

# What Do Lawyers Contribute to Law and Economics?

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*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 recognizes the distinct methodological tools 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 through their involvement in law as an applied discipline and their mastery of the common law's analogical method of argument. We draw on the idea of analogical argument to explain some of the 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 inefficient boilerplate terms persist in certain standardized contracts. By enriching the standard economic model with insights from other disciplines and clarifying the connections among these disciplines, the lawyer provides skills that are critically important for advancing normative claims.*

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## Introduction

The law-and-economics movement has 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 now a fixture in fields of scholarship such as business law, contracts, torts, and property. Scholars in these and other fields of law are, without exception, familiar 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 legal and social order. Within the past 20 years, a new generation of lawyer-economists have applied economic methods to derive testable hypotheses subject to increasingly rigorous empirical analysis. Throughout this period, the discipline of law-and-economics has benefited from a partnership among trained economists and academic lawyers. Yet one cannot help noticing that 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 presented by this Symposium on future challenges to law-and-economics to address that question.<sup>1</sup>

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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 that he could buy 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

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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.<sup>2</sup> The more challenging question is whether lawyers have methodological skills beyond their knowledge of the law that add value to the scholarly project. Second, law is not an autonomous academic discipline.<sup>3</sup> 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, philosophy, and economics.

While several leading law-and-economics scholars have written that the field is simply the trade of applying economic methods to legal knowledge,<sup>4</sup> we offer an alternative claim that legal academics make significant methodological contributions to law and economics scholarship. On its face, that may not seem like a very controversial claim. Many would agree 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.”<sup>5</sup> But the conclusory nature of these observations suggests that identifying the distinctive skills of the academic lawyer is a difficult task, in large part because legal skills have so much of the character of tacit knowledge.

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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.’” (citation omitted)).

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. See GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* (2016). See *infra* text accompanying notes 27-29.

3. See, e.g., Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

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. LEGAL EDUC. 437, 439 (1983). Priest argued that “[t]he lawyer-economist[s] . . . education teaches him that his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training—legal training—will become.” 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 substance or methodology, only in audience and impact. Henry Hansmann, *The Current State of Law-and-Economics Scholarship*, 33 J. LEGAL EDUC. 217, 218 (1983) (“[L]aw-and-economics . . . does not stand out from the rest of economics scholarship in terms of either methodology or subject matter.”). 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 for Law and Economics on September 11-12, 2020.

We set out in this Essay to unpack this tacit knowledge. We offer an interpretive theory of law and economics scholarship over the past 50 years that incorporates the specific methodological skills of the academic lawyer.<sup>6</sup> 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 argument used in common-law analysis.<sup>7</sup> Whether used in isolation or combined 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 to analyze legal issues from a number of social sciences—economics, political science, psychology, and sociology, to name four—and the humanities—history, philosophy, and literary analysis. 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, 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 which similarities are relevant and which are not. As generations of legal realists have noted, however, there is a looseness to 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 type of analogical reasoning works synergistically with the 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. These tools are used to enrich the explanatory and normative theories of observed legal phenomena provided by economists. We begin in Part I of the

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6. Other essays in this Issue 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 in CALABRESI, *supra* note 2.

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Essay with 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 II 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 III sets out several examples of past law-and-economics scholarship that support our claim. We speculate in the Conclusion 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 cannot 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.

### I. 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 reflect an efficient organization of the research enterprise.

Fundamentally, disciplines consist in 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.<sup>8</sup> For these reasons, it has been difficult for universities to develop, and even more difficult to maintain, a true interdisciplinary scholarly tradition. Moreover, a melded discipline like law-and-economics is seen quite differently by adherents of the respective parent disciplines. In light of these challenges, the law-and-economics movement has been a great success.

Scholars have created various taxonomies of academic disciplines. Anthony Biglan's framework divides academic disciplines along two dimensions: (1) 'hard' or 'paradigmatic' disciplines that specify problems for

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8. See generally Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CALIF. L. REV. 815 (1990); Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229 (1996).

