Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law & Economics

Eric M Fink

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Introduction

Socio-legal scholarship's distinctive contribution consists in offering a constitutive theory of law in society. This theory posits that law is neither autonomous of, determined by, nor determinative of society. Rather, law and society are mutually enmeshed in an ongoing process of structuration, in which social action—by individuals and groups—simultaneously plays out within and (re)produces a structured social terrain. In the socio-legal imagination, law is "a generative force of our public life," it is "both agent and object."  

One problem that is ripe for socio-legal inquiry is the emergence and diffusion of the Law and Economics movement. A socio-legal approach would consider Law and Economics not simply as a style of legal analysis or a school of thought within law, but as a discursive project, constituted by and constitutive of an emergent socio-legal matrix. That approach would be attentive not only to the instrumental significance of Law and Economics, but also what difference, if any, Law and Economics makes in deciding legal cases; who employs and benefits from Law and Economics; and similar concerns. This approach would additionally be particularly attentive to its constitutive significance for socio-legal praxis—how Law and Economics frames meaning and action across the multiplicity of socio-legal fields. In order to more closely examine this breadth, this Article represents an attempt to sketch the outlines of a socio-legal analysis of Law and Economics, and to suggest some starting points for socio-legal research into the Law and Economics movement.
I. Law and Economics and its Discontents

The Law and Economics movement comprises a diverse group of legal scholars who are cognizant of each other's writings, and who at a minimum share the view that the principles of neoclassical economic analysis - particularly the principles of price and allocation theory that rest upon the concepts of methodological individualism, rational maximization, and marginalism - can fruitfully be applied to aid in understanding and evaluating the operation of legal rules and institutions. n8

While economic theory has long informed legal analysis, n9 the Law and Economics movement as such is a more recent phenomenon. General consensus dates the origin of the movement to the 1960 publication of a germinal article by Ronald Coase, The Problem of Social Cost. n10

A. Claims of Law and Economics

Proponents maintain that Law and Economics is positivist in its analysis, n11 and portray it as a non-political, value-free scientific approach. n12 Law and Economics practitioners typically eschew consideration of distributional claims, consigning those to the political realm. n13 They insist that the movement's influence is methodological, articulating formal theoretical models of legal phenomena resting on explicit behavioral and factual assumptions derived from economic theory. n14

Three premises underlie Law and Economics argument: that rational individuals pursue preference-maximizing actions and exchanges; n15 that rules of law impose prices on (or subsidize) individual action, such that those rules alter the nature and amount of activity; n16 and that common law rules are efficient (in a Pareto n17 or Kaldor-Hicks n18 sense), in that they reach the results that rational actors would reach through a process of free exchange. n19

On the basis of these premises, advocates of Law and Economics contend that efforts to regulate individual behavior through the law are likely to be futile or have perverse or dangerous consequences. n20 The argument against regulation is twofold: first, the costs (anticipated and unanticipated) of regulation often outweigh its benefits; n21 second, regulation is a form of rent-seeking behavior by cartelizing groups seeking to gain a premium over the market price for their activity. n22 Legal intervention in private interaction is justifiable only when it restores a dysfunctional market to efficiency and facilitates free individual exchange. n23

Law and Economics does not limit its analysis to areas of law that are most obviously economic in nature, such as antitrust, bankruptcy or taxation. n24 Rather, like other forms of "economic imperialism," n25 Law and Economics extends its reach into criminal law, torts, family law, constitutional law, environmental law, jurisprudence, and the legal process, to name but a few. n26 For traditional legal scholars, who often assume that the application of market logic outside the formal economic realm is limited or inappropriate, the imperialism of Law and Economics is often especially troubling. n27 Yet advocates of Law and Economics denounce, as untested and ill-founded, the assumption that market reasoning has little applicability outside the economic realm. n28 The decision whether to apply market analysis and commodity valuation, they assert, should rest on a dispassionate assessment of the benefits and costs of doing so in a particular case. n29

Within the Law and Economics movement there are various tendencies or strains that differ with respect to their claims and methodology. First, it is possible to distinguish four distinct claims in Law and Economics scholarship: n30 the behavioral claim holds that microeconomic analysis can predict how individual actors will respond to different legal rules; n31 the normative claim asserts that considerations of efficiency ought to determine legal regimes; n32 the descriptive claim suggests that "common law ... legal rules in fact induce efficient behavior"; n33 and the evolutionary claim identifies social forces as the driving mechanism behind law's tendency toward efficiency. n34 In addition, as the movement has developed, alternative forms of Law and Economics have emerged, which depart in various ways from the premises or methodology of the Chicago School. n35

Notwithstanding these differences in argument and approach, it remains meaningful to speak of a Law and Economics movement, albeit not as an hypostatized, coherent and discrete corpus. Instrumentally, the divergences within Law and Economics are significant; different versions of Law and Economics may hold different implications and yield divergent
conclusions with respect to any given legal question. In any form is nonetheless constitutive of neo-Liberal ideology to the extent that it reproduces economistic discourse.

B. Critiques of Law and Economics

Law and Economics has been subject to considerable critique, from both proponents and opponents of the movement. There have been two principle lines of critique: challenges to the foundations of economic analysis, and criticism of the ideological nature and implications of economistic legal theory.

Celebrating the "Courtship of Law and Economics," Charles Goetz observed that "acceptance of a model must rest largely on pragmatic ground: How well does the model work?" It is not surprising then that both critics of and adherents to Law and Economics have given considerable attention to the practical weaknesses in its model. An early statement of the foundational challenge from within the ranks of Law and Economics is Arthur Leff's critical review of a leading Law and Economics treatise, Richard Posner's The Economic Analysis of Law. Leff sharply questioned the view of homo economicus on which Posner's analysis relied, and argued for a richer model of human behavior drawing on psychology and sociology.

Subsequent assessments of Law and Economics echo and extend Leff's critique. Along with finding the microeconomic model inadequate or questionable as a depiction of human behavior, critics have observed that Law and Economics models ignore or distort the nature of legal and social institutions and their implications for human behavior. In addition, critics challenge the positivist claim of Law and Economics, maintaining that empirical research fails to bear out the theoretical hypotheses that the microeconomic model begets. As Goetz feared, such critics are apt to conclude that Law and Economics is of little value to practical legal concerns.

Partly in response to such criticism, some Law and Economics scholars have embraced Leff's call for an enriched foundational model. Some neo-institutionalist Law and Economics scholars in particular have urged that the movement draw on insights from other disciplines such as sociology and psychology to augment or refine their microeconomic assumptions.

Other critiques of Law and Economics challenge the movement's ideology, which the critics perceive as destructive of law. For these critics, Law and Economics "distorts the purposes of law and threatens its very existence." The ideological objection to Law and Economics is twofold, taking issue with its economic imperialism and with its conception of value.

The first aspect of the ideological objection to Law and Economics is a variety of what sociologist Viviana Zelizer terms the "boundless market" critique. This critique "centers on the destructive social, moral, and cultural effects of commoditization" as the market model extends beyond the scope of the economy itself. The "boundless market" critique does not necessarily reject the premises of microeconomic theory. Rather, it focuses on the (usually unacceptable) social outcomes as the market paradigm spreads out from the economic realm to govern social relations as a whole.

The economic imperialism of Law and Economics asserts two claims that trouble "boundless market" critics. On the one hand, under the influence of Law and Economics and related movements, "the political sphere has come to be identified as an economic domain." On the other hand, Law and Economics scholars "contrast the beneficent market with the corrupt democratic state." Turning the first of these claims against the second, Mark Kelman argues that the flaws that Law and Economics scholars identify in action by the democratic state in fact reflect the state's embeddedness in and subordination to "the acquisitive capitalist culture they extol." He contends that, rather than representing a scientific extension of value-free economic analysis to law, Law and Economics "is, in the deepest sense, partly about particular views of family life, childrearing, ambivalence, ambition, asceticism, irony, the meaning of time, learning, leisure, and love." Yet these views do not follow logically from the premises of economic argument; rather, they are "cultural," an outcome of the worldview that market logic engenders.

Even some advocates of Law and Economics recognize that market reasoning has limits. For instance, Neil Duxbury disparages resistance to extending the market domain and insists that "creeping commodification ... is not necessarily insidious commodification." Yet he concedes that conclusions derived from economic analysis of some forms of human activity "might be considered inappropriate because market reasoning is able to provide only a limited or impoverished account of the particular issue at stake." But, in contrast to the "boundless market" critics of Law and Economics, Duxbury would place the burden of proof on those who would restrict the application of market logic to show that the costs of doing so would outweigh the benefits.
The second type of ideological critique objects to "reliance on economic efficiency as the touchstone or guide to legal-economic policy making." \(^n61\) Particularly where the conception of efficiency is "wealth maximization," critics object that this is "not an adequate basis from which to assess and make suggestions concerning the law." \(^n62\) Rather than maximizing social well-being and satisfaction in general, such critics insist, the Law and Economics conception of value as wealth favors certain groups, notably producers over consumers and the rich over the poor. \(^n63\) The ostensibly positivist welfare claim of Law and Economics turns out, on closer inspection, to be "an ideological, and frequently objectionable" position. \(^n64\)

\[^{941}\] Representing a ligature between the foundational and the ideological challenges to Law and Economics, a third strand of critique takes aim at the movement's positivist claim. For positivist Law and Economics, the mantle of science is what confers legitimacy and acceptability to its analysis. \(^n65\) To test whether the movement was true to its positivist aspiration, Christopher Bruce examined contributions to a leading Law and Economics journal over a seventeen year period. \(^n66\) Contrary to the assertion of positivism, Bruce found a substantial degree of normative argument, little rigorous testing of models, and little effort to contrast economic with other models of law. \(^n67\) He suggested that the infidelity of Law and Economics to its own positivist image would impede its acceptance. \(^n68\) Conversely, Donald McCloskey urges Law and Economics to dispense entirely with the claim to be a positivist science, characterizing this assertion as a "rhetorical practice" that intimidates non-economists and narrows the scope of inquiry. \(^n69\)

II. Law and Economics in Historical-Sociological Perspective

While the theoretical foundations and ideological implications of Law and Economics have received substantial critical attention, the existing literature does not offer an account of the historical sociology of the movement. Indeed, few discussions, whether friendly or oppositional, seriously consider that Law and Economics has a history. \(^n70\) Yet the significance of the movement becomes fully apparent only by locating Law and Economics against the historical-sociological background within which it has emerged and spread, and to which it has helped give form and direction.

