precedent, etc. But our focus here is on the analogical reasoning that is characteristic of the common law method. For a scientific treatment of analogical thinking see, THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE (Dedre Gentner, Keith J. Holyoak & Boris Kokinov eds. 2001); Keith J. Holyoak & Paul Thagard, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT (1995); SIMILARITY AND ANALOGICAL REASONING (Stella Vosniadou & Andrew Ortony eds. 1989).

42 For discussion see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 5.2 (2009).

Here is where the lawyer's learned skill in normative argument is useful in law-and-economic scholarship. The key to what makes this skill distinctive is that legal argument by its nature is adversarial: one analogy is in contest with another (or many others). Thus, the academic lawyer borrows the perspectives of other disciplines and deploys them as principles of relevance in drawing analogies between the source theories and the problem being studied.\textsuperscript{44} In this way, the lawyer uses both the experience gained from institutional knowledge and the access to other theories of explanation to broaden the scope of an hypothesis beyond what the formal tools of the economist might develop independently. This, we suggest, is what sympathetic observers mean when they say that the lawyer "asks better questions" or "more readily solves complex problems" or "better describes policy goals."\textsuperscript{45}

Undergirding these statements that seek to describe the lawyers' toolkit is the fact that lawyers in the Anglo-American system are trained to be advocates and adversaries. The analogical reasoning of the common law is a tool of advocacy with which lawyers are intimately familiar. To lawyers, there are competing principles mandating either that A and B are relevantly similar or that they are relevantly different. While the economist thinks in strictly predictive terms that fits the available data best, the lawyer – by professional instinct – carries the illusion of control. The data omits an important variable: her advocacy in convincing the court of the primacy of one guiding principle over another. There is what we are calling (non-pejoratively) a looseness in the lawyers’ perspective compared to the confining rigor of the economist. Moreover, while the lawyer also works with the data of the common law, she frames it within much larger questions of normative principle. As James Boyd White put it, “The lawyer knows that her categories are those of argument and judgment, not simple factual descriptions.”\textsuperscript{46}

\textsuperscript{44} In contrast with the economist, the relevant economic principles are developed from the particular details rather than imposed from above by axioms derived from a general theory.

\textsuperscript{45} See text accompanying note 5, supra.

This observation that the most careful economic analysis may miss larger and more significant issues has been made before in other contexts. While empiricists have challenged work published in law reviews as violating basic rules of inference, lawyer-economists have criticized empirical studies for having missed the forest for the trees. As a result, much empirical results do not generate useful descriptive or prescriptive lessons. A similar point may be made with respect to theoretical economic analysis of law, producing a distinct dialectic between economist and lawyer academics in which economists focus on what can be modeled and/or measured with available data (the “trees”), while the lawyer seeks to yield more valuable positive or normative insights. Collaboration between the two professionals can enhance the impact of the research enterprise.

In sum, lawyers contribute to law-and-economics more than their knowledge of law and its institutional context. The differences in methodology between the two disciplines has been the basis for substantial criticism of law and economics over the years. At the same time, they have yielded synergies when the contrasting methodologies are brought together in interdisciplinary work. Lawyers bring a deep-rooted experience in the legal academy with multidisciplinary inquiry that improves the accuracy of descriptive research and normative

47 Pam Karlan wrote “It would be a pity if legal scholarship, like much of contemporary political science, were to adopt the view that the only questions worth asking, and the only answers worth giving, are quantitative or based on models so highly stylized that they omit the messy but important lessons of experience”. Karlan, supra note 1, at 1271.


49 E.g., David Freeman Engstrom, The Twiqbal Puzzle and Empirical Study of Civil Procedure, 65 Stan. L. Rev. 1203, 1220 (2013)(“virtually the entire body of Twiqbal empiricism misses the forest (e.g., a bottom-line judgment about Twiqbal’s effect on plaintiff access to the legal system) for various trees (e.g., isolating and measuring a ‘judicial behavior’ response to the decisions.”)

50 David Engstrom describes another important concern: “a move toward use of computer-automated systems to create ever-larger datasets will crowd out qualitative institutional insight – and, more specifically, lawyerly understanding and judgment – in the formation of hypotheses, the construction of data samples, and the coding of variables.” Id., at 1238. Engstrom cites, as an “early statement of the perils of ‘naïve empiricism’, Willard Hurst, Perspectives upon Research into Legal Order, 1961 Wis. L. Rev. 356, 365. Id., at 1238 n.108.

