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## WHATEVER HAPPENED TO LAW AND ECONOMICS?

ANITA BERNSTEIN\*

### INTRODUCTION

One way to celebrate Guido Calabresi and his *Costs of Accidents*<sup>1</sup> is to remember some carping about the field they helped create. Carpers speak from many corners of the law school curriculum. In recognition of *The Costs of Accidents* as a torts classic, we can start with torts. “Every fresh contribution to the economic analysis of tort law,” wrote Ernest Weinrib in 1989, “adds a new storey to an edifice whose bottom has long since disappeared into the sand.”<sup>2</sup>

With these words, Professor Weinrib added a storey of his own to another edifice; his remark joined an array of criticisms that declared law and economics to be dead, futile, or spent. In the salad days of this academic movement, for instance, Morton Horwitz used a *Hofstra Law Review* symposium on efficiency to say that law and economics had “‘peaked out’ as the latest fad in legal scholarship.”<sup>3</sup> Then came Leonard Jaffee, twelve years later in the same journal: “So, I have two big gripes against Law and Economics. One is that it’s sick and spreads sickness. The other’s that it doesn’t work in ways it claims, or do what it pretends.”<sup>4</sup>

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\* Sam Nunn Professor of Law, Emory University. Thanks to Jami Hodo for research assistance, and to the faculties of Indiana (Indianapolis) and Rutgers (Newark) law schools for helpful feedback at workshops. The usual disclaimer absolving helpers from responsibility for errors may need amplification here: to write about law and economics, I needed to consult with colleagues whose greater familiarity with the subject has led them to contrary conclusions. For collegial disagreement and gracious tutelage, I thank Tom Ulen; for good ideas and helpful comments on a draft, Robert Ahdieh, Robert Blecker, Bill Carney, Dan Cole, and Paco Guerra; and for planting a seed two years ago, by asking me casually where I stood on law and economics, Jill Fisch. I join the applause for Don Gifford and the University of Maryland School of Law faculty, students, and staff, who made the Symposium weekend so stimulating and enjoyable. Honoring Judge Calabresi was an honor: long may Guido enjoy renewed celebrations of his book.

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter *THE COSTS OF ACCIDENTS*].

2. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 487 (1989).

3. Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905 (1980). Nine years later, Owen Fiss agreed that law and economics had “peaked.” Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 245 (1989).

4. Leonard R. Jaffee, *The Troubles with Law and Economics*, 20 HOFSTRA L. REV. 777, 779 (1992). To which Judge Posner replied that at first glance he thought Jaffee’s article “was either a spoof or the product of a deranged mind.” Richard A. Posner, *The Strangest Attack Yet on Law*

Duncan Kennedy called efficiency, a central tenet of law and economics, “incoherent” and likely to remain alive only because of the “enormous apologetic usefulness” it offered.<sup>5</sup> According to David Gray Carlson, “[t]here are two types of law-and-economics: one that is dubious and another that is dubious in the extreme.”<sup>6</sup> In her 2004 book, *The Triumph of Venus*,<sup>7</sup> Jeanne Schroeder, who’d majored in economics in college, declared that “most law-and-economic proposals are classic cases of GIGO (garbage in—garbage out): nonfalsified theories are applied to untested assumptions in order to produce nonverifiable conclusions. Law-and-economics has all the characteristics of a cult.”<sup>8</sup>

These attacks arrayed in the background, I make here a somewhat different claim: that law and economics is no longer amenable to critique.<sup>9</sup> This movement, in my view, is not an edifice whose bottom has disappeared into the sand. Instead it is not an edifice at all. In past decades, it did take shape as a unique structure; the Chicago school bore distinctive characteristics.<sup>10</sup> A scholar generating new work in law and economics during this “edifice” era would borrow precepts from neoclassical economics and apply them to the law, in an effort either to describe, in material terms, how law affects and responds to aggregations of human beings (“positive” law and economics) or to propose measures designed to improve these consequences (“normative” or “prescriptive” law and economics).<sup>11</sup> Many practitioners, Richard Posner foremost among them, dealt in both description and prescription. The combination brought to law the most philosophical strand in microeconomic theory, welfare

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and Economics, 20 HOFSTRA L. REV. 933, 933 (1992).

5. Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388, 445 (1981) [hereinafter *Critique*].

6. David Gray Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. MIAMI L. REV. 577, 614 (1989).

7. JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (2004).

8. *Id.* at 2.

9. In this contention I agree in part with Nicholas Mercuro and Steven Medema, who argue that “[l]egitimate critiques of Law and Economics can only come from comparing competitive methodologies or approaches.” NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 175 (1997). No competitive methodologies or approaches exist, I argue here, now that law and economics has diffused and disintegrated. Or, to paraphrase Mercuro and Medema: Law and economics can be critiqued only to the extent that it can be compared to competitive methodologies or approaches. *Id.*

10. *See id.* at 51-83 (describing the Chicago school).

11. *See* Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. \_\_\_\_ (2005) (comparing positive and normative law and economics). Writers raise questions about these labels. *See, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474-75 (1998) (distinguishing “prescriptive” from “normative” on the ground that the latter is broader). I hope to move along here without getting bogged down.

economics.<sup>12</sup>

Today the Chicago edifice shares attention with other types of law and economics. Anyone reading this far has undoubtedly heard that law and economics contains multitudes—an array of literatures, sub-movements, and schools of thought.<sup>13</sup> Perhaps it does. Certainly a scholar trained in both economics and law has the vocabulary to combine the two disciplines in ways that would not hew to the descriptions of Chicago-style welfare economics, or to any other fraction of the genre. But observers with no stake in the cliché about diversity can see how well it serves insiders, who get from it a basis to say that their movement is big *and* a ready retort to semi-disavow anything in it that provokes criticism: “Well, that’s one of the other schools.”<sup>14</sup> Law and economics can claim pluralism when pluralism suits, monolithic unity when pluralism threatens to splinter its power.<sup>15</sup>

This inclination within the movement to have it both ways impels me to take a second look at its premise that law and economics is distinct from all other disciplines yet eclectic and pluralistic, the academy’s big tent. The two postures are not only in tension with each other but perhaps also, I start to suspect, questionable in isolation. For law and economics to be valid, two conditions must obtain: law and economics needs a foundation of meaningful concepts and a boundary to fence out what it rejects or does not believe. If these two elements are missing, then its distinctive aspects may be unsound and its variations, offshoots, and alliances may be incoherent.

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12. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 43 (3d ed. 2000) (describing welfare economics as “much more . . . philosophical than the other topics in microeconomic theory” and defining it as the study of “how the decisions of many individuals and firms interact to affect the well-being of individuals”).

13. See Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 *LAW & SOC’Y REV.* 157, 158 n.4 (2000) (noting a reviewer’s reproach to Etzioni that there is “no single law and economic paradigm”). For iterations of the familiar “I am large, I contain multitudes” claim, see David Friedman, *Law and Economics*, in 3 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 144 (John Eatwell et al. eds., 1998) (noting that law and economics “involves three distinct but related enterprises”); Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 *NW. U. L. REV.* 443, 481 (2001) (stating that “there is no single ‘economic theory’”); Fred S. McChesney, *Purchasing Political Inaction: How Regulators Use the Threat of Legal “Reform” to Extort Payoffs*, 21 *HARV. J.L. & PUB. POL’Y* 211, 211 (1997) (describing law and economics as “a mansion with many rooms”).

14. A section of Harvard Law School’s website called *The Bridge*, which provides an overview of law and economics, cautions that those who seek to understand critics’ objections to this “most controversial of the methodologies currently employed in legal scholarship and legal education” must “keep in mind that there are many varieties of economic analysis,” and that “[c]riticisms that bear directly upon one variety are often irrelevant to the others.” *Criticisms of Economic Analysis—and Responses Thereto*, in *THE BRIDGE*, at <http://cyber.law.harvard.edu/bridge/LawEconomics/critique.txt.htm> (last visited Oct. 27, 2004) [hereinafter Harvard Statement].

15. As economist Jack Hirshleifer said, in italics, “*There is only one social science.*” Jack Hirshleifer, *The Expanding Domain of Economics*, 75 *AM. ECON. REV.* 53, 53 (1985).

In this Article I explore this question of foundations under, and boundaries around, the movement.

Following the lead of our symposium, which looks at “a generation” that runs from 1970 to 2005, my rhetorical question, *Whatever happened . . . ?* broaches an argument that although a generation ago law and economics stood—as an edifice, if you like—it no longer endures. The movement was done in by a blend of some claims that were wrong with other claims that came across in legal circles as too right—and also too trivial—to reject. Law and economics combined too little accuracy with too much: While ill founded, dubious, or tautological premises were eroding its credibility, other notions from the movement, consistent with what diverse thinkers and audiences believed, blurred the line between law and economics on one hand and everything else in jurisprudence on the other. Withdraw the mistakes and exaggerations from law and economics and what you get is either “positive” scholarship declaring 5 to be the sum of 3 and 2, or some indistinguishable share of the centrist, forward-looking, quasi-utilitarian mélange of advice to policy-minded lawyers that now dominates the legal academy, unconfined to any sector.

During the last decade, members of the movement labored to stop the fall. Unable to do much about errors, they worked on the second front, the crisis of too much acceptance, mainly by trying to claim successful outsider movements as their own, rather than reacting to them as threats or challenges. When psychology dealt blows to the ideal of a rational actor, for instance, economic analysts invoked the label of “behavioral economics” to describe claims that were directly contrary to neoclassical dogma.<sup>16</sup> Led by Robert Ellickson, they used the word “norms” to summarize phenomena inconvenient to the edifice.<sup>17</sup> This capacious label

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16. See Carlson, *supra* note 6, at 614. Among scholars, an affinity for behavioral economics obstructs faith in strong forms of Chicago doctrine but generally does not lead to full repudiation of law and economics; those with these mixed feelings favor the flexible adjective “bounded”:

[P]eople’s decisionmaking commonly exhibits “bounded rationality,” in that they can only process a finite amount of information and thus must rely on “rules of thumb” to make decisions; “bounded willpower,” in that they sometimes do things that are not in their long-term self-interest; and “bounded self-interest,” in that they care about other people and whether the treatment they receive is reciprocally “fair.”