A. The Rise of Law and Economics: Previous Explanations

Scholars within the movement have employed the economic analysis of supply and demand to account for the emergence and diffusion of Law and Economics. \(^n71\) The supply of economic arguments "refocused the research interests of many legal scholars and even altered classroom discussion." \(^n72\) \[^{942}\] The diffusion of Law and Economics, as well as its failure to penetrate into some areas or to gain more adherents, is a product of the demand side. \(^n73\) Yet these analyses offer no mechanism, beyond the "inherent "imperialistic' nature of economics," \(^n74\) to explain why the supply of economic argument should have come to market when it did. Nor do they consider the extent to which supply, whatever its source, may create its own demand. \(^n75\)

Other accounts of the rise of Law and Economics are more historical. One explanation notes "the almost simultaneous emergence" of Law and Economics and Critical Legal Studies in the 1970s. \(^n76\) These two movements, despite the common perception that they are opposing tendencies with contrary political orientations, share roots in the legal realist tradition. \(^n77\) They arose when they did in response to the perceived failure of "legal process" jurisprudence, which both Law and Economics and Critical Legal Studies critique (though in different terms and with different conclusions). \(^n78\) Some credit social events and cultural change as the \[^{943}\] driving force behind the upheaval in legal theory. \(^n79\) Others point to fundamental changes in the nature of the economy during the same period. \(^n80\)

B. Law and Economics in the Transition to Late Capitalism

The timing and trajectory of the Law and Economics movement's birth and development coincide with a set of economic, political and cultural developments that numerous scholars have argued represent a fundamental social transformation on a global scale. \(^n81\) The specific trends \[^{944}\] that others have identified as the driving force behind the diffusion of Law and Economics are encompassed within this broader transformation. \(^n82\) Yet previous explanations of the emergence of Law and Economics are inadequate to appreciate the movement's significance as a socio-legal phenomenon. Instead, a critical socio-legal theory would locate Law and Economics as a constitutive element in a restructuring regime of capital accumulation and social regulation. \(^n83\) Such a theory would simultaneously identify the socio-economic relations and interests that both give impetus to the project of reconstituting capitalism and foster Law and Economics as a theory of law in harmony with a neo-Liberal hegemonic project. \(^n84\)

Like the late twentieth century, the late nineteenth century was a period of fundamental economic and social
transformation. In that period, a new ideology of Liberalism gained ascendency over social thought and policy. Law, no less than other social institutions, came under Liberalism's sway. Dominant explanations of the rise of Liberalism identify law as a tool that particular social actors wielded to reconstruct social institutions to suit their needs. As an alternative to this instrumentalist conception, legal historian Robert Gordon offers what he terms an "ideological" approach. In this view, the work of legal elites brings legal theory into play through legal practice: articulating clients' problems and legal cases in terms of operative categories of legal discourse. The emergence of a new mode of legal theory and ideology is thus significant not merely because of the instrumental force it might exert over legal outcomes, but because it reorients consciousness among attorneys, judges, clients, and other legal actors. Moreover, legal ideology does not exist in a distinct space bounded-off from the rest of society. In the period that Gordon studies, "transformations in legal ideology were paralleled in all other spheres as well."

During the early 1970s, the global capitalist economy experienced a profound crisis of accumulation. This crisis manifested itself not only economically, but politically and culturally as well. Law and Economics, which emerged and grew to prominence during this period, is a constitutive element of the social and economic transformation emergent in the wake of this crisis. The significance of Law and Economics in this sense is not, however, merely its instrumental utility in serving the functional needs of capital accumulation. Even more significant is the movement's influence on the terms and categories of legal discourse. That is, Law and Economics is most fully understood in socio-legal terms as constitutive of neo-Liberal ideology in and through legal theory and practice. In this sense, Law and Economics does serve to "legitimate and justify the newly emergent forms of domination" of late capitalism. Yet it does so not in a blunt instrumental way, but by contributing to the hegemony of neo-Liberal ideology such that pro-corporate capitalist outcomes come to appear universal, rather than particular, and as common sense, rather than contested.

On the cusp of the crisis of late twentieth-century capitalism, neo-Liberal actors launched a tactical "war of position" to rearticulate the terms of debate over economic and social policy. This project began to take shape before the capitalist crisis was fully apparent; even while interventionist hegemony was at its apex, a counter-hegemonic movement was taking shape. But it would not come into full flower for another decade. By the mid-1980s, the corporate investment had borne fruit, as conservatives secured social hegemony and political power.

Central to this hegemonic project is a reorientation of popular conceptions of the economy. Neo-liberal discourse postulates the "free market" ideal as a model not only for political economy but for social life in general. Law and Economics grows out of, and helps to form, this hegemonic discourse. In this sense, Law and Economics not only "codifies the biases and dominant ideology, the common sense, of the historical period in which common law developed," but also crafts and codifies the biases, dominant ideology, and common sense of a new historical period as it unfolds. More than just the application of economic theory to law, Law and Economics is a "form of political action" aimed at creating "communities, shared references, commonsensical stories that help shape and order an amorphous world." Law and Economics plays a twofold role in this project: the movement's scholarship advances economic discourse as the basis for framing and addressing social problems, and judicial opinions adopting Law and Economics precepts enforce economic conceptions as law.

"To the extent that many businesses oppose many government activities," Kelman observes, "there will always be an active market for politically plausible, if academically shoddy, antiregulatory work." Law and Economics has indeed been the beneficiary of "well-funded efforts to promote it" both within the legal academy and to the judiciary. Large corporations and corporate foundations have lavished millions of dollars on Law and Economics centers, programs, professorships, and fellowships at law schools throughout the Untied States. Outside the academy, corporate donors have funded numerous "efforts aimed at shaping views toward modern capitalism," including studies supporting deregulation, tort reform, and reduced antitrust enforcement. They have also sponsored Law and Economics seminars for judges. Supporters of these programs defend them as "simply about making the law more efficient and fair"; but critics aver that the corporate patrons of Law and Economics seek to use the movement to reshape the legal regime in contours more facilitative of capital accumulation.

An early product of the Law and Economics Center illustrates the return that the movement's underwriters have realized on their investment. Responding to "strong, even strident, antibusiness and anticorporate sentiment," the Center published a volume of essays espousing "free-market" analyses of various legal, social, and economic issues of concern to large corporations. The volume was intended as a "quick fix" to "anti-free-market attitudes." Contributors deployed Law and Economics argument to rebuff calls for corporate social responsibility, workers' rights legislation, insider trading controls, wage and price regulation, stricter antitrust enforcement, and similar measures inimical to
unrestrained accumulation of corporate profits. n118

The significance of this work is not merely instrumental. Specific prescriptions may, of course, influence legal decisions, shape policy, and decide cases in ways favorable to corporate interests. Even when it does not achieve such direct instrumental impact, however, Law and Economics exerts its influence by recasting the terms of legal debate, reconceptualizing socio-legal problems and goals, and reorienting the practice of socio-legal actors whether or not they share the interests of corporate capital.

Aided by the largesse of its sponsors, Law and Economics has assumed its place as a "mainstream element of academic discourse" in the contemporary law school. n119 In the estimation of Yale Law School Dean Anthony Kronman, Law and Economics is "the intellectual movement that has had the greatest influence on American academic law in the past quarter-century." n120 Whether measured by the number of law school professors holding a Ph.D. in economics, n121 the number of law school chairs, fellowships, or programs in Law and Economics, n122 or the inclusion of *Law and Economics* in the law school curriculum, n123 the movement's prominence is evident. The precise scope, extent, loci, and patterns of its influence are less clear.

C. The Judiciary as a Site of Law and Economics Praxis

Appellate judicial opinions are central to the Anglo-American system of law. Judicial precedent is the touchstone for legal practice, legal education, and legal scholarship. The significance of judicial opinions in reshaping the legal landscape is both instrumental - i.e., deciding individual cases - and ideological - i.e., guiding the way that legal actors think and speak about the law. For Law and Economics as a hegemonic project, the judiciary is therefore particularly crucial terrain. To the extent that judges adopt and reproduce Law and Economics argument in their opinions, the movement gains ground in both the "war of position" (i.e., transforming legal ideology) and the "war of maneuver" (i.e., winning legal cases).

