
Legal Scholarship and the Practice of Law

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I. Introduction

Since the founding of the first faculty of law in the late 11th century at the University of Bologna, there has been a rocky, vacillating, and generally slowly deteriorating relationship between, on one side, those who profess law and, on the other side, those who practice or apply law and adjudicate disputes.

For centuries the distance between the academy and the bar was not great. By the time of Blackstone's *Commentaries* in 1776,¹ lawyers and law professors were still within easy reach of one another. Blackstone systematized the law and sought to articulate its general principles in a fashion that those who actually practiced or fashioned the law could appreciate and apply.

In the United States the connections between the study of law and the practice of law were initially very close. The first legal instruction was in the College of William and Mary in Virginia, where Professor George Wythe, the first American professor of law and a signatory of the Declaration of Independence, taught some of the U.S. and Virginia's most distinguished early statesmen, such as John Marshall, Thomas Jefferson, George Mason, and James Madison. Between the time of the American Revolution and the Civil War most legal training was in small institutions whose sole task was preparation for practice (such as Tapping Reeve's Litchfield Law School in Litchfield, Connecticut, founded in 1784 and operated till 1833) or by means of apprenticeship (called "reading the law") in the office of an established attor-

¹ WILLIAM BLACKSTONE, *Commentaries on the Laws of England* (1776).

ney. Although it must have been the case that some early instructors and their students found what they were learning to be distressingly far from what the practice of law required, the distance between scholars/teachers and practitioners must not have been so large as to make either side uneasy.

There were certainly changes that occurred in legal education between the late 19th and mid-20th centuries, but even so, no one made a strong case that education and practice had drifted apart. Perhaps there were those who felt that separation had occurred, but if so, that view did not become one that was voiced prominently or that prompted a reaction within the academy to reduce that separation.

But with the advent of law and economics matters changed. By the late 1970s the economic analysis of law had made enough of an impact on the academy that the debate about the distance between the legal academy and legal practice revived. Indeed, that debate reached an intensity that it had never reached before.

Perhaps the iconic lament about the distance that recent legal scholarship – particularly law and economics – was said to have carried the academy away from practice was a famous 1992 article by Judge HARRY EDWARDS.² I discuss that article in Section 3.

In this brief essay I seek to put the relationship between law and economics and the practice of law into the larger historical context to which I have already referred, to provide the outlines of a general theory of the relationship between legal scholarship and the practice of law, and to correct what I believe to be Judge EDWARDS' criticisms of the current direction of legal scholarship. That is, I hope to paint a picture of a far more congenial relationship between law and economics and law practice than Judge EDWARDS and others have painted. Moreover, I am convinced that in the future the benefits to the practice of law of the emerging developments in law and economics will be even more substantial than they have already been.

A substantial portion of the reason for my optimism is that I think that whatever centrifugal forces may exist to drive legal scholarship and the practice of law apart (and there are such forces), it is simply not possible for those two aspects of law to drift too far apart. There is a symbiotic relationship between the academy and the bar that serves to keep them close. But it is an elastic relationship, one that can be stretched near to the breaking point or cause the two parties to live in close harmony and, finally, to oscillate between those extremes.

² HARRY T EDWARDS, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). The Michigan Law Review published a symposium issue – Symposium, *Legal Education*, 91 Mich. L. Rev. 1921 (1993) – in which many prominent law professors responded to Judge EDWARDS' article and Judge EDWARDS responded. I discuss these articles in Section 3 below.

My intuition is that we are in a phase in which a significant substantive scholarly innovation – law and economics – has temporarily pushed the academy and the bar apart. As the centripetal forces between those elements of the legal profession reassert themselves – that is, as the academy makes its innovation's practical applications more evident – then the distance between the academy and the bar will diminish.³

A second and perhaps more compelling reason for being optimistic is that I believe that there are signs that law and economics has had a more important effect on law practice than many have presumed. I shall elaborate below, but here let me summarize that argument by asserting that critics may have been looking for the influence in the wrong place – namely, in the pronouncements of state and federal appellate court judges. Those pronouncements have traditionally been the measure of a legal scholar's influence, but they may not be the best evidence of the impact of law and economics on the practice of law. Rather, I shall argue, we should look for that influence in the counsel that lawyers familiar with the tools of law and economics have been giving their clients and in the behavioral responses of those clients.

Here is how I shall proceed. In Section 2 I try to articulate some general propositions about the relationship between what we teach in law school and the practice of law. I must make two disclaimers about that section. First, I have never practiced law.⁴ Second, I have not done a thorough enough study of the relationship to be able to ground my hypothesis in empirical evidence.

Section 3 explains what I perceive to be the connections between various areas of law and economics and legal practice.⁵ Some areas of law have been deeply affected by law-and-economics scholarship while other have not. I attempt to offer a taxonomy of the areas that have and have not been affected by law and economics and speculate on the reasons for the differences. I conclude that brief survey with suggestions about why and in what way law and economics may have had a more profound impact on legal practice than we might have noticed. These suggestions are simply hypothetical. I confess that I have only anecdotal evidence in support of them. The hard work of supporting these assertions with empirical studies remains to be done.

³ I am not, of course, asserting that the relationship between legal scholarship and the practice of law is the only or even the most significant change going on in the market for legal services and legal education. I am well aware of the other forces that are altering the practice of law and the demand for legal education. See, for example, ULEN, "Legal Education as a Business," in a Festschrift for Prof. Christian Kirchner (2014).

⁴ The reason is that I am not a lawyer and have, therefore, never practiced law. What I know about the practice of law comes from many discussions with my late father and with the many law students with whom I have stayed in touch over the past 35 years. I know that is not a close substitute for never having practiced law.

II. Some General Thoughts on Innovation in Legal Scholarship and Legal Practice

There ought to be a theory about scholarly innovation, but there is not. The closest thing we have to such a theory is THOMAS KUHN'S famous meta-theory of large-scale changes in science.⁵ For example, KUHN has written about how the Copernican view of the solar system – that the planets orbit the Sun – replaced the Ptolemaic view – that the Earth was the center of the solar system and that the Sun and other planets orbit the Earth – as a model of how scientific revolutions in many fields occur.

