A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula

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I. INTRODUCTION

It is a commonplace of modern (North American) commentary on legal education and legal scholarship to remark on the transformation wrought on every field by economic analysis. Indeed, many of the core fields of law are now taught as much from an economic point of view as

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from a doctrinal point of view.[1]

One of the remarkable aspects of the centrality of economic analysis in the modern American legal academy is that it seemed, at one point, an extremely unlikely thing to occur. In the early days of law and economics—roughly the late 1970s and early 1980s—the field came upon the academy so quickly and initially seemed so attractive that law school faculties, which were generally not equipped to offer courses in the subject, scrambled to find instructors. Some law schools were reduced to hiring economists to teach the new material. Others invited traditionally trained law professors to undertake teaching the material by assigning Judge Posner's pathbreaking textbook and staying a chapter or two ahead of the students, much as my high school vice principal did in my calculus class.

From these shaky beginnings, law and economics managed to secure its position in the legal academy. It developed a core of skillful and devoted instructors, encouraged additional textual material, fostered an ever-expanding corpus of scholarship, and in all other ways became an established presence within the legal academy.[2] It is a testament to what must be the inherent attractiveness of law and economics and to its now settled position in the legal curriculum that it is no longer necessary for law schools to hire economists to teach the material to their students. Rather, it is possible to hire extremely competent scholars who either

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1. For example, most of the leading contracts casebooks today include a discussion of "efficient breach of contract," something that was very rare fifteen years ago. *See, e.g.*, E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 19–20 (3d ed. 1980). And one can scarcely talk about property law without at least mentioning the Coase Theorem, about criminal law and punishment without reference to the Becker theory of the decision to commit a crime, about remedies without reference to Calabresi & Melamed, *see infra* note 30, about tort law without reference to theories of the "least-cost avoider," and so on. *See generally* ROBERT D. COOTER & THOMAS S. ULEN, LAW AND ECONOMICS (4th ed. 2003).

2. In *Legal Scholarship Today*, Judge Posner identifies two factors that account, he believes, for the general rise of "law and . . ." scholarship: (1) independent, valuable developments in contiguous disciplines, such as the rise of the analysis of nonmarket behavior in microeconomics and the revival of political philosophy after the publication of John Rawls's *Theory of Justice* in 1971; and (2) the dramatic increase in the number of law professors over the period 1960 to 2000, which created, he suggests, pressure for these professors to adopt new forms of scholarship to distinguish their work from that of those who came before and to allow them to compete effectively with their peers for academic favor. Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1317–19, 1324 (2002).

In *A Nobel Prize in Legal Science: Theory, Scientific Method, and Experimental Work in Law*, I agree with Judge Posner's identification of the prevailing trends in legal scholarship but offer a somewhat different view of the reasons for those trends. In brief, my argument is that the longer term trend away from doctrinal scholarship and toward more theoretical and empirical legal scholarship is a Weberian process of rationalization in the scholarly study of law. Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Scientific Method, and Experimental Work in Law*, 2002 U. ILL. L. REV. 875.

have both a J.D. and a Ph.D. in economics, or have a J.D. from a top law school where they learned law from faculties that were fully conversant in, comfortable with, and contributing to law and economics.[3]

In this brief Article, I want to remark on two developments that I perceive in the teaching of law and economics in the North American legal academy.[4] First, I perceive a paradoxical trend: As law and economics becomes more firmly accepted among legal scholars, the need for separate courses in law and economics may decline. I hedge by saying "may" to cover the possibility, which I discuss later, that the incorporation of law and economics into other courses might be haphazard rather than systematic. There will almost always be a place for a more formal treatment of the economics relevant to legal inquiry,[5] but at the moment the trend is away from a separate course in law and economics and toward the incorporation of the relevant concepts by means of the "pervasive method" of instruction.[6] In what follows I shall try to explain why this is happening and to evaluate whether, in light of other developments, that is a good thing. Second, I believe that the legal academy is developing an important independent literature in law and

3. I have insisted to my economist and European law professor friends that they would be amazed at the sophisticated understanding of microeconomic theory, game theory, and econometrics that many of the top young legal scholars possess these days simply on the basis of their legal training.

4. I limit my remarks to trends in Canada and the United States. There are productive scholars in law and economics throughout the world, but I am less familiar with foreign legal educational systems and, so, am unable to comment on how those other legal educational systems accommodate a legal innovation such as law and economics. My impression is that law and economics has not yet had the impact on, say, British and Continental European legal scholars and education that it has had in North America.

5. It is not inconceivable that the legal academy will eventually develop a law-specific course in economics and in other social science tools that are useful to the examination of law. As an example of a law-specific economic tool, consider the notion of Kaldor-Hicks efficiency. *See* COOTER & ULEN, *supra* note 1, at 41–42. Welfare economics as taught in economics departments focuses on Pareto efficiency and rarely, if ever, mentions Kaldor-Hicks efficiency. That notion is, however, central in law and economics.