By most accounts, Law and Economics has not had the "pervasive" influence within the judiciary that it has in the legal academy. n124 Earlier in the movement's history, one federal judge asserted that "in eleven years as a district judge and almost one year as a judge of the Court of Appeals, I have never heard a case in which law and economics analysis has been applied." n125 A more recent commentator has predicted that the lack of penetration by Law and Economics into the courts is "unlikely to change." n126 Echoing the ideological critique of Law and Economics, the lack of impact by the movement on the judiciary is attributed to the limited practical utility of economic analysis in judicial decision-making. n127

Yet the judiciary has not been entirely immune to the charms of Law and Economics. In various ways, Law and Economics has gained a judicial following and enlisted judges in its hegemonic project. Law and Economics scholarship diffuses directly into judicial decision-making in two ways. First, judges may read and adopt the arguments of the Law and Economics literature. n128 Second, Law and Economics scholars themselves may move from the academy to the bench. n129 Indirect transmission may also occur via other legal actors. Judicial Clerks who have been immersed in Law and Economics while in law school may draft opinions that cite to and follow the analysis of the Law and Economics literature. n130 Attorneys may introduce judges to Law and Economics by citing to the literature in their briefs, n131 or employing Law and Economics scholars as expert witnesses. n132

The judiciary likewise fosters the diffusion of Law and Economics to others. Legal scholars read and analyze judicial opinions, interpreting them in terms of, or deriving from them, the categories of economic analysis. Opinions expressly or implicitly adopting Law and Economics principles may find their way into law school casebooks, thereby socializing law students into the discipline. n133 Attorneys, particularly when appearing before judges associated with the movement, may draft their briefs and frame their arguments accordingly. n134

III. Empirical Investigation of Law and Economics and its Diffusion

Empirical, and especially quantitative, research remains uncommon within legal scholarship. n135 It is therefore not surprising that there has been no comprehensive account of the scope and pattern of diffusion and influence of Law and Economics. There have, however, been a few empirical investigations by legal scholars that bear on the issue. That work offers a mixed picture of the movement's impact within the legal academy and the courtroom. In light of the incomplete and inconclusive nature of previous research, further study, grounded in socio-legal theory, remains necessary to elucidate the significance of the Law and Economics movement.

A. Previous Empirical Investigations of Law and Economics
Ernest Gellhorn and Glen Robinson assessed the permeation of Law and Economics within law schools in the early 1980s. However, after surveying the inclusion of Law and Economics in widely used course books in four legal fields, the authors concluded that the movement had "scarcely penetrated legal education at all." Robert Ellickson examined the diffusion of Law and Economics within law schools, across legal specialties, and into other university departments. He showed that Law and Economics was established within elite law schools by 1970 and spread rapidly to other law schools across areas of law over the next few years. But by the mid-1980s, Ellickson contended, the diffusion of Law and Economics had stalled. To support his claim, Ellickson examined the proportion of articles making Law and Economics arguments among all contributions to four elite law reviews. He found that this figure increased significantly between 1966 and 1970, but reached a plateau thereafter. Following up on the Gellhorn and Robinson study, Ellickson found that law school course books gave no greater space to Law and Economics in the late 1980s then they had at the start of the decade. Similarly, Ellickson noted a decrease in the frequency of publications in a series of Law and Economics "readers" by a leading legal publisher. Ellickson also compared the attendance at programs sponsored by the Law and Economics section of the Association of American Law Schools (AALS) at its annual conventions with attendance at programs sponsored by other interdisciplinary sections. While the sections on Legal History, Law & Humanities, and Law & Religion attracted an average of about five percent of convention attendees at their programs, Law and Economics attracted just slightly more than three percent of the same audience. Finally, Ellickson measured the professionalization of Law and Economics, as indicated by the increased dominance of Ph.D. economists among contributors to leading Law and Economics journals. On the basis of these findings, Ellickson concluded that Law and Economics had become "a technical sideshow" rather than a dominant "intellectual tide" within law schools.

Landes and Posner examined the frequency of citation to Law and Economics scholarship in both scholarly literature (both in law and in other disciplines) and appellate judicial opinions. First, they measured citations in law and social science journals to the work of three selected groups of Law and Economics scholars. They found that citations to that work increased during the period from 1976 to 1990, both in absolute terms and relative to "doctrinal" and "political theory" scholars. They also measured citations to articles appearing in two leading Law and Economics journals: Journal of Law and Economics and Journal of Legal Studies. Citations to those journals also increased, both in absolute terms, and relative to citations to other interdisciplinary law journals, fifteen leading law reviews. Finally, they classified articles in five leading law reviews by analytical approach, and measured citations to those articles in law reviews and judicial opinions. The number of citations to "economics" articles was greater than for articles in any other category except for "doctrinal." On the basis of these various measures, Landes and Posner conclude that Law and Economics has had a greater impact relative to other approaches to legal scholarship since the mid-1970s.

Two studies shed light on the extent to which Law and Economics has penetrated into the courtroom to influence judicial decision-making. These provide a mixed picture and suggest that the judicial impact of Law and Economics may vary across areas of law. Surveying judicial opinions in contract cases, Jeffrey Harrison found scant evidence of Law and Economics influence. Of fifty-eight books and articles that Harrison analyzed on the Law and Economics of contract, half were never cited in any state or federal opinion. Moreover, where judges did cite to Law and Economics literature, they often did so without any detailed discussion or comment. In contrast, William Kovacic's analysis of judicial opinions in antitrust cases in the 1980s suggests a greater influence of Law and Economics in that field. The opinions of Reagan-appointed judges in antitrust cases were markedly conservative, embodying policy views grounded in the theories of the Chicago School Law and Economics.

As a provisional examination of the diffusion of Law and Economics through the judiciary, I collected data on the frequency of judicial citations to Law and Economics scholarship during the period of the contemporary Law and Economics movement (1965 to the present). Citations to Law and Economics scholarship are one way that judges may incorporate Law and Economics into their opinions. As such, the frequency of such citations provides a measure
of the ideological influence of Law and Economics, regardless of whether or not there is any instrumental link between
citations to Law and Economics literature and decisions reached in the citing opinions. n171

To examine the diffusion of Law and Economics into judicial decision-making, I searched for citations in federal
appellate court opinions n172 to five leading Law and Economics journals: Journal of Law & Economics, Journal of
Law and Economics. n173

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Table 1
U.S. Court of Appeals Citations to Law and Economics Journals, 1968–2002

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[*960] No federal appellate opinion cited to any of the journals in my search prior to 1968. During the ensuing dozen
years, the volume of citation remains quite small; prior to 1981, the annual number of citations never exceed four, and
seldom exceeded one. In 1981, there is a small but noticeable jump, with the number of citations doubling from three
to six and increasing for seven years thereafter. Following a peak of thirteen citations in 1987, the number of citations
has dropped back into the upper single-digits in most years. n174 These data are consistent with the hypothesis of a
constitutive relation between Law and Economics and a neo-Liberal hegemonic project of late capitalism in the 1970s
and 1980s. Specifically, they indicate that judicial citation to Law and Economics scholarship did increase noticeably (if
not overwhelmingly) once the organized efforts at promoting the movement had taken steam. n175

Of 168 total citations between 1968 and 2002, seventy-eight are from Seventh Circuit cases. n176 Moreover, that
court's citations account for most of the increase in total annual citations since 1981. In no circuit other than the Seventh
does the number of citations ever exceed three in a year. n177 Yet the Seventh Circuit never cited to these Law and
Economics journals prior to 1982. Of the seventy-eight Seventh Circuit cases in Table 1, Judges Posner and Easterbrook
are responsible for sixty-eight of the citing opinions. n178 Thus, the data supports the popular view that Judges Posner
and Easterbrook are the leading judicial adherents of Law and Economics. n179

In light of the status of Ronald Coase's article, The Problem of Social Cost n180 as a catalyst for the Law and
Economics movement, I searched for all federal appellate cases citing to that article through to [*961] the end of 2002.
n181 The first such citation was in a 1968 case in the Second Circuit. n182 However, that debut citation hardly signaled
an embrace of Coase's theorem. Adverting to the "theoretical" possibility of Coasean bargaining between shipowners and
drydock owners over the allocation of risks between them, the court opined that "this would seem unlikely to occur in
real life." n183 Not until six years later did a court cite Coase approvingly for his proposition regarding the appropriate
allocation of tort costs. n184 Another six years lapsed before a subsequent citation to Coase's article. n185 Altogether,
federal Court of Appeals judges have cited to Coase's article in twenty-six cases between 1968 and 2002. n186 Of these,
more than half have been in the Seventh Circuit.

Overall, these data do not contradict the conclusion of previous commentators that the explicit influence of Law
and Economics on judicial practice has been modest. The fact that so sizeable a proportion of citations to Law and
Economics journals are in opinions authored by two judges who are prominent as Law and Economics scholars suggests
that appointment of those individuals to the bench is a particularly significant route of diffusion for Law and Economics.
Yet, the colleagues of Judges Posner and Easterbrook on the Seventh Circuit Court of Appeals have been only slightly
more likely than judges in other circuits to cite to Law [**962] and Economics journals. n187 Thus, it is not at all clear
that the presence of such judges on a court substantially increases the propensity of their colleagues to adopt Law and
Economics in their own opinions.

The body of Law and Economics literature is, of course, greater than that contained in the journals included in this
analysis. Future investigation might examine citations to a broader body of literature, to obtain a more comprehensive
picture of the extent and pattern of explicit judicial reliance on Law and Economics scholarship. n188 It would also be
helpful to compare citations to journals and leading scholars representing other approaches to legal analysis (i.e., Critical
Legal Studies, Socio-Legal Studies, etc.), to be able to gauge the relative influence of Law and Economics in their own opinions.

Explicit citation to Law and Economics literature may not be the only measure of the movement's diffusion through
the judiciary, however. A more interesting sign of the movement's influence would be opinions in which judges adopt the
discourse and categories of Law and Economics argument without expressly citing to the scholarly literature. n190 To the
extent that the discourse and reasoning of Law and Economics attains the status of common sense, reasonable ways of
deciding cases, without need of supporting authority, n191 Law and Economics may truly be said to be hegemonic. Future
research - involving close reading of a large number of judicial opinions to identify those in which Law and Economics
is implicit as well as explicit - would provide an important [*963] test of the movement's significance as a constitutive
element in and of neo-Liberalism. Along with citations to Law and Economics literature, future investigation might also
look at citations to precedent opinions that have relied on that literature, to see whether they adopt or comment on the
Law and Economics principles incorporated into those precedent opinions. Once a body of Law and Economics opinions
has been compiled, these may be analyzed and classified by subject area. The relative frequency with which opinions in
different areas of law deploy Law and Economics argument will further map the reach of the movement.