Before I explain that theory and its relevance to legal scholarship, let me be plain about what I mean by “scholarly innovation.” I do not mean a minor tweak of an existing manner of doing an area’s scholarship. For example, I do not mean – to take a legal example – finding a previously uncited case that is relevant to the resolution of a scholarly controversy about a particular area of law. What I have in mind is a substantial change in the methodology of a particular area or in the theoretical basis of a scholarly discipline. An obvious example is changing the view of our solar system from one in which the Sun and planets revolve around the Earth – a geocentric system – to one in which the planets revolve around the Sun – a heliocentric system. To take a legal example to which I shall return later, viewing the goal of tort law to be the minimization of the social costs of accidents rather than that of making the victim whole is a fundamental change in the way one views tort law.

The gist of KUHN'S theory is that every scientific domain has at a given moment of time a central “paradigm” that those learned in that domain learned in graduate school and are, by and large, working within. When, however, “anomalies” appear in the work based on this prevailing paradigm, they create a ferment within the scientific domain to accommodate or amend the paradigm.⁶ Eventually, KUHN hypothesizes, the anomalies become so numerous that to accommodate them the prevailing paradigm becomes a complicated, inelegant mess. This creates an incentive for some bright person to introduce an alternative paradigm, one that provides an elegant, relatively simple, coherent, and comprehensive explanation for the anomalies while also encompassing the established observational regularities.

There are some important implications of this way of conceiving of scholarly innovation. First, because many – perhaps most – of the experts in the

field have learned and contributed to the existing paradigm, they are likely to be, at a minimum, skeptical of the new paradigm. Indeed, they may be overtly hostile to the new paradigm.⁷ Often, the opposition to a new paradigm is centered around older scholars, and the enthusiasm for a new paradigm, around younger scholars.

A second implication of the Kuhnian hypothesis is that the process of accepting a new paradigm may not be a smooth one. Rather, there is likely to be a struggle between the two paradigms that may include some accommodation between the two but may also involve an unpleasant process in which one side triumphs completely.⁸

A third implication of KUHN'S hypothesis is that the “triumph” of a new paradigm may never be complete. He implies that the process of scholarly innovation is never complete but only evolving toward something better; the process never reaches a comfortable resting point from which further change does not occur. That means that those within a discipline can expect their careers to be characterized by unsettling change and, perhaps, a paradigm shift that devalues much of what they have learned, taught, and written.

How might this theory apply to what has been going on in legal scholarship in the past 40 years or so?

The first point to make is that I believe that law and economics constitutes a paradigm shift from doctrinal legal scholarship. Therefore, we are likely to find the same process occurring within the legal academy that KUHN identified when paradigm shifts occur in other academic disciplines.⁹

Secondly, every paradigm shift causes turmoil within its academic discipline. Legal scholarship has and is still experiencing this turmoil. There was and is substantial hostility to law and economics (and other scholarly innovations) within the legal academy. When law and economics or the economic analysis of law first appeared in the late 1970s and early 1980s, there was a great deal of overt hostility to it in the legal academy. That hostility was in part due to a perception that law and economics involved subscribing to a conservative (or neo-liberal) political philosophy and, by implication, rejecting the activist and progressive aspects that had characterized much legal advocacy of the post-World War II era. Many proponents of law and economics – a large majority, I believe – reject this view of law and economics. Nonetheless, there can be little question that this perception – or some close

⁵ THOMAS KUHN, *The Structure of Scientific Revolutions* (3d ed. 1996).

⁶ Kepler, who began his astronomical investigations as a Ptolemaist, was surprised to find that the orbits of some planets seemed to contain loops. That is, some of the planets did not orbit the Earth in a smooth elliptical motion but seemed at several points in their orbit to stop and reverse direction before then reversing again and following their original course. He (and others) found this motion anomalous in a paradigm in which the Earth was at the center of our solar system.

⁷ In particle physics, “string theory” is challenging quantum mechanics as the paradigm. For a critical view of string theory, see BRIAN GREENE, “Why String Theory Still Offers Hope We Can Unify Physics,” *Smithsonian Magazine* (January, 2015), available at <http://www.smithsonianmag.com/science-nature/string-theory-about-unravel-180953637/?all&no-ist>.

⁸ Max Planck famously quipped of this process that “Science advances funeral by funeral.”

⁹ I shall shortly argue that there is another aspect of the paradigm shift within the legal academy that KUHN did not find in his studies of such shifts in other academic disciplines – namely, that there is a significant effect of the scholarly academic changes on the practitioners of law.

relatives, such as the belief that law and economics focuses only on the normative goal of efficiency and ignores that of distributive equity and fairness – still characterizes much of the opposition to law and economics.

Another important element of hostility to law and economics (and to many other changes) is, I believe, simple inertia. Those who are comfortable with the old paradigm do not like the fuss and bother of learning new material about which, it is true, they are skeptical. Law and economics has put demands on its proponents and those who are intrigued by it. Many must inform themselves about the field of microeconomics and find a means of keeping up with changes occurring in that field.¹⁰ Lately, because of the rise of behavioral law and economics, they must also acquaint themselves with cognitive and social psychology and try to stay current with results in those fields. And finally, they should become skilled in the techniques of empirical studies. None of this is easy. Quite to the contrary, it is difficult and made all the more challenging if the scholar wishes to hedge her bets by staying current with substantive doctrinal and other developments in a particular area of the law.

The story of how – in light of these factors militating against a scholarly innovation – some such innovations succeed (and others do not) is a fascinating one. KUHN has, of course, provided a general template and at least one in-depth case study.¹¹ But there are many other such studies that might be undertaken, including that of legal scholarly innovations.

Because my focus is on the relationship between law and economics and the practice of law, I cannot here pursue the fascinating topic of why some legal scholarly innovations have succeeded and others have not. Instead, I turn to my central concern.

