

The Uses of History in Law and Economics

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During the last quarter of the twentieth century, the humanities and social sciences have turned toward history, something that culminated in the 1990s, and this phenomenon was evident in law as well. However, until recently, law and economics, the most influential post-World War II jurisprudential movement, was a-historical in its methodology and research agenda. The first objective of this article is to call attention to this neglected characteristic of law and economics and to explain its causes by analyzing its intellectual origins, its methodological causes, and the nature of its interaction with other sub-fields of law and of economics. The second objective of the article is to identify a change-in-the-making and its characteristics. Law and economics scholars have turned to history more often and for new purposes in recent years. The article identifies the set of factors that brought about this turn to history. These factors include: a growing willingness to conduct empirical research; the integration of public choice analysis (which often led to the study of past legislation) into mainstream law and economics; preliminary comparative law and economics studies; a growing interaction between law and economics and new institutional

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economics; and the importation of the concept of path dependency and of greater awareness of past burdens from other quarters of economic theory. Finally, the article examines the concrete ways in which these developments are being realized, by pointing out the various uses of history evident in specific law and economics studies conducted in recent years. It suggests a classification of this growing literature into six distinct uses of history, four of them emerging only in recent years. The general aim of this article is to enhance awareness among law and economics scholars of the actual and potential uses of history. The article further seeks to connect law-and-economics historical studies to other relevant historical works so that the law and economics inquiry will not be conducted in a disciplinary vacuum. It thus calls to the attention of legal historians and economic historians the new literature published in the field of law and economics. Finally it is also directed at scholars interested in the intellectual history of jurisprudence and in the methodological turn to history in the social sciences.

INTRODUCTION

Many scholars have observed that during the last quarter of the twentieth century, the humanities and social sciences have turned toward history, something that culminated in the 1990s.¹ This was manifested in the rise of schools and trends such as historical sociology, ethno-history in anthropology, new institutionalism in political science and economics, and new historicism in literary theory. This phenomenon was evident in law as well, with the advance of new types of legal history writing associated first with the Wisconsin School of Legal History and then with Critical Legal Studies. But law and economics, the most successful school of jurisprudence of the second half of the twentieth century² and whose influence in law schools is still on the rise, seems to stand in contradiction to this general shift toward history, at least insofar as legal scholarship is concerned.

The aim of this article is to enhance awareness among law and economics scholars of the actual and potential uses of history. When dealing with past

1 Terrence J. McDonald, *The Historic Turn in the Human Sciences* 1 (1996).

2 Neil Duxbury, *Patterns of American Jurisprudence* (1995). Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *Harv. L. Rev.* 761 (1987); William M. Landes & Richard A. Posner, *Symposium on the Trends in Legal Citations and Scholarship: Heavily Cited Articles in Law*, 71 *Chi.-Kent. L. Rev.* 825 (1996).

periods and changes over time, law and economics scholars need not begin their inquiry from square one. They can build upon modes of historical reasoning, theories, and research methods that have been developed by others. This article seeks to connect law and economics historical studies to other relevant historical works so that the law and economics inquiry will not be conducted in a vacuum. The article demonstrates the limitations of some of the uses of history by law and economics scholars and the prospects of other uses from the perspective of legal historians and economic historians. It does not seek to offer a single formula for law-and-economics historical studies or to grade various uses of law and economics in history as superior or inferior in absolute terms.

This article also seeks to call to the attention of legal historians and economic historians the new literature published in the field of law and economics, literature that may make the field relevant to their research interests for the first time. The article also targets scholars interested in the history of jurisprudence. A new trend within a major jurisprudential school is something worth documenting and monitoring. Finally, this article offers those interested in the shift toward history in general with a discussion of one remarkable variant of its manifestation.

The article proceeds according to the following structure. It first explains the reasons for the a-historical nature of law and economics, by analyzing its intellectual origins, its methodological paradigm, and the nature of its interaction with other sub-fields of law and of economics. It next calls attention to recent developments within law and economics that indicate that it, too, may join the general trend within the social sciences toward history. The article discusses the methodological origins of this new trend and the manner in which the new methodological approaches relate to the original methodological paradigm of law and economics. Finally, the article examines the concrete ways in which these developments are being realized, by pointing out the various uses of history evident in specific law and economics studies conducted in recent years.