Conclusion

I have suggested that the Law and Economics movement is best understood as an aspect of a neo-Liberal hegemonic
project to restructure economic and social relations in the transition to a new regime of capital accumulation. A preliminary
examination of the extent to which Federal appellate judges have cited to Law and Economics scholarship during the
past thirty years, while insufficient to offer strong empirical support for the argument I have presented, does suggest that
further inquiry in this direction is worthwhile.
I have already indicated some respects in which further investigation might augment and refine the data and analysis regarding judicial citation to Law and Economics scholarship. In addition, further areas for socio-legal inquiry into Law and Economics remain unexplored. Within the formal "legal system" itself, future research might examine the constitutive play of Law and Economics in professional legal practice, n192 exploring whether and how attorneys incorporate or draw upon Law and Economics in developing legal theories, preparing and presenting evidence, and framing legal arguments; how legal practice (re)produces Law and Economics argument, and how economic ideology constitutes and is diffused through lawyer-client interactions. In addition, the socio-legal understanding of "law" as embedded and enmeshed in "society" suggests inquiry into the diffusion of Law and Economics through, and its constitution of, multiple legalities above, below, and beyond the formal "legal system" itself. n193 [*964] A fuller investigation into Law and Economics along these lines would contribute to socio-legal scholarship in two respects. First, such research would enrich the understanding of a movement that has been highly visible in legal circles for the past two decades or more, and provide an analysis of that movement that would better enable a decisive critique of its claims. Second, such work would add to the broader socio-legal understanding of law as a constitutive element of society, both agent and object of social structure and change.

Legal Topics:
For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral Overview

FOOTNOTES:


n2. Examples of legal theories positing the radical autonomy of law from society are legal positivism, see, e.g., H.L.A. Hart, The Concept of Law 181–82 (1961), and autopoiesis theory, see Roger Cotterell, The Sociology of Law 65–70 (2d ed. 1992).

n3. Social determinist theories of law include the economic determinism associated with Marx, see, e.g., Karl Marx, A Contribution to the Critique of Political Economy (1970), as well as those versions of Law and Economics that posit a structural/evolutionary tendency toward efficiency in the law. See Lewis Kornhauser, L'Analyse Economique du Droit [Economic Analysis of Law], 16 Materiali Per Una Storia della Cultura Giuridica 233, 244–45 (1986) (discussing evolutionary claim of Law and Economics).

n4. Instrumentalist theories portray law as structuring social action and institutions, but fail to explain why law is able to do so, and ignore the power of social forces in driving law to do so. See, e.g., James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 33 (1956); Cotterell, supra note 2, at 135 (discussing versions of Marxist analysis that locate law within the determinative economic base); Kornhauser, supra note 3, at 237–38 (discussing instrumentalist claim of Law and Economics). For a socio-legal critique of instrumentalist theories, see generally Robert W. Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920, in Professions and Professional Ideologies in America 70 (Gerald L. Geison ed., 1983).


A second article that is frequently credited as a progenitor of the modern Law and Economics movement is Guido Calabresi, Some Thoughts on Risk Destruction and the Law of Torts, 70 Yale L.J. 499 (1961). See, e.g., Duxbury, supra note 10, at 300; Kornhauser, supra note 10, at 27; Aron et al., supra note 10, at 27. Also significant in bringing early attention to Law and Economics was a 1963 article on antitrust policy by Robert Bork and Ward Bowman in Fortune magazine. See Peritz, supra note 10, at 236.


n11. See Peritz, supra note 10, at 238. "The positive claim that the consequences of a given legal rule can be fruitfully examined using microeconomic theory," according to one Law and Economics scholar, is "the only claim that would win widespread acceptance among law and economics scholars." Ulen, supra note 10, at 210. See also Posner, supra note 7, at 2 (identifying "positive" Law and Economics as effort to "explain and predict the behavior of participants in and persons regulated by the law" on basis of economic analysis).

n12. See, e.g., Roger LeRoy Miller, Where Joe Bain, Mike Scherer, and Fritz Mueller "Went Wrong": A
Libertarian View, 14(2) Antitrust L. & Econ. Rev. 15, 26 (1982) ("Economics is not going to change people's values because it's a value-free science."); Editors, Foreword: Antitrust Law and Economics at the University of Miami, 14(2) Antitrust L. & Econ. Rev. 1, 6 (1982) (characterizing "'pure' microeconomics" as "a set of value-free analytical tools," and maintaining that "attempting to present "the other side' would make no more sense ... than requiring professors of chemistry and physics to give students 2 "versions' of those demanding sciences"); Ulen, supra note 10, at 210 (arguing that "there is nothing value-laden" in the positive claim for microeconomic analysis in law and that this claim "would win widespread acceptance among any legal scholar, adherent of Law and Economics or not"); Posner, supra note 7, at 15 (asserting that "economics is pretty value-neutral, or at least aspires to be value neutral" and suggesting that Law and Economics analysis may favor "liberal" as well as "conservative" policies); see also Peritz, supra note 10, at 238-41 (discussing the Law and Economics movement's claim to be non-political in contradistinction to distributional claims); Horwitz, supra note 10, at 910 (criticizing the movement's "effort to create a system of legal thought that is objective, neutral and apolitical," claiming the mantle of science).

n13. See Peritz, supra note 10, at 238-41; Horwitz, supra note 10, at 910.


n17. Pareto efficiency describes a distribution in which no person can be made better off without at least one other person being made worse off. See Cooter, supra note 15, at 820-21; Kornhauser, supra note 3, at 240-41; A. Mitchell Polinsky, An Introduction to Law and Economics 7 n.4 (1989). Polinsky's book provides an accessible guide to the basic concepts, premises, and application of Law and Economics analysis. Id.

n18. Kaldor-Hicks efficiency, which addresses perceived limitations in Pareto efficiency, holds a distribution efficient if the surplus redistributed to the winners is sufficient to compensate the losers fully, even though no actual compensation need take place. See Cooter, supra note 15, at 827-29; Kornhauser, supra note 3, at 241.


n21. Richard Epstein, for example, argues that strict liability encourages increased risk-taking by consumers, and is therefore more costly and less efficient than a fault-based system. Richard A. Epstein, Products Liability as an Insurance Market, 14 J. Legal Stud. 645, 653, 664-69 (1985); see also Bogus, supra note 15, at 26-28.

n22. See Kelman, supra note 20, at 236-38.

n23. See Peritz, supra note 10, at 258-62; Duxbury, supra note 10, at 309-10; Bogus, supra note 15, at 18. For Law and Economics scholars of the Chicago School, the argument against legal regulation of or interference with private interaction arises out of the conception of "wealth maximization" and "freedom of contract" as the fulfillment of liberty and personal autonomy. Peritz, supra note 10, at 238-39 (citing Robert Bork, The Antitrust Paradox 116-33 (1978), and Richard Posner, Antitrust Law, An Economic Perspective (1976)). See also Bogus, supra note 15, at 18 n.66 (discussing Posner's endorsement of products liability doctrine as an "efficient mechanism for transmitting information ... from manufacturers to consumers").

n24. Posner, supra note 15, at 4-5; Posner, supra note 7, at 3 (noting influence of Law and Economics on "antitrust, the regulation of public utilities and common carriers, environmental regulation, the computation of damages in personal injury suits, the regulation of the securities markets, the federal sentencing guidelines, the division of property and the calculation of alimony in divorce cases, and the law governing investment by pension funds and other trustees").


n27. See, e.g., Bogus, supra note 15, at 18 (criticizing Law and Economics for its "unbounded faith in the market").

n28. Neil Duxbury, Law, Markets & Valuation, 61 Brook. L. Rev. 657, 662-63. Duxbury insists that even the most imperialistic legal economists, such as Posner, do recognize limits to market reasoning. Id. at 662.

n29. Id. at 700-01. Duxbury appears not to recognize the arguable circularity of justifying the Law and Economics approach in terms of economic analysis. The employment of economic analysis to explain the influence of that analysis within legal scholarship is symptomatic of the hegemonic force of economic ideology.

n30. See Kornhauser, supra note 3, at 237; see also Fiss, supra note 6, at 2-8 (distinguishing positive or descriptive welfare economics arguments and normative libertarian economic arguments); Bogus, supra note 15, at
17 n.60 (citing Anthony Kronman's distinction between positive/descriptive and normative arguments in Law and Economics).

n31. See Kornhauser, supra note 3, at 237–38. Within the behavioral claim is an instrumentalist sub-claim, which takes account of the power of law to shape the preferences and incentive structures that drive individual behavior according to microeconomic models. Id. at 239.

n32. Id. at 240–42. Two prominent statements from outside law of the normative claim for neo-classical economics are F.A. Hayek, The Road to Serfdom (1944), and Milton Friedman, Capitalism and Freedom (1962); see also Peter L. Berger, The Capitalist Revolution: Fifty Propositions About Prosperity, Equality, and Liberty (1986), Posner identifies "normative" Law and Economics as scholarship that "tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences, whether on economic efficiency, or the distribution of income and wealth, or other values." Posner, supra note 7, at 3.

n33. See Kornhauser, supra note 33, at 243–44.

n34. See id. at 244–45.


n37. "Neo-Liberalism" refers to the resurgent "free-market," contractarian ideology that has been hegemonic in the late twentieth and early twenty-first centuries, reminiscent of - though not identical to - that which characterized the hegemonic Liberal ideology of the late nineteenth and early twentieth centuries. See generally Gordon, supra note 4.