One of the factors that is almost unique to law (but shared to a lesser degree by medicine, business, and a few other disciplines¹²) is that the academic study of law is connected to a vigorous profession. What this adds to the Kuhnian account of scholarly innovation is that there is another party to the struggle: Not only are camps of legal academics pitted against one another, but the practitioners of the profession are another group whose vote counts in weighing the old versus the new paradigm.

The presence of another interested group to the academics means that the introduction of a scholarly innovation and the displacement of an old paradigm is potentially more complicated than in those scholarly disciplines where there is no extramural interested party. The simple reason that this

¹⁰ I am speaking of those doctrinal legal scholars who wish to learn about law and economics, not of economists who must learn about the law (although that is an important category of law-and-economics proponents).

¹¹ THOMAS S. KUHN, *The Copernican Revolution: Planetary Astronomy in the Development of Western Thought* (1957).

¹² For a study of the relationship between developments in the academic field of economics and private and public policies implementing those developments, see ROBERT E. LITAN, *Trillion Dollar Economists: How Economists and Their Ideas Have Transformed Business* (2014).

complicates the analysis is that the extramural practitioners look to the academy for tools of practice. Their current tools of practice are in part a product of their legal education as tempered and informed by their own experience. Practitioners can learn of developments in legal scholarship in various ways – through presentations made to them at conventions, through expert witness testimony and consulting work with current legal scholars, through articles in law journals and magazines, through the skills that they observe in the young lawyers whom they hire, and through word of mouth. Surely it must be the case that if those various methods of communication tell them of a scholarly innovation that is useful to them or that they can envision as being useful to other practitioners, then practitioners will approve that innovation. Because it is not uncommon for practitioners to hold their former professors in very high regard, the presumption among practitioners is almost certainly that what their former professors are doing is worthwhile, new, and likely to be useful to them.

But there must also be circumstances in which a fight between camps within the legal academy spills outside the walls of the academy and disturbs practitioners. Perhaps the vigor of the fight within the academy is so strong that each camp tries to enlist allies from the ranks of former students and current practitioners. If one camp ultimately wins the battle within the academy but somehow fails to persuade former students and practitioners that the new paradigm is also useful to them, then a very serious chasm may appear between the academy and the bar.

Arguably, that is what has happened with regard to law and economics: It has generally triumphed within the academy but has not successfully persuaded judges and lawyers that there is something in the economic analysis of law for them.

That is the subject to which I turn in the next section.

III. Judge Edwards on Legal Scholarship and Practice

One of the most famous criticisms of legal scholarly innovations generally and law and economics in particular is a 1992 article by Judge HARRY EDWARDS.¹³ The thrust of that article is that a wide and widening gap has opened between the legal academy and the practice of law and the art of judging. While the legal profession is focused on practicalities, the academy is focused on impracticalities. The academy is pursuing theoretical scholarship, much of it “bad” interdisciplinary work, at the expense of solid doctrinal scholarship. The theoretical scholarship has very limited utility to practitioners. To the extent that this fascination with theoretical work informs what is

¹³ EDWARDS, *The Growing Junction*, supra n. 3.

taught in law school, Judge EDWARDS worries about the useful lawyering skills that are being imparted to law students.¹⁴

He writes:

“The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. ... But many law schools – especially the so-called ‘elite’ ones – have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. ... While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground – ethical practice – has been deserted by both.”¹⁵

Although law and economics is the principal villain in Judge EDWARDS’ account of current legal scholarship, he also cites other scholarly innovations, such as law and literature, law and sociology, critical legal studies (CLS), critical race studies, and feminist legal studies as examples of the theoretical, impractical direction of scholarship in the modern U.S. legal academy.

An additional irritant to the judge is his view that those who participate in these scholarly movements have a “low regard for the practice of law.”¹⁶ He suspects that among the undesirable side effects is that they communicate this low regard to their students.¹⁷

The scholarship that the academy produces today (or in the early 1990s) had very little value for practical decisionmakers: “[J]udges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”¹⁸

Of the many possible defenses of the trends in legal scholarship, the one that seems to irritate Judge EDWARDS the most is the suggestion, made by Professor GEORGE PRIEST of the Yale Law School in a 1988 article, that law school should become a sort of graduate study of law.¹⁹ Here is what Professor PRIEST wrote in that article:

¹⁴ I once heard Justice Scalia make a similar complaint about what was being taught to students at Yale Law School. He recounted a conversation that he had with one of his clerks, a graduate of Yale Law, in which he asked the clerk to do some research about subrogation – about which even I knew something. The clerk said that he had no idea what that was. Justice Scalia told those of us conversing with him that if this was indication of what passed for legal education at Yale, he would be reluctant to choose another clerk from that school. I further recall that when I told this story to one of my colleagues who had recently graduated from Yale, she was aghast. She quickly explained to me that she and her classmates learned about subrogation in their torts class.

¹⁵ EDWARDS, *The Growing Disjunction*, supra n. 3, at 34.

¹⁶ *Id.* at 35.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The suggestion was made by Professor George Priest of Yale in an article published before Judge EDWARDS’ 1992 *Growing Disjunction*. GEORGE L. PRIEST, *The Increasing Division Between Legal Practice and Legal Education*, 37 *Buff. L. Rev.* 681 (1988). See also GEORGE L. PRIEST, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 *Mich. L. Rev.* 1929 (1993).

“The distance between the bar and the law school will become greater. The obsolescence of the law faculty will increase. Divisions within the law schools and battles over faculty appointments will escalate. Some may view these trends, as many do today, as signaling the disintegration of the academy. Far from disintegration, they are a sign of intellectual progress and advance. ... [Legal education should focus on] the application of the social sciences and social theory to criticize legal analysis and the legal system.”²⁰

Judge EDWARDS describes Priest’s views as “utterly specious.”²¹ Judge EDWARDS has sterling credentials to make these charges. Before joining the federal bench in 1980, he was a distinguished labor law scholar at the law schools of Harvard and the University of Michigan. He was Chief Judge of the U.S. Court of Appeals for the DC Circuit from 1994 to 2001. When he stepped down from the federal bench in 2005, he resumed his academic career, becoming a professor at the New York University School of Law.