6. I first heard the expression "the pervasive method" applied to the practice of introducing the concepts of professional responsibility in every course rather than treating those concepts in a separate course. Similarly, one could argue that law students today learn law and economics not by means of a separate course but piecemeal by, for example, picking up something about the Coase Theorem in property law, about Pareto efficiency in their discussion of breach in contract law, and about deterrence theory in criminal law. Some law schools include a "legal methods" course in the first-year curriculum that introduces many of the relevant economic concepts.

economics. By "independent," I mean that this literature has begun to take on a flavor and dynamic of its own, a distinctively legal cast. Originally, law and economics consisted of nothing more than the application of relatively simple microeconomic concepts to legal decisionmaking. However, over time, law and economics has adapted concepts from other disciplines, such as political science, psychology, and sociology, so as to extend simple microeconomics into a more complex and refined analysis that addresses the particularities and contexts of legal decisionmaking. In Part III, I will seek to characterize two examples of this independent literature and to discuss how it might work its way into our teaching.

II. THE LAW AND ECONOMICS CANON

When law and economics first appeared in the law school curriculum in the late 1970s and early 1980s, it had a relatively easy birth by comparison to other scholarly innovations. There was already a comprehensive and accessible text (Judge Posner's estimable *Economic Analysis of Law*),[7] an extensive scholarly output of articles in professional journals from which instructors could cull instructional materials, and several important peer-reviewed journals devoted to scholarly work in this area.

A. Scholarly Innovations

It is hard to exaggerate how important these factors are to a successful scholarly innovation. As we shall see, most scholarly innovations are not so fortunate. The very novelty of an innovative approach often means that there are no canonical texts with which to instruct those new to the field. And the lack of such texts makes it difficult for instructors who find the field attractive but are not themselves learned in its materials to propose and teach a new course in that field. The academy rarely rewards professors for developing these texts or teaching new courses. If the field catches on (an eventuality that is obviously made less likely precisely because there may be no settled course materials), then such canonical materials eventually appear, summarizing the new field in a comprehensive way. The presence of accessible teaching and scholarly materials is absolutely vital to the curricular success of the innovation. They allow students to see the field as a coherent whole: that the field has a settled body of learning, that there is a consensus among its proponents about

7. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973).

what is valuable and new in the scholarly innovation, and that the roistering and roiling controversies of the early days of the scholarly innovation have given way to grudging acceptance by the critics on the one hand and enthusiastic advocacy by proponents on the other.

Established scholarly outlets may also have a difficult time accepting scholarship by those learned in the field. Unless the field manages to produce, at an early stage in the innovation, a high-quality journal devoted to articles in the new area, the innovation may not gain traction among scholars who read and pay attention to the far edges of their field. If the output of the innovators is scattered among the normal output within the larger field in which the innovation is occurring, then it may be very difficult for those outside the innovation to realize that there is an innovation underway.

Those scholars already established in the larger field will be looking for other indicators of a successful scholarly innovation: that there is a "research program" in the field; that the innovators have thrown important new light on previously dark corners of the subject area; that there are scholarly journals devoted to publication (and perhaps to the peer review of manuscripts); that there is a professional organization for those in the field and that organization holds an annual meeting, publishes proceedings, and performs other services for scholars; that there are other periodic conferences and symposia on topics in the field, and so on.[8]

There is, however, another, darker side of scholarly innovation to which Judge Posner has correctly called attention: the problems of quality assurance that any scholarly innovation presents. He notes that innovators desire to secure a foothold in the academy and, to do so, have an incentive to cite one another's work and use those citations as evidence of scholarly acceptance. He calls this practice "circulating-pump scholarship."[9] The point is especially acute in the early days of a scholarly innovation, when those outside the innovating group are skeptical and those within the innovating group are eager to find acceptance. It could be the case that those within the academy are well aware of the circulating-pump phenomenon and therefore make it so difficult for scholarly innovators to secure a position that those who do succeed must have something significant to say.

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8. Law and economics, unlike other recent innovations in the legal academy, had or quickly developed all of these indicia of a stable academic field.

9. *See* Posner, *supra* note 2, at 1325–26.

I have sketched some factors that may help to explain why some academic innovations are successful and others are not.[10] Rather than elaborate on these factors, I turn now to the first point I mentioned above: the paradoxical point that as it has gained acceptance, the need for separate courses in that field appears to have waned.

Teaching law and economics to law students is difficult. Most of them do not have a formal background in economics, and they have widely variant levels of knowledge of the subject. Some may have undergraduate degrees in economics or cognate fields, such as finance; some may have Ph.D.s in economics; some may have undergraduate degrees in engineering or the natural sciences and find the mathematical nature of much modern economic reasoning to be easy to grasp; some may have been out of school for twenty years and have never had any formal exposure to economics; some, while undergraduates, may have fled from economics courses as if from the plague and be extremely wary of their abilities to follow the material. Getting a class in which students have such disparate backgrounds to feel comfortable with the economic basis of the material is a formidable task for even the most gifted teacher.

There are at least three general methods of doing this. One, which I follow, is to spend the first two or so weeks of the semester teaching microeconomic theory. I do not try to convey the technical details of the subject so much as a feel for the questions that economists ask, the answers that they give, and the structure of microeconomic theory. For reasons that I shall return to in Part III, I spend more time than would be the case in an undergraduate course on microeconomic theory on the topic of welfare economics and how economists have sought to analyze issues of distributional equity.