Kenneth Dau-Schmidt, *Pittsburgh, City of Bridges: Developing a Rational Approach to Interdisciplinary Discourse on Law*, 38 LAW & SOC’Y REV. 199, 202 (2004) (citing Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000)). Posner argues that these three “bounded[s]” misleadingly make behavioral economics look as if it has “a unified framework of analysis.” Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1555 (1998) [hereinafter *Rational Choice*].

17. See Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 546-49 (1998) (discussing various attempts to incorporate norms theory into law and economics).

not only could obscure what did not fit the neoclassical model, but also aid a contention that human behaviors deviating from the paradigm—behaviors that reveal altruism, expenditures that appear to waste rather than accrete money, refusals to cheat or defect in games, and the like—are consistent with law and economics, rather than refutations of its core premises. This cooptation strategy reached a height in 2002 with the publication of *Fairness Versus Welfare*,<sup>18</sup> a book from two scholars identified with the law and economics movement who declared victory by asserting that Welfare accounted for everything that jurisprudence pursues, except for a handful of silly vestigial claims which the authors disparaged as Fairness.<sup>19</sup> This putative victory, however, would be better described as submergence into a larger whole. Part of the law and economics edifice has disappeared into the sand; part has joined the sand itself.

So much for Weinrib's edifice; Jeanne Schroeder had a different one-word critique. Schroeder called law and economics a "cult" in order to rebuke it for falling short of scientific standards.<sup>20</sup> Yet cults are characterized by more than just clinging to a dogma that gets reality wrong. They are social groups.<sup>21</sup> They contain members who disdain nonmembers, and who have been known to enjoy thinking that outsiders feel hostility towards them.<sup>22</sup> I quote Schroeder's insult with approval—even though one might debate her charges of falsity—as a concise description of a movement done in by the twin stabbings of excessive inaccuracy and trivial accuracy. Stripped of its distinctive intellectual features, no longer able to give descriptions or policy recommendations that could not have come from sources outside the movement, law and economics now functions mainly as a faculty club with opaque, arbitrary criteria for membership.

Where do *The Costs of Accidents* and Guido Calabresi fit in this picture? Away from the missteps. Calabresi's book, in contrast to the one by Kaplow and Shavell, focuses on Welfare without perceiving it as a prizefighter that has beaten or should beat a straw man, hapless Fairness. It draws readers in with its clarity and reason, never trying to exclude or

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18. LOUIS KAPLOW & STEPHEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

19. *See id.* at xvii ("Our thesis is that social decisions should be based *exclusively* on their effects on the welfare of individuals—and, accordingly, should not depend on notions of fairness, justice or cognate concepts.").

20. Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 150 (2000).

21. Doni Whittett & Stephen A. Kent, *Cults and Families*, 84 FAM. IN SOC'Y: J. CONTEMP. HUM. SERVS. 491, 499 (2003).

22. *See id.* at 496 ("Cults divide the world into discrete, dichotomous categories: good and evil, the saved and the damned, winners and losers, and so on. These divisions represent *splitting*, which is a primitive defense mechanism that reduces the anxiety of having to live with life's uncertainties." (citation omitted)).

intimidate anyone. It is a model, indeed, of what law and economics scholarship can contribute in the eras following refutation of its core tenets: a wide social science that invites participants to consider the common good.

#### I. ERRORS: WHAT HAS CRUMBLLED, WHAT HAS NEVER BEEN

Consider how the tenets and distinguishing features of law and economics are faring at the thirty-fifth anniversary of *The Costs of Accidents*.

##### A. Three Precepts

1. *Rational Choice*.—On the first page of *Economic Analysis of Law*,<sup>23</sup> Richard Posner declared a first axiom: “man is a rational maximizer of his ends in life.”<sup>24</sup> This individual knows what he wants and chooses means to reach his goals. The world through economists’ eyes begins here, at the point where an individual makes a choice among alternatives. Rational choice is the “first and most basic” of “the critical early moves” in law and economics.<sup>25</sup> Only if individuals can know what they want and act instrumentally on their desires can the other central precepts of the discipline—among them preferences, opportunities, and a consciousness of scarcity—make sense.

Moreover, Posner continues,

the concept of rationality used by the economist is objective rather than subjective, so that it would not be a solecism to speak of a rational frog. Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have.<sup>26</sup>

According to this construction of rationality, the chooser will not lose the designation of “rational” just because her choices are self-destructive, perverse, opaque, inconsistent, unstable over time, resistant to Arrowian ordinal ranking, or dependent on the unpredictable choices that others make. Her choices can even defy the downward-sloping demand curve. As Arthur Leff noted decades ago, when

a society dentist raises his prices and thereby increases his gross volume of business, it is no violation of the principle of the

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23. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1 (1st ed. 1972).

24. *Id.* at 3. The current edition has the phrase on page 3, its first page of text. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003) [hereinafter *ECONOMIC ANALYSIS*]. Citations below are to the current edition.

25. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 456 (1974).

26. POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, at 17.



inverse relation between price and quantity. It only proves that buyers now perceive that they are buying something else which they now value more highly, “society dentistry,” say, rather than “mere” dentistry.<sup>27</sup>

Because “whatever ends the chooser happens to have” emerge from her behavior rather than from her own testimony or other expression, any means in this “objective” sense can be “apt.”

One critique of Chicago-style law and economics argues that rational choice according to this school remains vulnerable to challenges that philosophy has long been expressing, perhaps “since the fourth century B.C.”<sup>28</sup> For openers, explains philosopher and classics scholar Martha Nussbaum, law and economics regards preferences as “exogenous, i.e., not significantly shaped by laws and institutions,” whereas “the endogeneity of preferences has been recognized by almost all the major writers on emotion and desire in the history of Western philosophy.”<sup>29</sup> To speak of choice as if it originated entirely inside the actor is simply wrong. Furthermore, individuals do not simply make choices: they value their power to do so.<sup>30</sup> People “do not typically view as equivalent two states of the world, one produced by their own agency and the other not.”<sup>31</sup> Ends, which law and economics sees as fixed, actually vary over time and through discourse; human beings deliberate about them.<sup>32</sup> The concept of “preferences” sloppily throws together what philosophers have kept separated as five distinct phenomena: “belief, desire, perception, appetite, and emotion.”<sup>33</sup>

Along with old writings that cast the economists’ version of rational choice into question, newer ones have refuted this concept through experimentation and revision. The neoclassical conception of rationality had fancied that human beings make choices within “a preference ordering that is complete and transitive, subject to perfect and costlessly acquired information.”<sup>34</sup> Reality began to sully the premise. In the mid-twentieth century Herbert Simon established a beachhead for empiricism in economics with his identification of “bounded rationality,” whereby a subject makes the best choices she can, given her limited “knowledge and

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27. Leff, *supra* note 25, at 457-58.

28. Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197 (1997).

29. *Id.* at 1197-98.

30. *Id.* at 1204.

31. *Id.*

32. *Id.* at 1207-08.

33. *Id.* at 1209. Nussbaum adds that these five exist “at the very least.”

34. MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 229 (2d ed. 1992).

computational capacities and skills.”<sup>35</sup> Simon’s work brought about behavioral economics, the branch of microeconomics that focuses on the choices individuals make rather than the processes of their decisionmaking.<sup>36</sup> “Choice,” manifested in behaviors rather than the trail of conscious strategy that precedes them, came to subsume “rational”: if some actor did it, then we’ll say she made a choice in pursuit of her own ends.

As Jeanne Schroeder has argued, this outcome cannot sit well in law and economics because of how much it gives away.<sup>37</sup> Schroeder recounts Posner’s distressed response<sup>38</sup> to the leading law review article on behavioral economics, Jolls, Sunstein and Thaler’s *A Behavioral Approach to Law and Economics*.<sup>39</sup> Posner “assumes that adding an account of ‘non-rationality’ in market relations would be tantamount to abandoning theory entirely in favor of a mere all-inclusive description of empirical behavior lacking any explanatory or predictive power.”<sup>40</sup> He concludes that “behavioral economics merely describes human actions [and does a poor job of doing so] but has no theory of action.”<sup>41</sup> In response to Posner, Schroeder offers psychoanalytic theory as an alternative account for the manifestations of human choice that cannot be wedged into either the neoclassical construct of strategic, utility-maximizing decisionmaking on one hand or the blank catchall of random, arbitrary behavior on the other.<sup>42</sup>

Whether or not one accepts Schroeder’s alternative, the dilemma for law and economics is clear. Neoclassical assertions of rationality—abstract, laboratory-crystalline, severed from ordinary experience—stray too far from empirical fact to explain or predict much. Posner’s “rational frog” expresses this limitation succinctly: we believe the frog pursues her own ends, but we have nothing but her behavior to look at when we seek support for that belief. To the extent that economic analysts accept variety

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35. Schroeder, *supra* note 20, at 165 (quoting HERBERT A. SIMON, AN EMPIRICALLY BASED MICROECONOMICS 18 (1997)).

36. Although much work in law and economics concedes that behavioral economics has supplanted or significantly modified the old paradigm of rational choice, some disagree. See Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 73-74 (2002) (“Whereas law and economics assumes too much rationality on the part of legal actors as an empirical matter, behavioral law and economics errs by assuming too much irrationality.”).

37. See Schroeder, *supra* note 20, at 169 (“[I]t is a standard critique of neo-classical theory that to so expand the definition of economic preferences is to rob the theory of all explanatory and predictive power”).

