Successful Stories and Stories of Success: Reflections on the History of the Law and Economics Movement

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SUCCESSFUL STORIES AND STORIES OF SUCCESS

REFLECTIONS ON THE HISTORY OF THE LAW AND ECONOMICS MOVEMENT

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Abstract

This paper joins a handful of attempts to understand the Law & Economics movement’s success in American legal academia. Adopting an historical perspective, the paper analyzes for the first time the movement’s own stories of success, developed and maintained by the movement’s own members, and considers them as a possible blue-print for success in contemporary legal academia. By following these stories of success, one comes to understand the keen ability of the movement’s economists and lawyer-economists to identify those patterns of academic practice which would eventually grant them the paramount academic capital that they have enjoyed over the last thirty years. What emerges is an image of a “self aware” academic practice, laboring over its representation as “successful” just as much as over its core contributions to the filed of law.
"Intellectuals produce ideas which are received or rejected based on social conditions beyond their control. The basic views of the world of a Coase, a Director, or a Friedman never really changed. The World changed and, for some reason we do not understand, became receptive. Perhaps people get bored and reject first one orthodoxy and then another. This is just a moment in the sun for neoclassic price theory, which will doubtless pass."

In 1977, Guido Calabresi was invited to deliver the opening speech in a symposium held in Lund, Sweden, dedicated to the introduction and furthering of Law and Economics research in Europe. Little did his audience know that the words about to be voiced by one of the movement's most accredited spokesmen would be a tad shy of enthusiastic. "I will be somewhat skeptical of the law and economics research as it is today," Calabresi commenced. "That may be a bit dangerous in a place where that research is just beginning," he acknowledged, but "there is no reason why you should go down the same dead ends which we went down, instead of avoiding them."

One may speculate as to Calabresi's particular choice of message. Quite obviously, it seems that an audience of the kind that was assembled that summery day in Lund almost mandated an address of a different nature. As Calabresi's words accumulated, what appeared at first to be friendly advice from a seasoned colleague gradually unfolded into a critical account of the present state of law and economics research in the United

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States. Speaking of dead ends, deficiencies and missed opportunities, Calabresi may have surprised some of his distinguished listeners; to one notable participant, a certain Richard Posner, his words were merely a well-executed performance of a very familiar scene, usually performed by non-members of the movement. This often-occurring, often-repetitive theater of critique seemed like a "trustworthy" companion for lawyer-economists such as Posner since they first dubbed their endeavor "New law and economics." And however ruinous it appeared to be from time to time, it hardly dented the movement’s accumulating prestige.

However, a second reading of Calabresi’s address reveals an additional affinity with the law and economics’ experience. Unlike external critics of the movement, Calabresi offered insights from within the movements’ discourse in an attempt to better equip legal - economic theory to explain the legal world. In this respect, Calabresi’s critique was of a kind rarely performed in legal academia before him; the methodological innovations he introduced were targeted at the economic analysis itself, at its inner workings, and not in any direct sense at the fashion with which this analysis could supply tools for legal practitioners. This move away from legal practice into the closing audiences of intellectuals, I maintain, was part of what enabled law and economics to ground itself as a successful endeavor in the legal academia. In the process, it played a leading role in disassociating legal scholars from their previous milieu, thus shaping the legal academia as a genuine playground of ideas – a place where only ideas can play.

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My search for a coherent explanation of law and economics’ past and present success joins a handful of past efforts. In his attempt to present such an explanation, historian Neil Duxbury has claimed that "it is as if economic analysis [was] something that [was] simply there to be done or to be denounced. There [was] little indication as to why law and economics [was] actually there, rooted in the American jurisprudential tradition, in the first place." Additional accounts usually posit themselves in reference to a dichotomy articulated by Morton Horwitz in his article Law and Economics: Science or

Politics? Arriving from a critical standpoint, Horwitz questioned law and economics' scientific aspirations and unequivocally unveiled the true reason for the movement's success: its political accord with the conservative ruling powers of the day. Partially answering Horwitz's agenda setting article, partially opposing it, a different kind of reasoning emerged. This reasoning accentuated the movement's scientific character and its superiority, and claimed that law and economics obtained its success simply because it represented better legal scholarship.

My account suggests that it was indeed the superiority of economic scholarship that contributed to its success in the legal realm. However, I maintain that before demonstrating this superiority, an acceptable standard of quality needed to be established, a standard through which it would be possible to measure whether a proposed legal theory has any merit, and how this theory measures up against rival theories. If the story of the law and economics movement shows us something with clarity, it is that the main scholars of the movement understood the importance of this "yardstick for scholarship," and that the yardstick they eventually adopted – theoretical coherence – was previously unattained in the realm of legal academia.

That is not to say, however, that there were no previous attempts. One of the strongest explanations for the evolution of American jurisprudential thought is the constant attempt (and failure) of various movements to attain a coherent positive understanding of the legal phenomena, to moor "a set of interpretative and adjudicatory principles from which to justify judicial decisions, guide the law's development, and ground its legitimacy and authority." While not attempting initially to achieve this goal, some law and economics scholars gradually understood the power of their analysis on

6 See for example: James J. Heckman, *The Intellectual Roots of the Law and Economics Movement (Commentary)*, 15 Law & Hist. Rev. 327, 332 (1997). ("Could it not be said of the early pioneers of law and economics that they had a better way of interpreting the law and creating useful analytical categories, and that is was the fruitfulness of their framework that contributed to its success? That it was their scholarship and not their politics that carried the day?").
8 This might be an appropriate place to state exactly what kind of law and economics scholarship I am referring to - neoclassical "Chicago style" law and economics. Under no circumstances am I claiming
that basis. Based on lessons learned from within the economic academic sphere, they have also understood that in order to construct a viable *theory* of human behavior, the observer must make certain concessions, and that the theory of law cannot be treated differently.

It was these concessions that later became the focal point of critique voiced by various members of the legal academia. And however ruinous this critique seemed from time to time, it could not have damaged the fabric of economic analysis. It could not have done so, because the standard of success, the language applied by the two opposing sides, was not the same. While law and economics attempted to speak using a unified theory, unconvinced legal academics insisted on multivocality. They argued that "much of the meaning of law lies in the tension it creates among various ways of speaking," and trying to impose a theoretical structure upon law would turn it into something completely different. Without attempting to resolve this debate, I would like to propose that legal academia has made its choice, and even without conforming to the economic language, law professors of different persuasions have predominantly joined into totalities of their own.

In the following analysis, I propose to explain the history of the law and economics movement based on the simple dictum borrowed from economist Lionel Robbins, following which in order for a theory to be, it has to be something. In this way, one can view the array of choices made by law and economics scholars as a perpetual attempt to manufacture and maintain their own language, and thus, to insure that it would always be *something*. Even if this language can only be viewed as describing an imaginative legal world, they maintained, it would still leave the legal academia with something to discuss.

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that this was the only successful involvement of economics with law. For another, less successful, example, see: Herbert Hovernkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990); Duxbury, *supra* note 4, at 316-330.


10 See: *infra* at pp. 19-21.
PART ONE: SETTING BOUNDARIES

As their name suggests, the law and economics movement aimed at notions of conjunction. More generally, it simultaneously responded and helped create a certain "fashion" in legal academia that promoted interdisciplinarity as a mode of thought. However, even a glance at the movement's other label, Economic Analysis of Law, tells us a somewhat different story, one of passivity and control. Thus, a survey of the movement's own choice of words when describing their endeavor will offer us a telling vision of their entire enterprise. As we shall see, before setting out to "encounter" law, the founders of the movement insisted first on establishing their own practice and their own particular language. They did this by setting temporal, methodological and geographical boundaries. Before long, the movement was widely recognized as having been established in Chicago of the 1930s, by only neoclassical economists.

A. Temporal Boundaries

More than other legal intellectual groups in contemporary times, the law and economics movement has spent time and effort in establishing what Ron Harris has labeled "the official, internal history of the field." Through repeated meetings and roundtables, a carefully manufactured synthesis emerged. This synthesis, while providing, as Edmund Kitch intended, "a source document so that some future student of men and ideas might gain some insight into how people, ideas, universities, and societies interact," established, perhaps not surprisingly, a triumphant narrative of a very particular kind.

11 For a provocative general discussion of what she names "Discipline Envy" see MARJORIE GARBER, ACADEMIC INSTINCTS 53-96 (2001).
13 Two documented examples of discussions of the said nature can be found in: Kitch (ed.), supra note 1; Roundtable (Douglas G. Baird, ed.), The future of Law and Economics: Looking Forward, 64 U. CHI. L. REV. 1129 (1997).
According to this account, what marked the beginning of the movement was the introduction of economics to the law school at Chicago. This was done through the teachings of Henry Simons, who in 1937 received a part-time appointment at the Law School, in addition to his existing contract with the economics department. Interestingly enough, this appointment was not directly related to an ideologically tainted faculty hiring mission, but to a much more practical need – the introduction of a four-year law curriculum at the law school. As Kitch explained, "This was a vision of the law school curriculum that was put into place for students who would come to the law school without a B.A. ... It reflected the atmosphere favorable to acceleration at Chicago, spurred on by Hutchins, [University of Chicago's Rector - n.a.] who had as a general theme of educational criticism that the pace of educational programs should be more finely tuned to the interests and talents of students, who should not be required to follow a rigid, lockstep program of curricular development." 

