1. The changing methodologies of law and economics

*Thomas S. Ulen*

1.1 INTRODUCTION

Law and economics has been an important part of the legal academy since the mid- or late 1970s – about 40 years. Its initial appeal was that it brought a new set of tools to bear on the core issues of the law and seemed to give fresh justifications for core legal doctrines. There was no particular evidence that the study of law had grown stale or that innovative scholarship in the law had slowed. Nonetheless, the eagerness with which the legal academy – and to a much lesser extent, in the United States at least, the economics profession – greeted the application of economic analysis to law suggests that this was an innovation that might last and bring about some big changes. To be fair, it is also true that there was a healthy amount of skepticism in the legal profession about the application of economics to legal areas outside of antitrust. I shall say more about this skepticism shortly.

During that early period the principal means by which the discipline advanced was by applying the standard tools of microeconomic theory – the rational choice theory of individual and business firm decision-making and the tools of price theory, market analysis, game theory and decision-making under uncertainty (expected utility analysis) – to legal issues. So, for instance, law-and-economics scholars showed that secure property interests would not only induce investments in the search for and protection of valuable assets but also foster arm’s-length bargains that would enhance efficiency by moving those assets to their highest and best uses.

---

Methodologies of law and economics

A significant aspect of this example and of most others that could be cited was the importation of some version of the notion of efficiency – allocative or Pareto efficiency, productive efficiency, and Kaldor–Hicks efficiency – into the normative canon of legal analysis. These two aspects of the law-and-economics intellectual revolution – the use of microeconomic tools and of the normative notion of efficiency – were the distinguishing characteristics of the revolution.

As in the example of the economic analysis of property interests above, some of the conclusions that the new form of analysis reached were not significantly different from those that more traditional doctrinal analysis had reached when examining similar issues. There was a sense, however, that economic analysis might provide a unifying theme and methodology for looking at many areas of the law, which theme and methodology traditional doctrinal analysis had not been able to provide. For example, economics seemed to provide tools for drawing sharper lines and distinctions among the various areas of the law. While the differences between public and private law were reasonably well known to traditional legal scholars, law and economics suggested clearer and crisper reasons for drawing a distinction between public and private law. Those reasons included analysis of the different remedies available in those two areas of law, the institutions in which laws were generated (including common law courts, legislatures, and the analogous institutions in civil law countries), the significant differences between rules and standards\(^2\) and the like.

Consider the outpouring of scholarship on the Coase Theorem, first articulated by the late Ronald Coase in his famous 1960 article.\(^3\) That remarkable article revised the framework that economists had used since A.C. Pigou’s famous formulation of market imperfections and their policy correctives in the early 1920s.\(^4\) Rather than the usual list of reasons that markets fail (monopoly, public goods, external costs and benefits, and others, such as severe informational asymmetries, since added), Coase reduced all those to instances of “transaction costs” – the costs of finding someone with whom to bargain, of negotiating the terms and conditions of the bargain, and of monitoring the bargain to make certain that the other party adhered to the terms and conditions of the bargain. That is, he claimed that markets worked (and could, by implication, be left unregulated) to achieve efficient results when transactions costs were zero or very

\(^3\) Coase, supra n. 1.
low and that markets needed regulatory assistance (law) to overcome the potential inefficiencies of high transaction costs.

One might have predicted that this very straightforward, even simple, observation would elicit a shrug and not much more. However, the literature that it fathered has been immense. Most of those familiar with law and economics will be so well acquainted with that literature that they will need no examples. These responses include attempts to show that the theorem was wrong or inconsequential, to demonstrate its application to more and more examples from law and policy, to show that laboratory experiments confirmed the theorem’s predictions, and more. And they will almost certainly know that Coase’s article is the most frequently cited article in the legal literature of the twentieth century.5

I suggested above that law and economics, in some instances, reached similar conclusions to traditional doctrinal analysis. If that was the case in many instances of legal analysis, then there might not have been much to be said for adopting law and economics. Was there more? Yes, and that “more” was important. I am not stretching a point to say that law and economics revolutionized legal scholarship in the 1980s so much that by the 1990s it was probably the leading method by which to engage in any legal analysis. Indeed, law and economics had become so mainstream in North America by the last decade of the twentieth century that most young legal scholars used law and economics in almost every piece of their work, even if they were not members of the American Law and Economics Association or professed the subject.