The great cost of my method of trying to equip all the students with a common grounding in microeconomics is that I use up a significant fraction of the semester before I even get to the core material of the economic analysis of law. Being an inveterate proponent of cost-benefit analysis, I do so on the ground that making certain everyone in the class has the same economic toolkit pays substantial dividends once we get to the law and economics material. I do not have to interrupt the flow of explaining, for example, contract law and the agency problem with a

10. A famous recent example of an innovation that has not, apparently, entrenched itself in the legal academy is critical legal studies. *See* Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 525–28 (2000). For a general discussion of innovations in the legal academy, see Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251 (2001). Let me not be too triumphal about law and economics. It has so far been a singular success, but who knows what the future holds?

short course on game theory; nor do I have to stop to explain what attitudes towards risk are and how insurance markets deal with adverse selection and moral hazard.

A second method of teaching law students enough economics to do law and economics is simply to plunge into the material—beginning, for instance, with the Coase Theorem—on the theory that the best way to learn economics is to do it. Slowly, through the repeated interaction with the examples and the back and forth of questions and answers, the students will get the drift of what the field is all about. The potentially great cost of this method is that it may scare many of the students out of their wits and lead them to drop the course. Arguably, the group most likely to be frightened by the "cold plunge" method is the group most likely to get the most from seeing the course through to its conclusion.

A third method, intermediate between the two already mentioned, is to take a shorter period at the beginning of the semester to teach economics, but to confine one's instruction to relatively simple propositions—such as that "people respond to incentives."[11] One could plausibly claim that this proposition, duly elaborated, is really all that one truly needs to master in order to understand law and economics.[12] Indeed, in the introductory chapter of our text, Bob Cooter and I identify the central premise of law and economics to be the idea that legal rules create incentives for behavior and that one may use the simplest notions of microeconomics to explain and predict how decisionmakers are likely to respond to the incentives of legal rules.[13] If that is, in fact, the core of law and economics, then one might argue that the technical material of economics is not necessary to do law and economics. Ultimately, I do not believe that. I think that the additional tools, some of which I have already mentioned and some others—graphical analysis, game theory, discounting to present value, performing and evaluating empirical work, and so forth—are tools that a well-educated law student ought to master. They are, I believe, essential to both scholars and practitioners in the analysis of a wide range of legal topics.

However one decides to approach this first problem (that of equipping

11. *See* STEVEN E. LANDSBURG, THE ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE 3 (1993).

12. "The main contribution of law and economics" is to take seriously the proposition that people respond to incentives. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1054 (2000).

13. *See* COOTER & ULEN, *supra* note 1, at 3.

law students with enough economics to understand the material), there are more and equally serious problems to come. Another formidable impediment to teaching the material is that the average law student typically has a great deal of skepticism about the worth of law and economics. He or she seems to approach a course in the subject as a necessary evil, akin to having root canal work done. Not knowing what law and economics is about is marginally worse than finding out, just as enduring the poking and drilling of the dentist is only slightly less painful than the malady that has occasioned the visit. I am referring here both to the daunting technical nature of law and economics and to the allegedly conservative political nature of law and economics. I have already commented on the technical nature. Here, let me turn to the seemingly off-putting political nature of law and economics.

I confess to being mystified as to why or how law students frequently come to the study of law and economics forewarned that "here be dragons." My sense—it is no more systematic than that—is that students have been signaled (by reading, word of mouth, other professors, older students, and observation) that there is a high correlation between one's comfort level with law and economics and one's comfort level with the policies and personalities of the conservative wing of the Republican Party. In my view and experience, that correlation is spurious.[14] But this is, nonetheless, a widespread delusion. What I try to tell the students early in my introductory law and economics course is that, as everyone active in the field knows and as any skeptic could discover by attending any scholarly meeting—such as the annual meetings of the American Law and Economics Association, the Canadian Law and Economics Association, or the European Association for Law and Economics—is that those in the field espouse a very broad range of political ideologies. That would be evident if it were easy to determine each scholar's

14. I should also say that, for someone who has spent a great deal of his professional time in the rest of the university (that is, outside a law school), the ideological—more accurately, the *seemingly* ideological—nature of much law school faculty disputes is breathtakingly large. To put the matter baldly, I cannot recall in the past quarter century a hiring or promotion decision in any of the nonlaw academic units with which I have been affiliated at the University of Illinois in which the candidate's political ideology has played a significant part in the faculty deliberations regarding hiring. By contrast, I can hardly remember a hiring or promotion decision in the College of Law in which political ideology did *not* play a significant, if unarticulated, part.

Much of this is, however, shadow boxing in two senses: First, as I have tried to indicate, the supposed correlation between political ideology and law and economics (and other areas of specialization) is, I believe, spurious. Second, the true lines of dispute on law school faculties may have to do with something other than areas of specialization or political ideology, but those may be the convenient labels under which to group the disputants and their differences. I think, for instance, that there is an important difference of opinion about the relative weight to give to scholarship and professional education as principal goals of the law school.

political proclivities.[15] But it is not. Most of the time one does not know or care what the political ideology of the scholar is; it is simply irrelevant to the determination of the worth of his scholarship. What unites those in law and economics is not political beliefs but rather the belief that economics is a highly useful (though not necessarily dispositive) method of examining a wide range of legal topics.[16]