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., mathematics and philosophy) versus ‘applied’ disciplines (e.g., engineering and finance).<sup>9</sup> Using these criteria with respect to interdisciplinary studies in law and economics, law appears to be the softer and more applied discipline, at least in the academy.<sup>10</sup> Some scholars view economics as defined by a unique approach or set of tools,<sup>11</sup> as opposed to law, which 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 nuanced analysis results, however, from a brief review of the intellectual histories of both economics and law over the past one hundred years, which we provide in the next two Sections.

#### A. *What Is Economics?*

An adequate description of the progression of economic thought would fill 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. Over the next century, however, “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. Economics was often

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9. Anthony Biglan, *The Characteristics of Subject Matter in Different Academic Areas*, 57 J. APPLIED PSYCHOL. 195 (1973); Anthony Biglan, *Relationships Between Subject Matter Characteristics and the Structure and Output of University Departments*, 57 J. APPLIED PSYCHOL. 204 (1973). Biglan places economics near the middle of the spectrum, but closer towards the pure or theoretical disciplines—engaging with “living systems” (e.g., biology) versus “non-living systems” (e.g., history). Law is not discussed in his article, but presumably it falls toward the soft and pre-paradigmatic and leans towards applied on the theoretical-applied dimension. Another framework is proposed by David Kolb, who categorizes disciplines as abstract or concrete on the one hand and active or reflective on the other hand. On the one hand, abstract disciplines emphasize concepts and theories; concrete disciplines focus on “experiences.” On the other hand, active disciplines revolve around experimentation; reflective disciplines make general observations about the world. David A. Kolb, *Learning Styles and Disciplinary Differences*, in *THE MODERN AMERICAN COLLEGE: RESPONDING TO THE NEW REALITIES OF DIVERSE STUDENTS AND A CHANGING SOCIETY* 232 (1981).

10. Of course, there are branches of scholarship in law schools that are theoretical. Indeed, they have come under public criticism from jurists and lawyers for being too abstract to be useful to them. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 37 (1992) (criticizing the predominance of “impractical scholars” at elite law schools).

11. Nobel Laureate in Economics 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).

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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 its own right 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 social 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.

After World War I, "institutional" economics flourished as an alternative to the neoclassical model. It rejected the prevailing abstract theories 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. Institutional economics seemed, however, to fall short of developing a systematic theoretical core or generalized insights, and its expansion was limited by a lack of technical rigor.

Mathematical economics developed in the 1930s, largely due to the work of influential American economists such as Irving Fisher, Milton Friedman, and Paul Samuelson, and a similar group at the London School of Economics. Their research was revolutionary in two ways. First, it transformed Marshall's insights into a mathematical model that utilized basic maximization and minimization under constraints. And second, it developed a powerful general equilibrium theory (previously, each market had been studied separately). When the mathematical school allied themselves with scholars in econometrics, economics adopted the character of a "hard" discipline.<sup>12</sup>

Next, Keynes's 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 observed reality of the Depression-era economy was incompatible with orthodox thinking and called for new theories. Keynes opposed mathematical economics and econometrics, but later 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

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12. See *supra* text accompanying note 7.

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 fully separated from the practicing bar only in the past 50 years.<sup>13</sup> 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.<sup>14</sup> Once established within the university, academic law began to assert itself as a respected discipline. To do so, law framed 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.<sup>15</sup> 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 to the status of a fully autonomous discipline with distinctive methods that generated predictable outcomes.<sup>16</sup>

The distance between law as conceived by the formalists, on the one hand, and the observed effects of law on society on the other, generated a revolution in legal thought in the 1930s, culminating in the Legal Realist movement. The Legal Realists advanced a radical theory in opposition to

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13. 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. See John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in 2 *PRESSING PROBLEMS IN THE LAW: WHAT ARE LAW SCHOOLS FOR?* 1, 2-5 (Peter Birks ed., 1996). 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.

14. Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 *J.L. & SOC'Y* 163, 174-77 (2004). 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.

15. 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 their 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 *WM. & MARY L. REV.* 329, 337 (1993).