The introduction of the four-year program placed a crucial decision in the hands of the law school administration. Through their curricular decisions, they would be able to shape the intellectual horizons of many of their students. They chose, in the vein of legal realism, to emphasize the role of the social sciences, including economics. This particular "realist" approach, however, was not completely in accordance with realist

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16 As Kitch tells us: "My impression from what I've been able to find on Chicago is that the interest that law schools had in economics did not come out of any explicit anti-interventionist thinking." Kitch (ed.), *supra* note 1, at 175.  
17 *Id.* at 167.  
18 A future dean of the Law School later recounted: "The new plan for the Law School on which Wilbur Katz and Malcolm Sharp worked so hard in the thirties, and which helped to spawn most of the developments in legal education since that date, took considerable time. It was that new plan which expanded the horizons of the School to include such radical subjects as economics and accounting. But it did not stop there. It included sociology, criminology, and comparative law. It thought legal history was important. It introduced the tutorial system... It emphasized jurisprudence and ethics..." Edward H. Levi, *Reminiscences*, 3 U. CHI. L. ALUMNI J. 23, 26 (1977). The introduction of extra-legal disciplines to the law school was not, however, particular to Chicago. According to Yale Lawyer-Psychologist Edward Robinson "some of the more progressive schools of law are already turning out graduates whose fundamental attack upon social problems is that of the economist rather than that of the jurist." Nonetheless, even this sort of training, Robinson conceded, was founded upon "the idea that economics, psychiatry and the rest are merely techniques that up-to-date lawyers must learn to use". See Edward S. Robinson, *Law – An Unscientific Science*, 34 YALE L. J. 235, 266 (1934).
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ideas common at that time. By and large, the social sciences were brought into the law school in order to train the future litigator "to deal with experts from other disciplines." More generally, law school principles wished to prepare their graduates for the changing legal environment, reflected most clearly in the adoption of the Federal Securities Acts in the early thirties.

While manning the economist's post, however, law school chiefs got more than they bargained for. Quite simply, Simons was an economics department "reject" (with some friends in high places) who voiced pro-market views at a time where those were highly unpopular. "By comparison with almost everybody else he was very free market oriented," Milton Friedman recalled. When Simon's first important book was published, in 1934, Stigler pointed out, "close to a majority of the social scientists and the students in the social sciences at the University of Chicago were either members of the Communist Party or very close to it. That was the environment in which Frank Knight [the leading neoclassical thinker at the time - n.a.] gave a series of lectures under the title, 'Why I am a Communist, by an Ex-Liberal.'" In light of this interventionist front, Simons foresaw a bleak outlook for traditional anti-statist liberal thought, even in Chicago. These premonitions later led him to his most important role according to the law and economics movement's "official" story – his role in the arrival of Aaron Director at the Law school at Chicago.

19 Kitch (ed.), supra note 1, at 168. This, incidentally, was also how economics was viewed, as Calabresi noted years later: "Until not very long ago, the economist was viewed by the lawyer essentially as an expert or a technician who could help answer legal questions such as: 'what were the damages to a machine?' How do you establish the value of a capital asset?' That is, the economist was asked to take a legal norm as fixed and give a technical answer under that rule." Calabresi, supra note 3, at 10.
20 "[T]his guy", as George Stigler described him, "had written two book reviews in the previous twelve years... [was] a terrible teacher... and the students all report that he doesn't want to be bored with stupid questions..." Kitch (ed.), supra note 1, at 177.
21 Although pale in comparison with current understandings of those
22 Kitch (ed.), supra note 1, at 178.
23 HENRY C. SIMONS, A POSITIVE PROGRAM FOR LAISSEZ FAIRE: SOME PROPOSALS FOR A LIBERAL ECONOMIC POLICY (1934).
24 Kitch (ed.), supra note 1, at 178.
Around 1945, Simons, acting towards the preservation "of his kind," conceived the idea of establishing an "Institute of Political Economy." This institute, needless to say, would play host to a certain "breed" of intellectuals, all supportive of the liberal or rather libertarian traditions in economics. Establishing a safe haven of that kind was the order of the hour for Simons, especially at Chicago, where some of the liberal vein still existed. This haven's *raison d'être*, aside from the provision of research facilities, would be to establish a beacon for liberals everywhere, and to influence public policy as well.

Although never realized, Simons's ideas prepared the ground for a similar endeavor, to be hosted at the law school and headed by Aaron Director. Simons's untimely death in the summer of 1946 marked the closure of law and economics' opening chapter at Chicago.

This first chapter, although rather minor, bares the distinctive marks of a great overture: the unwelcomed "ugly duckling" turning into a fierce protector of his kind, the almost accidental need for economists who would usher in a new era of legal education, and the "fire of truth" to be discovered by skeptical, indifferent lawyers. Still, a somewhat less distinctive mark of the law and economics movement's story is its unconditional fascination with economists and neoclassical economics. Indeed, the

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25 Coase, supra note 15, at 244.

26 "Chicago economics still has some distinctively traditional – liberal connotations and some prestige. Here, more than elsewhere, the project would be that of sustaining or keeping alive something not yet lost or submerged - and something which here, too, will shortly be lost unless special measures are taken." Henry C. Simons, *Memorandum I in a proposed Institute of Political Economy* 5 (Henry C. Simons Papers, U. Chi. Law School Archives, undated).

27 Simons explains: "[the center] should focus on central, practical problems of American economic policy and governmental structure. It should afford a center to which economic liberals everywhere may look for intellectual leadership or support. It should seek to influence affairs mainly through influencing professional opinion and by preserving at least one place where some political economists of the future may be thoroughly and completely trained along traditional-liberal lines." *Id.* at 12.

28 Note that this is the actual title given to one of Law and Economics' first roundtables. See: Kitch (ed.), *supra* note 1.

29 Indeed, Ronald Coase has noted that Simons's thinking "would not have posed a threat to [law professors] way of thinking that the later sharper analysis of law and economics was to do". Coase, *supra* note 15, at 243. Similarly, Director described law professors' indifference: "I don't think there was any great resistance, but I don't think there was any great enthusiasm. The resistance appeared only when it came time to consider whether we should have a second economist." Kitch (Ed.), *supra* note 1, at 186. The indifference of "lawyers" could also be noticed by law school's administration indiscriminate attitude towards the social sciences. As Neil Duxbury put it: "...more or less any social science – economics, psychiatry, psychology, whatever – was deemed to be somehow useful. Economics was but one tool among many. It was accorded no special status." See Duxbury, *supra* note 4, at 301.
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lawyers involved in the introduction of economics to the Law School were rather passive in any theoretically significant regard. For them, economics was to complete a certain arsenal of tools, imperative to the modern lawyer; a set of instruments so general, it didn't even matter what type of economics would be taught. The possible theoretical contribution of neoclassical economics to the understanding of law was never really reflected-upon by law school personnel, but in their passivity, they ended up welcoming an economist from one of the most theoretical schools of the time. What is more, the whole story begins, quite mysteriously, when economics first sets foot at the law school, not the other way around. Law, at any rate, would have "never" discovered the scientific power of neoclassical economics if economics had been "too shy" to approach.30

The striking particularities of the movement's own account and its carefully chosen accents emerge even more clearly when juxtaposed with alternative accounts, provided by sources external to the movement. 31 These accounts locate a different theoretical point of origin for law's involvement with economics and, more importantly, underline the legal academia's role in this encounter. In so doing they reject Duxbury's declaration that "to understand properly the significance and the appeal of - not to mention the controversy generated by - the modern law and economics tradition in the United States, it must be conceived not against the backdrop of American jurisprudence, but in relation to developments in economics, primarily at the University of Chicago, since the 1930s."32

According to these alternative accounts, understanding change in legal academic practices involves mainly the ability to follow law's ever-changing character as a living

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30 One official commentary (that of Coase) goes even farther and completely erases the law school's part in hiring an economist. According to this commentary, hiring in the law school was an "internal" (!) affair of the economics department: "Simons's accession to the Law School was not, however, the result of a strongly felt need by the law professors to have an economist as a colleague. It came about accidentally as a partial response to problems that had arisen in the economics department." Coase, supra note 15, at 243.

31 That is not to say that all external accounts depict a different picture. The most elaborate account of the law and Economics movement's evolution to date shares in large parts the movement's self-narration. See: Duxbury, supra note 4, at 301 - 419 (1995). Around the time of the book's publication, Richard Posner affirmed that Duxbury's vision of law and economics coincides with his. See: RICHARD A. POSNER, OVERCOMING LAW 3 (1995).

32 Duxbury, Id. at 6.
social phenomenon. In so doing, classic accounts of American jurisprudence have developed a meta-narrative occasionally referred to as the "pendulum swing" narrative. Generally speaking, the legal phenomenon can be regarded as an autonomous sphere of activity, unoccupied by other considerations such as politics or morals, or as a potentially transparent endeavor, sensible in various degrees to political and moral influences. It is the contention of these accounts that academic legal practices change according to the contemporary view of the legal practice, as "politics" or "law". Moreover, the history of American jurisprudence shows us that these academic practices tend to swing from one end towards the other, replacing each other in a sort of dialectic dynamics. And so, legal Realism replaces legal formalism, only to be replaced by the Process Tradition and to come back reincarnated as Critical Legal Studies. And during these "swings," only law and law's image in the legal academia serve as the key forces, not scientific foreigners from other buildings on campus.