A prominent example of that revolution is contract law, an area of law that Grant Gilmore famously pronounced to be “dead” in 1974.6 By the early 2000s the subject of contract law had become, in essence, “the law and economics of contract law.” The leading casebooks frequently begin with a discussion of the concept of the “efficient breach of contract” and include economically minded discussions of the various defenses, performance excuses, and remedies. That is not to say that contract law has settled into a staid law-and-economics equilibrium. There are still fascinating open research questions on many, if not most, of the economically informed doctrines of contract law, as evidenced by recent work by Douglas Baird, Ian Ayres and Alan Schwartz, Schwartz and Bob Scott, Dan Markovits and Schwartz, and Greg Klass, among others.7

---

Methodologies of law and economics

While there was, ultimately, a warm welcome to law and economics in the North American legal academy, there was also, early in the 1980s, a very strong adverse reaction to the new field. With some tempering of the rhetoric, that unfavorable reaction has continued. There are those in the legal academy and beyond who have little use for law and economics, but their numbers seem to be decreasing.

What prompted opposition to law and economics? There were questions about the role of theory in legal analysis, about the suitability of efficiency as a legal norm, about the seeming conservative or neo-liberal slant of much of the early literature, and more.

My own feeling about those criticisms was that they were unjust and ill-informed but that they were, nonetheless, good for the field of law and economics in that they forced the new field to demonstrate its utility to lawyers, judges, law professors, and law students. My reading of the debate in the 1980s and early 1990s is that the responses to these criticisms won the day and established law and economics as an important part of legal scholarship and practice.

One of the most important contributions of law and economics to the legal enterprise is its demonstration effect to other innovators. The intellectual ferment that that innovation brought to law schools in the 1980s suggested a receptivity to other innovations, and those quickly followed. For example, critical legal studies (CLS), which held, among other things, that the rules of law are not just or efficient but created to further the interests of those who are in a privileged position – a plausible hypothesis – appeared in the late 1980s and sought to position itself as the alternative to law and economics. The legal academy was open to this and other innovations and gave their exponents an opportunity to make their cases. I think that it is fair to say that with regard to CLS the case was not successfully made, largely (I believe) because there was no compelling evidence for the central hypotheses of CLS. The movement has more or less disappeared from academic view.

However, other scholarly innovations in law of the past 20 years have

---


Perhaps the most famous of these criticisms, made by a former distinguished law professor and then federal appellate court judge, was Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession,” 91 Mich. L. Rev. 34 (1992). There is a large literature commenting on that article.
been successful and sustained, such as the use of anthropology, history, philosophy, political science, and psychology to examine legal doctrines. It is a testament to the legal academy that it has been so open to these many innovative means of exploring the law.\footnote{Let me elaborate on this by making two points. First, because there is no core methodology in the study of law (the area being defined by its subject matter rather by its way of examining it), there is no central method of investigation that needs to be displaced in order for innovations to arise and be taken seriously. As a result, law has over the past 30 or so years been singularly open, among social and behavioral sciences, to new methods of examining its core subjects. In other disciplines with a core methodology that defines the discipline (such as economics and rational choice theory), there is personal and institutional resistance to change, a fact captured in Max Planck’s famous quip that “Science advances one funeral at a time.” Second, most of these legal scholarly innovations have been focused on proposing new hypotheses about the law. Interesting hypotheses are always welcome, but there is more to scientific inquiry and hypothesis-framing. For instance, early law-and-economics analysis focused on framing hypotheses about the efficiency of various legal rules and standards. However, the most important aspect of current legal scholarship (regardless of disciplinary hypothesis) is empirical. This is certainly true, as I shall argue in a later essay in this volume, of law and economics. I am certain that those contiguous disciplines that do not move from hypothesis-proposal to empirical work are not going to be as valuable to the legal community as those that do.}

My hope for this volume is that it will give an up-to-date view of the various methodologies that those learned in law and economics are using or might use. That information should be of interest to those within the field, those contemplating working in this field, and those in law or in economics who are curious about recent methodological developments within the field.