51 Lawyers in the law-and-economic school are also aware of related objections from critical legal scholars. “The crits have seen hard methods, in technical legal analysis as well as in economic analysis of law, not as bad in themselves, but as a vehicle for technocratic imperialism, at the expense of participatory modes of decision making.” Duncan Kennedy, law-and-economics from the perspective of critical legal studies, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 473 (Peter Newman, ed., 1998).
recommendations. In collaborations with economists, they also have the instinct to keep the analytical focus trained on questions of larger impact, which we argue here is related to the common law method: the analogies that matter derive from normative principles that serve one’s goals, whether those of one’s clients or the public interest. We draw on this use of analogy as argument in Part IV to explicate differences in the ways that economists and lawyers analyze some of the building blocks of our economy, including the relationship between formal or legal modes of enforcement and informal or social sanctions and the evidence that obsolete and inefficient terms persist in certain standardized contracts.

IV. TWO EXAMPLES OF THE LEGAL METHOD IN LAW-AND-ECONOMICS SCHOLARSHIP

The following examples are presented as exemplars of the contributions by lawyers to law-and-economics scholarship. By using these examples we do not mean to suggest that they are representative in any systematic way of the range of contributions that academic lawyers have made to the field. But the examples do illustrate what we believe to be essential features of the academic lawyer’s method that creates complementarities with the work of economists. The first example focuses on how the differences in lawyers’ methodology yield insights that economic methods alone are likely to miss. The second example illustrates the synergies that can result from a collaboration that joins the two methodologies in a single research project.

A. Social Norms and Legal Enforcement

It is now well appreciated that the legal system co-exists and interacts with social norms and associated mechanisms for extralegal enforcement, such as the termination of repeat transactions and reputational costs. The contrasting analysis of social norms and extralegal enforcement by lawyers and by economists reveals the difference in their respective methodological approaches. Economists stylize these phenomena and identify measurable variables. Unencumbered by the logic of economic models or statistical regressions, lawyers apply looser analogical reasoning, drawing on legal classifications, to advance the understanding of the relevant extralegal mechanisms. Economists may deprecate the lack of rigor of the latter
approach, but we argue that it has yielded important insights that economists would miss in studying the law.

Robert Ellickson’s pathbreaking work, *Order without Law*, observed that ranchers in Shasta Country, California, largely disregarded the legal rules of trespass and nuisance in assessing responsibility for property harm caused by their respective cattle. This closely-knit community governed itself by means of informal rules – social norms – that it developed without the aid of legal institutions. In other words, the community disregarded the classifications of the common law in favor of those produced by their social conventions. Ellickson combined the analysis from game theory with the methods of sociology and anthropology, together with the classifications familiar to the common law, to describe a taxonomy of extralegal mechanisms of social control over human behavior.

In his review of Ellickson’s book, economist William Fischel wrote that “it presents a case against the current methodology of law-and-economics scholarship and advances by example a different paradigm.” In his opinion, Ellickson’s “eclectic” approach blended economic tools with the analysis of the law-and-society school, yielding insights that would be missed by someone trained in the conventional and predominantly quantitative methods of graduate school economics. We would add that there is another element informing Ellickson’s contribution: the taxonomy he offered is structured analogically to the common law. Later law-and-economics scholarship builds on Ellickson’s work to examine the interaction between the extralegal and legal enforcement and exhibits similar evidence of distinctive lawyerly contribution.


Lisa Bernstein’s study of how commercial relations – in the diamond and cotton trade – are regulated by informal and formal enforcement adopted a similar approach, again distinct from the economist’s approach. In her article on cotton trade, for instance, she emphasized the significant impact on behavioral incentives of non-legal sanctions such as that resulting from a seller’s reputation for not performing up to the expectation of its buyer. She found evidence of such reputational discipline in the qualitative responses to her survey from participants in the trade. While her article has been influential in law-and-economics, it does not specify how the reputational mechanism works (how information is transmitted and sanctions meted out). Questions remain: how much of a deviation from expected quality, for example, would trigger how much of a failure to deal? An economist studying the impact of reputational deterrence would be compelled to specify it as a quantitative variable. Yet, the lack of specificity allowed Bernstein to contribute important insights: notably, a plausible hypothesis of the relationship between the non-legal sanctions and the industry’s formal legal system. Like Ellickson, Bernstein combined the economic game theory analysis with the techniques of sociological inquiry. But, we argue, the combination was enhanced by the perspective of legal training. The way that both Ellickson and Bernstein describe the operation of non-legal sanctions bears close analogy to the operation of a formal legal system, with similar systems of classification, fact-finding and sanctions.

A similar observation may be made in contrasting the economist’s and lawyer’s approach to relational contracting. The economic literature on incomplete contracting regards formal and informal contracting as separate phenomena. Its usual focus is either on how parties with incomplete information can write formal contracts so that powerful courts can compel efficient trade or, in the alternative, on how parties can harness reputational constraints and the


discipline of repeated dealings to secure voluntary enforcement when formal enforcement is ineffective. 57 This line of analysis, however, pays scant attention to the relationship between the two types of enforcement, and particularly how reliance on one type interacts with reliance on the other. The technical load may simply be too much for the economic models.