Both of these conflicting stories of the law and economics movement evolution force us to look at its beginnings in order to understand its success. For, if the law and economics movement achieved its unparalleled accomplishments due to reformulations of "ancient" legal traditions, the role of legal thought in the story would be vindicated. If it was the transformation of American law that spawned these novel and inspiring ideas, then the existence of outer stimuli have played only a negligible role.

Far from deciding the matter, my wish here is only to shed light on the interesting underpinnings of law and economics' current success, as it is seen by the movement's own. While the events retold above have certainly contributed to the evolution of the movement, it is important to reconstruct their historical meaning in light of available

33 Id. at 2.
34 It is quite obvious that "law and Economics" enjoys an ambiguous status according to this narrative. In this light, one critical scholar decided it would be better not to take a stand: "Law and economics theory is very much an exercise in legal realism", since many lawyer-economists "believe that … the only reasonable way to judge the efficacy of the legal system is through use of any social scientific methods at our disposal." Nonetheless, "law and economics is very much an exercise in formalism." Joseph William Singer, legal Realism Now, 76 CALIF. L. REV. 465, 515, 522, 526 (1988).
alternatives. The decision to set boundaries separating law from economic theory from the outset led to the establishment of a certain kind of edifice, now largely accepted as authentic. Furthermore, the decision of law and economics to sketch its evolution as detached from the common legal debates of pendulum swings, of Formalism v. Realism, emphasized the simple fact that "law had nothing to do with it," that law could not contribute in any meaningful way to the advancement of legal - economic thought. This is the first instance where we discover, following James Boyd White's observation, that economics flashes its nature as a "total culture," a culture that posits its language as if it were the only language available.

These language battles continue as we survey the other sites were neoclassical economics set out to establish boundaries. As we shall see shortly, the significance of boundaries resurfaced once more, when the movement's chronicles narrated economics' internal battles, again in compliance with the notion that only these battles really mattered to law and economics' final triumphant configuration.

B. "Scientific" Boundaries

While paying close attention to the establishment of a clear starting point from which law and economics grew to greatness, the movement's accredited storytellers did not forgo the opportunity to demonstrate the uniqueness of law and economics' scientific attributes in comparison with law, and more importantly, in comparison with rival economic traditions, namely, Institutionalism. Here, the link between the success of the

36 Boyd White, supra note 9, at 164 -167, 201.
37 The American Institutionalist School, commonly associated with Thorstein Veblen, John Commons and Wesley Mitchell, was for a brief period effectively the orthodoxy in the United States, between 1888 and the end of the 1920s. The Institutionalist school developed in the late 1880s in the United States and was heavily influenced by the German Historical School and the English Historicists. Deploring the universalist pretensions of much of economic theory, the Institutionalists stressed the importance of historical, social and institutional factors which make so-called economic "laws", contingent on these factors. Much of everything in the economic world, they argued, was not immutable but rather conditioned by the influence of an always changing history - whether acting on the individual directly, or indirectly through the institutions (such as markets) and society which
movement and its theoretical neoclassical foundations was heavily accentuated, even more than the location of the movements' intellectual origins in economics and not in law. In essence, neoclassical economics' superiority was said to be grounded in its unrivaled scientific nature, one with which neither law nor institutionalism could meaningfully compete.

The basic tenet of neoclassical economics is what is known in the literature as price theory. \(^{38} \) This theory explains human behavior as rational reactions to price incentives, *i.e.*, the assumption that people will consume more goods as their price reduces, and vise versa. Prices of goods, on the other hand, are set according to the principle of scarcity, the basic principle that aspires to equate supply and demand. According to the theory, the free market, featuring unfettered competition, would lead to over all societal welfare. This would happen because scarce resources would be allocated efficiently, that is, to people who value them the most and are willing to pay for them accordingly. If the pricing mechanism backed by competition leads to the best available allocation of resources - a coveted goal - measures should be taken in order to reinforce this mechanism and prevent market failures. This is the only excuse for neoclassical economics to allow for state regulation of markets, the only reason why the "invisible hand" should have a more conspicuous partner.

The attractiveness of this theory was profoundly dependent upon its configuration as a science.\(^ {39} \) This configuration in turn was developed in accordance with

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\(^{38}\) The literature on this subject is voluminous. For one explanation of the application of price theory to legal rules, a fundamental principle of neoclassical law and economics see: Mercuro & Madema, *supra* note 7, at 58-59.

\(^{39}\) As Morton Horwitz later criticized law and economics, science could give law and neoclassical economics its "cloak of legitimacy." See: Horwitz, *supra* note 5.
a certain mode of thought, known largely as analytic philosophy. The intellectual environment supporting this turn towards analysis was mainly situated in Vienna in the 1920s. The so called "Viennese Circle" was comprised of not only philosophers but also physicists, mathematicians, psychologists, sociologists, and lawyers. The circle's main goal was to establish the realm of philosophy in order to institute it as a methodologically sound science. This was done through a careful analysis of language that describes each genuine proposition as either empirical or logical. In so doing, the movement bound the realm of knowledge as the sum of all empirical propositions and the realm of logic as the construction allowing the connection between empirical statements. For example, the statement "2 + 2 = 4" is necessarily true but says nothing about the factual world, as opposed to the empirical statement "the blackboard is white." It is the philosopher's task to differentiate between empirical and logical statements, but also to establish a criterion for determining the truth or falsehood of empirical propositions. This criterion, known as the "verifiability criterion," was the circle's great contribution to modern philosophy. In essence, it provided the philosopher with a surgeon's scalpel to dispose of propositions, which could not be verified through empirical testing and were not considered a part of logic. These sentences were generally dubbed "nonsense."

Given this analytic device that bluntly established the realm of knowledge, science could now be better oriented. For, if it was the philosopher's task to christen a proposition as "empirical", that is, verifiable, it was the scientist's chore to actually prove its accurateness. The philosopher merely created a sphere of potentiality that is language, while the scientist now had to attempt and demonstrate language's adequacy as a description of the world. Among the social sciences, neoclassical economics claimed the scientific mantle in the most palpable way.

43 The difference here between potentiality and falsehood is exactly what demarcates the boundaries of science. For, even if our blackboard is not white, we still understand the sentence, the sentence has a
One of the first accounts that provided neoclassical economics with its mature definition as "economic science" was Lionel Robbins's *Essay on the Nature and Significance of Economic Science*. In this essay, Robbins's concerns were most pressingly with economics' lack of boundaries. He acknowledged, as Hackney puts it, that "though a praxis of economic theory had been established, there was no common definition of what the discipline was about, or more importantly, not about. We all talk about the same things, but we have not yet agreed what it is we are talking about," Robbins provocatively asserted. "The unity of a science only shows itself in the unity of the problems it is able to solve," and "economics is the science which studies human behavior as a relationship between ends and scarce means which have alternative uses." Robbins stressed that the conception neoclassical economics adopted "may be described as analytical. It does not attempt to pick out certain kinds of behavior, but focuses attention on a particular aspect of behavior, the form imposed by the influence of scarcity… There are no limitations on the subject-matter of Economic Science save this."  

These fervent concerns with the unity of economic science, and the need to better sketch its boundaries, did not occur in an intellectual vacuum, for what was at stake here was the internal claim for professional superiority. To be sure, neoclassical theorists' struggle against the ruling class in economics at the time - Institutionalism - was a contest over the nature of economics itself; moreover, it was a confrontation over the professionalizing project that had been defining the field long before Robbins's critique.

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44 Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (1962) (1932). See also: Hackney, supra note 40, at 288-289. Robbins's role in the development of the law and economics movement was acknowledged by Ronald Coase, his former student at the London School of Economics. Aside from being a brilliant economist and one of the intellectual founders of neoclassical economics, Robbins also participated personally in the evolution of the law and economics movement, by assessing Aaron Director's performance, while he was visiting the LSE (a positive assessment that indirectly led to Aaron's hiring at Chicago). See: Coase, supra note 15, at 244.

45 Hackney, supra note 40, at 289.

46 Robbins, supra note 44, at 1-2, 16.

47 *Id.* at 16-17.

Looked upon from Robbins's bounded vision, economics was only to focus on the part of individual behavior which was most under the control of *measurable verifiable motives*, and to gradually understand the whole by studying its parts. If, however, "this methodological posture were destabilized, if the parts were understood to be dependant on the whole, the need to address a diverse array of historical, sociological, and descriptive issues would leave economics bereft of a strong case for its disciplinary birthright." Paraphrasing Robbins, in order for economics to be, it had to be something different: a true science. These methodological differences were carried further as the debate advanced, and their place in law and neoclassical economics's story was certainly accounted for. From law and neoclassical economics's victorious position, Institutionalism and its subsequent incarnations were described as a rather pathetic endeavor.