16. The prevailing philosophy of the formalist movement was positivism. The law was conceived as a deductive system with fundamental premises leading to inevitable conclusions. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *VA. L. REV.* 451, 453 (1974).



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the formalist understanding: law is an instrument of social policy and its content cannot be found through the relatively sterile analysis of legal texts alone. Courts, they asserted, do not reason from categories, they reason from principles grounded in social policy to reach an outcome in a particular case. The resulting legal doctrine was the rationale offered by courts once governing policy principles had directed the outcome of the dispute. Legal Realism directed attention away from close analysis of cases and doctrine to empirical investigations of how the law worked in action, thus setting the stage for the subsequent turn to the social sciences.<sup>17</sup>

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 other law-making institutions such as legislatures, process scholars developed a set of “neutral principles” designed to direct lawmaking to the body best able to resolve a particular issue.<sup>18</sup> 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 with the landmark work of Calabresi at Yale and Ronald Coase at Chicago, followed quickly by the magisterial efforts of Richard Posner.<sup>19</sup> But law-and-economics was only one perspective imported from the university during this period. Interdisciplinary studies transformed legal studies into a truly 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.<sup>20</sup> 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 perspectives that have shaped legal thinking in the new century.

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17. See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1241-43 (1985).

18. See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18, 24-25 (David Kairys ed., 1982).

19. Many other scholars made seminal contributions to law and economics during this period. See generally GEORGE L. PRIEST, *THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY* (2020).

20. Particularly trenchant critiques were offered by the Critical Legal Studies movement, which 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 the 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, 1526 (1991). But the half-life of critical theory was short, and after less than 15 years it receded due to its inability to offer a positive program for the society that would replace the current one.

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—such as economics, philosophy, or psychology—to build theories that inform and interpret those doctrines. As such, academic law is more than just a “soft-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 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, rigid 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 (J.D. or Ph.D.), 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 a quantitative or qualitative emphasis)? We have chosen to focus on demonstrated skills, while appreciating that this may lead us perilously close to tautologies. 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.<sup>21</sup> 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.<sup>22</sup>

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 its focus on the internal

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21. Two other notable examples of economists who developed into first-rate lawyers are Charles Goetz (Virginia) and William Landes (Chicago).

22. Because the newer generation of J.D./Ph.D. researchers 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 *infra* notes 27-29 and accompanying text.

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structure and operations of institutions such as courts, administrative agencies, and so on.<sup>23</sup> In Part II of this Essay, we further develop two types of skills that we suggest distinguish legal academics from the old institutional economists: multidisciplinary analysis and the common-law method of normative argument. We suggest that the two are interrelated, perhaps explaining why legal realism and law-and-economics in particular flourished in the U.S. earlier than in civil law jurisdictions. We also elaborate on the significance of multidisciplinary in law school culture and what we mean by the common law method as an analytical tool. Then, in Part III, we explore several examples where law-and-economics analysis has been informed by these two uniquely legal skills, as well as by economic theory or econometrics.

### II. 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.<sup>24</sup> 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 rigorously test those hypotheses with econometric techniques. Unsurprisingly, advocates of this view have often been skeptical about the 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.”<sup>25</sup> 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.<sup>26</sup>

George Priest similarly observed that “[t]he lawyer-economist[’s] . . . education teaches him that his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training—legal training—will become.”<sup>27</sup> 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,” and thus “proceed at a much faster pace and

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23. See Geoffrey P. Miller, *Law and Economics Versus Economic Analysis of Law*, 19 AM. BANKR. INST. L. REV. 459, 460 (2011) (“Economics adds the insights of economic science; law adds the understanding of complex institutions, politics, and social policies.”).

24. Henry G. Manne & Joshua D. Wright, *The Future of Law & Economics: A Discussion* (George Mason Law & Econ. Research Paper No. 08-35, 2008), <https://ssrn.com/abstract=1145421> [<https://perma.cc/7RAE-3GH4>].

25. *Id.* at 25.