In so far as there is evidence to support the assertions made in the article, that evidence comes from a survey that Judge EDWARDS did of his former clerks. Several of them have been in practice, and many of them have become academic lawyers themselves. He extensively quotes those clerks’ replies to his questions, which, although not shared with the reader, clearly ask directly about such things as the “gap” between what legal scholars are writing and what is useful in the practice of law.

Judge RICHARD A. POSNER, in his reply to Judge EDWARDS’ *Growing Disjunction* in the *Michigan Law Review* Symposium, raises questions about the survey on which EDWARDS relies.

It is an article about the sociology of legal education and practice. The author relies heavily on a traditional sociological technique, the survey, but admits that his survey did not produce “statistically reliable data.”²² That is an understatement. The survey was confined to Judge EDWARDS’ former law clerks. He does not tell us what percentage responded or to what precise questions they were asked to respond; evidently the responses were not anonymous, although the article does not reveal the names of the respondents.²³

Judge POSNER’s most powerful rebuttal to Judge EDWARDS is his list of the many ways in which interdisciplinary research has improved the practice of law and the process of adjudication:

“Consider some of the developments in interdisciplinary legal scholarship over the past two or three decades. The one that I am most familiar with is law and economics, that is, the application of economics to law. To begin with, it is generally believed that law and economics has transformed antitrust law. It can, to be sure,

²⁰ GEORGE L. PRIEST, *The Increasing Division*, at 681-82.

²¹ EDWARDS, *The Growing Disjunction*, at 76.

²² *Id.* at 42.

²³ RICHARD A. POSNER, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 *Mich. L. Rev.* 1921, 1922 (1992).

be argued that all that law and economics really did, so far as its impact on the practice of antitrust law was concerned, was to provide conservative judges with a vocabulary and conceptual apparatus that enabled them to reach the results to which they were drawn on political grounds. Even if this is all that law and economics has done for (or to) antitrust, or for that matter to any other field of law, it would be far from negligible; to enable is to do much. But there is much more. Law and economics has contributed significantly to the deregulation movement, which has transformed the legal landscape in a number of fields of law, such as transportation law and communications law. It has transformed the proof of commercial damages. It has underwritten the movement toward awarding "hedonic" damages in personal injury cases, that is, damages for loss of the pleasure of living. It has influenced environmental regulation. It has contributed to the increasing judicial favor for giving commercial speech constitutional protection. It has armed divorcing women to argue that a husband's professional degree is a (human) capital asset to which the wife contributed and in which she should be recognized as having an interest. It has greatly influenced the proof of injury and damages in securities cases. It has changed the way in which lost earnings are computed in tort cases. It has suggested new lines of proof in employment-discrimination cases (again through the human-capital model of earnings), at the same time casting new doubts on the theory of comparable worth. It has influenced the design of the federal sentencing guidelines (an economist was a member of the Sentencing Commission that promulgated the guidelines), which have transformed the sentencing process in the federal courts. It is powering a gathering movement to reform the Bankruptcy Code. It is influencing the standard for preliminary injunctions and for the constitutional right to a hearing. It is even influencing the way in which courts treat indigent litigants. Judge EDWARDS discusses none of these examples. Furthermore, he does not discuss the criticisms that Bayesian probability theorists and cognitive psychologists have made of the rules of evidence, jury instructions, and burdens of proof – criticisms of immediate practical import, made by scholars who have at least as much to say about these matters as judges and practicing lawyers. He does not discuss the impact of feminist jurisprudence on rape law, sexual harassment, employment discrimination, and the legal protection of pornography; he does not, in fact, discuss feminist legal writing at all. He is silent on the growing literature, a literature informed by philosophy and literary theory, on the interpretation of constitutions and statutes, even though interpretation is the major function of the court on which Judge EDWARDS sits. The use of testimony by political scientists in reapportionment cases is ignored, along with (and related to the theory of interpretation) the burgeoning literature in public choice, economics, and political science concerning the legislative process.²⁴

That is a formidable list, but, as we shall see in the next section, it is only a portion of the reply that might be made to Judge EDWARDS.

²⁴ Id at 1925-26.

IV. The Specific Case of Law and Economics

In this section I shall take a new tack toward establishing that law and economics might have had a profound effect on the practice of law – at least in the United States. I shall look at several areas of the law (contracts, criminal law, and torts²⁵) to look for those effects and then propose a more general method by which law and economics may have worked an influence on the law. The key difference from previous attempts to measure an influence that I want to propose here is to suggest that the place to look for that influence is not in the published opinions of appellate courts but in how law and economics may have directly influenced the practice of lawyers.

To be more precise, I believe that the most important influence that law and economics has is through how people, perhaps informed by counsel, seek to avoid the dire consequences of the law by taking steps to conform their behavior to what the law requires of them. The argument is this: Law and economics, in contrast to doctrinal law, stresses the *ex ante* impacts of law – that is, the impact that contract law, tort law, criminal law, and all the other areas of law might have on how people behave so as to minimize later problems that would arise from not following the law, including civil and criminal liability and problems with a contractual partner. So, for example, a corporation that produces consumer products might invest in making those products safer if it believes that the costs incurred in doing so may allow them to escape liability for harms that the consumers of their products might suffer. An auto manufacturer, for example, may include safety devices, like a back-up camera, because doing so is required by regulation but also, in the absence of regulation, because doing so will make their car more attractive to consumers and possibly make the manufacturer not liable for injuries suffered by those with whom its car would have collided but for the camera. I shall also discuss possible examples from an economic interpretation of contract and from criminal law.

There is scant (but some) empirical evidence to confirm my hypothesis.²⁶ In the following section I shall address how that evidence might be gathered.

²⁵ I chose these areas only for their illustrative purposes, not because they are the areas of law that best illustrate law-and-economics' influence on the practice of law. Obviously, I have left out property law, including intellectual property law, business association law, securities regulation, bankruptcy, environmental law, antitrust, government regulation, and others. Those areas would have been rich sources of evidence for my hypothesis. See, for example, RONALD J GILSON & REINIER KRAAKMAN, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. Corp. L. (2004).