In the next section I shall explain a possible curiosity of the book’s title and of this introduction’s title. In Section 3, I shall introduce the contributors and their contributions. Section 4 discusses legal areas and additional methodologies that are not dealt with in chapter-length contributions to this volume. Section 5 concludes this introduction.

1.2 WHY “METHODOLOGIES” NOT “METHODOLOGY”?

I want to explain two things about the title of this introduction and this volume. First, why do I use the plural – “methodologies” – rather than the singular? Isn’t there a standard methodology – singular – of law and
Methodologies of law and economics

economics? And isn’t that methodology the standard methodology of microeconomics? Well, no. I don’t think that it is. I think that one of the miraculous things that has happened in the legal academy over the past 30 or more years is that, from its modest beginning, law and economics has continued to evolve and to change. It has been, to use a very useful word, syncretic, borrowing tools from several different disciplines and putting that toolkit of related disciplines to work in explaining the law. There is now no one way to do law and economics. There is a behavioral way, a psychologically influenced way, a historical viewpoint, a political-science take on legal issues, an exploding set of experimental and other empirical results, and a way of using complexity theory to cover and re-explore legal topics. All of those different methodologies are explored in this volume. To illustrate these developments, in 2010 the University of Illinois College of Law, on the motion of the law-and-economics scholars on the faculty, changed the name of the Illinois Program in Law and Economics to the Illinois Program in Law, Behavior, and Social Science.¹⁰

The second aspect of this essay’s title that warrants comment is the word “changing.” I have already indicated the broadening from the narrow base of microeconomic theory that characterized the early years of law and economics. The means by which legal scholars and economists have investigated the law have changed. They have not leapt from fad to fad or from stone to stone in a river of disciplines. Rather, they have incorporated all of these new ways of investigating the law. I think that, if surveyed, most law-and-economics scholars would suggest that each of the different methodologies illustrated in this volume is important and has contributed importantly to modern legal scholarship. More than that, I suspect that most of those in this hypothetical survey would not willingly create a hierarchy among these different methodologies. They would be unlikely, for example, to say that the use of the tools of microeconomic theory has been the most important methodology or that empirical legal studies have been the least important. The discipline sees these various methods of inquiry as being collaborative and cumulative – that our picture of what the law is and can be depends crucially on our looking at our subject matter through each of these lenses and building up a composite picture that brings together the findings from all of these studies.

I do not know precisely what, if any, external forces – external, that is, to

¹⁰ Revealingly, there were law-and-economics practitioners on our faculty who strenuously objected to this renaming of the program on the (in my view, preposterous) ground that economics was better than or deserved special notice of its distinction from those other social and behavioral disciplines.
the law school – might have caused this remarkable intellectual flowering. There may be such forces, but in my experience the principal force that has caused the changes in the scope of methods used in legal scholarship has been a stunning willingness on the part of law school professors to pick up any tool that might be useful for understanding the law. I have had wide experience throughout a first-rate, comprehensive university, and I am fairly certain that what has been going on in US law schools is one of the most notable and exciting intellectual developments of the late twentieth and early twenty-first centuries.\textsuperscript{11} While many disciplines have been drilling deeper into a relatively narrow shaft of material, academic law has been doing something completely different. It has been seeking out scholars from many different disciplines to help them better understand the law. At the University of Illinois College of Law we had in the very recent past 14 faculty members out of 39 who had a PhD in a discipline other than law and, typically, also a JD. I think that the principal motive driving this interdisciplinary hiring was a desire to have learned colleagues in contiguous disciplines immersed (or, like wartime journalists, embedded) in the life of the law school.

1.3 THE CONTRIBUTORS AND CONTRIBUTIONS OF THIS VOLUME

As seems appropriate, this collection begins with a marvelous essay by Tom Miceli of the Department of Economics, University of Connecticut, on “The use of economics for understanding law: one view of the cathedral.” The essay is not only a superb survey of how economic tools have served to broaden our understanding of some central topics in law; it also shows that there are some common economic concepts that run through the different areas of the law, thereby providing the beginnings of an economic theory of all of law, not just a series of loosely related vignettes.