When asked of the role of institutional economists in advancing the field, George Stigler replied: "If you look at them - I haven't gone through all of them - it is my impression that you will be dissatisfied with them on the ground that they were largely descriptive rather than analytical." A large number of people "whose common unifying theme was a great dissatisfaction with neoclassical price theory or indeed formal theory of any sort," rallied around Thorstein Veblen, whom Stigler proclaimed as institutionalism's intellectual leader. Veblen's disciples formed "all kinds of schools, many of which [he] has never read because I have never felt quite that masochistic." Stigler concluded, "I would say the institutional school failed in America for a very simple reason. It had nothing in it except a stance of hostility to the standard theoretical tradition. There was no positive agenda of research, there was no set of problems or new methods they wanted to invoke." For other spokesmen, institutionalism's bias for details was

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49 Id. at 45.
50 Kitch (ed.), *supra* note 1, at 169. Richard Posner framed a similar type of comment in a more persuasive way: "I once tried to read Willard Hurst's [A new Institutionalist - N.A.] magnum opus, a massive tome on the history of the lumber industry of Wisconsin, but didn't get far. The book is a dense mass of description - Lucid, intelligent, and I am sure scrupulously accurate, but so wanting in a theoretical framework - in a perceptible point - as to be unreadable, almost as if the author had forgotten to arrange his words into sentences." Posner, *supra* note 24, at 427, Quoted in Harris, *supra* note 12, at 671-672.
51 Id. at 169-170.
52 Id. at 170.
politically motivated, as Harold Demsetz maintained: "[T]heir interest in empirical work derived solely from their failure in the twenties and before to influence government or influence legal policy by other more traditional, normative methods. They turned to empirical work to try and develop some technique for influencing policy in a way that they had failed to do before. When the political climate in the country changed [leftwards - n.a.], they immediately dropped the empirical work that they have been doing... and fled to Washington during the early New Deal."53

These accounts of institutionalism, biased as they may be, exhibit in detail some of the previous conclusions made about economics, and law and economics’ abilities to mold their own craft. From neoclassical economics’ inception, its custodians arrived at the conclusion that in order for them to enjoy some kind of specific capital, they would, first and foremost, have to establish their intellectual perimeters vis-à-vis their most immediate opponents in economics. Simultaneously, they assured the potential growth of their science by not limiting it to a certain subject-matter. Indeed, as Robbins argued, as long as one can frame an activity as a matter of choices involving scarce resources, it could be the subject of economic analysis.54 The next natural evolution would thus be exactly that - framing law as an activity of the said nature. The first man to effectively do that, and who has later to achieve a mythical standing in the annals of law and economics, was Aaron Director.

PART TWO: THE MARCH THROUGH LAW

"In our most theoretical moods we may be nearest to our most practical implication."55

53 Id. at 175.
54 Hackney, supra note 40, at 290.
In fact, what Director was most famous for was his ability to show legal decision-making's malleability in light of neoclassical economics' sturdy analysis. Before becoming a student in the economics department at Chicago, Director graduated from Yale, where he co-founded with Mark Rothko a weekly newspaper, *The Saturday Evening Post*. After finishing his graduate studies, he continued his apprenticeship in academia and government, including several stints in Washington, most notably in the Treasury Department. He also worked with Chicago economist Jacob Viner on a study of the Bank of England, which exposed him to the London School of Economics and the leading British economic thinkers of the day.

As noted before, Director's second arrival at Chicago, or "the accident," as he referred to it, was indirectly brought about by Henry Simons's efforts to establish a libertarian oriented research center at the University of Chicago. In furthering his project, Simons sent in 1945 a copy of his proposal to economist Friedrich Hayek. Hayek, whose bestselling book, *The Road to Serfdom*, turned him into a household name, had established connections with the Volker fund and its chief, H. W. Luhnow, and thus was the right man to approach as far as research resources were concerned. In a somewhat Kafkaesque turn of events, it was Director himself who secured Hayek's recognition, and the high circulation of his libertarian ideas, when he convinced the University of Chicago Press to publish Hayek's book. Simons's proposal fit like a glove Hayek's overall plans to foster what was left of liberal thought, and he set out to negotiate the terms with the relevant functionaries. After a couple of years, Director, who was to head Hayek's project, was appointed as a research associate at the Law School, where the study was to be conducted. Focusing on the "study of a suitable legal and institutional framework of an effective competitive system," Director was not supposed to teach at all. However, Simons's unfortunate death in 1946 led Dean Katz to ask that the terms of the Volker grant be modified to allow Director to teach a course in economic analysis. Symptomatic

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56 Friedrich Hayek, *The Road to Serfdom* (1944).
58 Memorandum in file in the Dean's office, University of Chicago Law school. See: Coase, *Id.* at 246.
of Director's career, the research project "never amounted to very much,"\textsuperscript{59} but that was certainly not true of his teaching.

After teaching economic analysis for a while, Director was invited by colleague Edward Levi to collaborate with him in teaching the antitrust course. Director recalls: "we began with a system in which we were both to teach the course at the same time. That didn't even work for a whole quarter. So very early it was divided into four days for Edward and one day for me."\textsuperscript{60} What happened in that course can certainly be considered part of the movement's mythology. As Wesley Liebeler described it, "for four days each week Ed Levi would develop the law and would use the traditional techniques of legal reasoning to relate the cases to each other and create a synthesis of the kind... lawyers... are familiar with to explain and rationalize the cases. It was some accomplishment... For four days Ed would do this, and for one day each week Aaron Director would tell us that everything that Levi had told us the preceding four days was nonsense. He used economic analysis to show us that the legal analysis simply would not stand up."\textsuperscript{61} Robert Bork added: "One of the pleasures of that course was to watch Ed agonizing as these cases he had always believed in and worked on were systematically turned into incoherent statements. Ed fought brilliantly for years before he finally gave up... There was a quality about the teachings at that time that doesn't come through. A lot of us who took the antitrust course or the economics course underwent what can only be called a religious conversion. It changed our view of the entire world... We became janissaries as a result of this experience."\textsuperscript{62}

Director's paramount success in teaching the antitrust course amounted, however, to more than just creating janissaries and "defeating" Levi's spirit. Further funding enabled this oral religion to transform into a full research project, which brought, among others, John McGee, Robert Bork, and Ward Bowman to the Law School as research fellows. "Their work and that of other students of Director... brought his ideas and

\textsuperscript{59} Kitch (ed.), \textit{supra} note 1, at 181.
\textsuperscript{60} \textit{Id.} at 183.
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} at 183-184. (Emphasis added)
SUCCESSFUL STORIES AND STORIES OF SUCCESS

approach to the attention of the academic world outside Chicago, and eventually led to the establishment of the Law and Economics Program at Chicago."

Thus, law and economics' second chapter is one of voyage. It is about the voyage of ideas, firmly based in economics, to law, as it is about the voyage of money and other means of material support towards Chicago. Above all, it narrates the first significant strides of what would become a noteworthy conquest of law by neoclassical economics. This theater of ideas, played so elegantly inside Director and Levi's classroom, represented for the first time a new form of persuasion foreign to legal rhetoric, and would be played eventually in much larger scales: in almost every legal field, in many law school classrooms. Director's approach took the standard pedagogy of law schools – the case method – and inverted its sense. No longer were cases used to show the underlying coherency of the legal concepts; now, they represented material evidence for the common law's lack of coherency, a first important step in advancing a new and improved theory.

What is more, Chicago neoclassical law and economics has first produced a piece of legal scholarship, and thus initiated its proliferation outwards, towards other schools and scholars. If one more step needed to be taken, it was the final act that would prove neoclassical economics' applicability to non-market areas of law. Ronald Coase's article *The Problem of Social Cost* was to provide ample demonstration. Published in 1961, Coase's article was hailed as a revolution of "Kuhnian proportions" in the foundation of law and economics theory, and sure enough, it also bears its own mythology.

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It all started when Coase sent to publication a lesser known paper dealing with the Federal Communication Commission. This paper included a shortened form of the ideas that would later evolve into *The Problem of Social Cost*. When Director, Stigler and others intimated to Coase that his views in the FCC article were erroneous, Coase replied that even "if it's an error it's an interesting error and [he] would just as soon it stayed in." At approximately the same period, Coase was invited by Stigler to present a paper of his at the Industrial Organization Workshop, a joint project of the economics department and the law school. Coase replied that he would do so only if allowed to present his views on the other question in some other event. That event was arranged to be a casual meeting in Director's home. Director's brother-in-law, Milton Friedman, was present, along with Stigler, Reuben Kessel, Arnold Harberger, and other prominent figures. Nobel laureate Stigler later attested that the meeting was "one of the most exciting intellectual events of [his] life." And so the story, told by Stigler, goes: "At the beginning of the evening we took a vote and there were twenty votes for Pigou and one for Ronald, and if Ronald had not been allowed to vote it would have been even more one-sided. The discussion began. As usual, Milton did much of the talking. I think it is also fair to say that, as usual, Milton did much of the correct and deep and analytical thinking. I cannot reconstruct it. I have never really forgiven Aaron for not having brought a tape recorder that night. He should have known this was going to be a great event because he is a wise man. My recollection is that Ronald didn't persuade us. But he refused to yield to all our erroneous arguments. Milton would hit him from one side, then from another, then from another. Then to our horror, Milton missed him and hit us. At the end of that evening the vote had changed. There were twenty-one votes for Ronald

69 Kitch (ed.), *supra* note 1, at 220.
70 *Id.* at 221.
71 The reason Coase was presumed in error, was because he set out against one of the most established theoretical views in neoclassical economics and welfare economics, until that day, that is. In his *The Economics of Welfare* Arthur Pigou claimed that in order to remedy problems of social costs, *i.e.*, the cost inflicted on parties other than the economic agent, a system of government taxation is needed. Simply put, Coase shifted the economists' regard to the importance of property rights in the matter. If no transactions costs occur, said Coase, the parties will bargain among themselves for the optimal allocation of resources. What was later dubbed by Stigler, "the Coase Theorem" will be further discussed in the following paragraphs.
and no votes for Pigou." 72 After the meeting Coase was asked by Director, still the only economist at Chicago's Law school, and the editor of the young Journal of Law and Economics, to write his thoughts up for the journal, this time in full. Coase agreed and intellectual history was made.73

Apart from being one of the first times economic analysis was devoted to non-market behaviors,74 Coase's article revolutionized the way that economics grasped social costs, resulting in an utterly antithetical approach to causality in law.