n38. Even work critical of Law and Economics may be indicative of - and contribute to - its hegemony, to the extent that it is Law and Economics that the critics are criticizing (rather than safely ignoring it). See William M. Landes & Richard A. Posner, The Influence of Economics on Law: A Quantitative Study 7 (Univ. of Chi. Law Sch., John M. Olin Program in Law & Economics, Working Paper No. 9, 2d Series, 1992), at http://www.law.uchicago.edu/Lawecon/WkngPprs 01-25/09.wml-rap.econ.pdf ("Scholars rarely bother to criticize work that they don't think is or is likely to become influential. They ignore it.").

n40. Goetz, supra note 14, at 250.


n42. Id. at 462-77. For another early critique of the analytical assumptions of Posnerian Law and Economics, also from a scholar within the movement, see generally A. Mitchell Polinsky, Law and Economics as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law, 87 Harv. L. Rev. 1655 (1974).

n43. See, e.g., Kelman, supra note 20, at 202-03. For example, the assumptions of rational and informed consumers have been challenged with respect to goods that are inherently dangerous to use (e.g., cigarettes), unlikely to provide satisfaction (e.g., lottery tickets), or difficult to assess (e.g., automobile safety). Bogus, supra note 15, at 23-25, 27-38.

n44. Kelman alleges that Law and Economics scholars offer a "distorted" description of institutions such as common law rules. Kelman, supra note 20, at 202-04. Bogus argues that "moral hazard" arguments against strict products liability inaccurately portray human response to legal rules, and that the bargaining model of interaction ignores the force of social context and institutions such as employment relations, which constrain individual choice and voluntary assumption of risk. Bogus, supra note 15, at 27-29.


n45. Kelman reviews work within the public choice school of Law and Economics and finds that empirical investigation does not support the predictions of perversity or futility of government regulation. Kelman, supra note 20, at 237-38. Likewise, Bogus insists that empirical reality does not support the claim that strict products liability entails jeopardy in the form of more reckless consumer choice and behavior. Bogus, supra note 15, at 27-28.
n46. See Bogus, supra note 15, at 29.


n48. See generally Ulen, supra note 10; Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors, 65 Chi.-Kent L. Rev. 23 (1989).

n49. Fiss, supra note 6, at 1.


n51. Id.

n52. Id. A leading critical work in the "boundless market" tradition is Karl Polanyi, The Great Transformation (1957). Polanyi's thesis is that modern market exchange is radically cut off from existing social relations with the result that "instead of economy being embedded in social relations, social relations are embedded in the economic system." Id. at 57; see also Pierre Bourdieu, Firing Back (Loic Wacquant trans., The New Press 2003) (2001); Pierre Bourdieu, Acts of Resistance (Richard Nice trans., The New Press 1999) (1998); Enzo Mingione, Fragmented Societies (Paul Goodnick trans., 1991); Andre Gorz, Critique of Economic Reason (Gillian Hordyside & Chris Turner trans., 1989); Bernard Barber, The Absolutization of the Market, in Markets and Morals (Gerald Dworkin et al. eds., 1977).

n53. Peritz, supra note 10, at 302.

n54. Kelman, supra note 20, at 268.

n55. Id.

n56. Id. at 270–71.

n57. See id. at 270.
n58. Duxbury, supra note 28, at 700.

n59. Id. at 662.

n60. Id. at 700.

n61. Mercuro, supra note 25, at 20. Mercuro attributes efficiency-fetishism specifically to what he identifies as the “Chicago-Virginia” school of Law and Economics, from which his own favored neo-institutionalism represents a departure. Id.


n64. Id. at 3-4; see also Horwitz, supra note 10, at 911-12.

n65. See Goetz, supra note 14, at 248-50; Christopher J. Bruce, A Positive Analysis of Methodology in the Law and Economics Literature, 12 Hamline L. Rev. 197 (1989).


n67. Id.

n68. Id.


n70. Recognition of the history of Law and Economics is typically limited to acknowledgment of early examples of Law and Economics scholarship. See supra note 10 and accompanying text.
n71. See, e.g., Goetz, supra note 14, at 257-58; Mercuro, supra note 25, at 17.

n72. Goetz, supra note 14, at 257.

n73. Id. at 257-58. For instance, Goetz attributes the relative paucity of Law and Economics analysis in the area of constitutional law to a preference among legal scholars and jurists not to subject cherished legal premises in that area to deconstructive economic analysis. Id.

n74. Mercuro, supra note 25, at 17. To economic imperialists, "practically all forms of activity, including love affairs and intellectual inquiry, are subject to the laws of supply and demand." Goetz, supra note 14, at 257. The fact that these scholars employ the concept of supply and demand to explain the diffusion of economic theory into law is itself a further illustration of the hegemony of economic discourse.

n75. The most famous version of the belief that supply creates its own demand is "Say's Law," named for the French political economist J.B. Say, who held that "there could not be a shortage of purchasing power in the economy." John Kenneth Galbraith, Money: Whence it Came, Where it Went 218 (1975); Robert L. Heilbroner, The Worldly Philosophers 97 (1961). Say's Law, which was hegemonic within economic theory from the early nineteenth until the early twentieth century, "stands as the most distinguished example of the stability of economic ideas, including when they are wrong." Galbraith, supra note 75, at 219.

In asserting that the demand for economic arguments, in law and more generally, is in part a product of supply, I borrow not from Say but from sociological theory:

Preferences are formed not simply in response to the opportunities available, but by the nature of the discourse through which people understand what choices are available, what it is legitimate or socially appropriate to want, and according to the particular metric in which its costs and benefits are to be evaluated.


n78. Gary Minda, Antitrust at Century's End, 48 SMU L. Rev. 1749, 1778-79 (1995); Minda, supra note 76, at 99-100, 104; Fiss, supra note 6, at 2, 13-14; cf. Mercuro, supra note 25, at 17 (stating that Law and Economics "filled the void left by the legal realist movement," which had failed to fulfill its own agenda); Posner, supra note 7, at 3 ("Economic analysis of law is generally considered the most significant development in legal thought in the United States since legal realism petered out a half century ago.")

n79. See, e.g., Fiss, supra note 6, at 14 (ascribing the rise of Law and Economics and Critical Legal Studies to "the disintegration of public values" that defined the period of their emergence); Minda, supra note 76, at 104-05 (declaring that legal process jurisprudence was "oddly out of touch" with the realities of social events following the Vietnam war and Watergate); id. at 1750 n.4 (noting the cultural-social change associated with post-industrial or postmodern society).

n80. See, e.g., Minda, supra note 76, at 1750 n.4, 1779-80 (maintaining that previous antitrust doctrine and policy was ill-adapted to an emergent postindustrial economy); William E. Kovacic, Reagan's Judicial Appointees and Antitrust in the 1990s, 60 Fordham L. Rev. 49, 100-01 (1991) (locating antitrust's embrace of Law and Economics in the context of economic globalization beginning in the 1970s).

n81. A vast body of literature discusses and seeks to theorize the economic restructuring of the neo-Liberal era, along with a set of social and cultural trends that this literature posits to be both emergent from and engendering of that economic change. In the nomenclature of this literature, the economic restructuring of the past three decades represents a transition to a new mode of capital accumulation variously termed "post-industrialism," "post-Fordism," "flexible accumulation," "late capitalism," or "globalization"; the associated social and cultural forms are commonly identified under the rubric of "postmodernity."


n82. In the literature on late twentieth-century social transformation, phenomena and events such as "the disintegration of public values," "the Vietnam War and Watergate," "post-industrialism," and "globalization" receive
considerable attention. See supra notes 78-79 and accompanying text. However, this literature typically treats these matters as manifestations of underlying socio-economic change, rather than as autonomous explanatory factors. See generally supra note 81.


n84. See Antonio Gramsci, Prison Notebooks 12-13 (Quentin Hoare & Geoffrey Nowell Smith eds., 1971) (explaining the social-hegemonic function of intellectuals). Gramsci uses the term "hegemony" to describe the domination of one class over others through a combination of political coercion and ideological/moral consent. Id. at 58-59. The ideological dimension of hegemony entails the acceptance by the subordinate classes of the ideas and interests of the dominant class as "common sense," "natural" or "universal." For an examination of neo-liberalism as a Gramscian hegemonic project, see Susan George, How to Win the War of Ideas: Lessons from the Gramscian Right, Dissent, Summer 1997, at 47.

n85. See generally Gordon, supra note 4.

n86. Id. As Gordon notes, the hegemony of Liberal ideology was never total. Id. at 91. Nonetheless, it constituted "a collective consciousness, a way of organizing thinking about legal rights, that articulate members of the late nineteenth-century American legal elite constructed and held in common." Id. at 90-91.

n87. Id. at 70-71.

n88. Id. at 71.

n89. See id. at 71-72.

n90. Id. at 72.

n91. Id.

Sociologist, Fall 1975, at 5.

n93. See generally supra note 81.

n94. Cf. Gordon, supra note 4, at 93.

n95. Aron et al., supra note 10, at 37, explains corporate support for Law and Economics scholarship in these terms:

Dressed in the neutral and objective garb that academic research enjoys, the scholarship financed in this manner enjoys a stature and credibility that would not automatically attach to similar arguments were they made by business partisans before courts or legislatures. Generous support of academic forays in law and economics thus is an integral and strategic component of an overall campaign to secure a reshaped jurisprudence which accords heightened protection to commercial and private property interests.


n97. See Stefancic & Delgado, supra note 96, at 3 (noting the origins of the conservative project in the 1960s); Aron et al., supra note 10, at 27 (associating "growing interest in "law and economics" with "the mid-1970s business revolt against government regulation"). Discussing the ideological portent of Coase's article, which launched the modern Law and Economics movement, Horwitz remarks that its "boldest stroke ... was to deny the interventionist premises of welfare economics at just the moment it had achieved hegemony." Horwitz, supra note 10, at 907. The Coasean achievement, which consisted of supplanting prior conceptions of social costs with a new common sense of "transaction costs," exemplifies the activity that Gramsci identifies with the "war of position."


n99. Id. at 4. Stefancic and Delgado report on the success of the corporate-conservative hegemonic project in a range of areas, including the backlash against affirmative action, the campus culture wars, and tort reform. Id.; see also William M. Dugger, Corporate Hegemony (1989) (tracing the influence of corporate capital in reshaping economic, political, cultural and social thought, institutions and practices).
n100. Albert Hirschman expressly links the turn in economic discourse with the aftermath of the accumulation crisis of the early 1970s:

[Keynesian] doctrine achieved intellectual and policy dominance in the early high-growth postwar decades, but came to be contested in the seventies, with the unsettling experience of rising inflation accompanied by economic stagnation and comparatively high unemployment. The counterdoctrines that became most successful within the economics profession go by the labels "monetarism" and particularly "new classical economics" or "rational expectations."