\textsuperscript{11} There are changes going on all the time in academic disciplines, but the only intellectual ferment that I believe matches that that has characterized law schools over the last 30 years is what is going on in the biological sciences. To illustrate several points in this essay, including this one about biology, the University of Illinois College of Law has entered into a collaborative research endeavor with the University of Illinois’ Institute for Genomic Biology. Some of the topics that scholars from both institutions will be exploring are the causal influences of genes on legally interesting behavior and the causal influences of legally interesting behavior on individual genes. I am unaware of any other social scientific interaction in which the Institute for Genomic Biology is engaged.
Miceli also draws attention to a factor about law and economics that has recently been neglected but was one of Ronald Coase’s deepest hopes for his work: that law and economics can help economists better understand how the legal system impacts the economy.

The second essay – “A public choice perspective on law and economics” – is by Max Stearns, Associate Dean for Research and Faculty Development and Venable Baetjer & Howard Professor, University of Maryland Carey School of Law. Stearns is one of the leading legal scholars working on public choice aspects of the law. In this essay he first introduces the tools of public choice analysis and then shows how they help to sharpen our understanding of topics in law and public policy.

The third essay develops a topic related to but distinct from that of public choice – “A social choice view of law and economics” – and is by Max Stearns and Megan McGinnis, a recent graduate of the University of Maryland Carey School of Law, former clerk to the Honorable J. Mark Coulson (magistrate judge on the US District Court for the District of Maryland), and associate at Anderson, Coe & King of Baltimore, MD, USA. As deserves to be better known in the legal community, “social choice” is the field of study that began with the work of Abram Bergson in the 1930s (hypothesizing that society had a convex, well-behaved “social utility function” analogous to the individual utility function), refined by Paul Samuelson in the 1940s, then set on its ear by Kenneth J. Arrow’s *Social Choice and Individual Values* in the early 1950s, and revived and extended by Amartya Sen in the latter part of the twentieth century. Despite that literature’s vital importance in economics and in building a bridge between economics and political science, it has had a relatively limited impact on the law and economics literature. Stearns and McGinnis write a superb introduction to the concepts of social choice and show how they might be applied not just to topics of constitutional and other public law but to the understanding of common law.

The fourth essay brings together law and economics and jurisprudence: Horacio Spector, “Law and economics and legal philosophy.” Spector is the founding Dean of the Faculty of Law and former Provost at the Universidad Torcuato Di Tella, one of the leading private universities in South and Central America, and Professor of Law at the University of San Diego School of Law. Law has a long and productive association with

---

philosophy. Indeed, for literally centuries philosophy was the only other academic discipline from which law took nourishment. Spector writes about the apparent but illusory competition between legal philosophy and law and economics. He shows that there are still some vital legal topics to which philosophy can contribute and about which economics has relatively little to say, such as the independent value of individual autonomy and the role of rights. Thus, Spector believes, there is much of value that can come from joint work involving legal philosophy and law and economics.

The fifth essay is by Dan Klerman, Charles and Ramona I. Hilliard Professor of Law and History at the University of Southern California – “Economic analysis of legal history.” Klerman is prominent in at least two areas of legal scholarship – legal history and law and economics. That makes him uniquely positioned to write about what a familiarity with both history and economics might contribute to our understanding of law. Historical episodes, Klerman demonstrates, are a very fruitful (but underused) source of research for law and economics. Just as the variation in laws across national boundaries at a particular point in time can throw light on why law varies, so, too, the variation of law within a jurisdiction over time can help us to understand law’s effects, why it changes and whether there is a pattern of legal dynamics. Klerman gives a fascinating survey of recent scholarship that uses historical data to illustrate or extend law-and-economics insights into substantive and procedural aspects of law.

Daria Roithmayr, George T. and Harriet Pfleger Chair in Law at the University of Southern California Gould School of Law, has contributed one of the most forward-looking pieces in the volume – “Evolutionary dynamic theory and empirical method.” The chapter begins by defining the field of “complexity economics” and showing how that new field provides a more satisfying theoretical foundation than does neoclassical economics for analyzing the law. The argument, in short form, is that an economy, like the law, is a complex adaptive system much like a complex biological system, for which there are insightful models of behavior. Roithmayr makes the case for bringing these complex models and evolutionary game theory to bear on legal topics and outlines what complexity-based law and economics might look like.