²⁶ For an earlier attempt to provide such evidence, see WILLIAM M. LANDES & RICHARD A POSNER, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. Econ. 153 (1993).

1. Contract Law

Contract law was the area of the traditional law – excepting antitrust, governmental regulation, and tax, where the connection with economics was obvious – that was first colonized by economics.²⁷ That makes perfect sense in that one of the central concerns of microeconomics is exchange, which is also at the heart of contract law. And it is not much of a stretch to contend that contract law has become, in essence, the economics of contract law – at least in North America. Almost all the leading casebooks and treatises in contract feature the notion of efficient breach, a discussion of how remedies (whether court-determined damages, liquidated damages, or specific performance) influence the decision to breach or perform and the decision to enter into a contract and to what extent, the economic analysis of donative promises, the economic understanding of liquidated damages (even though the law reaches a different conclusion than does the economic analysis), and more. I highly recommend DOUGLAS BAIRD, *Reconstructing Contracts* (2013), as an example of how a leading contracts scholar has fully incorporated economic analysis into a more traditional, doctrine-based analysis of contract.

But the central question that I am concerned with here is the extent to which the economic analysis of contract law has had an impact on the practice of law. Of that there is not much evidence, other than the fact that law students are learning the economics of contract law. That learning may be affecting how those students practice law, perhaps incorporating some of the concepts of economic analysis into their practice. I shall hypothesize about that in a subsequent section.

The traditional evidence of scholarly impact is the extent to which appellate courts cite an individual scholar's work or the work of scholars working in a particular area. That method of measuring impact suggests that the principal means by which a scholarly innovation affects the law is through capturing the attention of judges (and other legal decisionmakers) and causing them to incorporate that innovation in their opinions. So, by that measure the economics of contract law may not have had much influence on law. If, for example, the economic analysis of liquidated damages, which, roughly, holds that if untainted by the usual formation defenses and performance excuses, these clauses agreed to by the contracting parties ought to be enforced as written,²⁸ then courts presented with liquidated damages clauses that appeared to be supra-compensatory might have used the economic analysis to enforce them. But the precedential and statutory law was so strongly against such general enforcement that judges were very reluctant to change the law of liq-

uidated damages, which generally holds that the clauses are enforceable only to the extent that they are a reasonable approximation of the actual losses from nonperformance.²⁹

But to the extent that a scholarly innovation has an impact on law, including the practice of law, through affecting behavior outside of litigation, it is less likely to show up in an appellate opinion, even if the effect has been profound. Suppose, for example, that contractual parties routinely insert arbitration or renegotiation clauses into their contracts and that they also stipulate to what appear to be punitive liquidated damages clauses to be applied by the arbitrator or as part of a settlement. If parties adhere to these agreements routinely (a strong assumption), then the law and behavior may have changed even if we find no evidence of that in appellate opinion. It could even be that most liquidated damages clauses induce performance or settlement rather than litigation so that they have the predicted economic effect but not through the direct impact of changing the law at the appellate court level.

Another example may be the choice of remedy for contract breach. We teach our students that the default remedy is compensatory money damages and that specific performance is available only in extraordinary circumstances, where the loss from nonperformance is not compensable by a sum of money – as when the performance was for a unique good. But DOUGLAS LAYCOCK of the University of Virginia Law School has long argued that specific performance is routinely available in the United States to the disappointed party who simply argues that his injury is “irreparable” through a payment of damages.³⁰ LAYCOCK has assembled impressive evidence to support this contention, suggesting that the economic analysts who have argued for the wider availability of specific performance have been listened to.³¹ Nonetheless, we do not teach that, not even with the cautionary warning that specific performance might be more widely available than traditional learning indicates.

²⁷ ROBERT BIRMINGHAM, *Damage Measures and Economic Rationality: The Geometry of Contract Law*, 1969 Duke L.J. 50 (1969).

²⁸ CHARLES J. GOETZ & ROBERT E. SCOTT, *Liquidated Damages, Penalties, and the Just Compensation Principle*, 77 Colum. L. Rev. 554 (1977).

²⁹ Judge POSNER, sitting in a diversity case (in which the parties are from different states and can request a federal judge to hear the case and apply the relevant state law, in this instance Illinois law), *Lake River Corp. v. Carborundum*, 769 F.2d 1284 (1985), wrote that although enforcing liquidated damages clauses as agreed to the parties should generally be enforced, Illinois law forbade the enforcement of party-agreed damages clauses that appear to be punitive. See YAIR LISTOKIN, “Why Not Enforce ‘Penalty’ Liquidated Damages Clauses?,” *The Prawfs Blog*, April 27, 2007, available at http://prawfsblawg.blogspot.com/prawfsblawg/2007/04/why_not_enforce_1.html.

³⁰ DOUGLAS LAYCOCK, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. (1990) and DOUGLAS LAYCOCK, *The Death of the Irreparable Injury Rule* (1991).

³¹ Not all law-and-economics scholars agree that specific performance is better than damages for breach of contract. See, for example, STEVEN SHAVELL, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 Tex. L. Rev. 831 (2006); and BEN DEPOORTER & STEFAN TONTRUP, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 Ariz. L. Rev. 673 (2012).

Let me conclude this section with an account of a finding from Professor TESS WILKINSON-RYAN of the University of Pennsylvania Law School regarding liquidated damages.³² WILKINSON-RYAN noted that most people are reluctant to break a contractual promise, principally because moral considerations teach them that it is wrong to do so. As a result, there is less breach than there should be. Economic analysis of contracts holds that it is more efficient to breach than to perform a contractual promise if no one is made worse off from the breach than from performance and at least one person is made better off. So, apparently, moral considerations induce people to over-perform contracts: There are times when they should breach, according to the Pareto criterion, but do not because of their belief that morality compels them to perform.

Professor WILKINSON-RYAN performed a number of on-line experiments in order to test the hypothesis that people are more likely to breach (when it is more efficient to breach than to perform) if there is a liquidated damages clause. And she found that there was a statistically significant increase in breach when there was a liquidated damages clause. She attributed that increase to the fact that the parties had already monetized the act of breach and so were “primed” to think of breach versus performance in the efficiency terms that the economic analysis of contract law suggests is appropriate.