In contrast, legal scholars working in the law-and-economics tradition have analyzed the common practice of commercial parties writing contracts that combine both explicit and implicit contract terms and modes of enforcement. 58 Conceiving of relational contract in this way reveals how norms of trust and reciprocity develop as parties who are granted discretion by the broad standards of obligation imposed on them by the formal contract mutually adjust to an uncertain future. This richer (and looser) conception of relational contracting is not premised on formal contracting giving way to spontaneous self-regulation. Rather, it points to formal contractual requirements establishing an information exchange regime that allows each party to judge reliably the capacities and intentions of the other. 59 Unencumbered by the formal modeling imperative of quantitative variables, the lawyer-led qualitative examination has advanced the understanding of relational contracting. More to our point, there has been a productive synergy between the alternating tighter and looser modes of analysis.

Our argument here is neither that the lawyer’s methods in law-and-economics are superior to those of the economists nor even simply that they yield valuable insights that might be missed by economists. Other lawyers have contributed to the understanding of the interaction between informal and formal norms and enforcement and, more to the point, economists have


made significant contributions by building on them. We suggest that there is a dynamic between the looser qualitative classifications advanced by legal scholars and the quantitative modeling and empirical study of economists, either in sequential publications or in collaborations in coauthored works. There is a healthy synergy between the qualitative expansion led by the lawyers into new domains of interest or relationships, followed by a tightening of analysis by rigorous application of economic methods.

B. Obsolete and Sticky Boilerplate in Large Market Contracting

This example is taken from a decades-long research project to which one of us has contributed together with two lawyer/economists. Obviously, separating the different skills of the academic lawyer and the economist in such a collaboration requires an exercise in imagination. To make the illustration sharper, we have distilled the respective contributions of each party into a single lawyer and a single economist. Assume, therefore, that a lawyer and an economist agreed to collaborate. After 10 years their research has produced results that have undermined the standard economic assumption that sophisticated commercial parties are motivated to correct a court’s interpretive mistakes. The research developed empirical evidence that parties in some large multilateral markets fail to react to judicial errors in interpreting boilerplate terms and are unable readily to convert boilerplate into new and intelligible formulations. The most salient example of this market failure occurred when Argentina settled with activist creditors who successfully held out from a restructuring offer after asserting a novel interpretation of the ubiquitous \textit{pari passu} clause found in almost all sovereign debt contracts.\footnote{Stephen J. Choi, Mitu Gulati & Robert E. Scott, \textit{The Black Hole Problem in Commercial Boilerplate}, 67 DUKE L.J. 1 (2017); Stephen J. Choi, Mitu Gulati & Robert E. Scott, \textit{Variation in Boilerplate: Rational Design or Random Mutation?}, 20 AM. L & ECON. REV. 1 (2017).} The research showed that collective action problems, exacerbated by agency costs on both sides of the transaction, impaired the efforts of parties in these and other large markets to clarify the meaning of boilerplate terms that are overlaid with legal jargon.\footnote{Another example was the standard No Recourse clause that had become obsolete over time with the introduction of limited liability under state corporate law. Stephen J. Choi, Robert E. Scott & Mitu Gulati, \textit{Revising Boilerplate:} Electronic copy available at: https://ssrn.com/abstract=3707783} The inefficiencies caused by
linguistically uncertain boilerplate offered arbitrage opportunities for activist traders who exploited those uncertainties. The empirical data showed that the process of modifying obsolete boilerplate terms to correct for these ambiguities or uncertainties can take years.

In time, the research developed additional evidence that the repetition of standardized terms in boilerplate contracts produces a form of obsolescence that presents a particular concern in large markets with network effects. Once a term in a network contract becomes obsolete the cost of switching to an optimal term now includes both the cost of creating the new solution and the cost of persuading enough other industry participants to use the term so as to realize the network efficiencies. Efforts to coordinate industry participants are a public good, however, and thus are under-produced particularly in markets characterized by large agency costs. Consequently, these standardized contracts will provide efficiencies at the outset but freeze inefficiencies as the world changes. Yet, the empirical results also showed that coordination in these markets can often be stimulated by the intervention of a coordinating entity --a "spider in the web." One normative implication, therefore, is for the state to facilitate the coordination necessary to provide a network-wide solution to the obsolete terms(s), a response that also anticipates obsolete terms recurring as the future unfolds and thus argues for a mechanism for updating the stock of standard terms.