26. *Id.*

27. Priest, *supra* note 4, at 439.

with a much greater range than lawyers.”<sup>28</sup> Richard Posner and Henry Hansmann have articulated a substantially similar view of law-and-economics as applying economic tools to legal knowledge.<sup>29</sup> The lawyer’s role under this view is limited to providing (and correcting) the economists’ understanding of the relevant institutional facts.<sup>30</sup>

In a recent book, Guido Calabresi provides an alternative framework.<sup>31</sup> He begins by drawing a distinction between what he labels as the “economic analysis of law” and “law-and-economics.”<sup>32</sup> Calabresi observes that, of the two approaches, the former has been central, even dominant. Practitioners of the former use economic tools to model the legal world, and then if their models cast doubt on that world, they seek to reform that legal reality.<sup>33</sup> In contrast, Calabresi identifies law-and-economics as a bilateral relationship between the two disciplines, in 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 understands 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 subtler and more nuanced in order to accommodate the world as it is.<sup>34</sup>

Calabresi cites the work of Ronald Coase<sup>35</sup> 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. Elsewhere, Calabresi adduces examples of law-and-economics scholars 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, observing such inconsistencies, can turn to other disciplines for

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28. George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681, 682 (1988).

29. Posner, *supra* note 3; Hansmann, *supra* note 4.

30. See Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1370 (2013) (noting “the failure of both [economic] theorists and empiricists to pay sufficient attention to institutional facts,” and particularly the incorporation of inaccurate factual assumptions such that “the results of the models cannot be trusted”); see also John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271 (2000) (showing how flawed design impaired economic research on the poison pill and other takeover defenses).

31. CALABRESI, *supra* note 2.

32. See Miller, *supra* note 23, at 459-60 (contrasting economic analysis of law and law-and-economics).

33. CALABRESI, *supra* note 2, at 2-7. 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.’” *Id.* at 2.

34. *Id.* at 3-4; see Miller, *supra* note 23, at 470.

35. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

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explanation or normative evaluation.<sup>36</sup> He adds that the lawyer's understanding of legal structures—akin to institutional economics—is essential in shaping the best explanation or the 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.<sup>37</sup> Here, the lawyer serves primarily as a resource for the economic models and the empirical tests that they generate.

To be sure, the lawyers' contribution of factual knowledge should not be undervalued. In many instances, legal scholars have significantly advanced the economic analysis of law by correcting and refining the economists' understanding of the law. In their models, economists assume or invoke highly stylized characterizations of concepts such as property, corporation, or adjudication. For example, some economists define a property right as the residual right of control over the subject asset.<sup>38</sup> But 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 important fact 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).<sup>39</sup> In another vein of scholarship, some economists see a corporation (or "the 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.<sup>40</sup> 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

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36. Calabresi refers, as an example, to the occasional use of anthropology in a book written with Philip Bobbitt. See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978). 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, 1219 (2002).

37. Many of the new generation of J.D./Ph.D. researchers fall into this category.

38. See, e.g., OLIVER HART, FIRMS, CONTRACTS AND FINANCIAL STRUCTURE 5-6 (1995); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 692 (1986).

39. See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357-59 (2001) (examining the deficiency of conceptions of property in law and economics).

40. ADOLPH A. BERLE & GARDNER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); Coase, *supra* note 35.

by a parent holding company, giving rise to the theories of each firm as distinct legal entities.<sup>41</sup> 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, accounting for the allocation of burdens of proof and opportunities for summary judgments.<sup>42</sup>

While lawyers have made significant contributions through their specialized knowledge of the law, the more interesting phenomenon is what Calabresi describes as “law-and-economics,” where lawyers also contribute distinct 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 we further claim that the lawyer’s contribution to law-and-economics is even broader and more lasting than in Calabresi’s description.<sup>43</sup> Our challenge is to show that the analytic and methodological skills of lawyers work symbiotically with the techniques of economic theory to both explain and rationalize the law. It is that challenge that we take up next.