Hirschman, supra note 20, at 74. See also Thomas Ferguson & Joel Rogers, Big Business Deserts the Democrats, Nation, July 5/12, 1986, at 1.

Writing of the shift in antitrust doctrine in line with Law and Economics beginning in the late 1970s, Peritz recalls "the elevation of "efficiency" to something akin to a neutral principle of government, [and] the call to rally "round the flag of managerial expertise and its sanitizing logic of market economics." Peritz, supra note 10, at 230. This "rhetoric of efficiency," Peritz explains, "meant getting government off the backs of business." Id. Thus, the Reagan administration rode to power in 1980 "promising ... [a] return to a robust economy founded in a regime of corporate control, subject only to the discipline of "the free market." Id. at 266.

The logic of the market, private property, and deregulation extends beyond obviously economic areas of law such as antitrust. A similar logic has guided the U.S. Supreme Court's First Amendment jurisprudence as well. Thus, in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court justified restrictions on core political speech in a private shopping mall in terms of the owner's property rights and the interests of consumerism. See Peritz, supra note 10, at 248-49. Conversely, in Buckley v. Valeo, 424 U.S. 1 (1976), the Court struck down limits on campaign expenditures in a decision that equated spending with speech, and property with liberty. See id. at 249-50. Peritz argues that the Court thus "refused to allow Congress to regulate the effects of great wealth in political markets," and refused to extend First Amendment protection against the effects of great wealth in property markets, just as it refused to apply antitrust law to regulate the effects of great wealth in commercial markets. Id. at 250-51.

n101. Mercuro observes that, "the emergence of law and economics (particularly the Chicago-Virginia reliance on private market institutions) evolved contemporaneously with an intellectual climate that was increasingly receptive to the view that markets are an effective form of social organization." Mercuro, supra note 25, at 18. See also Duxbury, supra note 10, at 302 (attributing the failure of dissenting strains within Law and Economics to take hold to "the manner in which ... [the] concept [of transaction costs] has been manipulated by proponents of law and economics in order to promote a modern, 'sophisticated' version of laissez faire ideology"); Stefancic & Delgado, supra note 96, at 144-45 (identifying Law and Economics among conservative ideological initiatives in the academic world).

n102. Baker, supra note 62, at 48. Thus, for example, the influence of Coasean Law and Economics lies in what it removes from controversy: the Coasean model assumes freedom of contract as the normal and natural condition, and places the burden of explanation and justification on those who would regulate or intervene in the bargains of contracting individuals. Horwitz, supra note 10, at 908.

n103. Duxbury contrasts contemporary Law and Economics, which seeks to enshrine "the myth of a free market," with realist-institutionalist economic jurisprudence in the 1920s, which sought to "explode" that myth. Duxbury, supra note 10, at 308. In each instance, legal scholars and jurists deployed economic discourse to reshape social consciousness and political-economic policy. Id.; see also Gordon, supra note 4, at 91, 109 (noting demise of Liberal jurisprudence as it came under attack in the early twentieth century).
n104. Kelman, supra note 20, at 270.

n105. See Horwitz, supra note 10, at 907-08; Tushnet, supra note 96, at ix; Peritz, supra note 10, at 230, 248-50, 262-64; Kovacic, supra note 80, at 83-84.

n106. Kelman, supra note 20, at 269.


n108. The largest contributors have been the John M. Olin Foundation, which has dispensed more than $13 million in support of Law and Economics, and the foundations associated with Richard Scaife, which have spent about $3 million. Id. at 18 n.62; see also Eric Alterman, The Troves of Academe, The Nation, June 24, 1996, at 22; It Pays to Think Right, Nat'l L.J., Aug. 15, 1992, at 28; Yale Notes, Nat'l L.J., July 7, 1986, at 4; Joint Law Program Receives $354,700, L.A. Times, Jan. 13, 1991, at J7.

Among the institutions boasting Law and Economics programs, chairs, or fellowships – all of them supported by corporate foundations – are such elite law schools as Yale, Chicago, Harvard, Stanford, Virginia, Pennsylvania, Cornell, Georgetown, and Berkeley, as well as the law schools at the University of Miami, Emory, University of Kansas, and University of Southern California (the latter in conjunction with Cal-Tech), and the business schools at MIT and Washington University. Eric Alterman, The Troves of Academe, The Nation, June 24, 1996, at 22. One law school, George Mason University School of Law, which also receives substantial funding from Olin, Scaife, and other corporate foundations, has elevated Law and Economics to a central organizing principle of its curriculum. See Chris Klein, Law and Economics Finds its Niche, Nat'l L.J., Oct. 14, 1996, at 21; Bogus, supra note 15, at 18 n.62.

n109. Willard F. Mueller, The Anti-Antitrust Movement, 13(3) Antitrust L. & Econ. Rev. 59, 70 (1981). The Law and Economics Center at George Mason University has received as much as one-third of its funding from corporations including Exxon, General Motors, Pfizer and Mobil. Bogus, supra note 15, at 18 n.62. Yale's Center for Law, Economics and Public Policy has received funding from the Aetna Life & Casualty Foundation to support its civil liability conferences for federal judges. Id. A similar coterie of donors have funded the Foundation for Research on Economics and the Environment, which runs seminars for federal judges on environmental economics and policy. Conferences in July, Greenwire, June 17, 1994.

n110. Kelman, supra note 20, at 269. Kelman comments wryly on the irony of corporate support for deregulation, in light of the Law and Economics argument that regulation is the product of cartelizing behavior by producers seeking to extract surplus rents from consumers. Id.

n111. The Aetna and RJR-Nabisco foundations funded a five-year ALI study of the tort system that resulted in a project to revise 402A of the Restatement (2d) of Torts, dealing with products liability. Bogus, supra note 15, at 18 n.62.
n112. See Mueller, supra note 109, at 71.

n113. The most sustained effort to induce judges to imbibe Law and Economics teaching has come from the Law and Economics Center, established by Law and Economics "founding father" Henry Manne, and currently located at George Mason University. See Nan Aron et al., Judicial Seminars: Economics, Academia, and Corporate Money in America, 25(2) Antitrust L. & Econ. Rev. 33 (1994); Kovacic, supra note 80, at 100; Minda, supra note 76, at 1755 n.31; Bogus, supra note 15, at 18; Edward R. Becker, The Uses of "Law and Economics" by Judges, 33 J. Legal Educ. 306 (1983); Mueller, supra note 109, at 71. More than six hundred federal judges have attended the Center's judicial institutes since its founding in 1976. George Mason Univ. Sch. of Law, Law & Economics Center, at http://www.gmu.edu/departments/law/lawecon. At least one federal judge has urged the initiation of similar programs for state judges. Becker, supra 128, at 309.

Similar programs for federal judges are or have been offered on the Law and Economics of civil liability at Yale University. Aron et al., supra at 43; see also Bogus, supra note 15, at 18 n.62; and in "free market" environmental economics and policy through the Foundation for Research on Economics and the Environment (FREE), among others. See In re Aguinda, 241 F.3d 194, 198 n.2 (2d Cir. 2001) (discussing judicial seminars offered by the Law and Economics Center, FREE, the Manhattan Institute, and Yale Law School); Who's Junketing the Judges, at http://www.tripsforjudges.org/free.html (last visited Feb. 18, 2004); Foundation for Research on Economics and the Environment, at http://www.free-eco.org/programs judges.php (last visited Feb. 18, 2004).

In the past, corporate sponsors directly bore much of the cost of immersing judges in Law and Economics. Aron et al., supra at 10. In the face of criticism, the Law and Economics Center has replaced direct corporate funding with grants from private foundations, many of which were themselves "established with corporate money and remain wedded to their creators' staunch "free market' ideologies." Id. (citing Olin and Bradley Foundations). One observer muses that "the fact that corporations fund "Manne's initiative' to essentially persuade federal judges on the wisdom of minimal antitrust enforcement policy is rather curious and troublesome." Minda, supra note 76, at 1755 n.31. Another notes that some corporate donors are themselves parties in "cases before the very judges attending" the seminars. Mueller, supra note 109, at 71.