The implication of this finding for the practice of law is obvious: If a lawyer would like his client or the other party to a contract to be willing to think about breach versus performance in nonmoralistic terms, then the parties should incur the costs of inserting a liquidated damages clause in their contract.

This is a powerful example of a direct connection between a scholarly innovation (law and economics, as applied to contract law, with the addition of psychology and empirical experimentation) and the practice of law. If this scholarship has an impact on the practice of law, note that that impact will not show up in the opinions of appellate-court judges. Rather, it will show up, if at all, in an increased use of stipulated or liquidated damages clauses and a resulting increase in the instances of breach.

2. Criminal Law

Since the foundational article about crime and punishment by the late Professor GARY BECKER, law and economics has maintained that the decision to commit a crime can be understood in the same rational-choice terms as any other economic decision³³: A person might commit a crime if she perceives that the expected benefits of doing so exceed the expected costs. If, however,

³² TESS WILKINSON-RYAN, *Do Liquidated Damages Encourage Breach?: A Psychological Experiment*, 108 Mich. L. Rev. 633 (2010).

³³ GARY S. BECKER, *Crime and Punishment: An Economic Analysis*, 76 J. Pol. Econ. 169 (1968).

the expected costs are greater than the expected benefits, she might not commit the crime.

This theory also helps in the formulation of criminal justice system policy. To deter crime, governments should adopt policies that efficiently raise the expected costs of crime above their expected benefits. Because the expected costs of crime consist of the probabilities of detection, arrest, and conviction times the value of the sanction (imprisonment or the assessment of a monetary penalty), there are three obvious means of raising those costs. First, policies can raise the probabilities of detection, arrest, and conviction. That might be accomplished by the increased use of cameras and product registration to raise the probability of detection; or by the increased use of investigators to raise the probability of arrest; or by the increased use of legal staff to raise the probability of conviction. BECKER noted that any of these policies costs real resources. Second, the expected costs might be increased by raising the sanction for committing any given crime.³⁴ BECKER claimed that this method of increasing the expected costs of crime is virtually costless, requiring (absent the political costs) only minimal action by the legislature. Third, a combination of policies one and two might be implemented.

There is also a nonobvious way to raise the expected costs of crime. That is to raise the opportunity cost of illegal activity by making legitimate employment more certain and more rewarding. There is, incidentally, some empirical evidence to suggest that this nonobvious method of discouraging crime may be the most successful of the four policies considered.

As the long excerpt from Judge POSNER’s response to Judge EDWARDS in Section 3 indicated, this theory has had a deep effect on criminal justice policy in the United States in the past 30 years. To take the most dramatic example, between 1980 and 2007 the number of prisoners in federal and state prisons and jails increased by 500 percent, from 500,000 to 2.5 million. The rate of incarceration in the United States in the mid-2000s was approximately 737 per 100,000 population, a rate that was the highest in the world and seven times greater than the average incarceration rate in the other OECD countries. The United States in 2007 had 5 percent of the world’s population but 25 percent of the world’s prisoners.

Recently, a consensus has begun to emerge that we have gone too far in relying on the deterrent aspect of incarceration. Since 2007, the prison population of the U.S. has begun to decline, and there are calls and legislative proposals to reduce it even further. A central concern of the move to reduce our reliance on incarceration is informed by law-and-economics’ concerns: We

³⁴ On the assumption that the seriousness of different crimes is reflected in differences in the sanctions, policymakers cannot simply raise the sanction for one crime. To do so would create potentially disruptive relative deterrence effects across different crimes, possibly influencing decisions about which crimes to commit.

want to release from prison only those offenders who are least likely to commit violent crimes and sentence to prison only the most violent offenders.³⁵

I want to distinguish two very different senses in which law and economics might be said to have had an effect on criminal law. The first sense is in using BECKER's theory to give an account of how the typical criminal makes a decision to commit a crime. The second sense is in showing how that account suggests deterrence policies that might reduce the social costs of crime and providing a methodology for evaluating whether those deterrence policies are working. Let me comment briefly on these two very different matters.

With respect to the rational-choice theory of the decision to commit a crime, I sense that that theory, which was popular and influential in the 1980s and 1990s, has begun to give way to an alternative account of the criminal's decision. That alternative theory has not fully emerged yet, but it clearly grows out of the work in behavioral economics that finds that rational choice theory is not a good guide to much human decisionmaking. We humans make predictable mistakes, such as being overoptimistic about our own life conditions. We believe that we are less likely than others to have bad things happen to us and more likely than others to have good things happen to us. We believe that we are all better-than-average drivers. And every criminal no doubt believes that he is less likely than average to be detected, arrested, and convicted.

The thrust of these behavioral accounts of human decisionmaking is that policies – including those of deterrence against crime – that are premised on rational decisionmaking may be a poor guide to what potential criminals really think and do.³⁶ We need far more information than we currently possess about why people commit crimes and others do not. After all, we know very well that both violent and nonviolent crime have declined dramatically in the U.S. (and in most other developed countries) since the early 1990s. But we also know that we do not fully understand the reasons for those declines.³⁷

With respect to the second practical implication of the law-and-economics account of criminal policy, there I believe that the role of economics has been lasting and important. We now know that we have overrelied on incarceration as a deterrence policy. That discovery is a result of work by law-and-

³⁵ For a fascinating discussion of these policy matters, see STEVEN RAPHAEL & MICHAEL A. STOLL, *A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime* (2014). See also ULEN, *Skepticism about Deterrence*, 46 *Loy. U. Chi. L.J.* 381 (2014).

³⁶ See PAUL H. ROBINSON & JOHN M. DARLEY, *Does Criminal Law Deter?: A Behavioral Science Investigation*, 24 *Oxford J. Leg. Stud.* 173 (2004); and PAUL H. ROBINSON & JOHN M. DARLEY, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 *Geo. L.J.* 949 (2004).