### *B. Multidisciplinarity in the Legal Academy*

The emergence in the 1970s of the “law-and” movements from legal realism made law schools hubs 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 symposia. 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-economics scholars

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41. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102 (2004); George Triantis, *The Personification and Property of Legal Entities*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 190 (Kenneth Ayotte & Henry E. Smith eds., 2011).

42. See, e.g., Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

43. 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.

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not only needed to justify the value of their perspective, but also were motivated to incorporate the insights of other disciplines into their work. The rational-choice assumptions of neoclassical economics, for example, came under attack in law schools earlier and more vociferously than in economics departments. As Kathleen Sullivan observed in a different context, “[T]he 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.”<sup>44</sup>

The dialectical process that Professor Sullivan envisaged is evident in some of the leading collaborations between legal academics and economists. In Section III.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 academics’ contribution to that work was to bridge the predictions of economic theory with legal reality by drawing on methods from other social sciences, particularly from both sociology and linguistic theory.

### *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.<sup>45</sup> Although the classifications come 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 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, apply those generalities to other particular facts and show a correspondence.<sup>46</sup>

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.

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44. Sullivan, *supra* note 36, at 1219 (emphasis added).

45. 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) (arguing the common law provides a normative classification scheme that acts as “common logic” under which contracting parties can coordinate their expectations).

46. 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 et al. eds., 2001); KEITH J. HOLYOAK & PAUL THAGARD, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT (1995); and SIMILARITY AND ANALOGICAL REASONING (Stella Vosniadou & Andrew Ortony eds., 1989).

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.<sup>47</sup> Relevance thus requires access to a governing principle.<sup>48</sup>

Here is where the lawyer's learned skill in normative argument is useful in law-and-economics scholarship. What makes this skill distinctive is that legal argument is necessarily adversarial: one analogy is opposed by 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.<sup>49</sup> In this way, the lawyer uses both institutional knowledge and theories of explanation from diverse disciplines to broaden the scope of a 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."<sup>50</sup>

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 justifying 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 ability to convince the court of the primacy of one guiding principle over another. There is what we call (non-pejoratively) a looseness in the lawyers' perspective as 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.<sup>51</sup> As James Boyd White put it, "The lawyer knows that her categories are those of argument and judgment, not simple factual descriptions."<sup>52</sup>

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47. For discussion, see, for example, FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 52 (2009).

48. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (referring to principles that operate at a low or mid-level of abstraction.); see also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996).

49. In contrast with the economist's methodology, the relevant economic principles are developed from the particular details rather than imposed from above by axioms derived from a general theory.

50. See *supra* text accompanying note 5.

51. See Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2297 (2017) ("Through legal tools of contract, tort, property, constitutions, administrative regulation, and policy analysis, as well as adversarial and collaborative procedures, lawyers use analytic arguments to connect moral and institutional concerns and to translate interests into deals and decisions.").

52. James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 202 (1987). As Henry Hansmann wrote to us in his comment on an earlier draft: "American law is not . . . a system of rules, but rather a grab-bag of arguments, and their [law students'] skill



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This observation—that the most careful economic analysis may miss larger and more significant issues—has been made before in other contexts.<sup>53</sup> While empiricists have challenged work published in law reviews as violating basic rules of inference,<sup>54</sup> lawyer-economists have criticized empirical studies for having missed the forest for the trees.<sup>55</sup> As a result, much empirical research does not generate useful descriptive or prescriptive lessons.<sup>56</sup> A similar point may be made with respect to theoretical efforts in the economic analysis of law, producing a distinct dialectic between economists and lawyer academics in which economists focus on what can be modeled and measured with available data (the “trees”), while the lawyer seeks to yield more valuable positive or normative insights (the “forest”).<sup>57</sup> Collaboration between the two professionals, with their distinct perspectives, can enhance the impact of the research enterprise.

In sum, lawyers contribute more to law-and-economics than their knowledge of law and its institutional context. The differences in methodology between the two disciplines have 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 with multidisciplinary inquiry in the legal academy that improves the accuracy of descriptive research and normative 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

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will lie in drawing the right arguments out of the bag . . . [S]omehow this mode of argument is connected to lawyers’ skill in designing social institutions—contracts, corporations, or constitutions—that are admirable in the messy world in which we actually live.” Email from Henry Hansmann to Robert Scott (Sept. 13, 2020) (on file with authors).