Yet another predictable problem in teaching a separate course in law and economics is that the field has grown so fertile that there simply is not enough time to cover all the topics that one ought to cover in a one semester survey course. I find, for example, that in my introductory course to law and economics I cannot easily get through an introduction to microeconomic theory, the economics of property, the economics of contracts, the economics of torts, the economics of the legal profession and the decision to litigate or to settle, and the economics of criminal law and punishment. By the end of the semester, I am going through material so quickly that I often take no more than one day to present Professor Becker's famous economic model of the decision to commit a crime and the criminal justice system implications of that model.[17] I do not have time to deal with the burgeoning empirical literature in law and economics (never mind an introduction to quantitative techniques such as statistics and regression analysis),[18] with the remarkably interesting and promising literature on the relationship between law and social

15. At a recent meeting of the Midwest Law and Economics Association, Professor James Lindgren of the Northwestern University School of Law, as part of a larger research project, administered a portion of the General Social Survey of the National Opinion Research Center to the participants in the conference—all of them law professors and law and economics adherents—in order to determine their political beliefs relative to those of the population as a whole. As will surprise no one, there was much protest by the law professors about the wording of the questions. Each participant did his or her questionnaire independently and anonymously. The results of the same instrument administered to the population as a whole reveals an average liberal-conservative score of about 45%, with 0 being extremely conservative and 100 being extremely liberal. The average for our group was 73%, with only one of the group apparently qualifying as very conservative.

16. Related to this misperception of the ideological core of law and economics is apparently the view, I am told by my students, that economists are hostile to consideration of the equitable distribution of wealth and income. That too is a fanciful notion. But it is one that is important enough to warrant separate discussion, as we shall see in Part III.

17. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170, 172 (1968); *see also* COOTER & ULEN, *supra* note 1, at 3–5, 453–54.

18. *See generally* Symposium, *Empirical and Experimental Methods in Law*, 2002 U. ILL. L. REV. 791.

norms,[19] or with any of the literature in the economics of public law issues such as corporation law,[20] securities regulation, bankruptcy,[21] environmental regulation, health and safety regulation and how regulation and private causes of action interact, and so on.

This brings me directly to the first point that I noted above: namely, that at the same time that law and economics has become an established part of the law school curriculum and of law professors' scholarship and that the range of law and economics scholarship has been expanding, the demand for a separate course in the topic may be waning. Precisely because law and economics has become so familiar in (and perhaps central to) the legal academy, nearly every law school course contains an economic treatment, however cursory, of that course's content. And in some instances, there is no treatment other than the economic one.

The questions are whether this is a good thing and what it might mean for further scholarly innovations in the legal curriculum. One cause for concern is that the law and economics that students appear to be picking up in their core courses is not particularly good. On the basis of what I have observed, the second- and third-year students who take my stand-alone law and economics course claim to know the Coase Theorem and to understand the Calabresi-Melamed analysis of property rules *versus* liability rules. But their knowledge and understanding are either imperfect or wrong. For instance, my students often claim to have been told that the Coase theorem demonstrates the irrelevancy of law. Not at all. Often, the theorem demonstrates the *centrality* of law.[22]

To the extent that this is a common occurrence, it cuts against the

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19. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991) (extending the findings of the importance of social norms over law in a wider variety of examples); ERIC A. POSNER, LAW AND SOCIAL NORMS 2–4 (2000) (stressing how costly compliance with social norms signals a low discount rate and, therefore, one's suitability as a partner for cooperation); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672–74 (1986) (showing that compliance with a prevailing social norm of "neighborliness," not compliance with the law, motivated both cattle ranchers and those whose property was damaged by wandering cattle); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339–40 (1997) (showing how economic factors explain the private origins, spread, and evolution of social norms). *See generally* Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625 (2001) (reviewing ERIC A. POSNER, LAW AND SOCIAL NORMS (2000)).

20. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–41 (2001); *see also* Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1251–53 (2002).

21. See the articles collected in BANKRUPTCY ANTHOLOGY (Charles J. Tabb ed., 2002).

22. The theorem holds that bargaining will lead to efficient resource allocation, regardless of law, *when transaction costs are zero or very low*. *See* COOTER & ULEN, *supra* note 1, at 81–82. It follows that when transactions costs are positive, bargaining might not succeed and, therefore, the law might improve resource allocation's efficiency. *Id*.

fading away of the stand-alone law and economics course and its replacement by incorporation of economic material into the core doctrinal courses. But this may not be a common occurrence, or even if it is, it may be only a transitional matter. For instance, the miscommunication about economic concepts may be due to the fact that doctrinal professors are not yet familiar enough with the material to work it into their courses accurately or comfortably. Presumably, they will become more familiar and comfortable as time goes by.

To be fair, one should note that when the economic concepts are conveyed to a doctrinal class in a full and accurate manner, the effects are laudable. I have already mentioned a prominent example of this in contract law, the concept of efficient breach of contract.[23] Although Professor Robert Birmingham had introduced this notion in the late 1960s,[24] its usefulness—indeed, its centrality—in the analysis of contract law was not evident till the mid-1980s. Now, it is not uncommon to have a doctrinal course on contract law organized around the concept of efficient breach.[25] There are other examples of concepts from law and economics that have migrated from stand-alone courses to importance in doctrinal analysis, such examples as "least-cost avoider" and "market failure." When an economic concept has made this transition into the core of a doctrinal course, it probably, although not certainly, has been convincingly understood by those in the law and is felt to be important enough to warrant treatment in an already crowded set of materials.[26]

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23. *See id.* at 215.

24. Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 292 (1970).

25. There have been, of course, criticisms of the concept of efficient breach. *See* Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 2 (1989). The idea has withstood these criticisms, as it has been recognized that the notion did not license a cavalier treatment of contractual promises, but rather provided a crisp organizing concept for the pragmatic view that not all enforceable promises ought to be performed. *See* COOTER & ULEN, *supra* note 1, at 215–21.

26. I stop short of contending that the process by which economic concepts become incorporated into doctrinal learning inevitably strips away inaccurate understandings of the underlying economics. One can imagine that process doing much of the stripping, but not all. There are still examples of the inaccurate or inappropriate incorporation. One such is the least-cost avoider idea in tort law, the notion that to promote efficient precaution among future victims and injurers, the court should assign liability to whichever party could have prevented or insured against the accident at lower cost. *See, e.g.*, POSNER, *supra* note 7. The reason that this notion is of limited practical utility is that in many instances tort involves parties who had no opportunity to identify one another before the accident and therefore could not compare their precautionary costs beforehand, as the rule seems to suggest that parties should do. *See* COOTER &

These thoughts suggest at least two further queries. First, what is the limit on extrinsic material in the doctrinal courses? Some might hope that the doctrine shrinks to a smaller and smaller nub of the core courses, to be replaced by more and more economics, psychology, philosophy, sociology, and so on. But assuming, correctly I believe, that this will not and should not happen, one must recognize that the central task of the core law school curriculum for the foreseeable future is to train lawyers, and that means teaching them doctrine and how to use it. That being the case, there is a limit to how much of the burgeoning law and economics (and other extrinsic) literature that can be shoehorned into the first-year and other core classes and still do students the service of teaching them the doctrinal material. In fact, we may already be close to that limit.

Second, in light of all these concerns, what will become of the current stand-alone course in law and economics? It will survive in those schools that determine to put severe limits on the amount of nondoctrinal matter in their core courses. In those schools where the law and economics content of the core continues to push out doctrine, the stand-alone law and economics course may become a seminar in advanced topics or a two course sequence for specialists. There is a cost—perhaps a high cost—to either alternative. Specifically, the remarkably rich body of independent literature that law and economics scholars are developing will not find a ready audience among law students.[27] If the core courses teach enough law and economics, then students will probably count themselves satisfied with the taste they have had and not pursue an advanced course in which the richer literature might appear.[28] This would be a shame, but it may be an unavoidable shame, given the rich array of interesting legal courses and the limited time in which to take

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ULEN, *supra* note 1, at 261.

27. Richard McAdams and I are writing a book that will introduce new law students and new law school faculty to important extra-legal concepts. We are including concepts from economics, philosophy, game theory, and the like. Our hope is that the book will equip first-year law students and new faculty with the material that they need to appreciate the new scholarly literature in the law.

28. Every law student might learn about the Calabresi and Melamed analysis of property rules *versus* liability rules, but only those who take an advanced course will learn about the interesting deeper analyses that have been done with respect to the choice of remedies. *See, e.g.*, Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 715, 715–23 (1996) (using systematic economic analysis to show that liability rules are superior to property rules in protecting individuals from harmful externalities); Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 602–07 (2001) (analyzing how entitlement allocation affects parties' ex ante actions and investment regarding externalities); Ian Ayres & Paul M. Goldbart, *Correlated Values in the Theory of Property and Liability Rules*, 32 J. LEGAL STUD. 121, 121–29 (2003) (rejecting the correlated-value claim that liability rules cannot harness private information when disputing parties' valuations are correlated).

them. An alternative is that the rich independent law and economics literature (and other literatures) will continue to find a way into the core courses. But I have suggested that there are limits, perhaps already reached, for this to continue.[29] In the next part of this Article, I suggest what some of that rich literature is and indicate how difficult it will be to incorporate that literature into the economic treatment of core legal topics.

III. WHAT TO ADD?

I said before that law and economics is developing a large, growing, and important independent scholarly literature. There are two broad senses in which I mean to identify this literature. The first involves what I would roughly call traditional law and economics scholarship. This literature is characterized by the use of traditional microeconomic models—rational choice theory and game theory, for example—to investigate a broadening range of legal issues. This literature has grown and developed due to two main factors. First, scholars have developed logical extensions of the existing law and economics literature, such as the increasing amount of empirical work that seeks to confront some of the now standard law and economics results with new data sets to see if the theoretical conjectures and hypotheses survive that confrontation.[30]

29. Arguably, the most important concepts have already been incorporated. In the future, only equally important new insights will find their way into the core course materials.

30. For example, Ward Farnsworth has surveyed many recent cases in which courts have awarded injunctive relief to the plaintiff in order to see whether the hypotheses of Calabresi and Melamed are borne out. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment: A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 381–91 (1999). Calabresi and Melamed hypothesized that courts could efficiently protect legal entitlements in situations of very low transaction costs by awarding the entitlement holder some form of equitable relief, which they call "property rules." In situations of high transaction costs, courts could efficiently protect legal entitlements by serving as a hypothetical market-maker and requiring the defendant-injurer to pay the entitlement holder a price that compensated him or her, which they called "liability rules." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–93 (1972). One implication of the Calabresi & Melamed hypothesis is that if courts award equitable relief in situations of low transaction costs, then in at least some instances there will be postinjunction bargaining between the parties, resulting in the entitlement holder's waiving his or her right to be free from further invasion upon payment of an adequate sum by the defendant-injurer. Farnsworth found *no* instances of postinjunction bargaining.