Before Coase, economists commonly believed that in order to achieve allocative efficiency, economic agents should be wholly responsible for the undesirable external effects of activities carried out by them or on their own property. According to this view, legal rules would serve as taxing mechanisms causing agents to bear (internalize) the full costs of their offending activities. Coase shattered this traditional economic reasoning by compelling economists to view the harmful event from a different perspective in time - the ex ante perspective. This perspective ignored legal rights as an ingredient of allocative efficiency and only looked at cost. Resources, Coase maintained, would always gravitate towards their most efficient place, where the actors are rational and no transactions costs influence the ability of the sides to bargain.75

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72 Kitch (ed.), supra note 1, at 221.
73 A more elaborate description of the inception of Social Cost was presented by Coase himself as the Henry C. Simons Memorial Lecture. See Coase, supra note 15, at 248-251.
74 Other influential examples include ARMEN A. ALCHAIN, SOME ECONOMICS OF PROPERTY (1961); Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L. J. 499 (1961) and Gary Becker's seminal work on the economics of criminal law. See: Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968). Becker's work was particularly important, since it enabled the expansion of law and economics to virtually all domains of law. This expansion would later be executed by Richard Posner (and discussed in detail in part three of this piece).
75 A short numerical illustration would help. Consider a polluting factory that gains 100 from its activities and "causes" a harm of 60 to its neighboring household. Under the usual legal regime, an injunction would be issued and the harm would be stopped. However, according to Coase, this would not be the end of the story. The factory, would then buy off of the household its "right" not to be polluted, for an amount between 60 and 100. In this event, maybe it would be more economic for the factory to pay for the residents to move completely, or to install protective gear. In any event, the fact that the residents has the legal "right" would not matter, if the actors are rational and there are no transactional costs that would impede on the ability to bargain.
In stressing costs over and above legal rights, Coase departed from traditional legal reasoning by conceiving the legal dispute from a "new narrative starting point." He assumed that the task of judges and juries in deciding on conflicting resource disputes is not to establish which action caused the harm, but rather to establish which cost caused the activity which resulted in the harm and, from this, which party should be legally responsible for minimizing costs (this would be the party whose costs of prevention are less). Moreover, Coase showed that the judicial decision would not affect allocative efficiency in any way; it would only affect the distribution of wealth between the sides. Bruce Ackerman explained, that "rather than beginning with the moment at which the actors get into some form of obvious trouble, Coasean assumptions force the lawyer to start his story at a much earlier point in time: when the parties might have reorganized their activities in a way that could have avoided the trouble entirely."

Coasean assumptions have also created a rather imaginative world of rationality and zero transactional costs. Misunderstood at times, Coase's theorem was heavily attacked by the previously uninterested legal academia. These critiques were partly responsible for the shift that occurred in law and economics in the following years. Quite simply, Coase never intended for his work to be carried on by legal professors. Coming from economics, Coase was highly interested in judicial decisions, but only as "processing materials" for neoclassical economics' overarching theories. In his article he has never claimed that a scenario where agents are completely rational and no transaction costs occur actually exists, rather, he merely wished to shift economics' view towards these

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77 In our example if courts were to grant an injunction against the factory, the residence would have stronger negotiating power to extract from the factory as much as it can get, beyond his actual costs of 60, but not above the benefit to the factory of a 100. It is clear how the distribution of wealth between the sides could alter, based on the liability rule adopted.
78 Ackerman, supra note 67, at 53.
79 As Duxbury puts it, "it has been the subject of diverse refutations, defenses, tributes, applications, reassessments and attempts at modification." Duxbury, supra note 4, at 388 and notes therein. All of those, as we shall see later on, did not come immediately.
80 Coase explains: "In the Problem of Social Cost I had no intention of making a contribution to legal scholarship. I referred to legal cases because they afforded examples of real situations as against the imaginary ones normally used by economists in their analysis... My interest is primarily in the economic system." Coase, supra note 15, at 251.
assumptions and study them empirically. Indeed, a true "scientist". For if his imaginary world led to the redundancy of legal rules of liability, then in other, more realistic worlds, these rules have an important effect on economic activity, that should be studied meticulously. Furthermore, it may well be legal rules that are summoned to rectify an unjust economic imbalance between agents, arising out of transactional costs.

But, Coase's goals were somewhat misunderstood. Rather than economists picking up where he left off in actually studying the effects of transaction costs on allocative efficiency, law professors used his theorem to promote a modern, "sophisticated" version of _laissez faire_ ideology.\(^81\) Coase, as we have seen, did not adhere to the more absolute anti-statist sentiments of his predecessors. In fact, he incorporated state intervention through legal rules into his model, attempting to recreate "zero transaction costs" scenarios through judicial decisions. In addition, Richard Posner, who met Director in 1968 while teaching at Stanford, picked up Coase's incidental point in _Social Cost_, about the ability of judicial decision to actually promote efficiency, and "ran with it."\(^82\) From then on, the "Chicago tradition" led by Posner was "taking a very simple model of liability rules, assuming people are well informed and risk neutral, and seeing to what extent that model can be used to explain a lot of existing rules governing liability."\(^83\)

This explanatory endeavor, needless to say, was less interested in actual empirical data.\(^84\)

\(^81\) Duxbury, _supra_ note 67, at 302.

\(^82\) Coase carefully narrated this transformation: "But in _The Problem of Social Cost_ I did something else. I pointed out that the judges in their opinions often seemed to show a better understanding of the economic problem than did many economists even though their views were not always expressed in a very explicit fashion. I did this not to praise the judges but to shame economists. Richard Posner, who had been set on the right road through his contact with Aaron Director at Stanford and who moved to Chicago, picked up what I had said about the judges and ran with it. I have never attempted to follow him. For one thing, he runs much faster than I do." _Id._. Posner himself said: "Ronald suggested, although it was not the focus of his article, that judges had an instinctive grasp of the economic issues in these cases... My interest in using economics to try to explain legal rules stems in significant part from that part of Ronald's article." Kitch (ed.), _supra_ note 1, at 226.

\(^83\) Kitch (ed.), _Id._ at 228.

\(^84\) Intended as a _Text Book_, Posner's "monumental" _Economic Analysis of Law_ treats economically fields like property, torts and contract, back to back with others like procedure, racial discrimination and the family. Arthur Leff described this endeavor in his brilliant and colorful way: "Having [read the book] one cannot help being naggled throughout by what may be the literary critic's most pernicious and unavoidable naggerie: Where have I seen this before? At any rate, from my first glance at the table of contents, with its relentless item by item _march through all of law_- property, contracts, crimes and torts, labor law, corporations, taxation, racial discrimination, civil procedure... all the way
After Director and Coase, the economists, delivered the economic gospel at the gates of law, it was a lawyer who reduced and bound the relatively vast potential of the research agenda. Institutionally located in the law school, the movement had no other choice but to conform to a certain kind of scene, a scene that contained its own particular ways of argumentation. For the first time in our tale, economics no longer played the lead role. Instead, it was insiders to the law, insiders who undoubtedly understood the complicated workings of the legal field, who deprived economics of its richness, selecting (though not altering) only the tools needed for their success. It is in this light that law and economics' strategic and successful march should be understood.

Genuinely affected by their "religious experience" in Director's class, future law professors understood the power of economic analysis, especially when juxtaposed with its legal counterpart. Being first and foremost part of an educational institution, future professors understood the rhetorical capital that came across their way. If Director could perplex Levi time and time again using simple economic models, so could they. Soon enough, "it was impossible for any [Chicago law] student to fashion a curriculum that did not include a number of courses taught with substantial economic content. It was entirely possible for some very interested students to fashion a curriculum which consisted entirely of economics classes, ignoring the standard law school curriculum altogether." Alongside the well-known style of legal teaching, a different style emerged that would be

through a final "Note on Jurisprudence" – I smelled a familiar genre. But for the longest time, I couldn’t place it. A manual of possible uses, the kind that comes with a new chain saw? A text on herbal healing? Not quite. But what? I was more than half way through the book before it came to me: as a matter of literary genre the closest analogue to Economic Analysis of Law is the picaresque novel. In each case the eponymous hero sets out into a world of complexity and brings to bear on successive segments of it the power of his own particular personal vision. The world presents itself as a series of problems; to each problem that vision acts as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure." Arthur Allen Leff, Economic Analysis of Law: Some Realism about Nominalism, 60 VA. L. REV. 451 (1974) (Commentary) (highlight added).