38. Posner, *Rational Choice*, *supra* note 16.

39. Jolls et al., *supra* note 11.

40. Schroeder, *supra* note 20, at 155 (citing Posner, *Rational Choice*, *supra* note 16, at 1552).

41. *Id.* (citing Posner, *Rational Choice*, *supra* note 16, at 1558-59).

42. *Id.* at 155.

in human behavior, especially behavior that defies well-ordered pursuit of transparent ends, they became less able to explain and predict because they have conceded that human behavior is either random or, alternatively, obedient to some logic alien to the rational actor model, and thus beyond their ken.<sup>43</sup>

Economic analysts regret this defeat and hope they can undo it. “Deviations from the rational-actor assumption can and should be incorporated into economic analysis,” declares the Harvard law and economics website.<sup>44</sup> The cooptation strategy cannot, however, readily accommodate material so contrary to a first principle of economic analysis.

2. *Efficiency vs. Wealth Maximization vs. Welfare.*—What do, or should, individuals or societies or legal systems choose to pursue? Economic analysts have shuttled between terms to describe the goal. Two leading contenders have been “efficiency” (or sometimes “allocative efficiency”) and “wealth maximization.” A third term, “welfare,” has arisen more recently. None is stable.

Begin with the earlier terms. Among pursuits with philosophical implications, both “efficiency” and “wealth maximization” line up at a utilitarian side of the standard divide between a deontological, or “Kantian,” approach at one end and utilitarianism at the other; but the two have different meanings, at least for economic analysts. Richard Posner distinguished them in a 1979 paper, published shortly before his move to the federal bench. In *Utilitarianism, Economics, and Legal Theory*, Posner associated “efficiency” with utilitarianism and “wealth maximization” with law and economics, insisting that the two were not synonymous.<sup>45</sup>

If “efficiency” stands in for utilitarianism, Posner argued, then efficiency is inferior to wealth maximization as a description of what individuals and societies pursue, or should be understood as pursuing.<sup>46</sup> Utilitarianism, in Posner’s rendering, seeks a “surplus of pleasure over pain,”<sup>47</sup> but gives its followers no guidance as to whose pleasure counts (are animals included?), no distinction between average and total happiness,

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43. For another attempt to help law and economics by adding other logics, supplementing Schroeder’s suggestion of Lacanian philosophy, see Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001) (proposing “time-shifted rationality,” a version of rational choice suited to humanity thousands of years ago).

44. Harvard Statement, *supra* note 14.

45. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111-35 (1979).

46. *Id.* at 119-24.

47. *Id.* at 104.

and no metric to evaluate success and failure.<sup>48</sup> Wealth maximization as an alternative ideal avoids these difficulties by insisting on “value in dollars or dollar equivalents.”<sup>49</sup> In Posner’s summation: “The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market.”<sup>50</sup>

This solution, rooted in the philosophical case against utilitarianism, has proved to be no improvement over the old morass associated with using “efficiency” as the goal of policymaking. Installing precision in place of vagueness, it brought in difficulties of its own. First, as Morton Horwitz was quick to say in attacking law and economics on behalf of Critical Legal Studies—at the time, 1980, a plausible competitor in the legal academy—the new embrace of wealth maximization meant that “the ground of debate [had shifted] to social theory.”<sup>51</sup> As soon as law and economics declares that it is good to maximize wealth, the holders of wealth achieve new ascendancy, a pride of place unavailable to them in the old utilitarian days when “efficiency” covered and obscured too much for them to enjoy overt privilege. “For a long time, efficiency has been used in the economic analysis as if it were an independent concept, not entirely relative to whatever distribution of wealth existed,” Horwitz concluded.<sup>52</sup> “And once it has been realized that efficiency is, by definition, a function of a particular distribution (invariably the status quo), the inherently conservative bias of the definition of efficiency becomes clear.”<sup>53</sup>

In the same law review symposium,<sup>54</sup> Jules Coleman offered a more nuanced criticism of the move from efficiency to wealth maximization.<sup>55</sup> “Efficiency,” or any similar term that locates value beyond money, has the virtue of recognizing that individuals want more than to accrete wealth.<sup>56</sup> They must feel that way, given the nature of money: “Because wealth is not something of intrinsic value, its claim to moral worth depends on its extrinsic value, that is, on its capacity to secure other things of value.”<sup>57</sup> A broader, if vaguer, desideratum like “happiness” or “well-being”—something inherently good to have and an end in itself—would capture more accurately what people want and pursue.

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48. *Id.* at 112-13.

49. *Id.* at 119.

50. *Id.*

51. Horwitz, *supra* note 3, at 905.

52. *Id.* at 911.

53. *Id.* at 911-12.

54. *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

55. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 520-26 (1980).

56. *Id.* at 528.

57. *Id.*

Coleman also drives the wealth-maximization thesis to a pressure point when he notes that inherently it counsels policymakers to foster scarcity—to make more of it, rather than less—contrary to the neoclassical view of scarcity as a condition against which human actors struggle.<sup>58</sup> Wealth maximization requires prices: simple barter does not create new wealth. When you and I trade my orange for your apple, neither of us has attained wealth thereby.<sup>59</sup> Only in the context of price can one speak of wealth.<sup>60</sup> And price does not exist unless desired commodities are scarce.<sup>61</sup> Accordingly, an advocate of wealth maximization as the criterion of policymaking must oppose the abolition, or perhaps even the amelioration, of scarcity.<sup>62</sup>

The reliance on prices adds other complications to the wealth-maximization criterion. For openers, what about the barter point just mentioned? I am happier with my new apple and you are happier with your new orange—one might recall Vilfredo Pareto here<sup>63</sup>—but wealth maximization is indifferent to this surge in aggregate satisfaction. Price is a function of demand, and demand will vary in response to preexisting distributions of wealth.<sup>64</sup> It is thus idle—or instead politically significant, as Horwitz said<sup>65</sup>—to contemplate wealth maximization without attention to how much wealth each maximizer already has.<sup>66</sup> With a dollar the only metric and with the marginal utility of money a sure fact, wealth maximization “has the result of weighting the preferences of wealthy persons more heavily than the preferences of poorer persons”<sup>67</sup>—that is, the rich get extra ballots in the form of dollars they don’t need to save. *Tant pis*

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58. *Id.* at 524.

59. *Id.* at 523.

60. *Id.* Economists may disagree with Coleman on this point:

Not true: barter, just like exchange using money, improves welfare. The swap of an orange for an apple must, by hypothesis, make each of us better off or we wouldn’t do it. I like to eat apples more than I like to eat oranges. If you feel the opposite way, we’re both better off (more units of utility) if you swap your apple for my orange.

Memorandum from William J. Carney, Professor of Law, Emory University School of Law, to Anita Bernstein 3-4 (May 14, 2004) (on file with author).

61. Coleman, *supra* note 55, at 524.

62. *Id.*

63. See Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 175 (2000) (discussing the “Pareto principle”).

64. Coleman, *supra* note 55, at 526.

65. Horwitz, *supra* note 3, at 906, 910.

66. Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 470 (Peter Newman ed., 1998) [hereinafter *Palgrave Essay*] (“[I]t is hard to take seriously the proposal that the courts should just apply Kaldor-Hicks and stay out of distributive questions.”).

67. Harvard Statement, *supra* note 14, at <http://cyber.law.harvard.edu/bridge/LawEconomics/critique4.txt.htm> (last visited Oct. 29, 2004).

for wealth maximization.<sup>68</sup>

Following this critique of the wealth-maximization criterion, “welfare” has arisen as a kind of successor to the old precursor of wealth maximization, “efficiency.” Louis Kaplow and Steven Shavell have led the charge among economic analysts to promote this word as summation of what societies and individuals pursue.<sup>69</sup> To many, “welfare” seems more capacious, perhaps more humanistic, than “efficiency” or any other word standing in for utilitarianism.<sup>70</sup> Yet because it does not repair what “wealth maximization” once purported to fix—that is, vagueness, indeterminacy, disagreements about measurement—“welfare” carries economic analysts back to their old condition of not being able to describe what they seek.<sup>71</sup>

We see here a dilemma similar to that which haunts the economist’s view of rational choice. The movement can cling to “efficiency” and remain vulnerable to criticisms about tautology, circularity, vagueness, and evasion of pertinent political questions. Alternatively, it can focus on “wealth maximization,” a path that adds misdescription to the mix and cannot escape similar perils of tautology. Or try “welfare,” which in application cannot be distinguished from efficiency and its perils.

3. *Faith in Markets.*—Following *The Problem of Social Cost*,<sup>72</sup> both descriptive and normative strands of law and economics evinced some enthusiasm for what they called “the market.” Coase had recharacterized costs. Whereas earlier thinking, following Pigou, had seen costs as

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68. In commenting on a draft of this Article, Dan Cole noted that no economist I know (personally or by reputation) treats individuals as Posner does, as wealth maximizers. Posner took this turn early in his career for two reasons (so far as I can discern): (1) it makes measurement easier (as is always the case where “the light is better”); and (2) it helped him distinguish economics from utilitarianism, which was an obsession of his (but no longer seems to be so).

Memorandum from Daniel H. Cole, Professor of Law, Indiana University School of Law at Indianapolis, to Anita Bernstein 1-2 (Aug. 27, 2004) (on file with author).

69. See KAPLOW & SHAVELL, *supra* note 18, at 18 (noting that the concept of “well-being . . . incorporates in a positive way everything that an individual might value”).

70. See Chang, *supra* note 63, at 176 (“Welfarism includes a broader class of moral theories than utilitarianism, which takes social welfare in a given population to be equal to the sum of individual utilities.”).

71. Howard Chang notes one problem among many that “welfare” as a criterion raises: the term “welfarism,” which Amartya Sen defined as the belief that “[t]he judgment of the relative goodness of alternative states of affairs must be based exclusively on, and taken as an increasing function of, the respective collections of individual utilities in these states.” *Id.* at 176 n.6 (quoting Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 468 (1979)). This definition appears to foreclose the version of welfare that Kaplow and Shavell prefer, which does not equate social welfare with the sum of individual utilities. See *id.* at 176 (citing Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63, 65-66 n.5 (1999)).

72. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

detriments that one entity imposes on another, to Coase costs were instead phenomena that obstructed market functions.<sup>73</sup> “The market,” always central in all of microeconomics, took on after Coase even more fundamental importance to its cousin law and economics. Efficiency, for instance, could be defined as the outcome that a free market would produce.<sup>74</sup> In this normative sense, the existence of a market makes efficiency (or wealth maximization) possible.

The normative truism about markets making wealth has not much occupied law and economics.<sup>75</sup> In an alternative, descriptive sense, however, law and economics has seen markets wherever human beings deal with one another, including venues far from commercial transactions. Marriage and family formation take place in markets, according to Gary Becker and others.<sup>76</sup> Individuals negotiate their sexual relations as trades.<sup>77</sup> Scarce body parts like kidneys, say economists, could profitably become the objects of regulated exchange.<sup>78</sup> The adoption of infants takes place within a market whether we like it or not, said Posner in the famously career-thwarting paper he wrote with Elisabeth Landes.<sup>79</sup> Gestational surrogacy for pay is a service that American law has long been condoning.<sup>80</sup> Crimes, at least the subset of them that may be deemed “coerced transfers,”<sup>81</sup> provoke the wrath of the state (that is, independent of whether a victim, empowered to initiate legal redress in tort, chooses to protest) not (only) because they offend civic morality, but because of their contempt for an orderly hypothetical market.<sup>82</sup> In a recent essay, Claire Hill defends the faith-in-markets perspective within law and economics, and urges “skeptics” who don’t want to see markets applied to “the personal

73. *Id.* at 15-19.

74. Coleman, *supra* note 55, at 542; Horwitz, *supra* note 3, at 909.

75. I thank Alan Hyde, Howard Latin, and Tom Ulen for emphasizing this point to me, each in his own way.

76. See generally GARY S. BECKER, A TREATISE ON THE FAMILY (1981); Lloyd Cohen, *Marriage, Divorce and Quasi-Rents; or, “I Gave Him the Best Years of My Life”*, 16 J. LEGAL STUD. 267 (1987).

77. See RICHARD A. POSNER, SEX AND REASON, *passim* (1992).

78. Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1 (1994); Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989). Professors Crespi and Cohen are both Ph.D. economists.

79. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

80. Laura A. Brill, *When Will the Law Catch Up With Technology? Jaycee B. v. Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW. 241, 254-55 n.61 (1999).

81. See POSNER, ECONOMIC ANALYSIS, *supra* note 24, at 215-19 (describing “coerced transfers”).

82. See *id.* at 218-19 (noting the need to “adjust damages upward” and impose non-monetary sanctions such as imprisonment, in order to “discourage efforts to bypass the market”).

sphere” to reconsider their position.<sup>83</sup>

Yet even if “the market” can shed light on “the personal sphere,” the law and economics project of identifying unseen markets—in human bodies and intimate associations and the like—seems to have run its course. At the risk of signing a death certificate before the patient has died, and thus compelling myself to lie next to Morton Horwitz and Owen Fiss,<sup>84</sup> I will venture to say that today “the market” does not account for much novelty or centrality in this field, neither its normative nor its more recent descriptive versions. Coase’s masterpiece, always amenable to divergent readings, now sounds like a warning that markets always fail, rather than a promise that exchange will work perfectly after the friction of transaction costs has been removed.<sup>85</sup>

Accompanying this decline of the market in law and economics scholarship, a generation of writings skeptical of this institution has taken critical hold. The most important external criticism of the market appears in literature on “incommensurability” and “commodification.” Work in this genre rejects the market insofar as this artifact assigns a cash value to anything capable of being transferred from one possessor to another. The leading scholar in this field identifies her thesis, first expressed in her title *Market-Inalienability*,<sup>86</sup> as directly hostile to law and economics, whose “methodological archetype” she calls “universal commodification.”<sup>87</sup>

Internal criticism of the market is harder to spot because writers do not present their stance as contrary to the market, or to any other precept of law and economics. These scholars do not identify themselves as antagonists. Yet they do challenge the neoclassical market. Examples of topics within this internal critique are game theory, which identifies imperfect information combined with strategic behavior as an obstacle to the negotiation that the parties would prefer; explorations of conflicts between principals and agents that erode the possibility of attributing market behaviors to entities like firms; studies of network effects that conclude by endorsing (admittedly with some hesitation) state interventions into

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83. See Claire A. Hill, *Law and Economics in the Personal Sphere*, 29 LAW & SOC. INQUIRY 219, 257 (2004) (“The energy skeptics spend trying to keep the market—even the market-as-metaphor—out of the personal sphere would be better spent in other ways.”).

84. See *supra* note 3 and accompanying text (each has claimed that law and economics has peaked).

85. So argues Jeanne Schroeder. Schroeder, *supra* note 20, at 205.

86. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

87. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 2 (1996). Cass Sunstein adds that the notion of incommensurability is a plea for pluralism rather than monism generally, and so it has in its sights not only law and economics but all thinking that posits a unitary value. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 781 (1994).



markets;<sup>88</sup> and variations on a theme of tragedy of the commons, where resources are squandered due to flawed cost internalization.<sup>89</sup> “The endowment effect,” a mainstay of behavioral law and economics, denies the central tenet of a market.<sup>90</sup>

Adherents of law and economics might find this list—game theory, principal-agent problems, network effects, flawed cost internalization and the tragedy of the commons, the endowment effect—peculiar as an illustration of the collapse of law and economics. “But this is our material!,” they might protest. “These are the problems we economic analysts have identified. We are working on them—and frankly we’re the only ones working on them.” Although I would not question the sincerity of this hypothetical protest, or the feeling of kinship implied, it is hard for the prototypical outsider mentioned earlier—someone who has no stake in this movement’s expansive manifest-destiny ambitions—to agree that any one school of thought can hold contrary beliefs as simultaneous postulates. Economic analysts may find it easy to believe that markets work while at the same time believing that markets don’t work; but these contrary views divide the group; they do not unite. If a common interest in markets, or perhaps a tendency to use market analogies, is sufficient to put *X* and *Not X* under the same roof, then mainstream biologists share membership in an evolution-creation movement with creationists, and persons who choose to abstain from alcohol mingle with persons who choose to drink heavily when they convene at gatherings of the alcohol movement. Recalling behavioral economics reminds us that law and economics likes to expand, or at least keep, its domain by embracing antithetical developments. And so “market failure” has become almost as familiar a phrase in law and economics as “the market” itself. Same recipe as the one that cooked up “behavioral economics”: When truisms fail,, or get refuted, reassert ownership of all material under question by adding a layer of counter-jargon.

### *B. The Fall of the Claim to Science*

For academic lawyers looking for a movement to join, one appeal of

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88. Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 219 (2004); see also Avitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179 (2003) (discussing the role of regulation in transactions).

89. This concept comes from another field, biology. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Economic analysts have adopted it as their own. See Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 605 (2002) (noting that “[e]conomists use the term ‘the tragedy of the commons’”).

90. Or so I argued in Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 311 (1999).

law and economics is its air of rigor. At least since Langdell, and with renewed force after legal realism, leaders in the legal academy have strived to achieve the prestige of science. They still crave, in the words of critic Morton Horwitz, “a system of legal thought that is objective, neutral, and apolitical.”<sup>91</sup> This ideal would bring to law what colleagues elsewhere in a university ostensibly achieve in their laboratories: research and discovery in strict fidelity to the laws of nature.<sup>92</sup> The claim has fallen.

*1. Predictive Power.*—If economics functions within law as a science, then it ought to be able to identify which one of several potential outcomes must follow an antecedent change. The sciences are characterized by their power to predict. To the extent they cannot predict, they deviate from science.

Economic analysts diverge on the question of predictive power. The distinguished socialist economist Joan Robinson, who worked with Keynes, took a breezy view of her field’s pretensions to science: “It is the business of economists,” she once said, “not to tell us what to do, but to show why what we are doing anyway is in accord with proper principles.”<sup>93</sup> Judge Posner has rendered a less blithe assessment. In his treatise he ascribes predictive powers to economics in general rather than law and economics in particular:

[One] test of a scientific theory is its predictive power, and here too economics has had its share of successes, most dramatically in recent years. The effects of deregulation, for example of the airline industry in the United States, and, more dramatically, of the communist economies of Central and Eastern Europe, have had the effects predicted by economists.<sup>94</sup>

Because Posner does not say more about this “share of successes” that had appeared so “dramatically” before his eyes, a reader is hard-pressed to know what he means. Using “predictive” the way ordinary speakers of English do—that is, referring to a power to tell the future—I am equally hard-pressed to recall any historical occasion of accurate prediction from

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91. Horwitz, *supra* note 3, at 905.

92. See Tyler Cowen, *Fallacies and Vices*, *The Volokh Conspiracy* (Apr. 17, 2004), at [http://volokh.com/2004\\_04\\_11\\_volokh\\_archive.html#108224208129980443](http://volokh.com/2004_04_11_volokh_archive.html#108224208129980443) (“The Economist’s Vice: ‘to think that it is scientific to talk of ‘satisfying preferences,’ and paternalistic or mystical to talk about other normative values.’”). On the futility of the pursuit-of-science endeavor, see generally Mark V. Tushnet, *Law, Science, and Law and Economics*, 21 *HARV. J.L. & PUB. POL’Y* 47 (1997).

93. See Edward S. Herman, *The Economics of the Rich*, *Z MAGAZINE*, July/Aug. 1997, available at <http://www.zmag.org/ZMag/articles/hermanjuly97.htm> (cited in Paul H. Brietzke, *New Wrinkles in Law . . . and Economics*, 32 *VAL. U. L. REV.* 105, 126 (1997)).