³⁷ See STEVEN D. LEVITT, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 *J. Econ. Persp.* 163 (2004) and FRANKLIN E. ZIMRING, *The Great American Crime Decline* (2008).

economics scholars, as are some of the proposals for reducing that reliance. We also know, again on the basis of empirical work, that the death penalty does not deter homicide,³⁸ and we are as a nation moving away from capital punishment as a policy.

So, in summary, this is a mixed record of the relationship between the law-and-economics account of crime and the practice of criminal law and the implementation of criminal justice system policies.³⁹

3. Tort Law

Finally, we come to tort law, the law of accidents. The novel insight of the law-and-economic analysis of tort – pioneered by Judge GUIDO CALABRESI and Professor JOHN PRATHER BROWN⁴⁰ – is that tort law is a means of creating an incentive for potential injurers and potential victims to take precaution so as to minimize the social costs of accidents (the precaution costs, the accident losses, and the post-accident costs of determining what happened and who bears liability). Notice that in the economic analysis the focus is on the *ex ante* effects of exposure to tort liability. Tort law seeks to capture the attention and incentivize the behavior of people who cannot typically bargain with one another. In doctrinal law the focus is on doing post-accident justice to the victim, “making her whole.”

In pursuit of the connection between innovative legal scholarship and the practice of law, I have chosen to look at tort law because I believe that this is an area of the law in which law and economics does not appear to have had the effect on practitioners or policymakers that the economic analyses of contract law and criminal law have had. I stress the word “appear” because that effect may be present but, as I have noted above, in a difficult-to-see manner.

But first a preliminary point. There does not seem to be an accepted understanding of tort law among those academics who profess law and economics. I say this on the basis of a remarkable article by Professor JOHN MOORHOUSE, DEAN ANDY MORRIS, and Professor ROBERT WHAPLES.⁴¹

³⁸ See, for example, JOHN J. DONOHUE III & JUSTIN WOLFERS, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *Stan. L. Rev.* 791 (2005).

³⁹ I highly commend FRANKLIN E. ZIMRING, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 *J. Leg. Educ.* 5 (2014). Professor Zimring laments the fact that the developments in the real world of crime appear to have had no effect whatsoever on academic criminal law. I would argue that those real world developments have been a tremendously important part of the recent academic scholarship in the law and economics of crime.

⁴⁰ GUIDO CALABRESI, *The Costs of Accidents: A Legal and Economic Analysis* (1970), and JOHN PRATHER BROWN, *Toward an Economic Theory of Liability*, 2 *J. Leg. Stud.* 323 (1973).

⁴¹ JOHN C. MOORHOUSE, ANDREW P. MORRIS & ROBERT WHAPLES, *Law & Economics and Tort Law: Does Tort Law Really Deter?*, 62 *Alb. L. Rev.* 667 (1998).

The authors sent out surveys to members of the ALEA in the Summer of 1996 to determine "whether a consensus exists among these scholars about a few fundamental doctrines of tort law."⁴² They classified the respondents into three categories: "legal scholars" (those who had a J.D.), "economists" (those who had a Ph.D. in economics), or "both" (those who had both a J.D. and a Ph.D. in economics). They asked them whether they agreed with each of ten propositions about tort law and how strongly they agreed or disagreed with the proposition (with 1 indicating "strongly disagree" and 5, "strongly agree"). For example, the first two questions were "No fault automobile insurance is efficient" and "Contributory negligence is more efficient at producing optimal behavior than [is] comparative negligence."

The authors found a consensus on five of the ten propositions among the three groups. Those propositions that commanded agreement were "Liability rules are inefficient in the presence of risk-averse behavior" (the average was 2.20 for all three groups); "Holding Good Samaritans liable for negligence in rescue attempts would be inefficient" (the average was 3.7); "Limiting punitive damages to three times actual damages would be more efficient than the current procedure" (the average was 3.5); "Allowing injurers to deduct the proceeds of injured victims' insurance from the damages injurers must pay would be efficient" (the average was 2.25); and "Permitting attorneys to charge contingent fees is inefficient" (the average was 2.02).⁴³

There was no consensus among the three groups of respondents with regard to the five questions that had to do with tort reform – some were in favor, some opposed.

Finally, the authors found that

"no grand consensus about common law tort rules emerges from our survey of members of the American Law and Economics Association. ... [Additionally and importantly,] where there are differences over tort rules, those differences are expressed within each of the professions, but do not emerge systematically between professions. That is, the differences among legal scholars in the evaluation of a particular rule tend to be mirrored in the opinions of economists. More precisely, within group differences are larger than between group differences."⁴⁴

An implication of this study is that if there is no general consensus among law-and-economics scholars about some fundamental issues of the economic analysis of tort liability, it is probably not the case that the legal academy has replaced traditional doctrinal tort law with the economic analysis of tort law.

A second point regarding tort law – and in contrast to contract law – is that the economic analysis of tort liability has not displaced the traditional, doctrinal view of tort law in law-school teaching. Every textbook and case-

book in the subject mentions the economic analysis and the casebooks typically contain numerous excerpts from cases decided by Judge POSNER and Judge EASTERBROOK. But the subject has not been completely re-done and colonized by economics, as has been the case with contract law.

That having been said, a third point to be made is that there is some empirical evidence that suggests that the economic analysis of tort liability may have had an influence on public and private decisionmakers, perhaps through their counselors.

In a famous article,⁴⁵ Professor GARY SCHWARTZ of the UCLA Law School, surveyed the relatively few empirical studies that have been done of the effects of tort liability on precautionary decisions, principally among businesses. He concluded that "tort law provides something significant by way of deterrence." For instance, with respect to job-related injuries, SCHWARTZ reported that the introduction of workers' compensation in the 1910s "reduce[d] the workplace fatality rate by 33 percent."