Ron Harris, supra note 12, at 665-666. In his analysis Harris has also delineated the untaken paths of research: "on the assumption that law has no methodology of its own to contribute to the study of economics, three potential outcomes of the interaction between the disciplines of economics and law appeared around 1960: 1) the study of the effects of law on the economy; 2) the study of the effects of the economy on legal change; and 3) the application of economic methodology to the analysis of law. Until recently, only the third of these possible research agendas was considerably advanced within the field of law and economics.

Kitch (ed.), supra note 1, at 222 (comment by George L. Priest).
a significant scholarly and legal teaching method. As Kitch recalled, "by 1975 you could see that there were people in American law schools who could be characterized not as contracts teachers, or torts teachers, or regulation teachers, or antitrust teachers, but as having a general expertise in the application of economics to the legal system."87 And thus, what could have seemingly be taken as a flare for charlatanic generalizations became a well thought-out move towards becoming true Judges, knowledgeable in every known field of the law.

The effectiveness of this move should be further explained. Harris suggested that "limiting the [methodological] boundaries of law and economics made sense for a newly formed field, as it enabled concentrating on research resources and rapidly advancing learning on a narrow front."88 With regard to the special surroundings economists were in, formulating their discourse according to legal dictates meant that they could participate in the legal profession's other "pastime" activity - formulating legal reform in order to influence judges and other policy makers.89 When their language began to form accordingly, it reinforced a beneficial and pragmatic loop: students would pay more attention to these ideas since one "might actually cite this in a brief,"90 and as more brief citations occurred, the attention of the courts grew.91 In a similar way, law professors themselves had something to gain by turning to economics. Economics provided them with "liberation" from the burden of details,92 and, paraphrasing on a well known dictum in the field, allowed them to engage in physics rather than in stamp collecting.93

87 Id. at 225.
88 Harris, supra note 12, at 664.
89 As Kitch put it, "it is but a short step from the task of identifying and articulating the social purpose of legal rules... to formulating and advocating reforms..." Edmund W. Kitch, The Intellectual Foundations of "Law and Economics", 33 J. LEGAL EDUC. 184, 185 (1983).
90 Kitch (ed.), supra note 1, at 225.
91 This, however, does not mean that the movement had substantial genuine effects on courts and policy makers. The entire cycle described was fundamentally internal to the institutes of the legal academia. I shall later return to this significant distinction.
92 "[Economics] was a liberating insight for legal scholarship, because it freed scholars from the burden of explaining every case and problem and directed their attention to the identification of general tendencies." Kitch, supra note 80, at 188.
93 This saying was accredited to Ernest Rutherford, which has said that "science is either physics or stamp collecting." See Coase, supra note 15, at 254. Calabresi modified this dichotomy into the difference between modeling and laundry lists, still a rather pejorative appellation for the "other"
Coming originally from economics, law and economics scholars did not forget to import some institutional devices that would help spread their ideas in a controlled fashion. Among these innovations was the professionally-edited journal. The *Journal of Law and Economics*, first published in October 1958, can be perceived as a symbolic figure of the movement's success. By substantively detaching itself from common editing practices entertained by law school students, the *Journal of Law and Economics* editors would obtain a strong and clear message as to what they considered important contemporary scholarship. Thus, effectively and continuously controlling the journal's agenda, Director and subsequently Coase avoided the common practices law journals inherently entertained. In the following years, the *Journal of Law and Economics* acquired a distinctive character and systematically developed and supported a particular line of inquiry and style of work. Through the editorship of the *Journal*, it became possible to support faculty research by granting fellowships to those willing to conform to the *Journal's* agenda, and above all, to offer the opportunity to publish.

This unique and well-calculated combination of discourse, reform suggestions and controlled distribution mechanisms helped propel law and economics' status in the legal academia. What is more, it began to generate an effervescent debate on the adequacy of law and economics as a *legal* form of scholarship. Unable to deny law and economics' compelling powers, the existence and nature of these critiques clearly demonstrated law

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94 To be called first the *Journal of Law* "or" Economics, following Director's unsuccessful suggestion. See Coase, supra note 15, at 251.

95 Richard Posner commented on these practices in his unique and enjoyable way. See: *Against the Law* Reviews: Welcome to a world where inexperienced editors make articles about the wrong topics worse, LEGAL AFFAIRS, November/December 2004.

96 As Coase noted, as Editor of the *Journal* his aim was "to encourage the type of research which [he] had advocated in *The Problem of Social Cost*, and [he] used his editorship of the *Journal* as a means of bringing this about." Id. at 252. Additionally, Coase remarked that the possibility to edit the *Journal* was the real reason why he came to Chicago. See: Roundtable, supra note 13, at 1138-39 ("I only really came because it also gave me an opportunity to edit the *Journal of Law and Economics*, which I thought would be important in forwarding this process").

97 Id. at 253. Opportunities for publication were further enlarged by the establishment in 1972 of the *Journal of Legal Studies*, edited by Richard Posner.
and economics' secure standing in the legal academia. It is within the different stages of this debate that the movement's most [in]famous speaker emerged.
PART THREE: CELEBRITY

A. Gregor Samsa

"As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into an enormous Economic Analyst of Law. He was lying on his back, and when he began to lift himself up he stopped abruptly and considered whether it would be cost-effective to proceed. Concluding it wasn’t, he fell back on the cool sheets."\(^{98}\)

"I guess the worst form of public intellectual activity is where the intellectual is speculating in a factual void."\(^{99}\)

The story of neoclassical economics' successful involvement with American legal academia cannot be fully understood without acknowledging the specific role of its most visible member, Richard Posner. Without actually introducing significant methodological innovations into the field, Posner, in a relatively short amount of time, has succeeded in capitalizing on neoclassical economics' substantial advantages, thus turning himself into the subject of great admiration and critique.\(^{100}\) Closely following this unique individual's career will provide us with a better understanding of the movement's most successful intellectual formation, a formation finalized by Posner himself.

\(^{98}\) Anthony D’Amato, As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into an enormous Economic Analyst of Law 83 NW. U. L. REV. 1012, 1012 (1989).


\(^{100}\) Posner has been lauded as "not only the premier legal scholar of our time, but, indeed, [as] one of the extraordinary intellectuals of the late twentieth century." See: Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 CHI. -KENT L. REV. 23, 25 (1989). Others have found the sources of his impressive productivity in paucity of original thought and a large number of replies. See: D’Amato, supra note 97, at 1018. For Posner’s reply see Gregor Samsa Replies, 83 NW. U. L. REV. 1022 (1989).
Not surprisingly, Posner's biography does not include a formal encounter with neoclassical economics (or any kind of economics, for that matter). After majoring in English at Yale, Posner briefly considered going to graduate school in English literature but decided to go to Harvard Law School instead. He clerked for Supreme Court Justice William Brennan and then went to work for the government, first in the Federal Trade Commission and later as an assistant to Solicitor General Thurgood Marshall. Upon joining the Stanford Law School in 1968, Posner continued his research into the fields of antitrust and the regulation of public utilities, familiar to him from his government days. It was there that he first met prominent economists Director and Stigler, a meeting that would result in an almost instant transformation. Politically, methodologically and geographically, Posner started gravitating towards Chicago.

When he arrived, the Chicago law and economics scene was already an animated one, but it paled in comparison to what was to come. Essentially, the field had not evolved beyond the seminal work introduced by Coase and Gary Becker, and the applicability of neoclassical economic analysis to law was still confined to the boundaries shaped by the two. Then came 1973, when the first edition of *Economic Analysis of Law* emerged on the scene.

As mentioned before, the fundamental insight of Posner's work, that law creates incentives for people's behavior and could thus promote efficiency, was taken from Coase. The ambition to show the applicability of this insight to virtually every part of the common law, however, came from Becker. In *Economic Analysis of Law*, as in his...
subsequent work, Posner spared almost no legal field in order to demonstrate the 
applicability of neoclassical economics to legal rules. Quite understandably, initiating a 
work of this volume resulted in foregoing some of his predecessors' primary research 
agendas, namely, the need for quantitative data in order to understand the dynamics 
between law and transactional costs. This move, intentional or not, was not uncommon 
in general economic research at the time, and coupled with Posner's occasional soft 
spot for the provocative, it brought a good deal of attention to the practitioners of the 
field. An example will clarify this process.

One aspect of Posner's work, his positive analysis of law, was devoted to the 
thesis that the common law promotes efficiency. This is to say, that the judges whose 
collective decisions make up the common law, and who mostly talk about rights and 
duties, decide their cases in practice as though they were trying to bring about the 
outcome that a free market would produce, not only in explicit market areas, but across a 
whole range of social interactions. "In settings in which the cost of voluntary transactions 
is low, common law doctrines create incentives for people to channel their transactions 
through the market… In settings in which the cost of allocating resources by voluntary 

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107 See: Robert M. Solow, How Did Economics Get That Way and What Way Did It Get, in AMERICAN 
ACADEMIC CULTURE IN TRANSFORMATION 57, 74 (Thomas Bender & Carl E. Schorske, eds., 1997). 
Solow describes a situation in which economists are "obsessed" with data, which they need in order 
to corroborate their theoretical predictions. However, theory outruns the data available and instead 
of giving up, the economist returns to the drawing board and keeps refining his model ("Model 
builders' busywork is to refine their ideas to ask questions to which the available data cannot give the 
answer").