This example illustrates the ways that the collaboration’s success required the methodological skills of both disciplines. As a baseline, the economist contributed his skill and knowledge of economic theory in formulating testable hypotheses. Most importantly, he then deployed rigorous methods of data collection and statistical analysis to support tentative conclusions. This contribution by the economist is the independent variable in this example: a basic assumption of our inquiry is that skills in economics are important and essential to the project. The dependent variable is the nature of the lawyer's contribution. To clarify the distinction we seek to illustrate, we define the lawyer's contribution as potentially consisting of two separate elements: "institutional" skills and "applied analytical" skills. Institutional skills include knowledge of the relevant legal doctrines, including the ability to read and understand

the legal implications of key provisions in sovereign bond contracts. Other institutional skills include intimate familiarity with the sovereign bond market and deep understanding of the roles of the activist investors, the New York bond lawyers, the sovereigns' debt managers and the investment bankers. Applied analytical skills comprise two interrelated components. The first is familiarity with the tools of multiple disciplines that inform the study of institutions. The additional analytic component is the developed skill of analogical argument that allows a lawyer to draw relevant linkages between propositions in other disciplines and the particular case under study.

The results from this research project illustrate the value of the lawyer's knowledge of other disciplines: the capacity to understand and deploy theories of explanation other than economics to the problem under investigation. A number of allied disciplines helped to broaden the frame of the investigation. First, the lawyer interviewed a random sample of practicing lawyers and other market players to determine what the market believed the *pari passu* clause actually meant, and why, given the outcry, the clause had not been deleted or changed. Over 100 individuals were interviewed by using the "snowball" technique derived from sociology, and the consensus view of the sample was that no one had any idea where the clause came from or what it meant.63 Second, the lawyer's familiarity with techniques of archival research led to the discovery of the origin and function of *pari passu* when the clause was introduced in the 19th century. This historical search suggested that during that period a *pari passu* clause ensured that the bondholder was not subordinated to creditors who could use military force to enforce their bonds, an option no longer available today.64 Finally, the lawyer's access to linguistic theory led to the recognition that repetition of standard language tends over time to degrade the meaning of that language through either rote usage or the overlay of additional words that reduce intelligibility.65 The evidence that law firms generate


64 Id. at 134-38; Mark Weidemaier, Robert Scott & Mitu Gulati, Origin Myths, Contracts, and the Hunt for Pari Passu, 328 Law & Soc. Inquiry 72 (2013).

new contracts by asking inexperienced lawyers to make necessary changes to templates drawn from older deals, suggested that these random encrustations were made by lawyers during the process of producing contracts.66

The techniques imported from these other disciplines were harnessed to discover relevant connections between these seemingly disparate excursions into sociology, linguistics and history and the problem under study. As noted in Part III, a successful analogy requires a finding of relevance and relevance requires access to the best governing principle.67 Here is where applied analytical skills were important to the research project. The lawyer's command of the basic principles of economic theory could be deployed as principles of relevance in drawing analogies between the source theories and the problem being studied.68 In this way, the lawyer used experience gained from institutional knowledge and the access to other theories of explanation to broaden the scope of the hypothesis beyond what the formal tools of the economist might develop independently.

The conclusions that follow from this collaboration were hidden from view at the outset even though, once reached, they were fully explicable in economic terms. By enriching the standard economic model with insights from other disciplines, and visualizing the connections among those disciplines, the lawyer provided skills that were necessary inputs to reaching those conclusions and then advancing normative claims.

V. CONCLUSION

Our objective in this Essay is not to retrospectively claim that legal academics were indispensable or even principally responsible for the success of the interdisciplinary study of law-and-economics. The perspective of this Symposium is forward looking and so we should

66 Choi et al, Variation in Boilerplate, supra note 61.
67 See authorities cited in note 43 supra.
68 In contrast with the economist, the relevant economic principles are developed from the particular details rather than imposed from above by axioms derived from a general theory.
specifically address the role of lawyers in the future of law-and-economics. Here we admit to some pessimism. Much has changed in the structure and priorities of universities in the past few decades: in particular, law schools are no longer the predominant hub for multidisciplinary and applied or translational research. Both aspects have been embraced broadly by university leadership. This development might be attributed to the greater apparent urgency of social problems, universities’ growing financial reliance on philanthropy and sponsored research, and a bias in favor of the short-term returns from applied research. Whatever the reason, research economists (especially those in business schools) are engaging in more applied work and collaborating increasingly with scholars in other schools and disciplines. Lawyers have become less special as interdisciplinary brokers with “soft” skills. They will continue to be important nevertheless because of their subject-matter domain expertise and their contextual knowledge of law and legal institutions. With respect to what we have been referring to as their methodological contributions, we believe that, notwithstanding changes in academic fashion or disciplines, value will remain in the expansive perspective of lawyers, rooted in the common law method. Should that value be recognized in the academy, it will continue to serve as an important complement to scientific economic analysis.

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