94. POSNER, *ECONOMIC ANALYSIS*, *supra* note 24, at 18.

this discipline.<sup>95</sup> Posner does not even help us by saying which effects of deregulation “economics” foresaw, or could foresee, before they arrived.<sup>96</sup> Lower prices for some customers? Higher prices for others? New entrants to the market? New moves toward monopoly? Apparently he uses “predictive” in the peculiar sense that Joan Robinson lampooned: instead of predicting in the sense of foretelling in advance, economic analysis of law—here resembling its sometime companion, evolutionary psychology—makes highly accurate predictions after events occur: *We could have told you so!*, it proclaims.<sup>97</sup> Constitutionalizing the right to abortion begat a lesser generation of criminals—at least in hindsight, though perhaps not back in 1973.<sup>98</sup> Improvements in welfare came from changes in legal rules and also came from subsequent changes back to the pre-changed state.<sup>99</sup>

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95. Claire Hill is more candid, remarking that “the notion that predictions are what are being sought seems overblown. Often, law and economics accounts are explanations *ex post*. It’s not common that one can make useful, specific predictions.” Hill, *supra* note 83, at 256 n.44.

96. Responding to a challenge from philosopher and legal scholar Brian Leiter, Posner wrote a letter to Leiter in 1996, defending his domain against the charge of inability to make predictions. Posner did not quite say that economics had in fact predicted anything, but spoke of “predictions” that “have empirical support”:

[A] price ceiling will cause queues, black markets, and quality problems; deregulation results in lower prices and more product variety; communist economies are less productive than capitalist; . . . dirty or dangerous jobs pay more (*ceteris paribus*) than clean or safe ones; . . . an increase in the severity of punishment will (*ceteris paribus*) reduce the amount of crime . . . I could go on for hours.

See Brian Leiter, *Holmes, Economics, and Classical Realism*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 285, 306 (Steven J. Burton ed., 2000) (quoting Posner’s letter). For Leiter’s response, see *id.* at 306-12; Brian Leiter, *Is Economics a “Science”?*, *Leiter Reports* (July 16, 2004) at [http://leiterreports.typepad.com/blog/2004/10/is\\_economics\\_a\\_.html](http://leiterreports.typepad.com/blog/2004/10/is_economics_a_.html).

Specifics would have presented a mixed record. See, e.g., Richard D. Cudahy, *Whither Deregulation: A Look at the Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155, 185-86 (2001) (noting that deregulation of home electricity utilities failed to lower prices in California); Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation, and Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 114-15 (1996) (“Taxicab deregulation cannot be demonstrated to have produced . . . the benefits its proponents expected. Prices do not usually fall, improvements in service are difficult to detect, and . . . [t]here is little evidence that either consumers or producers are better off.” (citation omitted)).

97. “20/20 hindsight, masquerading as 20/20 insight,” wrote Robert Blecker in his comments on a draft of this Article. A half-century ago Milton Friedman wrote that this state of affairs in the discipline was just fine. MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 9 (1953) (“[T]he ‘predictions’ by which the validity of a hypothesis is tested need not be about phenomena that have not yet occurred, that is, need not be forecasts of future events; they may be about phenomena that have occurred but observations on which have not yet been made.”).

98. John J. Donahue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379 (2001).

99. Here I refer to the Scitovsky Paradox. See generally Richard S. Markovits, *A Constructive Critique of the Traditional Definition and Use of the Concept of “The Effect of a Choice on Allocative (Economic) Efficiency”*: *Why the Kaldor-Hicks Test, the Coase Theorem,*

yes, we could have seen that one coming.<sup>100</sup>

2. *The Testing of Hypotheses.*—The criterion of falsifiability (or falsification) expects law and economics, along with anything else that wants to be called a science, to put forward hypotheses that can be tested.<sup>101</sup> Law and economics is hardly alone among the sciences in falling short of this “very severe” ideal.<sup>102</sup> Its central precept of rational choice, however, does land extraordinarily short on the falsifiability scale: because preferences are inferred from behaviors, all behaviors become consistent with preferences.<sup>103</sup> Economist Dierdre McCloskey, a frequent participant in debates over the relation between economics and law, notes that one beloved tenet of economics, the “law of demand”<sup>104</sup>, has seldom been tested—and when tested has been found to be “true for clearheaded rats and false for confused humans.”<sup>105</sup> In an article about the falsifiability problem within law and economics, Gregory Crespi summarizes a dilemma that confronts anyone who tries to use economic analysis to answer questions about the law:

If one applies conventional neoclassical economic reasoning to evaluate proposed legal regimes, one can generally only respond in one of two ways. One can say that the proposals are “not Pareto improvements”—a blanket statement that provides no discrimination among alternatives—and that they are (or are not) “Kaldor-Hicks improvements”—a loaded statement that conceals ideological biases and should be accorded normative significance only by those persons who embrace the particular and somewhat counter-intuitive algebra for making interpersonal welfare comparisons inherent in that criterion. As an alternative, one can decline to offer evaluative judgments of such proposals and

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*and Virtually All of Law-and-Economics Welfare Arguments Are Wrong*, 1993 U. ILL. L. REV. 485, 511-12 (describing the paradoxical result of a policy being both efficient and inefficient because both the policy and its reversal pass the Kaldor-Hicks test).

100. Duncan Kennedy makes a related criticism when he notes that Kaldor-Hicks efficiency is a useless criterion for adjudication “in the vast number of cases where there are two available efficient rules with different distributive consequences.” Kennedy, *supra* note 66, at 470.

101. On Popper-style falsifiability as central to economics, see MARK BLAUG, *ECONOMIC THEORY IN RETROSPECT* 697 (4th ed. 1985) (noting that for economists, “theories are ‘scientific’ if they are falsifiable, at least in principle, and not otherwise”).

102. Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 239 (1991) [hereinafter *Mid-Life Crisis*]. For a stronger criticism of the criterion, see Thomas M. Crowley, *Help Me Mr. Wizard! Can We Really Have “Neutral” Rule 706 Experts?*, 1998 DET. C.L. REV. 927, 940 (calling the criterion of falsifiability “discredited”).

103. Leff, *supra* note 25, at 457-58.

104. See RICHARD A POSNER, *THE PROBLEMS OF JURISPRUDENCE* 363 (1990) (defining the law of demand: “a rise in the relative price of a product will, other things held constant, cause a reduction in the quantity of the product demanded”).

105. DIERDRE N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* 24-25 (2d ed. 1998).

simply attempt to predict their likely consequences. Unfortunately, virtually all explanatory and predictive models are based upon the standard nonfalsifiable rational behavior postulate. With such models, it is impossible for one to know whether the preferences imputed to persons to support a rationality-based prediction or explanation of past events in fact exist.<sup>106</sup>

Rational choice is not the only tenet of law and economics that has escaped the rigors of falsification.<sup>107</sup> Others—for example, the claim that the common law is efficient—have never been put to this test.<sup>108</sup> Still other claims have been refuted. For instance, data contradict public choice theories of behavior, for both voters and officials.<sup>109</sup> Critics of law and economics like to point out that economic analysts who discover an inefficient legal rule often succumb to temptation and call for a change in the rule, rather than modify their earlier belief in the desirability of pursuing efficiency.<sup>110</sup>

3. *Coherence.*—Another aspect that characterizes science is what some cover with the word “coherence,” or internal consistency.<sup>111</sup> We have just considered a few instances of contradictory beliefs within the movement.<sup>112</sup> Using coherence more loosely as “sticking together,”<sup>113</sup> one might also note the longstanding complaint that law and economics does not hold together in various respects, made particularly with reference to its inability to settle on either a descriptive or prescriptive stance. This elderly criticism needs updating, now that law and economics has been straying further from coherence.

Soon after—if not as a result of—the manifest failure of its center to hold, law and economics tried to align itself with fields that had once been

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106. Crespi, *Mid-Life Crisis*, *supra* note 102, at 243.

107. See, e.g., Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 210 n.294 (2003) (referring to works “arguing that Posner’s positive theory of tort law has been falsified or is non-falsifiable”).

108. Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 823 (1990).

109. Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 214-23 (1988).

110. Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 285 n.132 (1989) (citing Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1389).

111. See *id.* at 270 (“The postulates of a hypothesis must not conflict with one another.”).

112. See *supra* notes 24-91 and accompanying text (discussing rational choice; efficiency; wealth maximization, and welfare; and markets).

113. In her article on coherence within family law, June Carbone follows this definition, citing Webster’s. June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 43 n.3 (2002).

distinctly separate from it. In *Overcoming Law*,<sup>114</sup> for instance, published in 1995, Judge Posner sought to recharacterize law and economics as a subset of “pragmatism,” jettisoning for his purpose more familiar philosophical understandings of this word.<sup>115</sup> Some writers have advocated a closer union between law and economics and evolutionary psychology.<sup>116</sup> Evolutionary psychology certainly overlaps with law and economics—both see human beings as strategy-focused and forward-looking, struggling under conditions of competition and scarcity; both posit a human actor independent of contexts like nation and language; both have given social conservatives a friendly home—but, equally certainly, it differs with law and economics on basic points.<sup>117</sup> Some writers identified with law and economics see a natural fit between their field and empirical research,<sup>118</sup> even though empirical findings, especially those in behavioral economics, notoriously interfere with neoclassical precepts.<sup>119</sup> The charge that law and economics is conservative in some stealthy or dishonest way, eager to protect the holdings of firms and rich people while refusing to acknowledge its agenda, gets denied . . . and lives on. These occasional bedfellows—“pragmatism” reconstituted, evolutionary psychology, conservative politics, along with others—have made law and economics hard to distinguish from other fields, even ones that hold fundamentally conflicting tenets.

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114. RICHARD A. POSNER, *OVERCOMING LAW* (1995).

115. *Id.* at 15-21.