Corporate funding of such seminars has arisen as an issue in at least one federal court case. In Aguinda, a group of Peruvian and Ecuadoran plaintiffs sued Texaco over environmental damage and personal injuries allegedly caused by the company's operations in those countries. 241 F.3d at 197. While the case was pending on an appeal from the trial judge's dismissal on procedural grounds, the trial judge attended "an expense paid seminar on environmental issues" sponsored by FREE. Id. at 198-99. Upon remand, the plaintiffs moved for the trial judge to recuse himself on the ground that Texaco had provided financial support to FREE, and that a former CEO of the company was a speaker at the seminar. Id. at 199. The Court of Appeals affirmed the trial judge's denial of the recusal motion, citing Texaco's "indirect and minor funding role and the lack of a showing that any aspect of the seminar touched upon an issue material to the disposition of a claim or defense in the present litigation." Id. at 198.


n115. Id.


n117. Id. at xi, xiii.
n118. See generally The Attack on Corporate America, supra note 116.

n119. See Kovacic, supra note 80, at 99.

n120. Kronman, supra note 7, at 166; see also E. Allan Farnsworth, Developments in Contract Law During the 1980s: The Top Ten, 41 Case W. Res. L. Rev. 203, 227 (1990) (noting the "pervasive" influence of Law and Economics within the legal academy).

n121. See Kornhauser, supra note 3, at 246 ("Most major law schools now have at least one professional economist on their faculty."); Fiss, supra note 6, at 2 ("There is hardly a major law school that does not have a full-time economist on its faculty."); Miller, supra note 12, at 26 (estimating 25 law schools with Ph.D. economists as of 1981).

n122. See supra note 121.

n123. See Kornhauser, supra note 3, at 246; Bogus, supra note 15, at 17.


n125. Becker, supra note 128, at 309.

n126. Bogus, supra note 15, at 18. Bogus makes this prediction despite the "well-funded efforts to promote [Law and Economics] to the judiciary." Id. at 17.


n128. Cf. Kovacic, supra note 80, at 83 (citing legal scholarship as an influence on judicial opinions in antitrust cases); Peritz, supra note 10, at 282-84 (noting judicial adoption of "contestable market" theory from Law and Economics literature); Becker, supra note 113, at 310 (noting adoption by at least some federal appellate courts of "Areeda-Turner marginal cost/average-variable-cost theory of predatory pricing").

Educational seminars for judges represent a deliberate effort to introduce the judiciary to Law and Economics and encourage its application in deciding cases. See supra note 113. Absent any direct research, it is difficult to assess how effective these programs have been in bringing judges into the Law and Economics fold. There
is "at least some evidence that certain judges, after having attended [Manne’s seminar], have begun to apply the principles of Chicago neo-classical analysis in the resolution of antitrust cases." Neil Duxbury, Patterns of American Jurisprudence 360-61 (1995).

n129. See Fiss, supra note 6, at 2 (crediting the appointment of Law and Economics scholars to the federal judiciary as a crucial aspect of the movement’s influence); Ulen, supra note 10, at 202 (remarking that Law and Economics "has begun to have a marked impact on the law as handed down by federal and state courts" as "distinguished practitioners of law and economics have ascended to the bench and have used the tools of analysis from the field to decide cases before them"); Kornhauser, supra note 3, at 246; Posner, supra note 7, at 3 (noting that "a number of federal judges, including a Justice of the Supreme Court (Stephen Breyer), are alumni of the law and economics movement"); Landes & Posner, supra note 38, at 3 (citing the "fact that some judges appointed since 1980 are practitioners or former practitioners of economic analysis of law" as among the reasons that "judges are increasingly receptive to economic arguments").

Judge Posner and Judge Easterbrook of the Seventh Circuit Court of Appeals, Judge Douglas Ginsberg and former Judge Bork of the D.C. Circuit Court of Appeals, and Judge Ralph Winter of the Second Circuit Court of Appeals are among the most prominent figures of the Law and Economics movement to don judicial robes. See Minda, supra note 78, at 1755 n.31; Kovacic, supra note 80, at 124. In addition to those judges, appointments to the federal bench by Presidents Reagan and Bush (I) included numerous "staunch supporters of free market and anti-regulatory views." Minda, supra note 76, at 1755 n.31. By the end of his eight years in office, President Reagan had appointed "forty-seven percent of all judges sitting on the federal district and court of appeals." Kovacic, supra note 80, at 52. In making his selections, Reagan sought "individuals who ... were more likely to doubt the efficacy of government intervention in the affairs of business." Id. Kovacic credits President Reagan's "willingness to entrust the decision of appellate cases to academic scholars who have the intellectual capital to make a preferred agenda of ideas take root in the law," as the "shrewdest and most influential element of [his] judicial selection strategy." Id. at 124.

n130. See Harrison, supra note 36, at 104 ("Judicial clerks," trained in Law and Economics at law school, "may influence the judges for whom they work and write.").

In 1995, nineteen percent of George Mason graduates obtained judicial clerkships. Klein, supra note 108, at A26. The Federalist Society, which includes among its ranks many student initiates into Law and Economics, is especially active in securing clerkships for its members. The Federalist Society was established in 1982 at Yale University and spread to more than thirty law schools, including many of elite rank, within the next three years. It is supported by many of the same corporate foundations (notably Olin and Scaife) that have sponsored the Law and Economics movement. Glen Elsassen, Federalist Society Grows into Conservative Bigshot, Chi. Tribune, Jan. 11, 1987, at C1; Stefancic & Delgado, supra note 96, at 110-11. See generally The Federalist Society for Law and Public Policy Studies, at http://www.fed-soc.org (last visited Feb. 18, 2004).

n131. Kovacic, supra note 80, at 100.

n132. Becker, supra note 113, at 306-08; Posner, supra note 7, at 3 (noting that "the use of economists as expert witnesses has become conventional in a range of important fields"). One consulting firm, LEXECON, has provided expert witnesses on economic issues in numerous cases. E.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); Mak v. Wocom Commodities Ltd., 112 F.3d 287, 290 (7th Cir. 1997); Vitug v. Multistate Tax Comm’n, 88 F.3d 506, 514 (7th Cir. 1996); FTC v. Freeman Hosp., 69 F.3d 260, 265 n.10 (8th Cir. 1995); Schwartz v. Sys. Software Assocs., 32 F.3d 284, 287 (7th Cir. 1994); Boca Invesiterns P’ship v. United States, 167 F. Supp. 2d 298, 350 (D.D.C. 2001), rev’d, 314 F.3d 625 (D.C. Cir. 2003); Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 891 (N.D. Ill. 2000). Among the principals in

n133. See Harrison, supra note 36, at 104 (speculating that "students who have had 'law and economics' courses or who have been exposed to the 'law and economics' excerpts that pepper ... casebooks" may introduce Law and Economics argument into legal practice).

n134. See Ulen, supra note 10, at 202. Ulen mentions two other routes through which Law and Economics reaches the legal profession: the naming of trained economists as law firm partners and "the boom in litigation support provided by economic consultants." Id. Anecdotal evidence suggests, however, that Law and Economics has not been especially influential among practicing attorneys. Judge Harry Edwards cites one of his former law clerks who commented that Law and Economics is not of much use in legal practice. Edwards, supra note 127, at 48. Landes and Posner note that, "it is only since the early 1970s that the [Law and Economics] movement has had significant visibility in legal circles, and that it is too recent a period to have a profound effect [of Law and Economics] on the practical side of the legal profession." Landes & Posner, supra note 38, at 3.


n137. *Id.* at 265 n.76 (listing law school faculties with at least one Ph.D. economist).

n138. *Id.* at 254–65.

n139. Ellickson, supra note 48, at 24–32.

n140. *Id.* at 24, 26–27.

n141. *Id.* at 24, 28–32.

n142. The journals that Ellickson surveyed were the Harvard, Stanford, and University of Chicago Law Review(s) and the Yale Law Journal. *Id.* at 28.

n144. Id. at 30. The most notable change that Ellickson found was the addition of material critical of Law and Economics in one leading casebook. Id.

n145. Id. at 31. According to Ellickson, most of the titles in the Little, Brown series first appeared between 1975 and 1980 and did not subsequently appear in new editions. Id.

n146. Id. Ellickson's figures represent average attendance at each section's programs at AALS conventions between 1986 and 1989. Id.

n147. Id. at 32. Ellickson measured the change in the percentage of authors holding a Ph.D. in economics among contributors to The Journal of Law and Economics, The Journal of Legal Studies, and The Journal of Law, Economics, and Organization. He counted articles appearing during two periods: 1972-1975 (the first four years of publication of The Journal of Legal Studies) for the first two journals, and 1985-1988 (the first four years of publication for The Journal of Law, Economics, and Organization) for all three journals. The percentage of contributors who were law school faculty members with a Ph.D. in economics more than doubled between the two periods (from eight to nineteen percent), while the percentage of law faculty members lacking such a degree fell by more than one-third (from nineteen to twelve percent). Id. at 33 tbl.2.

n148. Id. at 32. Ellickson also suggested that Law and Economics work was being diverted from law schools to other university departments, notably business schools. Id. at 33-34.


n150. Using the Social Sciences Citation Index (SSCI), which tracks citations in articles appearing in some 1400 periodicals, including about 100 law journals, Landes and Posner counted citations to work by (1) thirteen non-lawyer economists on the faculty of fifteen leading law schools; (2) ten law professors at the same leading law schools who also have doctoral degrees in economics; and (3) four "founders of law and economics" (Calabresi, Coase, Manne, and Posner). Id. at 7-9.

n151. Id. at 10-30.

n152. Id. at 30-35.
n153. Id. at 35-37.

n154. The rate of increase was even greater for "critical legal studies" and "feminist" scholars. Id. at 37-38. Through various statistical manipulations, Landes and Posner seek to mitigate this finding. See id. at 38-41.

n155. Id. at 41-42. In addition to examining the absolute number of citations to each journal, Landes and Posner also examined the "impact factor" (i.e., "the number of times the average article in a given journal is cited"). Id. at 43. The "impact factor" controls for differences in the longevity of, or the number of articles published by, the journals surveyed. Id.

n156. Id. at 43-46.

n157. Id. at 46-47. Both the absolute number of citations and the "impact factors" were greater for the Law and Economics journals as compared to the other interdisciplinary journals. Id.

n158. Id. at 48-49.


n160. The categories were "Doctrinal," "Economics," "Philosophy," "CLS," "Feminism," "History," and "Other" (including "comparative law, empirical studies not otherwise classifiable, law and political science, and legal sociology"). Id.

n161. Id.