The economic theory of tort liability hypothesizes, among other things, that potential

Also, scholars have used the traditional methods to look at new topics in the law, such as comparative law issues or the relationship between social norms and law.[31]

The second sense is literature that is critical of the core assumptions or settled conclusions of law and economics and seeks to refine the assumptions or to question the conclusions. I want to be careful to distinguish this literature from literature that is simply skeptical of the entire law and economics enterprise. I would suggest that Professors Cass Sunstein, Jeff Harrison, and Owen Jones are examples of those who are writing critically about some of the assumptions or conclusions of law and economics, but are doing so from within the circle of those who find the basic premise of law and economics to be useful in looking at legal questions.

In the remainder of this Part, I want to focus on the burgeoning literature that is critical but respectful of law and economics—that of my second sense above—and speculate on how it might work its way into the law school curriculum. In the interest of time, I will focus on only two related fields that are vying for space in the law school and law and economics curricula: socioeconomics and behavioral science. But there are other innovations that fall within the same general spirit and to which the same general comments I shall make about socioeconomics and behavioral science would apply.[32]

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injurers and victims will take precautionary action so as to avoid liability. The late Professor Gary T. Schwartz surveyed a wide number of studies of industries and practices and found modest support for the proposition that tort law deters unreasonably injurious behavior. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 390–430 (1994).

31. For an example of the economic analysis of comparative corporate law issues, see Hansmann & Kraakman, *supra* note 20, at 455–68 (arguing that there no longer are meaningful distinctions among corporate law regimes in the world; rather, all regimes are moving towards the model of shareholder wealth maximization). On the issues of the relationship between social norms and law, see sources cited *supra* note 19.

32. Of these other innovations, the one that strikes me as raising some of the most interesting issues is the evolutionary analysis of law. For examples of that scholarship, see generally Owen D. Jones, *Evolutionary Analysis in Law: Some Objections Considered*, 67 BROOK. L. REV. 207 (2001) (responding to theoretical criticism and arguing that behavior biology can inform legal theory as have the fields of psychology and economics); Owen D. Jones, *Law and the Biology of Rape: Reflections on Transitions*, 11 HASTINGS WOMEN'S L.J. 151 (2000) (discussing how behavioral biological principles can be integrated with other life science and social science approaches in the study of rape); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001) (arguing that advances in behavioral biology have overtaken existing concepts of bounded rationality, allowing for better modeling of human irrational behavior for legal theorizing).

A. Socioeconomics

While there is a vigorous and growing socioeconomics section of the American Association of Law Schools, the boundaries of that field are not clear to outsiders. It is even fair to say that insiders are not sure what unites them. As a result, the field covers a great deal of interesting material, but not yet in a coherent manner that makes its learning evident to outsiders. If there are unifying themes among the membership, these might be a skepticism about rational choice-based law and economics and a sense that traditional law and economics pays too little attention to matters of distributive equity.

My saying that there is no core to socioeconomics is not meant to be a criticism so much as a statement about the early stage in which the field finds itself. Like other academic innovations, it will not be clear for some time whether this particular innovation will survive and prosper. Recall I mentioned earlier that when law and economics began in the late 1970s and early 1980s, it had the great good fortune to have Richard Posner pull it all together in a text that made the subject matter of the new field intelligible to outsiders. This has not yet happened in socioeconomics (nor, as we shall see, in behavioral science or in the evolutionary analysis of law), but it might.[33] Indeed, I would think that it must happen in order for that field to prosper. There have already been several very interesting attempts to put some socioeconomic literature into law and economics,[34] and there will no doubt be more.

How, if at all, will this literature come into the law school curriculum? One possibility is that some of the texts, such as those of Professor Dallas and Professor Harrison, will bring socioeconomic literature within the received law and economic canon. There will be some stand-alone

33. In fact, it is happening. Professor Lynne Dallas of the University of San Diego School of Law has a comprehensive and intriguing socioeconomics text forthcoming. LYNNE DALLAS, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (forthcoming 2004).

34. Jeffrey L. Harrison, *Teaching Contracts from a Socioeconomics Perspective*, 44 ST. LOUIS U. L.J. 1233, 1236–41 (2000) (showing that preferences are not exogenous, as rational choice theory assumes, but frequently induced by seller advertising); *see also* JEFFREY L. HARRISON, LAW AND ECONOMICS: CASES, MATERIALS, AND BEHAVIORAL PERSPECTIVES (2002); ERICA BEECHER-MONAS, CHALLENGING COASE: SOCIOECONOMIC EXPLANATIONS IN THE FIRST-YEAR CONTRACTS COURSE (Fla. State Univ. Coll. of Law, Public Law and Legal Theory Working Paper No. 51, 2002) (showing how some of the law and economic analysis of contract doctrine needs to be amended in light of behavioral economics and evolutionary game theory), *available at* http://ssrn.com/abstract_id=306565.

courses in law and economics that will adopt that approach, while others will opt for the nonsocioeconomic treatments available. Some stand-alone courses may try to acknowledge the existence of the socioeconomic literature by assigning supplemental reading in that field. But that will strain the already overfull stand-alone curriculum.