I. THE A-HISTORICAL ORIGINS OF LAW AND ECONOMICS

A. Intellectual Origins in the Chicago School of Neo-Classical Economics

The debate over the intellectual origins of the law and economics field is still at a very preliminary stage. Some outside observers suggest a peculiar connection between the law and economics movement and either institutional economics or else legal realism, or a combination of the two in the form of

the "first great law & economics movement."³ Insiders disdainfully repudiate such intellectual origins.⁴ They point to Chicago (not Yale, Columbia, or Wisconsin), to economics (not law), and to the neo-classical (not institutional or historical) school of economics as the bedrock of the field. Thus, the official, internal history of the field begins in Chicago. The questions that then arise are, When and who? Some trace the origins back in time (or deeper into economics) to Stigler and Friedman or even as far back as Knight and Hayek. Some stress the more lawyerly group organized under the guidance of Aaron Director and Edward Levy, which developed an anti-trust — or rather anti-anti-trust — theory influenced by economic price theory.⁵ But most stress as the immediate origins, both in terms of time and substance, the contributions of two economists: Ronald Coase and Gary Becker, circa 1960.⁶ Coase, in his seminal 1960 article, reintroduced transaction costs (after doing so for the

3 Peculiar in the sense that they shared the same subjects of research but not method or political positions. See Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 Stan. L. Rev. 993 (1990); Morton Horwitz, *The Transformation of American Law 1870-1960*, at 247-68 (1992).

4 See Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J.L. & Econ. 163 (1983), for the assessment of some of the participants. As for the influence of institutional economics on law and economics, George Stigler has said, "[T]he school died as completely as any school can die in the sense that it has no viable influence." *Id.* at 170. Henry Manne referred as follows to the impact of the interaction between institutionalist Walton Hamilton and legal realism at Yale: "[B]y the time I was graduate student at Yale in fifty-three no one seemed to remember the episode." *Id.* at 173. Finally, Milton Friedman has said of the first tenured economist at the Chicago Law School, Henry Simons, that "he was opposed to almost everything that the institutionalists and legal realists stood for." *Id.* at 176.

5 See James R. Hackney, *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 Law & Hist. Rev. 275 (1997), for an interesting discussion of the origins of law and economics in terms of analytic scientific turn and antistatist political position, with particular focus on Hayek and Knight. For a discussion emphasizing the role of post World War II Chicago economists, particularly Friedman and Stigler, and the difference between their approach and that of their teacher, Knight, see Duxbury, *supra* note 2, at 330-48. For a similar view, see Nicolas Mercuro & Steven Medema, *Economics and the Law, From Posner to Post Modernism* 54-56 (1997).

6 Some refer to Guido Calabresi's 1961 *Some Thoughts on Risk Distribution and the Law of Torts* as equivalent to Coase's contribution to the foundation of law and economics. Others view Calabresi as the founder of the New Haven School of Law and Economics, as distinct from the Chicago School of Law and Economics. See Guido Calabresi, *The Cost of Accidents: A Legal Economic Analysis* 205-25 (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

first, relatively unnoticed, time twenty-three years earlier in the context of his *The Nature of the Firm*), but this time with direct reference to the relevance of legal liability rules in a world with transaction costs.⁷ Becker, after completing his doctoral dissertation in 1955 (published in 1957), extended the realm of neo-classical theory by employing it in the analysis of non-market behavior. His starting point was racial discrimination; he then proceeded to the family (until then a black box for economists), and, by the late 1960s, arrived at crime and punishment.⁸ Thus the work of Coase and Becker planted the roots of the modern incarnation of law and economics in Chicago and in the neo-classical tradition.

B. Limiting the Research Agenda to the Economic Analysis of the Law

Both Coase and Becker, the intellectual founders of law and economics, were economists by training and much more interested in the study of economics than law. Ironically, the new field of law and economics that their work launched focused mainly on the law.⁹ Both noted this a few years ago at a Chicago Law School round table on the future of law and economics. Becker noted, "I am certainly not an expert in law and economics. ... [A] relatively small fraction of my time over the years has been spent on this subject." Coase confessed, "[N]ow an economist isn't really interested in this part of Law and Economics — the use of economics to analyze the law — at least this economist isn't."¹⁰ Despite the fact that Coase and Becker

7 Ronald Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937); Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

8 Gary Becker, *The Economics of Discrimination* (1957); Gary Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).

9 Interestingly, Coase also showed some interest in history. He used nineteenth-century litigation to illustrate his theorem and studied the history of lighthouses to disprove the use of this famous example in favor of government supply of supposedly public goods. See Ronald Coase, *The Problem of Social Costs*, 3 *J.L. & Econ.* 1 (1960); Ronald Coase, *The Lighthouse in History*, 17 *J.L. & Econ.* 357 (1974). But this interest, which stemmed from Coase's faith in Empiricism, did not affect the new field of law and economics. The prime manifestation of this interest is to be found in his somewhat later work *The Lighthouse in Economics*, where he refuted the well-established claim that lighthouses could not be owned by private entrepreneurs but only by the government because of the public-good nature of their service. Reviewing the history British lighthouses, Coase asserted that many were privately owned and allowed by the government to levy tolls on ships at port.