108 Some of Posner's work generated a substantial amount of discussion. Prominent examples include: 
Elizabeth M. Landes & Richard A. Posner, The Economics of the Baby Shortage, 7 J. LEGAL STUD. 323 
RICHARD A. POSNER, SEX AND REASON (1992). Posner explains this intellectual temperament in his 
admiration of the philosopher Friedrich Nietzsche in whom he sees a similar ambition to shock. See: 
MacFarquhar, supra note 104.

109 In this regard, it is worthwhile noticing that only after the publication of Posner's Economic analysis of 
Law that Coase's The problem of Social Cost generated the amount of responses that it did. For a random 
selection of these responses see: Duxbury, supra note 4, at 388 n.429-433.
transactions is prohibitively high, making the market an infeasible method of allocating resources, the common law prices behave in such a way as to mimic the market.”

In this seemingly simple thesis, Posner has fulfilled an important "wish" of legal jurisprudence: to explain, in a coherent and clear fashion, the inner workings of positive law; to understand what rationales stand as the backbone of judges' decisions. Success in doing so would enable law professors to articulate once more what it is they are engaged in (and later to convey it to their students). And indeed, Posner and his followers did just that. In complete accord with history, lawyer-economists did not heavily engage with details that could jeopardize their discourse. The thesis was there, and all that was left to do was to converse – to understand exactly how scattered judges promote a common cause, individually.

Posner's discovery of common law's efficiency is unmistakably legal. In orienting its analytic tools towards a tangible target, he gave the legal profession a sense of direction, a sense of unity. Adherents to this intellectual scheme engaged so vigorously in explaining the efficiency dictum that "coincidental" discrepancies faded away into the background; law indeed worked itself pure, or rather, efficient. What is more, it is once again the common law that law professors analyzed. The common law, and not just any statutory or regulatory mechanism which could be the result of ad-hoc politics. Posner, the lawyer, has taken Director's economic language and inverted its use. No longer is neoclassical economics summoned to demonstrate law's malleability and incoherence. Now, using case method, it is employed in order to excavate law's internal workings, its

inner unified truth. Finally, this "factual" recognition of common law's efficiency had a little rhetorical bonus at its side - a normative one. If the basic rational of common law is efficiency, then legal reformers ought to promote efficiency wherever it is absent, i.e., in those "obscure" areas of the common law where it is not to be found and more importantly, in statutory and regulatory law.\textsuperscript{112} Efficiency, in its wealth-maximizing form, became the normative standard for the law, not only its positive reality.

This last move, from positive to normative conclusions, was highly criticized in the legal world. The critique, aimed particularly at the illogical inference of normative goals from positive observations, corresponded well with the general unease with Posner's moral agenda. Wealth-maximization, it was argued, is not the only goal the justice system ought to promote, regardless of its current status.\textsuperscript{113} Contrarily to Posner's aspirations for unity of discourse (of a certain kind), critics pushed back to a more polyvocal state, a state where law does not conform solely to one idea. These critics, however, responded more and more by discovering their own unitary idea behind law. Using different methodologies that originated in other disciplines, law professors started to implement rhetoric of a Posnerian nature – speaking in a total language, albeit in a different one.\textsuperscript{114}

The rise of efficiency and the neoclassical methodology that supported it was the rise of law and economics as an academic vocation. This phenomenon cannot be explained, however, by the triumph of science over legal reasoning. More accurately, it was the first time law genuinely encountered a language of economics' nature. This

\textsuperscript{114} Posner refers to those who followed his lead as "moral entrepreneurs." As an example he points to Catharine MacKinnon whom he admires despite disagreeing with her politics. See: MacFarquhar, supra note 104. Other examples may include prominent members of the Critical Legal Studies Movement. The aspiration to positively show law's underlying nature as ideological, clearly conforms with Posner's unitary positive account. See: Duncan Kennedy, A Critique Of Adjudication (Fin De Siècle) 1 (1977) ("I argue that judicial law making has been the vehicle of ideological projects of this familiar kinds and of other kinds"). More explicitly see: Gary Minda, The Law and Economics and Critical Legal Studies Movements in American Law, in Law and Economics 102 (Nicholas Mercuro ed., 1989) ("Law and economics and critical legal studies... offer a theoretical approach that goes beyond the approach of the legal realists in establishing a systematic or totalistic critique and analysis of the structure of American law").
encounter grounded economics within the legal academic establishment, and generated new and exciting debates. What is more, now that neoclassical law and economics was cast into a rather stable structure, it was its turn to become "old doctrine."

**B. Multitudes**

"Do I contradict myself?  
Very well, then, I contradict myself;  
(I am large - I contain multitudes)"

A couple of decades would pass, however, before the attacks on law and economics would gain substantial ground. In fact, for law and economics' rather sturdy edifice to alter, it would take something more than just legally oriented critique. For law and economics to really change, it would take a critique that spoke in the same language, used the same kind of vocabulary. It is not surprising then, that this critique was largely to be found in extra-legal fields such as economics and psychology.

For the most part, lawyer–economists did not occupy themselves with the tedious labor of answering their critics from within the legal academia. To a certain extent, they did not need to; a great deal of the critique was directed at Posner, and more often than not it blended theoretical concerns with direct *ad hominem* attacks. As Duxbury explained: "a word which crops up constantly in the critical literature on Posnerian law and economics is 'hard': there is, it seems, a hardness about Posner's methodology and conclusions which critics generally find unpalatable." Substantively, Posner was commonly charged with conservatism and a relentless faith in free-markets, both neatly camouflaged under the pseudo-scientific cloak of efficiency. Critics have stressed that there can be no such thing as a uniquely wealth maximizing result, but only one which

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maximizes wealth on the basis of an existing distribution of entitlements. Thus, "for those who lack economic power or interest, the system of wealth maximization can be just as coercive as an arbitrary master." 

Understanding the nature of these critiques can possibly shed light on Posner's reluctance to concede any ground. Generally speaking, opposing arguments emphasized law and economics' ideological bias, and were less interested in quantitatively proving the faultiness of its underlying assumptions. Moreover, even when stressing the inaccuracy of these assumptions, detractors did so in an anecdotal fashion, much like Posner himself. What was consequently created was a performance of a very particular kind: each side asserting that its world view was paramount, each side promoting its own set of ideological beliefs. This theoretical deadlock would only change after evidence of real world behavior started to accumulate. This evidence, as might be expected, came from extra-legal fields of research and was somewhat delayed until it was entertained in the domains of law.

Most prominently, the evidence came from psychological experimentation on the neoclassical rational choice assumption. With these experiments, psychological literature questioned the fundamental law of neoclassical theory, the law according to which "man is a rational maximizer of his ends in life." "As early as 1985," Dan Farber observed, "the challenge posed by psychological research to economic theory was sufficiently pressing to prompt a conference of luminaries from both fields." Around that time, initial limited attempts were also made to introduce this literature to the legal world,

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119 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (1st ed. 1972)
attempts that largely built on Amos Tversky's and Daniel Kahneman's path breaking work from the seventies. However, it was not until the late 1990s that psychological insights gained increased attention from the law and economics establishment, fueling the start of a genuine debate.

An initial survey of the psychological literature would raise substantial doubts as to whether a genuine debate could have possibly evolved. In the simplest sense, behavioral economics demolishes the rational choice paradigm, and replaces it with a far less systematic model. As a starting point, behavioralists show that human ability to process information (the bedrock of competition) might be severed when the information is complex or extensive. People are often over optimistic when assessing probabilities ("overoptimism"), they tend to overestimate the original likelihood of an event after the event has already happened ("hindsight bias") and they overinflate risks involved with new or dramatic information ("availability bias"). Furthermore, and apart from their ability to assess the probability of an outcome, people make fairly poor evaluators of a specific outcome's value. The most recorded variation is the "endowment effect", which reveals that "opportunity costs do not count the same as "real" costs," or in other words, I may demand more compensation for a good I own, than I would be willing to pay for it in the market. The endowment effect's clear bias towards the status

125 CASS R. SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 95, 98 (2000).
126 Id. at 331, 338.
128 Farber, supra note 120 at 285.
129 The Endowment effect's clear bias towards the status...
quo, is reinforced by a similar bias, in favor of passivity: "people are willing to tolerate higher loses from failing to act in order to avoid the sense of responsibility when losses arise from their own affirmative acts." 130 Other valuation difficulties are caused by individuals' propensity to compromise,131 and most notably by attaching value not only to outcomes, but also to the process by which these outcomes were obtained.132