With respect to the core law school courses that now include some law and economics, I think that socioeconomics will have a difficult but not impossible time breaking into those courses. As I mentioned above, the core courses are already filled with doctrine and a little law and economics. I doubt that there will be room for much more, from whatever quarter it might come. I suspect that if socioeconomics can reduce its learning to a clear set of precepts—akin to the central premise of law and economics noted above—and pithy examples, then there may be room for socioeconomics in the doctrinal courses. There is also the strong possibility that the socioeconomic focus on matters of equitable distribution and fairness will find a deeper resonance among doctrinal scholars than has the focus on efficiency of traditional law and economics. If that is the case, then it may well be that socioeconomics, once its core learning is settled, will have an even larger impact on the doctrinal courses than that had by traditional law and economics.

B. Behavioral Law and Economics

There has been a great deal of interest in an internal critique of law and economics that uses the insights of cognitive and social psychology to question rational choice theory and its role in legal analysis.[35] This new field is called either law and behavioral science or behavioral law and economics.[36] The field is in the same tenuous state as socioeconomics in the sense that there is not yet a textual treatment of the field. That has begun to change, and more changes are on the way.[37]

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35. I refer to this as an internal critique because many of those who are participating are traditional law and economics scholars.

36. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–75 (1998) (outlining a "systematic framework" to apply behavioral approaches to the economic analysis of law); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1057–59 (2000) (arguing that law and economics can be "reinvigorated" by replacing its rationality assumptions with "a more nuanced understanding of human behavior" found in the emerging law and behavioral science paradigm). *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000) (providing an overview of how the field of behavioral economics and cognitive psychology can be applied to the study of law).

37. Jeff Harrison's text, *see* HARRISON, *supra* note 34, already contains extensive behavioral material, as does Professor Dallas's forthcoming text, *see* DALLAS, *supra* note 33.

A remarkable thing about this literature is that much of it is being produced by law professors. This is a departure from the usual practice in the various examples of "law and . . . ." Heretofore, much of the interdisciplinary work in law has consisted of simple arbitrage—of reading literature in other fields and applying its insights to legal topics—but not in doing original research in that collateral field. But with respect to behavioral science, law professors have learned experimental techniques and have performed their own experiments to test rational choice predictions about explicitly legal behavior.[38]

Will there be room in the stand-alone law and economics class or elsewhere in the law school curriculum for the literature in behavioral sciences as applied to law? Here I think that the answer is an emphatic yes. I am certain that the stand-alone course and the use of law and economics insights in the core courses will incorporate the behavioral literature. It is simply too well-established, too powerful, and too fundamental to the legal enterprise of regulating behavior to ignore. Even if some doctrine and some other law and economics must be displaced, I think that room will be made for the behavioral sciences. This displacement will occur, one hopes, to the extent that it is superior scholarship to the rational choice-based law and economics scholarship. But it must be said that an additional reason for its acceptance is the widespread skepticism among doctrinal scholars about the value of rational choice in the analysis of legal matters.

C. Equitable Distribution of Wealth and Income

I mentioned above that many students come to the study of law and economics with a belief that their generous impulses will get short shrift from economics. There is more. Many noneconomists apparently believe that economists do not like to discuss equitable issues or are hostile to the study of income and wealth distribution.[39] That is a pernicious bit of

38. *See, e.g.*, Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 633–47 (1998) (describing the results of the author's controlled experiments to test the preference exogeneity assumption in the context of contract default rules); David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1149–60 (2000) (describing the results of the authors' experiment using mock juries to test relations group deliberations and individual deliberations on civil damage awards). It is worth noting that one of the winners of the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel in the fall of 2002 was Daniel Kahneman, a psychologist working in the behavioral sciences.

39. Twenty years ago, my law school colleagues used to ask me, "Why are you

fiction. I do not expect my assertions on the matter to be dispositive, but I will say that there has been much remarkable scholarship among economists about matters having to do with the distribution of income and wealth.[40] I find this skepticism about economic interest in distribution to be so widespread among noneconomist law students that I make it a point in my stand-alone law and economics course to review much of that literature as part of my two-week introduction to microeconomic theory. Here, let me refer to three important strands of the recent literature by economists or law and economics scholars on distributional issues simply to give a feel for the ongoing interest the topic and its importance.

First, in a series of articles[41] and now in an important book,[42] Louis Kaplow and Steve Shavell have been arguing that it is more efficient to use the tax-and-transfer system than common law rules to redistribute income. This is an important claim that, in fact, has been and deserves to be taken seriously.[43] And the claims of *Fairness Versus Welfare* are so extraordinarily far-reaching that the book has been and will continue to be reviewed extensively.[44] My point is that this is not ideological advocacy on the part of Kaplow and Shavell; it is serious and important scholarship.

Second, in a forthcoming review of *Fairness Versus Welfare*, Professor Dan Farber contends that modern microeconomics has provided some vital insights into the topic of equity by, for example, developing game-theoretic notions of how a cooperative surplus ought to be divided—for example, the Nash bargaining equilibrium and fair-division games.[45]

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economists in favor of racial discrimination?" Happily, I never hear this sort of nonsense any more.

40. The remarkable field of social choice or collective choice, for work in which both Kenneth Arrow and Amartya Sen have won Nobel Prizes, is only one example.

41. Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

42. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

43. *See* Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1031–41 (2001) (evaluating Kaplow and Shavell's analysis of the redistribution efficiency of liability rules); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 800–20 (2000) (adapting Kaplow and Shavell's economic analysis to argue that the ability to redistribute by income tax does not make it appropriate to ignore redistributive goals when evaluating legal rules).

44. *See generally* David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351 (2002) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002)); Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 1995–2010 (2002) (book review).

45. Dan Farber, *Kaplow & Shavell: Fairness Versus Welfare*, 101 MICH. L. REV. 1791, 1813–20 (2003); *see also* STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION:

Third, there is a fascinating new economic literature on the effect that inequitable income and wealth distributions have on a nation's growth and political health. At the risk of doing an injustice to this rich empirical literature, I can summarize some of the conclusions as follows: (1) societies with extreme inequalities of income and wealth distribution do not grow as quickly as those with more equitable distributions,[46] and (2) those societies with inequitable income and wealth distributions run a grave risk of the very wealthy investing significantly in perverting the governance and judicial institutions of the society to favor their maintaining or increasing their wealth.[47]

Will this literature be of interest to stand-alone law and economics classes and to the core law school curriculum? Certainly so. Lawyers, law professors, and law students are deeply interested in matters of fairness, justice, and equity, and all three of these examples of recent economic literature are bound to find their ways into the legal curriculum and into legal scholarship.

D. Other Topics

There are other topics that are seeking to crowd into the law and economics or core law school curriculum. For example, there is an increasing empirical and experimental literature on legal topics.[48] That

FROM CAKE-CUTTING TO DISPUTE RESOLUTION 1–5 (1996) (surveying the application of fair-division procedures using game theory to practical problems of resource allocation).

46. *See* PHILIPPE AGHION & JEFFREY G. WILLIAMSON, GROWTH, INEQUALITY, AND GLOBALIZATION 1–3 (1998); GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 1–4 (2001); Alberto Alesina & Dani Rodrik, *Distributive Politics and Economic Growth*, 109 Q.J. ECON. 465, 484–85 (1994); Torsten Persson & Guido Tabellini, *Is Inequality Harmful for Growth?*, 84 AM. ECON. REV. 600, 617–18 (1994). *See generally* Raghuram G. Rajan & Luigi Zingales, *The Tyranny of Inequality*, 76 J. PUB. ECON. 521 (2000).

47. *See, e.g.*, KEVIN PHILLIPS, WEALTH AND DEMOCRACY i–xv (2002); EDWARD L. GLAESER ET AL., THE INJUSTICE OF INEQUALITY 4–7 (Harv. Inst. Econ. Res., Discussion Paper No. 1967, 2002), *available at* http://post.economics.harvard.edu/hier/2002papers/HIER1967.pdf; Paul Krugman, *For Richer*, N.Y. TIMES MAG., Oct. 20, 2002, at 62.

48. By "empirical" legal research, I mean formal attempts to test the believability of propositions about the law by confronting them with data. *See* William M. Landes, *The Empirical Side of Law and Economics*, 70 U. CHI. L. REV. 167, 169–80 (2003) (showing the relative infrequency of empirical law and economics scholarship when compared to empirical economics scholarship and offering an economic explanation for why law and economics scholars perform less empirical work than do economists). *See generally* COOTER & ULEN, *supra* note 1; Ellickson, *supra* note 10; Symposium, *supra* note 18. An indication of the rising importance of empirical work in legal scholarship is the founding of the *Journal of Empirical Legal Studies* by Blackwell Publishers. The

literature is not important only to law and economics; it is extremely important to doctrinal and other approaches to the law. To cite but one example, Douglas Laycock's empirical study of the use of equitable remedies in U.S. courts indicates that, far from being used only in instances in which compensatory money damages would be inadequate, equitable remedies are available virtually whenever the plaintiff asks for them.[49] Theoretically, equity is invoked only in instances of irreparable injury, but it turns out that plaintiffs can always demonstrate to the court's satisfaction that their injuries are irreparable.

Of course, if we expect students to be able to read empirical work or even to perform it, then we will have to carve out some time in an already crowded curriculum for courses that teach them quantitative methods. I am not proposing to teach only statistics and regression analysis, but also experimental design, game theory, a little calculus, and more. And I think that it is obvious that desirable though that knowledge may be to a legal scholar and even to a practitioner, there simply is not time in a standard three-year legal education to learn it adequately.

IV. CONCLUSION

Law and economics is becoming a crowded house. In addition to the core learning of the primary texts, there is a growing body of collateral scholarship that demands to be incorporated into the settled learning of the field. I have been skeptical in this Article of the ability of the law school curriculum to accommodate the expansive literature in law and economics. Some of that literature—for example, socioeconomics and behavioral science—has not yet resolved itself into crisp, clear material that can summarize the literature in that area; until it does so, I predict that it will not find that room will be made for it, either in the upper-level curriculum or in the core law courses. But there are signs that these extensions of law and economics are becoming richer, clearer, and succinct enough to make a strong case for inclusion in the core doctrinal courses. The ultimate test for inclusion will be the significance of the literature to the legal issues at hand. And on that test there will always be room for inclusion, no matter how crowded the curriculum may become.

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49. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE vii–x (1991).