n162. Id. at 50-51. The data that Landes and Posner report show an interesting discrepancy to which they do not call attention. Among the citing law reviews, the rate of citations per article for "economics" (23.57), while nearly as great as for "doctrinal" (26.71) and greater than for "history" (16.18), was less than the citation rate for "philosophy" (36.76), "CLS" (41.69), and "feminism" (30.0). See id. at 50 tbl.18. In contrast, among the citing judicial opinions, the rate of citations per article was greater for "economics" (3.47), than for "philosophy" (2.35), "CLS" (0.62), "Feminism" (0.60), "history" (1.71), or "other" (2.16), though not as great as for "doctrinal" (4.63). See id. These data suggest that Law and Economics may have made the greatest inroads into the judiciary among contemporary non-doctrinal approaches to legal analysis, while legal scholars have shown relatively greater interest in other non-traditional approaches. Partisans of Law and Economics would no doubt attribute this discrepancy to differences in the operation of market forces in the judicial versus the academic realm. A skeptic might note that CLS, feminism, and other alternative approaches have not benefited from well-funded and organized efforts to market their wares to judges, as has Law and Economics.
n163. Id. at 51–52.

n164. Id. at 7.

n165. Harrison, supra note 36, at 75–76. The opinions that Harrison examined included concurrences and dissents. Id. at 80.

n166. Id. at 80.

n167. Id. Harrison identified seventy-seven citations to the works he analyzed, with thirty-five of these consisting of a "mere notation." Id. In nineteen cases, in which a total of nine works were cited, Harrison concluded that the cited work had influenced the opinion. Id. In an additional twenty-three cases, Harrison believed that the judge "recognized the "law and economics' argument," even though the argument was not clearly influential on the outcome. Id. In federal appellate opinions, Harrison found thirty-three citations, nearly half of them by the Seventh Circuit Court of Appeals. Id. at 80.

n168. See generally Kovacic, supra note 80, at 49.

n169. Id. at 55–56, 82, 83 n.145. While Kovacic found a conservative trend among Carter-appointees as well, the trend was more pronounced among Reagan-appointees. Id. at 82. Kovacic observed, however, that even many conservative Reagan-appointees declined to follow Law and Economics precepts where these contradicted established precedent. Id. at 108–09.

n170. See Posner, supra note 7, at 3 (identifying judicial citation to economic concepts and scholarship as measure of influence of Law and Economics); Landes & Posner, supra note 38, at 6–7 (explaining use of citation analysis as measure of influence). Citation analysis is a particularly appropriate methodology in a discipline as "preoccupied with citation" as the law. See id. at 52; Posner, supra note 135, at 2 (noting that "both adjudication, a central practical activity of the legal system, and legal research are citation-heavy activities"). More specifically, because judicial opinions cite to other work for its "authority" value, citations by judges to Law and Economics scholarship is an indication that such work is seen as, at least in some sense, "authoritative." See id. at 6–7; see also Fred R. Shapiro, The Most-Cited Articles From The Yale Law Journal, 100 Yale L.J. 1449 (discussing citation data as measure of influence of legal scholarship).

n171. Law and Economics might influence judicial opinions in at least two ways. Instrumentally, economic analysis might produce different outcomes in particular cases and lead to the adoption of different legal rules more generally. Ideologically, judges might express their opinions in terms of economic analysis, without any direct impact on outcomes or rules, but enhancing the hegemony of economic reasoning. See Harrison, supra note 36, at 79 (distinguishing outcome-determinative from methodological impact of Law and Economics).

n172. I searched all cases from 1960 through 2002 in LEXIS (GENFED; USAPP file). Table 1 reports the
number of cases in which there is at least one citation to any of the selected journals. I included all opinions (i.e., those for the court, as well as concurring and dissenting opinions) in my search, but count a case only once, regardless of how many citations to the selected journals there are or how many opinions in that case cite to those journals. Because of its specialized docket, I omit the Federal Circuit Court of Appeals from my tabulations and analysis.

n173. My selection of journals follows Landes & Posner, supra note 38, at 42.

n174. 1994 and 1999 stands out with only one and three citations respectively.

n175. As Landes and Posner note, "it is evident that judges (or their law clerks) don't cite many articles of any type; perhaps the reason is that they have so many cases to cite!" Landes & Posner, supra note 38, at 50–51.

n176. This finding accords with Harrison's earlier findings for citations to Law and Economics scholarship in contracts cases. See Harrison, supra note 36, at 80.

n177. Though the annual numbers are very small, the Third, Ninth, and D.C. Circuits (in ascending order) show some propensity to cite to Law and Economics journals. At the other extreme, the Fourth, Sixth, and Eleventh Circuits have each cited to those journals only two times, and the Tenth Circuit has done so only once, in thirty-five years.


n179. Judge Robert Bork and Judge Douglas Ginsburg of the D.C. Circuit have also been singled out for their association with Law and Economics. See Minda, supra note 76, at 1755 n.31; Kovacic, supra note 80, at 124. Yet neither is responsible for a large share of that court's citations to Law and Economics journals. Likewise, on the Ninth and Third Circuits, which have the next greatest frequencies of citation, no single judge predominates among the authors of citing opinions.

n180. 3 J.L. & Econ. 1 (1960).

n181. See infra note 186.

n182. Ira S. Bushey & Sons v. United States, 398 F.2d 167, 171 n.7 (2d Cir. 1968).

n183. Id.

n185. Nelson v. United States, 639 F.2d 469 (9th Cir. 1980). Once again, the court paired Coase with Calabresi, this time citing the latter's article, Transaction Costs, Resource Allocation, and Liability Rules, 11 J.L. & Econ. 67 (1968). Nelson, 639 F.2d at 478 n.10.

n186. U.S. Court of Appeals' opinions citing to R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960), include: Michigan v. EPA, 213 F.3d 663, 676 (D.C. Cir. 2000); Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, 196 F.3d 818, 824 (7th Cir. 1999); Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1071 (9th Cir. 1998); Chrysler Corp. v. Kolosso Auto Sales, 148 F.3d 892, 894 (7th Cir. 1998); Avitia v. Metro. Club, 49 F.3d 1219, 1232 (7th Cir. 1995); Bidlack v. Wheelabrator Corp., 993 F.2d 603, 612 (7th Cir. 1993); Rodi Yachts, Inc. v. Nat'l Marine, Inc., 984 F.2d 880, 888 (7th Cir. 1993); Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273, 276 (7th Cir. 1992); Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1045 (D.C. Cir. 1991); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 158 (7th Cir. 1988); NBC v. Copyright Royalty Tribunal, 848 F.2d 1289, 1296 (D.C. Cir. 1988); Sec'y of Labor, United States Dept of Labor v. Lauritzen, 835 F.2d 1529, 1544 n.6 (7th Cir. 1987); Chi. Bd. of Realtors, Inc. v. Chicago, 819 F.2d 732, 742 (7th Cir. 1987); Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1083 (7th Cir. 1986); McMunn v. Herzl Equip. Rental Corp., 791 F.2d 88, 92 (7th Cir. 1986); Madison Consulting Grp. v. South Carolina, 752 F.2d 1193, 1210 n.7 (7th Cir. 1985); District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1079 n.3 (D.C. Cir. 1984); Flagstaff v. Atchison, T & S. F. R. Co., 719 F.2d 322, 323 (9th Cir. 1983); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1268 (7th Cir. 1983); Dobson v. Camden, 705 F.2d 759, 770 n.8 (5th Cir. 1983); Webster v. Houston, 689 F.2d 1220, 1237 n.7 (5th Cir. 1982); United States Fid. & Guar. Co. v. Plovidba, 683 F.2d 1022, 1029 (7th Cir. 1982); Powers v. United States Postal Serv., 671 F.2d 1041, 1044 (7th Cir. 1982); Nelson, 639 F.2d at 478 n.10; Union Oil Co., 501 F.2d at 569; Ira S. Bushey & Sons, Inc., 398 F.2d at 171 n.7.

n187. The Seventh Circuit colleagues of Judges Posner and Easterbrook have been responsible for only eight citing opinions since 1981, fewer than the members of the Third Circuit (ten citing opinions), Ninth Circuit (eleven citing opinions) and D.C. Circuit (nineteen citing opinions) during the same period.

n188. Cf. Harrison, supra note 36, at 80 (using list of fifty-eight selected books and articles to assess influence of Law and Economics in contract cases).


n190. Cf. Shapiro, supra note 170, at 1453 ("The most interesting legacy of [influential works of legal scholarship] may well be found in subsequent work which does not cite them."). Shapiro observes that, impact on terminology and discourse is a form of influence which may not always be reflected in counts of explicit citations, and thus resembles the phenomenon of "obliteration" identified by Robert K. Merton and other sociologists of science. The work of some thinkers is so influential that it is integrated into the common body of
knowledge to the point where scholars no longer feel they have to cite it explicitly.

Id. (citing Robert K. Merton, Social Theory and Social Structure 27-28, 35-38 (1968)). Opinions in which the court takes (express or implicit) judicial notice of economic reasoning would represent a similar type of influence at play: integrating economic ideology into the common law to the point that it requires no citation to scholarly authority.

n191. The argumentum ad verecundiem (i.e., argument from authority) is characteristic of legal rhetoric. McCloskey, supra note 69, at 755. In contrast, economic rhetoric gives no weight to the authority behind a proposition. Id. The emulation in legal argument of the rhetorical style, as well as of the analytical mode, of economics would further reflect the hegemony of economic ideology.

n192. Cf. Christine B. Harrington, Outlining a Theory of Legal Practice, in Lawyers in a Postmodern World 49–51 (Maureen Cain & Christine B. Harrington eds., 1994) (arguing that critical socio-legal accounts should be attentive to professional legal practice in the constitution of legal ideology); Gordon, supra note 4 (developing an ideological account of legal practitioners in the constitution on Liberal ideology).