I cannot resist saying a bit more about Professor Roithmayr. Daria used to be a colleague of mine at the University of Illinois College of Law. When she began her career as a law professor, she was a proponent of critical legal studies and critical race theory. If she were a different

---

Methodologies of law and economics

person or if Illinois had been a different place from what it was, she and the law-and-economics faculty members would have been at loggerheads. Yet we never were. Her inquiries into the power-motivated structures of law and the lock-in (or hysteresis) effect in racism were as genuine and thorough as were our inquiries into the search for efficient legal rules and standards. The conversations among Daria and the law-and-economics faculty members were invariably respectful and co-instructive. She made us do better work, and she learned from us. When I asked her to contribute to this volume, I was astonished at where her work had taken her and what she proposed to write about. I think that her chapter gives an exciting glimpse of how much legal studies can learn from disciplines that, at first, inaccurate glance, may appear to have very little to do with the law.

The next essay invites us to look to comparative law for law-and-economics insights. Nuno Garoupa, former H. Ross Workman Research Scholar and Professor at the University of Illinois College of Law, President of the Fundação Francisco Manuel dos Santos (Lisbon, Portugal, 2014–2016), and currently Professor of Law, Texas A&M University School of Law, and Mariana Pargendler, Professor of Law at the Fundação Getulio Vargas Law School in São Paulo, Brazil, and Global Professor of Law, NYU Law in Buenos Aires, have written a marvelous introduction to what law-and-economics scholars can learn from looking at how different legal families – principally, the common law and civil law systems, the judge-made and legislature-made systems – deal with the same general problems, such as enforcing contracts or remedying tortious injuries. They use the recent literature on “legal origins” – pioneered by LLSV,14 as they are known, who used theory and empirical analysis to show that differences in various national systems of corporate law can be attributed to the origins of those legal systems in British common law, French, German or Scandinavian law – to demonstrate the strengths and weaknesses of comparative law as a tool for law and economics.

The last two essays in this volume are “Empirical law and economics” and “Behavioral law and economics.” I wrote both of those essays and have tried to indicate, in each chapter, how each of those areas has contributed to our understanding of the law, why those methodologies are important, and how those who are unfamiliar with, for example, empirical techniques can learn them in order to use them to answer interesting empirical questions about their area of law.

1.4 WHAT’S MISSING?

Although I have invited a distinguished group of scholars to contribute essays on a wide range of methodologies in law and economics, there are some additional topics that might well have been covered but are not. I have the sense that the fields are new or lack, to date, a settled body of work that could amount to a methodology to place beside those that are here included. In addition, these are arguably areas of scholarly interest rather than areas of distinctive methodologies. Nonetheless, these areas have enough excitement building in them to warrant my explaining why they are areas to watch in the future. I shall also mention some leading articles or books that those readers who are interested in pursuing these matters might consult.

I shall focus on four different topics that might provide interesting methodologies for those doing law and economics to consider using. At the conclusion of this section I mention one last “methodology” on which it is impossible to lay enough stress – clear writing.

1.4.1 International Law

International law is a specialty of great breadth and learning. Yet it is a topic that is not well known to the general lawyer or legal scholar. There is an obvious connection to law and economics through the fascinating developments in the areas of international commercial law, international antitrust, international tax, international intellectual property and even the area of sovereign debt. One of the attractions of this area as a laboratory for generating new insights using law and economics is that much of international law lacks the usual institutional infrastructure that characterizes national courts and legislatures. Thus, many international agreements are like open-ended contracts with relatively little in the way of remedial hope or adjudicative mechanisms.

International law is said to be one of the last areas of the law to be touched by law and economics. However, there has been some marvelous work in that area using law and economics to examine various topics. For example, Eric Posner of the University of Chicago Law School and Alan Sykes of the Stanford Law School have provided a readable and insightful overview of international law using economic tools. Andrew Guzman, now Dean of the University of Southern California Gould

Methodologies of law and economics

School of Law, has used rational choice theory to examine how international agreements work.\(^{16}\) Tom Ginsburg of the University of Chicago Law School (and formerly the University of Illinois College of Law) has used international law, developing countries and, especially, East Asian nations as laboratories for exploring the explanatory possibilities of law and economics.\(^{17}\) He has also been engaged in a remarkable comparative study of constitutions using many of the tools explored in this volume.\(^{18}\) In several important recent articles Ginsburg and Greg Shaffer of the University of California at Irvine School of Law have surveyed the burgeoning area of empirical studies of international law topics.\(^{19}\)