10 See Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 *U. Chi. L. Rev.* 1129, 1134, 1138 (1997).

laid the theoretical foundations of law and economics and occupy a mythical position in its official history, they were not awarded the Nobel Prize for their contribution to this field, but, rather, for their work in economics in general. Nor did they operate in the field of law and economics as later defined by Posner, and they failed to shift the field's research agenda to studying the effects of the law on the economy or the economy on the law.

It was Richard Posner who, in fact, set and shaped the boundaries of the Chicago School of Law and Economics, limiting them to the economic analysis of the law. This school of thought marginalized and may even have prevented other potential connections between law and economics. The boundaries set by Posner and his colleagues held strong for at least three decades. A discussion of the reasons for this is beyond the scope of this article. I believe that it is related to Posner's personal interest and eminent position in the field. Limiting the 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. Moreover, law and economics was institutionalized as a discipline in law schools rather than in economics departments. By analyzing legal rules and providing prescriptions for legal reforms, law and economics scholars could participate in the major areas of discourse within legal academia. They could even demonstrate the power of their coherent and rigorous theory over the confused intuitions of other legal scholars. This further expanded their sphere of activity within the law schools. Only in the last decade has research transgressing these boundaries begun to appear.

In sum, 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. The narrow scope of the newly created field partly explains its a-historical nature and its lack of interaction with economic and legal history.

In addition to developing a normatively-based policy analysis, Posner and colleagues developed a positive branch of law and economics. The two were unified in the framework of the theory of the common law's tendency toward efficiency. This theory deals with the effects of law on economic growth or the effects of economic growth on the law. It also can be understood as encompassing both the positive and normative research agendas by creating identification between them, at least insofar as the common law is

concerned. I will elaborate below on the emergence of the positive element of this theory and its effects on the interaction of law and economics with legal history. At this juncture, suffice it to say that refining and defending this general theory of the common law's tendency toward efficiency consumed a great deal of the time and energy of law and economics scholars¹¹ and impinged on their interest in positive theories. Instead, they were occupied with proposing and examining theoretical mechanisms that might explain the tendency toward efficiency in the common law. This also limited their study of the past. Even when they moved from theory and speculation to actual historical research, the research was devoted to only a single theory. This limited work destroyed the reputation of law and economics historical studies in the eyes of legal historians — quite a bad start for a movement toward history in law and economics, specifically, and for any empirical and comparative studies in general. This weak start at positive research further removed law and economics scholars from engaging in the first two research agendas, which seemed important to both Coase and Becker. The interest in these two agendas was developed outside law and economics in fields such as New Institutional Economics, Historical New Institutional Economics, and the Wisconsin School of Legal History. Only recently has law and economics expanded its agenda to include these two issues.

More specifically, Chicago law and economics scholars claimed to be interested not only in legal rules but also in how legal incentives affect individuals' behavior. However, their research did not focus on studying the behavior of individuals, and the behavior of societies and basic social structures and trends was entirely beyond the scope of their research agenda. The behavior of individuals was assumed to be affected by changes in legal rules that affected individual incentives. Law and economics aimed at changing behavior but, in fact, studied rules and their change. As its other name, economic analysis of the law, implies, law and economics mainly aspired to normatively evaluate legal rules and prescribe their modification. Only rarely, when legal rules functioned within a market setting, as in the case of anti-trust and securities regulation, did Chicago law and economics scholars inquire into the behavior of individual agents more closely. It was more often the case that the legal rules were analyzed in non-market settings and the behavior of individuals was assumed rather than studied. The point made here with respect to the initial limitation of the scope of law and economics is extremely relevant to my general argument, and I will return to it.