116. Jones, *supra* note 43; Thomas S. Ulen, *Evolution, Human Behavior, and Law: A Response to Owen Jones's Dunwoody Lecture*, 53 FLA. L. REV. 931 (2001).

117. Evolutionary psychology seems even more committed than law and economics to the idea (wrongly associated with Coase) that legislation or legal change is futile as an instrument of social progress. The two disagree on money versus reproductive fitness as the primary motive for human action. Law and economics focuses on the present and is especially weak when it has to explain circumstances that change over time; evolutionary psychology focuses on the distant past. See Jones, *supra* note 43 (describing what behavioral economics deems not rational as instead rooted in “time-shifted rationality”).

118. Notably Tom Ulen. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875 (arguing for a new prize for empirical work that bears on law). Since Coase, it is commonplace for economic analysts of law to demand more and better empirical effort from economists, or from scholars of law and economics. *E.g.*, R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 19, 28 (1988) (decrying “blackboard economics” for its overpreoccupation with mathematics and other abstractions); MERCURO & MEDEMA, *supra* note 9, at 190 (claiming that one of the most urgent needs in law and economics is more empirical work). One commentator suggests rather cynically that the call within law and economics “for further ‘empirical research’ seems to be a call to find more examples and better evidence” of the prevailing dogma. Robert C. Downs, *Law and Economics: Nexus of Science and Belief*, 27 PAC. L.J. 1, 35 (1995).

119. For a detailed discussion of conflicts between the rational actor hypothesis and behavioral economics, see Posner, *Rational Choice*, *supra* note 16.

## II. WHAT LITTLE REMAINS OF LAW AND ECONOMICS

Now that rational choice, utilitarianism, efficiency, wealth maximization, markets, predictive power, and coherence have been questioned, abandoned, or smudged beyond recognition, the list of essential features defining law and economics gets shorter.<sup>120</sup> I offer here all I could come up with: only three items, and even that small total contains some redundancy.

*A. The Policymaker Ascendant*

The insightful critic Jeanne Schroeder has noticed something central to law and economics that seems to have escaped members of the movement and other observers: “Law and economics is a policy science,” whereas some other sectors of jurisprudence have no desire to form policy or, as Schroeder puts it, “give advice to the government.”<sup>121</sup> Not everyone writing scholarship about the law takes the perspective of the legislator or a judge. One important contributor, the “speculative theorist or critical legal scholar,” instead focuses on “the position of the governed—those who are subjected to the law.”<sup>122</sup> One might also mention the doctrinal writer who works to synthesize or understand a bounded set of materials like statutes or judicial opinions.<sup>123</sup> This policymaker-ascendant approach, then, is not found inevitably in legal scholarship.

Despite these few holdouts in the ranks of legal scholars, however, a focus on the policymaker has had a strong impact on the curriculum, as Martha Chamallas demonstrates by linking the rise of law and economics with the disappearance of consumers from the law school curriculum.<sup>124</sup> Products liability in particular, as well as some other courses, could be

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120. Judge Posner faults Christine Jolls, Cass Sunstein, and Richard Thaler for offering no definition of behavioral economics: “JST don’t actually tell us what ‘behavioral economics’ means. But implicitly they define it negatively: It is economics minus the assumption that people are rational maximizers of their satisfactions.” Posner, *Rational Choice*, *supra* note 16, at 1552 (discussing Jolls et al., *supra* note 11). This version of a definition may be too generous to behavioral economics; as Posner continues, behavioral economics is “antitheoretical.” *Id.* Tellingly, however, Posner is almost equally vague in his numerous writings that only “implicitly” tell us what law and economics means.

121. Schroeder, *supra* note 20, at 151. I say “seems to have escaped” because I have found no citations to this claim.

122. *Id.*

123. Not all doctrinal writing rejects the policymaker perspective. *See generally* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1339-40 (2002) (offering a cautious description and defense of contemporary doctrinal scholarship and noting that it is not monolithic).

124. Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9, 9-10 (2000).

taught as consumer law, but in most classrooms the instructor and teaching materials will focus on the manufacturer.<sup>125</sup> To the extent consumer law gets taught, argues Chamallas, the history and politics of American consumer movements receive little attention.<sup>126</sup> The subsuming of little-guy Consumer Law into Products Liability, with its all-present worry about ex ante effects on manufacturers and sellers, marks a triumph for law and economics.

Here, then, we see a piece of what remains in law and economics: an inclination to address governing entities more than governed individuals as ends of inquiry in themselves. Desires or resistances of human beings enter policymaking only in the aggregate. While the critical legal scholar works to “free the legal subject from manipulation by the law,”<sup>127</sup> the policymaker works to articulate the best manipulation.

### B. Better-Offness

With the policymaker’s ascendancy established, a next step asks what this policymaker should pursue. We have already explored the search for a word. One reviewer of contemporary law and economics, undertaking a task like mine here by querying “What is left of the traditional [law and economics] paradigm?” finesses with a somewhat evasive answer: “That people are purposively seeking to maximize something—often (but not always) their own utility, as they appraise it—and that their purposive efforts are in general well suited to their ends.”<sup>128</sup>

This tentative vocabulary identifies a goal. While “efficiency,” “wealth maximization,” and “welfare” remain inadequate as descriptors of what law and economics pursues, there does linger some slight residue of meaning—something like better-offness—held in common by each of the inadequate terms. *Fairness Versus Welfare*, as was mentioned, moves close to tautology by refusing to exclude much from “welfare,” in order to sell it to observers who would otherwise prefer to vote for “fairness.”<sup>129</sup> Kaplow and Shavell’s “welfare,” though inane—or, as Kaplow and Shavell prefer to describe their word, “all-encompassing”<sup>130</sup>—is precise enough to convey a couple of points. By referring explicitly to welfare economics, this term suggests that policymaking ought to seek that which can be counted and

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125. *Id.* at 23.

126. *Id.* at 12-13.

127. Schroder, *supra* note 20, at 151.

128. Hill, *supra* note 83, at 226.

129. See KAPLOW & SHAVELL, *supra* note 18, at 465 (describing “well-being” as conceived by welfare economics as “all-encompassing (and thus not limited to wealth or other tangible elements)”).

130. *Id.*



compared, if need be at the expense of less precise goals. Similarly, some demurrers from Kaplow and Shavell notwithstanding,<sup>131</sup> the word has a material connotation, implying that certain types of well-being experienced only as costly mental states (e.g., revenge or retribution, gratification of sadistic impulses, the pleasures of rape or racism or the oppression of homosexual persons) ought to carry less weight in policymaking than more tangible or alienable gains. “Welfare” also reminds policymakers of scarcity and the need to make tradeoffs, a goal that individuals asserting rights or entitlements will have a tendency to overlook.

Kaldor-Hicks therefore lives in law and economics: a transfer, or change, represents an improvement if the “gainers gain more than the losers lose.”<sup>132</sup> Especially when compared to the robust (if elusive) Pareto alternative for judging welfare, this better-offness criterion is so thin that many critics suspect its *raison d’être* must be to cover “ideological biases.”<sup>133</sup> Surely no policymaker could use it to figure out what to do.<sup>134</sup>

### C. *Ex Ante Rather Than Ex Post*

A final aspect of law and economics that may (or may not) contain content distinct from the other two is its focus on the future to the exclusion of the past. In this *ex ante* perspective, those who make law ought to strive to improve welfare not so much by reaching the right answer in a particular dispute but by writing doctrine that would foster the goods that law and economics says we all pursue: efficiency, wealth maximization, welfare, better-offness, or what you will. Focusing on *ex ante* rather than *ex post* is more legislative than adjudicative, and hence consistent with the policymaker ascendant: a mere litigant, in contrast to an *ex ante* policymaker, might simply try to win her own case. The better-offness criterion is also repeated here, as the *ex ante* approach to a dispute spreads its effects beyond the parties: more people, more welfare.

In this posture, law and economics stands against several smaller antagonists: the “corrective justice” sector, located mainly in tort theory and exemplified by Ernest Weinrib, whose opposition to law and economics we

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131. Kaplow and Shavell make clear that their notion of “welfare” is “not limited to wealth or other tangible elements,” and they go on to note that “[i]n arguing that no evaluative importance should be given to notions of fairness, we are criticizing principles [such as corrective justice and retributive justice] that give weight to factors that are independent of individuals’ well-being or its overall distribution.” *Id.*

132. Cooter and Ulen so define the Kaldor-Hicks criterion. COOTER & ULEN, *supra* note 12, at 44. Although this definition is of limited value because it finesses on the crucial question of measurement, it conveys a general idea of getting better.

133. Crespi, *Mid-Life Crisis*, *supra* note 102, at 243; *see also* Markovitz, *supra* note 99, at 494-507 (arguing that Kaldor-Hicks is biased in favor of the status quo).

134. Kennedy, *Palgrave Essay*, *supra* note 66, at 470.

encountered at the beginning of this Article;<sup>135</sup> those who, again in torts, emphasize “compensation” at the expense of “deterrence;”<sup>136</sup> the retribution tradition in criminal law and punishment;<sup>137</sup> the embrace of Kant within legal theory;<sup>138</sup> and dissenters aligned with a critique by Andrew Kull, a scholar of equitable remedies, of the tendency among courts to favor administrative ease over the attainment of justice between private parties.<sup>139</sup>

### III. WHO’S IN, WHO’S OUT

In a 2000 lecture, Judge Alex Kozinski noted the impact of the law and economics movement:

Incentives and disincentives, supply and demand, marginal cost and marginal benefit—all these terms and the concepts behind them have become the everyday building blocks of legal arguments. Their impact is felt not merely in areas such as antitrust, which have a more or less direct relationship to economics, but also in virtually all areas of the law.<sup>140</sup>

Kozinski sounds quite right. Now what? After this much success, where does law and economics end and other approaches to the law begin?