53. Pamela 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.

54. See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

55. See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1220 (2013) (“[V]irtually 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’ in response to the decisions.”).

56. 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,’” a paper by Willard Hurst in the 1961 *Wisconsin Law Review*. *Id.* at 1238 n.108 (citing Willard Hurst, *Perspectives upon Research into Legal Order*, 1961 WIS. L. REV. 356, 365).

57. 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 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 473 (Peter Newman ed., 1998).

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 III 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, as well as the evidence that obsolete and inefficient terms persist in certain standardized contracts.

### III. 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 illustrates the synergies that can result when the two methodologies are joined in a single research project. The second example focuses on how the differences in lawyers' methodology yield insights that economic methods alone are likely to miss.

#### *A. Obsolete and Sticky Boilerplate in Large Market Contracting*<sup>58</sup>

The following 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

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58. This example is taken from a decades-long research project to which one of us has contributed together with two lawyer-economists: Mitu Gulati and Stephen Choi. To make the illustration sharper, some of the details of that collaboration have been elevated and others have been ignored.

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*pari passu* clause found in almost all sovereign debt contracts.<sup>59</sup> 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.<sup>60</sup> 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. But 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 that the state should facilitate the coordination necessary to provide a network-wide solution to the obsolete terms(s). In addition, the state, anticipating that obsolete terms will recur as the future unfolds, should provide a mechanism for updating the stock of standard terms in contracts.

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

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59. Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017) [hereinafter Choi, Gulati & Scott, *Black Hole Problem*]; Stephen J. Choi, Mitu Gulati & Robert E. Scott, *Variation in Boilerplate: Rational Design or Random Mutation?*, 20 AM. L. & ECON. REV. 1 (2018) [hereinafter Choi, Gulati & Scott, *Variation in Boilerplate*].

60. 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, *Revising Boilerplate: A Comparison of Private and Public Company Transactions*, 2021 WIS. L. REV. (forthcoming).

of two separate elements: “institutional” skills and “applied analytical” skills. Institutional skills include knowledge of the relevant legal doctrines, the ability to read and understand the legal implications of key provisions in sovereign bond contracts, 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.<sup>61</sup> Second, the lawyer’s familiarity with techniques of archival research led to the discovery of the origin and function of *pari passu* clauses when they were 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.<sup>62</sup> 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, either through rote usage or the overlay of additional words that reduce intelligibility.<sup>63</sup> The evidence that law firms generate new contracts by asking inexperienced lawyers to make necessary changes to templates drawn from older deals suggested that these apparently random encrustations were made by lawyers during the process of producing contracts.<sup>64</sup>

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.

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61. MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 140-51 (2013).

62. *Id.* at 134-38; Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 328 L. & SOC. INQUIRY 72 (2013).

63. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985).

64. Choi, Gulati & Scott, *Variation in Boilerplate*, *supra* note 59.

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As noted in Part II, a successful analogy requires a finding of relevance, and relevance requires access to the best governing principle.<sup>65</sup> 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.<sup>66</sup> 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 clarifying the connections among those disciplines, the lawyer made contributions that were necessary in order to reach those conclusions and then advance normative claims.

### *B. Social Norms and Legal Enforcement*

It is now well appreciated that the legal system coexists and interacts with social norms and associated mechanisms for extralegal enforcement, such as the termination of repeat transactions and reputational sanctions. 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 subjects as quantifiable and 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. While economists may deprecate the lack of rigor of the latter approach, it has yielded important insights that economists would miss in studying these phenomena.

Robert Ellickson's pathbreaking work, *Order Without Law*, observed that ranchers in Shasta County, California, largely disregarded the legal rules of trespass and nuisance in assessing responsibility for property harm caused by their respective cattle.<sup>67</sup> In these domains, this closely-knit community governed itself by means of informal rules—social norms—that it developed without the aid of legal institutions. 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."<sup>68</sup> Ellickson's "eclectic" approach blended

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65. See sources cited *supra* note 48.