1.4.2 Social Norms and Expressive Law and Economics

Beginning with the remarkable study of Shasta County, California’s confluence of custom and law, Bob Ellickson pioneered the field of the law and economics of social norms.\(^{20}\) The main thrust of that work and of the literature that it set in motion is that those who are subject to law are also subject to social customs and norms and that sometimes those norms command greater attention than does the law. While this relationship had once been a scholarly topic among sociologists and a central theme of the law-and-society movement – still a vibrant area of scholarly inquiry – the notion of what Ellickson called “legal centrism” – that law was the


principal societal tool for channeling behavior – had blinded both doctrinal legal scholars and economically minded legal scholars to the possible influences of non-legal tools like norms, historical experiences, religious and moral commands, and the like.

The questions that this realization of the possible relationship between social norms and law raises are many and important. Does law crowd out social customs and norms? Or does law supplement social norms? How do social norms evolve and change? Are they subject to manipulation through “norm entrepreneurs”? When do private organizations or associations carve out and regulate areas of interaction that are largely immune to societal regulation through law? Are there social norms that are socially costly? Will those norms disappear through identifiable social forces or might they be made to disappear through law?21

A related but distinct area of inquiry that has its origins among law-and-economics scholars, particularly among those who worked on law and social norms, is “expressive law and economics.” This area focuses not so much on the ability of law to foster socially efficient behavior (the principal inquiry in law and economics) as on law’s ability to articulate society’s aspirations and law’s ability, depending on the law’s moral stature, to induce socially beneficial and morally approved behavior. Somewhat surprisingly, a tool that figures prominently in the literature on expressive law is game theory, thereby testifying to the literature’s origins in law and economics. There have been symposia on this topic in leading law reviews, but the leading contribution to this literature is from Richard H. McAdams of the University of Chicago Law School – The Expressive Powers of Law: Theories and Limits (2015).

1.4.3 Feminist Law and Economics

Feminism has been an established subject of teaching and research within the legal academy for at least 30 years.22 There have been some followers of feminism who are also adept at law and economics, but the intersection between those groups is relatively small.

Gillian Hadfield, Professor of Law at the USC Gould School of Law, is one of those in that small set. To see how one might use the tools of


22 The first Feminism and Legal Theory workshop was held at the University of Wisconsin, Madison, in 1985. See Martha A. Fineman, “Feminist Legal Theory,” 13 J. Gender, Soc. Pol’y, Law 13 (2005).
law and economics to investigate feminist legal theory, see her 2007 article.\textsuperscript{23} There she criticizes Kaplow and Shavell’s famous argument that efficiency ought to be the central normative criterion, that efficiency and equity are separable, and that equity goals ought to be furthered through the tax-and-transfer system and not through substantive legal doctrines.\textsuperscript{24} She says, for example, that two of the central focuses of feminism are, first, its commitment to rights, particularly to a woman’s right to choose whether to have a child and to be free from sexual harassment (noting that efficiency-focused law and economics does not address rights) and, second, its concern for an analysis of “caring labor” (also a topic that neoclassical analysis avoids on the theory that there is no legal warrant for establishing policies against sexual discrimination and sexual harassment because sensible employers would not tolerate those practices in a competitive market). She calls for law and economics to reject these analyses and to bring rights and the necessity of making the workplace and other regulated environments more friendly to women into standard law-and-economics analysis.

1.4.4 Neuroscience and Biology

The connection between these areas and law and economics may seem remote, but it is not. As I shall reiterate in the later chapter on behavioral economics, law and economics (and law generally) is deeply concerned with theories of human behavior. If law is to be effective, it must be aware of how people are likely to respond to the law’s directives. Do they know what the law requires of them? If not, do they inform themselves about those requirements? Where do they get their information about the law – from neighbors, from friends at work, from lawyers, from the internet? Or do they pay no attention to the law, following instead the dictates of norms (as Ellickson has so persuasively shown)?