The initial reaction of law and economics scholars, notably Posner, was not, as one may have assumed, a favorable one. In it, one may even detect a resemblance to the neoclassical critique of institutionalism.133 The prevalent message was one: "behavioral economics is economics minus the assumption that people are rational maximizers of their satisfactions… [it] is anti-theoretical."134 "In theory-making," Posner acknowledges, "descriptive accuracy is purchased at a price, the price being loss of predictive power".135 And indeed, "describing, specifying, and classifying the empirical failures of a theory is a valid and important scholarly activity. But it is not an alternative theory".136

However lacking in theoretical underpinnings, behavioral economics did present previously unattainable data as to the accuracy of the rational choice model. Following the Popperian model of scientific falsification, a challenge to neoclassical law and economics was made, a challenge that enabled, paradoxically, to incorporate behavioral economics into law and economics. For, this challenge did not defy the conceptual framework of economics, and law and economics: that human activity should be described in terms of choice between alternatives. As Farber commented: "often, the most significant question is not which alternative a person prefers but how that person


130 Farber, supra note 120, at 286.
131 Issacharoff, supra note 127, at 1740-41.
133 See supra, pp. 23-24.
134 Posner, supra note 123, at p. 1552.
135 Id. at 1559.
136 Id. at 1560.
interprets the available choices or the nature of the risk." Similarly, the focus on available options suffocates human creativity and imagination in inventing new and improved choices. And so, defining human activity as a matter of choice gave behavioral economics and neoclassical law and economics a common language, a language that enabled law and economics to continue and exist in a more expansive form. What is more, this new empirical data has challenged lawyer-economists to find ways to reconcile it with the traditional model of rational choice. Through what is generally known as "social norms theory," practitioners of the movement found, yet again, ways to implement their theoretical framework, on legally oriented subject matters, thus enabling them to advance new understandings of law as a social phenomena.

Social norms theory begins its inquiries from the same observation behavioral economics begins its: people's behavior seems to deviate from that predicted by the rational actor model. However, while behavioral economics argue that the rational actor model is psychologically false and should be modified, social norms research adopts the model and shows that any observed irregularities could be explained [away] by societal incentives unaccounted for. This acceptance of the rational choice model has, quite understandably, facilitated the admittance of social norms theory into law and economics, which is now considered to dominate the field of social norms within legal academia.

Building largely on anthropological-style field research, it was Robert Ellickson's path breaking study of Shasta County ranchers that first introduced social norms theory to the law and economics discourse. After studying dispute resolution among ranchers

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137 Farber, supra note 120, at 296.
138 For a critique of a similar nature, directed at Posner see: Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 Harv. L. Rev. 384 (1985);
139 Not all observers see law and economics’ cooptive move as a legitimate one. In her article, Whatever Happened to Law and Economics, Anita Bernstein criticizes this move as a purely strategic one, which, among others, has turned the law and economics movement to a mere cult. She asserts that "the cooptation strategy cannot... readily accommodate material so contrary to a first principle of economic analysis". See: Anita Bernstein, Whatever Happened to Law and Economics, 64 MARYLAND L. REV., 101, 109 (2005).
and farmers in California, Ellickson came to realize that most people find the costs of learning about the law (judge-made or statutory) and submitting to formal resolution procedures to be so high that it is easier to fall back on common-sense norms. Although providing an initial taxonomy of these "common sense" norms and of socially manufactured "controllers," Ellickson's study was mostly admired for the actual finding of these norms amongst the Shasta County ranchers.142 This positive discovery of an ordering mechanism different from law has generated volumes of writing on possible explanations for the existence of these norms. All functioning within the rational choice paradigm, they are all "lawyer - economists" now.143

The cases of behavioral economics and social norms theory demonstrate a transition in the way economic analysis of law is being conducted and perceived by members and non-members of the movement. While it is undoubtedly too early to estimate the future evolution of this process, it is possible to locate the general ground for its initiation. At the basic level, this process was fueled by law and economics' gradual acknowledgment of its own flaws. This acknowledgment, as we have seen, was not noticeable during the movement's formative years. Then, resources were mostly devoted to the establishment of intellectual boundaries, boundaries that would enable lawyer–economists to develop their own total language of law. As this language began circulating in the corridors of legal academia, it became more and more noticeable that it lacked the necessary vocabulary to appropriately describe the legal reality. For some, this deficiency meant complete denunciation, for others, it signaled an opportunity to join the discourse and find new words.


143 The different social norms scholars are quite numerous. Amongst them one can include game theorists such as Eric Posner, members of the "New Chicago School" like Cass Sunstein and Dan Kahan, socialization-theory advocate Robert Cooter and different Law and Society scholars (although the latter group can hardly be characterized as part of the law and economics movement since they are known "more for grubbing for facts than for building overarching theory." See: Ellickson, id. at 546).
A dominant feature of this intellectual process, as one might note, is its gradual detachment from the practice it describes, and initially hoped to improve. As law and economics theory evolves in its complexity, its value to judges and policy makers reduces significantly. Apart from basic, almost "common sense," economic findings, public officials rarely implement insights exclusively generated in the law and economics habitat. Legal-economic theory, once brought into the law school in order to better equip future practitioners, finds itself engaged more in academic monologues than in practical dialogues. A genuine playground of ideas has been formed, where real-world impact is used, if any, as a rhetorical tool of argumentation. In accordance, the multitude of practitioners currently involved in law and economics research implies that the noble dream of Posner, to master a unified theory of law, has not passed away. Nowadays, it is merely materializing in various ideal shapes and forms. This, I believe, is the inevitable outcome of being large - it might just mean containing multitudes.

144 This, of course, should be qualified according to the legal field involved. As one leans towards market oriented rules, such as antitrust and utility regulation, one can find public officials who can better speak the economic language.

145 On the practical impact of law and economics scholarship, members of the movement generally disagree. Richard Posner has commented that "it is difficult to tell whether the real impact is the impact of economic ideas or, as may well be the more important case, economics gave respectability to the instincts of people who favored efficient policies for different reasons." Ronald Coase has ironically said that his idea to price the use of the radio frequency spectrum was adopted by the FCC only in order to reduce the national deficit and not because it was economically efficient. Gary Becker has insisted that the picture is a very mixed one, "in some areas we move towards efficiency and in some areas we move very strongly in the opposite direction." Above all, Becker requested Posner to show him some evidence in support of his claims. See: Roundtable, supra note 13, at 1152-56. As it relates to judging, Posner, the judge, found that it is quite different from theory and cannot always be amenable to economic analysis (in fact it rarely is). ("When you are talking about the teaching of law or scholarly writing about law, the focus tends to be on the big questions and large principles that inform a field of law. There, I think the economic approach is very fruitful. But in the actual day-to-day litigation process, many of the cases involve issues that are of a purely interpretive, purely factual character, dealing with the details of comprehensive statutes, and they just don't lend themselves to economic analysis"). See: Kurtz, supra note 99.

146 Gary Becker has commented that the field of law and economics is, disappointingly, "too theoretical". Roundtable, supra note 13, at 1137 (1997). ("The problem with having a discipline that is too theoretical is that you begin to discuss the problems raised by other theorists rather than the problems raised by trying to understand the world out there; to some extent that is happening in law and economics").
CONCLUSION: A MOMENT IN THE SUN

"Ideas have histories, and jurisprudence is a much more enlightening and engaging enterprise when it focuses on those histories. When we concern ourselves with the history of ideas about law, we are likely to appreciate not only how certain ideas come to be discredited, but also, equally importantly, why they were ever considered to be significant in the first place."  

The question of why economics became significant in law "in the first place," the question I have attempted to (partially) answer in this paper, does not present itself effortlessly, at least not in regards to jurisprudential ideas. For, to ask of the appeal of a certain mode of thought in law, is normally to ask of its ability to present answers for a certain set of important questions about the law, namely, what is law, and how can we improve upon it. In our rationality, we find it hard to accept a narrative that crowns a certain "answer" for reasons other than its instrumental appeal. From what we have seen, law and economics seems to defy this rational.

Within legal academia the plea of law and economics' inaptitude is often sounded, and still we continued to ask: what was it that made it so successful? Throughout this paper I have attempted to show that law and economics theory did comply with this fundamental rule of reason. In order to do so, it simply altered the fashion with which one poses questions in the legal academic world.

Interestingly enough, law and economics' acceptance did not build upon a paradigm shift, like many have claimed. In many ways law and economics' success was due to its conformity with the existing mode of thought in American law schools. This mode of thought consisted of the noble dream to create a unified theory of law without loosing the nuances of the legal practice. Lawyer-economists merely demonstrated that at the present time, this cannot be done, and for legal academia to engage in some sort of rational discourse, it has to effectively dissociate itself from its quest and craft "answers"

147 Duxbury, supra note 4, at 7.
for a different set of questions, a set of questions posed by academics rather than lawyers and judges. In this manner, law and economics scholars pushed law professors to explain to themselves what it is that they are engaged in. When some of them couldn't do so, they were also there to offer the economic craft in exchange.

At the end, law and economics has succeeded because it had the ability to tell a story about itself, a story that was crafted from the beginning as a successful one. Law and economics has succeeded because this story is tightly bound, and successfully demarcates what law and economics is, and more importantly, what it is not. Law and Economics has succeeded because it strenuously resisted any form of translation into another language. If other scholars make the effort to speak this language, any discussion about truth is most probably over.