66. 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.

67. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

68. William A. Fischel, Book Review, 69 *LAND ECON.* 113, 113 (1993).

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. Ellickson criticized law-and-economics for exaggerating the role that the legal system plays in the overall system of social control over human behavior, while also criticizing the law-and-society movement for failing to develop theories to explain the social norms that developed.<sup>69</sup> Ellickson applied the tools of welfare economics to explain the findings he obtained by using the methods of sociology and anthropology.<sup>70</sup>

As a legal academic, Ellickson was able to use his deep understanding of the legal system to approach a qualitatively similar system of social control outside law. In generating a taxonomy of extralegal mechanisms of social control, he explained informal norms and their enforcement by analogy to common law concepts: including rules of evidence, choice of law and remedies.<sup>71</sup> In a subsequent article on norms in the whaling industry, Ellickson examined the resolution of competitive claims to captured whales and, as with trespass and nuisance norms in Shasta, used common law property law analogies—such as rules of possession and standards of reasonableness—to organize the extralegal norms, while applying welfare economics to justify them.<sup>72</sup>

Later law-and-economics scholarship builds on Ellickson's work to examine the interaction between extralegal and legal enforcement and exhibits similar evidence of a 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 that of the economist. In her article on cotton trade, for instance, she emphasized the significant impact on behavioral incentives of non-legal sanctions, such as from the loss to a seller's reputation for not performing up to the expectation of its buyer.<sup>73</sup> 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

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69. See ELLICKSON, *supra* note 67, 123-137. Ellickson takes on the giants of law-and-economics—including Ronald Coase—as being legal-centrists. *Id.* at 138-9. As for the law-and-society scholars, he criticizes Stewart Macaulay: “He communicated the (important) message that controller-selecting norms can discourage actors from using the legal systems, but did not offer a theory of the content of norms.” *Id.* at 154.

70. Similarly blended analysis can also be found in work of economists, including Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 L. & SOC'Y REV. 759 (1991); and Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 348 (1981).

71. ELLICKSON, *supra* note 67, at 132-36.

72. Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989).

73. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745-54 (2001).

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. This lack of specificity, however, allowed Bernstein to contribute important insights—in particular, a plausible hypothesis of the relationship between the non-legal sanctions and the industry's formal legal system. Like Ellickson, Bernstein combined game-theoretic 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<sup>74</sup> 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.<sup>75</sup> 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 how commercial parties write contracts that combine *both* explicit and implicit contract terms, as well as formal and informal modes of enforcement.<sup>76</sup> 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

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74. See, e.g., Aaron S. Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996); Grossman & Hart, *supra* note 38; Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990); Benjamin E. Hermalin & Michael L. Katz, *Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach*, 9 J.L. ECON. & ORG. 230 (1993); Jean Tirole, *Incomplete Contracts: Where Do We Stand?*, 67 ECONOMETRICA 741 (1999).

75. See, e.g., Benjamin Klein, *Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444 (1996); Landa, *supra* note 70. An excellent survey of early informal enforcement mechanisms is Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 287 (Peter Newman ed., 1998).

76. See, e.g., Scott Baker & Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559 (2015); Ronald J. Gilson, *Engineering Venture Capital Markets: Lessons from the American Experience*, 55 STAN. L. REV. 1067 (2003); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

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.<sup>77</sup> Unencumbered by the formal modeling imperative of quantitative variables, the lawyer-led qualitative and analogical examination has advanced our 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 simply that they yield valuable insights that might be missed by economists. 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.

#### 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 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 and policy work and collaborating increasingly with scholars in other schools and disciplines. Lawyers have become less unique in their role as interdisciplinary brokers with "soft" skills. They will continue to be important, nevertheless, because of their subject-matter expertise and their contextual

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77. See, e.g., Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981.



## What Do Lawyers Contribute to Law and Economics?

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.