#### *A. Policymaking, Better-Offness, and Ex Ante Outlooks Beyond the Movement*

What little remains of law and economics is now commonplace among judges and scholars who are emphatically not associated with this movement. Their writings express all three of the above-mentioned remaining law-and-economics characteristics: an explicit desire to make policy, an apparent taste for better-offness in a Kaldor-Hicks sense, and an affinity for ex ante perspectives on the law. Such writing could be taken as proof that the movement has triumphed: we are all economic analysts now,

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135. See *supra* note 2 and accompanying text (discussing Weinrib’s edifice metaphor). See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

136. See Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 337-38 (2004) (gathering materials on tort policy that appear to deem compensation more important than deterrence).

137. See *Morrisette v. United States*, 342 U.S. 246, 251 n.5 (1952) (discussing retribution as the historic purpose of the criminal law).

138. See George P. Fletcher, *Why Kant*, 87 COLUM. L. REV. 421, 428 (1987) (associating the rise of Kantian legal theory with a desire “to ground legal principles in solid, nonutilitarian values”).

139. See generally Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284 (2001).

140. Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, The Fourth Annual Frankel Lecture at the University of Houston Law Center, in 37 HOUS. L. REV. 295, 317 (2000).

perhaps.<sup>141</sup> But neither these writers nor anyone purporting to speak for the movement seeks to expand its boundaries to include them. Hence my contrary position: Law and economics has disintegrated to the point that its only remaining commitments are too diffusely held to be distinctive. To illustrate the point, I have gathered a few examples, first from judicial opinions and then from scholarly writing.

*1. What little remains, judicial division.*—Two Supreme Court justices who displayed especially little interest in, or connection to, the law and economics movement while serving on the Court during its heyday were Thurgood Marshall and Harry Blackmun. Both of these Justices nevertheless used law-and-economics watchwords and tropes in their opinions for the Court. Marshall employed cost-benefit reasoning not only where it was doctrinally required (for instance, in considering the application of an equitable rule to riparian rights),<sup>142</sup> but also where he did not have to (for instance, in judging a claim of conscientious objector status when the objector objected only to the Vietnam War, not to all war).<sup>143</sup> Blackmun, in an opinion that disallowed punitive damages against municipalities in § 1983 actions, expressed concern for the ongoing financial stability of local governments and made copious use of the ex ante perspective, focusing on the inability of these damages to deter misconduct.<sup>144</sup> In another decision Blackmun invoked deterrence when refusing to extend the exclusionary rule to exclude evidence in a federal civil proceeding: The police would not be much deterred by such an exclusionary rule, Blackman contended, and even if they were, the societal costs of this deterrence were too high.<sup>145</sup>

Policymaking, better-offness, and ex ante outlooks flourish among other leading judges who are equally unaffiliated with the movement. Stephen Reinhardt, who once “famously proclaimed at a Yale seminar that social science had never affected his judicial decisionmaking,”<sup>146</sup> nevertheless has pleaded in print for “numbers that can be supported by empirical and statistical arguments,”<sup>147</sup> and also has considered incentive

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141. See MILTON FRIEDMAN & ROSE D. FRIEDMAN, *TWO LUCKY PEOPLE: MEMOIRS* 231 (1998) (noting the statement “We are all Keynesians now” attributed to Richard Nixon and to Milton Friedman in 1966).

142. See *Colorado v. New Mexico*, 459 U.S. 176, 189-90 (1982) (listing factors to be considered in a cost-benefit analysis).

143. See *Gillette v. United States*, 401 U.S. 437, 455-60 (1971) (discussing the administrative burdens and uncertainty that a flexible rule would create, and the increased costs of applying such a rule).

144. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263, 268-72 (1981).

145. *United States v. Janis*, 428 U.S. 433, 453-54 (1976).

146. Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *STAN. L. REV.* 1193, 1296 (2003).

147. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 *LOY. L.A. L. REV.* 1, 6

effects on prospective parties.<sup>148</sup> One noted nonmember of the movement, Jack Weinstein, made his case against the federal sentencing guidelines in cost-benefit terms,<sup>149</sup> and several of his sentencing opinions speak about incentives and deterrence.<sup>150</sup> Joyce Kennard used similar reasoning to reject intentional spoliation as a freestanding tort,<sup>151</sup> and to adopt strict products liability for manufacturers of component parts.<sup>152</sup>

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(1993).

148. *Munoz v. Sullivan*, 930 F.2d 1400, 1407 (9th Cir. 1991).

149. *United States v. Aguilar*, 884 F. Supp. 88, 91-92 (E.D.N.Y. 1995).

150. *E.g.*, *United States v. Ferranti*, 928 F. Supp. 206, 220 (E.D.N.Y. 1996); *United States v. Concepcion*, 825 F. Supp. 19, 23-24 (E.D.N.Y. 1993).

151. *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 520-21 (Cal. 1998).

152. *Jimenez v. Superior Court*, 58 P.3d 450, 455 (Cal. 2002).

2. *What little remains, scholarship division.*—Although it is difficult to identify the legal scholars’ division of nonmembers—they do not sign up in a counterpart to the American Law and Economics Association—it is easy to find examples of policymaking, better-offness, and ex ante perspectives in work rooted far from law and economics. Margaret Jane Radin, a declared antagonist to the movement,<sup>153</sup> advocates weighing the harms of the death penalty against incremental gains in deterrence.<sup>154</sup> Detailing a plan for innovations in low-income housing, Duncan Kennedy works almost entirely in a vocabulary of incentives,<sup>155</sup> his critique of law and economics also relies on precepts shared with the movement.<sup>156</sup> Ronald Dworkin, a frequent sparring partner of Judge Posner, analyzes the *Bakke*<sup>157</sup> decision in cost-benefit terms.<sup>158</sup> Historian and law and society pioneer Lawrence Friedman studies the actionability of privacy under the New York law of consumer protection with reference to deterrence.<sup>159</sup> The Critical Legal Studies movement works extensively with empirical data.<sup>160</sup>

*B. Toward the Hard-to-Escape Conclusion that Law and Economics Has Deteriorated into a Faculty Club*

For this discussion I start with a leading publication about the condition of law and economics in the American legal academy. In 1989 Robert Ellickson set out to measure the presence of law and economics in law schools.<sup>161</sup> He reported stagnation: “In general, law and economics is no longer growing as a scholarly or curricular force within the leading American law schools. Instead, it is simply holding previously won

153. See *supra* notes 87-88 and accompanying text.

154. Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1029 (1978).

155. See Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 91-95 (2002) (arguing that allowing the occupants of low income housing to participate in the management provides an incentive for occupants to invest in their homes).

156. See generally Kennedy, *Critique*, *supra* note 5; Kennedy, *Palgrave Essay*, *supra* note 66.

157. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

158. RONALD DWORIN, *A MATTER OF PRINCIPLE* 296-97 (1985).

159. Lawrence Friedman, *Establishing Information Privacy Violations: The New York Experience*, 31 HOFSTRA L. REV. 651, 662-65 (2003). Friedman has also written that “all criminal justice, whatever else can be said about it, is economic in one crude, primary sense: its rules are attempts to fix prices or ration behavior.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 107 (1993). I thank Dan Cole for telling me about the quotation—a concise way to express Part III.A’s contention that if we can stick to a very thin working definition of “economic,” we are almost all economic analysts now.

160. Levit, *supra* note 109, at 286-89. On the complex relationship between critical legal studies and “empiricism,” see David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

161. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) [hereinafter *Critique*].

ground.”<sup>162</sup> Citing the obligation that he, as an economic analyst of the positive stripe, had to support his assertions with facts, Ellickson set out to “provide some evidence” that law and economics had plateaued in law schools.<sup>163</sup>

The effort foundered on methodological shoals.<sup>164</sup> When counting the number of articles in law and economics that elite student-edited journals at Chicago, Harvard, Stanford, and Yale had published, for instance, Ellickson classified an article as fitting within his paradigm “if it was both friendly to the economic paradigm and also made use of, or cited many works in, economics or law and economics”<sup>165</sup>—a standard that subsequent researchers could not use in an attempt to replicate his findings, even assuming (contrary to a criticism from Posner) that Ellickson had looked at the right schools and journals.<sup>166</sup> Ellickson also claimed that notable senior scholars, including Guido Calabresi, Bruce Ackerman, and Frank Michelman, had “either abandoned [law and economics] or begun to stress its limitations,”<sup>167</sup> a claim these scholars might have disputed and one that, like Ellickson’s earlier effort at article-counting, begs the question of what Ellickson meant when he said law and economics.

Ellickson’s agenda, frankly stated in his article, was to encourage a change in law and economics scholarship in the direction he favored, and that Posner had long opposed.<sup>168</sup> The stagnation he saw implied fatigue, if not malaise. He had a cure at hand: “All this [evidence of the law and economics decline in the legal academy] suggests how a freshening of the law and economics paradigm with ideas from psychology and sociology would help rejuvenate the specialty within law schools.”<sup>169</sup>

Now, along with many other readers, I admire much of the post-Chicago law and economics literature in general and Ellickson’s work in particular. It all ought to flourish. But Ellickson’s use of data shows the nearly infinite manipulability of what can be marshaled to bolster what anyone wants to say about the state of law and economics in the legal

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162. *Id.* at 26.

163. *Id.*

164. Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT L. REV. 57, 57-58 (1989) (criticizing Ellickson’s methodology) [hereinafter *Comment on Ellickson*].

165. Ellickson, *Critique*, *supra* note 160, at 27.

166. Posner, *Comment on Ellickson*, *supra* note 163, at 57.

167. Ellickson, *Critique*, *supra* note 160, at 28.

168. *See id.* at 25 (arguing that law and economics scholars “should increasingly look to psychology and sociology in order to enrich the explanatory power and normative punch of economic analysis”); *see also* Posner, *Rational Choice*, *supra* note 16 (criticizing Jolls, Sunstein, and Thaler’s case for behavioral law and economics).