Moreover, the particular tools that society uses (perhaps through law; perhaps in other ways, such as tax rates) to minimize social cost and maximize social benefit depend on knowing what motivates people to behave in the ways that they do. For instance, will people choose to donate more organs for transplantation if we (externally) incentivize them to do so with monetary awards or non-monetary awards or by altering the default rule for donation from one of opt-in to opt-out (or in some other way)? Or does an increase in the willingness to donate transplantable organs depend on


\textsuperscript{24} Louis Kaplow and Steven Shavell, Fairness versus Welfare (2006).
cultivating internal motivation to do altruistic acts? If so, how, if at all, can society create better people?

Owen Jones, Joe B. Wyatt Distinguished University Professor, New York Alumni Chancellor’s Chair in Law, Professor of Biological Sciences, and Director, MacArthur Foundation Research Network on Law and Neuroscience at Vanderbilt University School of Law, has been writing for several decades about the interface between biology and law. He has also founded the Society for the Evolutionary Analysis of Law, which has an extremely lively annual conference that I highly recommend.

The use of biology and, most recently, neuroscience to examine behavior that is relevant to law has expanded tremendously in the last several years. There is now a MacArthur Foundation Research Network on Law and Neuroscience, much interesting – indeed, arresting – academic research and a casebook for class adoption.

This area bears careful watching in the next several years. Those who are working in this area may be analogized to those who “discovered” the importance of social norms and their relationship to law in the 1980s. The potential impact of this literature on legal analysis is large.

### 1.4.5 Writing Well

One last thought. There is one further “methodological” skill that is not unique to law and economics but is very important to anyone who aspires to be a scholar – the ability to write clearly, concisely, and persuasively. That skill is remarkably widely distributed within the legal community and has been, for reasons that bear investigation, liberally lavished among

---


26 See the Society’s website at https://www4.vanderbilt.edu/seal/.

27 See the Network’s website at http://www.lawneuro.org/.


29 Owen D. Jones, Jeffrey D. Schall and Francis X. Shen, Law and Neuroscience (2014).
those who profess law and economics. These facts have led to two important determinants of the success of law and economics. First, as a partial result of that rich endowment of writing (and, relatedly, thinking) skills among law-and-economics scholars, the field has been well able to communicate clearly and forcefully what is new and significant about the field’s insights. Second, the rich endowment has equipped law-and-economics scholars to respond to criticisms in clear, calm and persuasive ways. The lesson here may well be that a scholarly innovation that is communicated clearly has a better chance of success, all other things equal, than one that is presented hazily.

So vital is the ability to write clearly in the legal academy that – to stretch a point – one can probably give a terrible idea a respectful hearing by clothing it in good writing. I am reminded of a wonderful line attributed to Groucho Marx: “The secret to success is sincerity. If you can fake that, you’ve got it made.” The analogy to good writing is that, if you do not have good ideas to communicate, at least write well; then you’ll have it made.

I shall not expound any further on good writing, other than to stress again how very important it is to good and impactful scholarship.30

1.5 CONCLUSION

The goal of this collection is to provide a tour d’horizon of the remarkable breadth of scholarship that now characterizes law and economics. The general point that I have tried to make in these introductory remarks is this: law and economics has gone far beyond its core tools, which it borrowed from microeconomics, such as price theory, market analysis and game theory, and has begun to incorporate tools from contiguous academic disciplines, such as psychology, history, evolutionary dynamics, statistics, philosophy, political science, social choice theory and more. The essays in this volume cover most of those tools, and the very able contributors do a marvelous job of explaining how and why those disciplines have something important to contribute to law and economics.

Just as importantly, the chapters of this volume, taken together, should give those who are new to the legal academy and to legal scholarship, those who are considering what it might mean to undertake law-and-economics scholarship, and those who are simply curious about what law and economics entails, an introduction to the breadth of methodologies that are welcome in law and economics, a sense of the scholarly excitement that characterizes law and economics and a suggestion as to how a particular area of scholarly inquiry could be informed and made richer by the techniques presented here.

ACKNOWLEDGMENTS

I would like to thank Professor Gerrit de Geest for the invitation to edit this volume in this excellent series. I also want to thank Ben Booth, Laura Mann, and the many others at Edward Elgar Publishing for their patience and help through the process of producing this volume. I also owe my dear wife of more than 40 years, Julia Ulen, thanks for all her support, encouragement, counsel and love. Finally, thanks to Diego Proietti, University of Illinois, LL.M. 2014, for excellent research assistance.