Several years later Professor DONALD DEWEES, DAVID DUFF, and MICHAEL TREBILCOCK undertook a more extensive survey of the effects of accident law on automobile, environmental, product, medical, and workplace injuries. They concluded

"[T]he empirical evidence has convinced us that a single instrument, the tort system, cannot successfully achieve all [] of the major goals claimed for it, and attempting to use it in pursuit of objectives for which it is not well suited is both costly and damaging to its ability to perform well with respect to other goals that it is better able to realize... Since the middle of [the 20th] century, no-fault compensation systems have been adopted in various jurisdictions to compensate victims of automobile accidents, complementing regulatory systems for reducing risks to motorists. We endorse these moves and propose extensions of them with three caveats: compensation schemes must be separately funded in each of the accident areas; premiums for compensation schemes must be risk-rated to preserve deterrence incentives; and tort should not be entirely displaced, but should have a residual role in cases of egregious behavior causing serious harm. However, we do not see these compensation schemes operating in the areas of product or environmental injuries."⁴⁶

These mixed results lead me to conclude that at least on this evidence, tort law might have had an impact on the practice of accident-law specialists and legislators, but if so, that effect has not been convincingly demonstrated yet.⁴⁷

⁴² Id. at 668.

⁴³ Id. at 693.

⁴⁴ Id. at 694.

⁴⁵ GARY SCHWARTZ, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. Rev. 377 (1994).

⁴⁶ DON DEWEES, DAVID DUFF & MICHAEL J. TREBILCOCK, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996).

⁴⁷ Professor Jennifer Arlen of the NYU School of Law urged me to explore medical malpractice where, she told me, there is much evidence that the economic analysis has had demonstrable beneficial effects on medical practice.

4. A More General Influence of Law and Economics

Several times I have made the point that in looking for practice effects of the law-and-economics innovation in legal scholarship we may have been looking in the wrong places. I have argued that appellate opinions are not the right place to look, and I have suggested that textbooks and casebooks might provide evidence of the intellectual triumph of a scholarly innovation but not of that innovation's impact on the practice of law. We have also seen hints that the innovation might have had effects on people's behavior – for example, in contract law there may be better and more contracts negotiated and successfully concluded; in tort law, there may be fewer accidents, safer products and procedures, and less costly injuries; and in criminal law there may be fewer crimes or less serious crimes. The evidence on many of these matters is simply not available or is difficult to tease out of the evidence that exists. For instance, to find an effect of a scholarly innovation on tort law, we would need to measure the extent of accidents and injuries that either did not take place because of the innovation or were less serious than they would have been but for the innovation.⁴⁸

I want to articulate a hypothesis about the connection between law and economics and the practice of law that captures some of the criticisms that I have been making. I think that it is reasonable to assume that the impact of law and economics on the practice of law may have occurred in an indirect way. Law and economics teaches our students to be mindful of the incentive effects that law creates, of the means by which legal rules and private agreements can allocate risks, of the possibility of strategic behavior, of the behavioral responses that certain situations might give rise to, and more. Consider the allocation of risk. While I do not doubt that good lawyers have always been aware of risk and have always sought ways to allocate risks, I think that it is possible that students who have been exposed to law and economics over the past 35 years may have a keener grasp of costs and benefits and of how risks might be allocated between parties and how certain actions, like precaution, can be perceived as an insurance mechanism.

If so, then perhaps the key to demonstrating that law and economics has moved out of the academy and into the practice of law is to examine what lawyers are telling their clients. It could be that the most beneficial effect of law and economics lies in the fact that it has made our students better lawyers. Better lawyers provide their clients with better advice and that better advice leads to smoother transactions and interactions and to the more orderly

⁴⁸ As I mentioned above, for crime we have evidence that is close to what we need – that is, evidence of crimes that were not committed or were less serious than they would otherwise have been because of policy changes that might be attributed to law and economics. As an example, consider the national moratorium on capital punishment that existed from 1972 to 1976 and in the State of Illinois between 2000 and 2010, when the Illinois legislature abolished capital punishment.

resolution of disagreements. I would like to know, for example, whether it is the case that law and economics has made the general counsels of firms who make potentially harmful products better at communicating to their business leaders how they can minimize their liability exposure. Or whether transactional lawyers are giving their clients better advice about how to draw up an agreement that skillfully allocates the risks of future contingencies and provides for periodic communication between the parties pending performance and renegotiation in the event of dire outcomes. Sadly, we do not have much evidence on these matters at any point in time, nor on how they might have changed over time.⁴⁹

V. Conclusion

Scholarly innovations in the legal academy have been relatively rare over the last few hundred years. Certainly one of the most dramatic of those innovations has been the recent use of social and behavioral sciences in discussing the law. That innovation began with the use of economics to examine traditional areas of the law but has now expanded to incorporate other social sciences, such as political science and anthropology, and behavioral sciences, such as psychology.

As exciting as these developments have been to those of us who work within the legal academy, it is not so clear that we have effectively communicated that enthusiasm and their practical applicability of those scholarly innovations to practitioners, judges, legislators, and other legal decisionmakers. That does not mean that there are not and have not been practical uses of those scholarly insights. But in trying to make the case that there are such practical applications, we may all have been looking in the wrong place. We have not seen much judicial use of the legal scholarly innovations of law and economics and of the social and behavioral sciences. But why should we? Perhaps the principal impact of law and economics has been to create better lawyers, who anticipate and allocate risks more skillfully, who measure the costs and benefits of alternative courses of action more carefully, and who prudentially guide their clients through the complexities of decisionmaking that may have adverse legal consequences.

⁴⁹ In one of the most important articles of the last 15 years, MARC GALANTER demonstrated that trials are vanishing and have been doing so for at least 20 years and perhaps longer. MARC GALANTER, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. Leg. Stud. 459 (2004). He canvases some reasons why this might be the case, but he does not mention the hypothesis that I have just laid out – namely, that trials are disappearing because we have been training better lawyers through law and economics and that those better lawyers have been advising their clients more skillfully so that disputes can be anticipated and resolved less contentiously.

We are not in a position to test whether law and economics has equipped lawyers with better lawyering skills. But certainly we shall be able to measure that change in the future. In the meantime, the marvelous scholarly innovations that are continuing within the legal academy, such as behavioral law and economics and empirical legal studies, are certain to provide not only more exciting intellectual fare but also some important guidance to practitioners and other legal decision makers.