169. Ellickson, *Critique*, *supra* note 160, at 35.

academy. Ellickson started by not defining law and economics. Then he found his evidence by referring to tautology: law and economics scholarship means scholarship friendly to law and economics or that cites writings in law and economics, he said. Then he pondered whether to exclude Calabresi and Ackerman and Michelman from law and economics based on their later writings (query: is a paper by a pedigreed author that criticizes this subject inside the movement, or out?), and decided to infer that recent increases in the representation of Ph.D. economists among those who publish in law and economics was evidence of decline rather than expansion.<sup>170</sup> And finally, as a tonic to “rejuvenate the specialty”<sup>171</sup> from a torpor that nobody else had criticized and that had no objective referents to help measure either the disease or the effect of an antidote, Ellickson prescribed—what else?—a large helping of his particular research interests.

I summarize Ellickson’s argument this way not to attack his plea for adding psychology, sociology, and “culture” to law and economics, nor to criticize him for doing bad empirical work, but to suggest that as soon as law and economics lost its distinctive character (thanks to too much refutation and too much acceptance), its adherents lost their basis for dividing the legal academy into members and nonmembers. Nevertheless their inclination to sort people into two piles without transparent criteria for division—the kind of dichotomous sorting that a Jeanne Schroeder-style “cult”<sup>172</sup> would do—remains. Unconstrained by genuine criteria for membership, decisionmakers in the academy and beyond—to the extent that law and economics extends beyond law schools—are now free to substitute prejudices for standards.

The most widely suspected prejudice is of political conservatism. Consider the possibility that

facile assumptions have been carefully chosen to push forward a politically conservative agenda. Viewed in this light, the choreography is unsurpassed. First, equate utility with ability to pay, but assume away the issue of initial wealth distribution and bargaining inequalities. Next, combine with the inevitability of common-law efficiency. The result is a bias away from government regulation toward a nineteenth-century, almost Lochneresque, laissez-faire conception of the primacy of private law. The ability of good rhetoric to make this all appear natural is remarkable.<sup>173</sup>

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170. *See id.* at 32 (worrying that this increased professionalization may “estrangle the law and economics movement from the ordinary law professor”).

171. *Id.* at 35.

172. Schroeder, *supra* note 20, at 150.

173. Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for “Critical*

Before continuing to muse about possible prejudices, I should emphasize that their existence cannot be proved.<sup>174</sup> Instead I look at the opportunity available within law and economics (that is, the loss and deterioration of most if not all meaningful movement-defining content, which would otherwise have constrained members from capricious exclusions and dismissals) combined with certain outcomes. In the absence of other explanations for what looks like a particular sort of prejudice, it may be reasonable to infer a connection between the freedom to indulge prejudice and results that are consistent with prejudice and less consistent with the absence of prejudice.

In this light, consider the scant presence of women in law and economics. (The same generalization holds for racial minorities, but appears less dramatic because of the underrepresentation of racial minorities in the legal profession and the legal academy, as a whole.)<sup>175</sup> According to data for the 2002-03 academic year, more than ninety percent of those teaching law and economics in American law schools were male.<sup>176</sup> Prejudice? (Men may have been more qualified to teach the course, or more interested in doing so.) A survey of the non-student-authored articles that the main law reviews at Berkeley, Chicago, Columbia, Duke, Harvard, Pennsylvania, Michigan, Stanford, Virginia, Yale, and UCLA published in 2002 found three hundred percent more law and economics articles than feminist legal theory articles,<sup>177</sup> while the number of professors teaching Women and the Law was twenty-six percent larger than the number who taught Law and Economics.<sup>178</sup> Prejudice? (Manuscripts on law and economics might have been of higher quality; the study did not look at unpublished manuscripts even to count the number of submissions in both categories; surely no one would argue for subject-matter quotas in a law review?) An outside surveyor cannot say that law and economics lingers as a sector in the legal academy in part for the purpose of excluding women and keeping women subordinated: one cannot

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*Legal Economics*," 2003 UTAH L. REV. 1155, 1170 (footnotes omitted).

174. Few even speculate about them in print, although Tom Ulen has recently written that a perceived "high correlation between one's comfort level with law and economics and one's comfort level with the policies and personalities of the conservative wing of the Republican Party" is "spurious." Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35, 42 (2004).

175. See Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 748-53 (1995) (discussing the connections between law and economics and critical race theory).

176. Marjorie E. Kornhauser, *Why a Duck? Are Feminist Legal Journals an Endangered Species, and If So, Are They Worth Saving?*, 12 COLUM. J. GENDER & L. 478, 483 (2003) (citing unpublished Association of American Law Schools data).

177. *Id.* at 481.

178. *Id.* at 482.



know for sure.<sup>179</sup>

Another prejudice, related to the one against women, could be an undertheorized, or less than conscious, affinity and affection for persons who hold power. Responding to Frank Easterbrook's study of economics as it arose in the Supreme Court's 1983 docket,<sup>180</sup> Robin West has speculated that those who adhere to law and economics venerate the authority that patriarchal figures hold.<sup>181</sup> Standing serene against the writings of Freud, these adherents of law and economics perceive no danger in the power of powerful men. West claims that law and economics urges the law to encourage the exercise of authority in response to their desires; the powerful must do as they like.<sup>182</sup> "[M]ight is innocent," according to the law and economics creed:

Our fathers are protecting us, not oppressing us. The revolutionary-federalist-founding father-fourteenth amendment-Civil Rights Act coalition of fathers has maintained our collective, public identity. Our stronger brothers—those with superior bargaining power in the private realm—have desires that serve the community. Father rules us while big brother increases the size of the pie.<sup>183</sup>

A reader need not credit speculations like these (I myself do) in order to accept my worry that law and economics has deteriorated into a faculty club. Even in the relative shelter of the academy, any sector that retains power while no longer possessing the central tenets that once defined it is dangerous. Its lack of foundational content threatens the movement itself, as well as outsiders vulnerable to the harms it can inflict through unjustified condemnation and exclusion. After its hollowing-out, law and economics may or may not be a faculty club; in any case it lacks the coherence and unified principles it possessed when *The Costs of Accidents* was new.

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179. Cf. Nancy E. Dowd, *Liberty vs. Equality In Defense of Privileged White Males*, 34 WM. & MARY L. REV. 429, 468 (1993) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) ("Certainly if one wished to discriminate not merely in spite of, but because of, race and sex, this book would provide an argument to do so. But I will give Epstein the benefit of the doubt (why, I'm not sure; it's probably a weakness of feminists).").

180. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

181. Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 846-47 (1986). See generally Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367 (2001).

182. West, *supra* note 180, at 852.

183. *Id.*

## IV. CONCLUSION: WHERE NOW?

Writers frequently depict law and economics as an aging giant. Their metaphors of decline and old age perhaps rush too fast to judgment: In addition to premature proclamations of death, and wishful thinking that the movement had “peaked,” the literature on law and economics includes a 1991 claim about a “mid-life crisis.”<sup>184</sup> I have already fretted about hurrying to entomb law and economics.<sup>185</sup> That said, this birthday of a great book, marking indeed “a generation of influence,” does invite thought about the state of the movement it helped inaugurate.

Conceding that dichotomous thinkers within the law and economics movement might be inclined to classify the reflections in this Article as hostile to their cause, I maintain that the Article has depicted law and economics as evolving, rather than entirely refuted or spent. This Article has indeed argued that the core tenets of the movement are refuted and spent. It has also contended that law and economics has failed to rescue itself by its tactic of trying to claim for itself various refutations of these tenets. But my reflections find a paradox in law and economics: the movement while deteriorating has been thriving. It reached heights scaled by no other jurisprudential school. Its success has consisted mainly of telling lawyers, lawmakers, and legal scholars how and why they must keep their eye on the welfare ball when making policy—but it has also fostered other triumphs: the importation of interdisciplinary findings into law and across campuses; the insistence on (if not quite the achievement of) empirical research as integral to legal policy; and the touch of science—whose perils and pretensions I have noted but that also can spur lawyers to reach for more rigorous work.

These victories of law and economics, or so it seems to me anyway, share a theme of *inclusion*. Law and economics works best when it opens, expands, stretches. Its worst tendency is to narrow itself into a small, crabby in-group, squinting at its ranks and those around it to refine its criteria for exclusion. In order for the movement to achieve its best self, members and nonmembers alike need to reread and reaffirm the generous manifesto celebrated in this Symposium.

*The Costs of Accidents* is a book that continually finds common cause with a large public. It not only links its goal of reducing accident costs with both fairness and welfare, thereby making room for everyone at the table, but it also sees little separation between the two; Calabresi begins the last part of the book, titled “Justice and the Fault System,” with an explicit

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184. Crespi, *Mid-Life Crisis*, *supra* note 102. Surely law and economics was only in its thirties that year—a stripling!

185. *See supra* notes 84-85 and accompanying text.

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connection: “None of my criticisms of the fault system, based as they are on its failure to reduce accident costs adequately, would be decisive if the fault system found substantial support in our notions of justice.”<sup>186</sup> The audience invited here is everyone who cares about the problem of injury to human beings, rather than a partisan cohort.

No surprise then that Guido Calabresi, more than any other of the four men whom the American Law and Economics Association calls founders of the movement,<sup>187</sup> has throughout his long career reached generously to engage those who care about American law and policy, paying no heed to club-membership credentials. Guido never invaded in order to enlarge the turf and boundaries that he built. He never even stooped to protect these spaces. When his concerns came together with a larger legal discourse, we readers, lawmakers, scholars, and the American public were all—in the happy ending that welfare economics endows—made better off.

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186. THE COSTS OF ACCIDENTS, *supra* note 1, at 291.

187. Along with Coase, Manne, and Posner. See Mercurio & Medema, *supra* note 9, at 193 n.1.