11 Nicholas Mercurio & Steven G. Medema, *Economics and the Law from Posner to Post-Modernism* 61-67 (1997).

C. The A-Historical Nature of Law and Economics

From its inception, Chicago law and economics involved the application of neo-classical tools, which reached a powerful phase in the 1950s and 1960s in the Chicago School of Economics. Neo-classical economics at Chicago University was remarkably a-historical. The detachment of economics from change over real time, and thus from history, began with the marginalist revolution and Marshall, continued with Keynes, and culminated in Chicago in the 1950s.¹²

For economics, the 1950s was a decade of high theory. It was one of markets, allocation, and equilibrium; of abstraction and deduction; of marginalism and incremental change; of optimization and mathematization. It was one in which the basic assumptions of neo-classical theory still held strong. This decade was a low point in economic theory in terms of interest in history and change over real time. Theory was mainly static, not dynamic. Insofar as dynamic elements played a role in economic theory, they were reflected in shifts of curves, moves from point to point along curves, or leaps from one equilibrium to the next, over a single time period. Time was not discussed in terms of months or years or decades; the flow of time was not treated differently for different historical eras. Not only was change over time neglected, but there was also a perception that the past of any given system had no bearing on its present and certainly not on its future. Since any given current regime of functions, allocations, and equilibria is not burdened by its past, it can serve as a good starting point for future predictions. An economic theoretician thus did not have to reconstruct the passage of time, as did historians — and some sociologists, anthropologists, political scientists, lawyers, literary critics, and philosophers. Imagining change was confined to the two-dimensional classroom world of blackboard curves and to figures in books. This static state of economic theory thus hindered the development of a history-conscious law and economics.

This was the economic theory applied in the late 1960s and early 1970s by Richard Posner and his colleagues at the University of Chicago Law School. By that point, law and economics had acquired all its familiar characteristics: reliance on the neo-classical assumption that individuals are rational maximizers; equating change in legal rules with change in

12 For a recent account of this process, see Graeme Donald Snooks, *The Lost Dimension: Limitations of the Timeless Economics*, in *Historical Analysis in Economics* 41 (Graeme Donald Snooks ed., 1993). For a more detailed discussion, see Ron Harris, *The Encounters of Legal History and Economic History*, 21 *Law & Hist. Rev.* 297 (2003).

relative prices; and adoption of Kaldor-Hicks efficiency ("potential Pareto efficiency," in more obscure terms) in the sense of wealth maximization as a standard of evaluation.

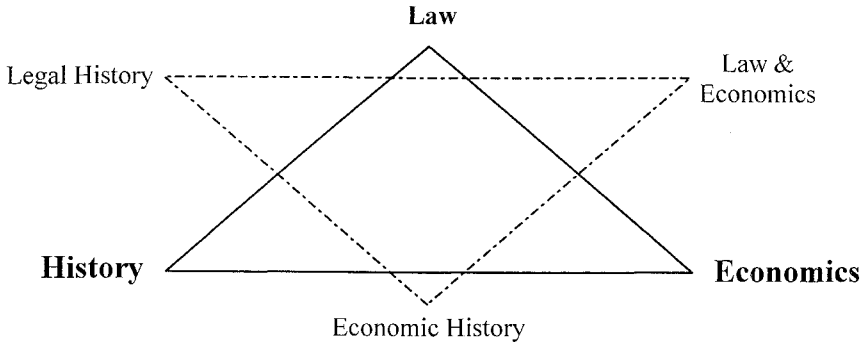
The a-historical neoclassical characteristics of law and economics dominated the field. Well into the 1980s and beyond, law and economics was still engaged in adapting price theory to non-market legal behavior as part of a wider project of the expansion of economics. It focused on the application of price theory to the specific contours of the law: judge-made law and legislation; property, contracts, and torts; liability rules; and remedies. Law and economics scholars were engaged in intense normative and policy debates with critics from rival jurisprudential and doctrinal schools. These debates revolved around the imperialistic tendencies of economics, its unrealistic assumptions (e.g., of rationality), and its ideological bias in favor of efficiency considerations at the expense of distributive considerations. As long as the debates at the normative and policy level were intense, law and economics scholars were not likely to find much time or motivation to turn to the study of history.

D. The Lack of Interaction between Economic History and Legal History

The 1960s, which witnessed the birth of modern law and economics, also saw the formation of two adjacent interdisciplinary fields. The one field, new economic history (also called cliometrics), was created on the borderline between economics and history. It employs economic theory and econometric and statistical tools to study the history of the economy. The other field, the Wisconsin School of Legal History, formed by Willard Hurst, is located on the borderline between law and history. It opened up legal history to external — that is, non-legal — historical perspectives, as well as, to a certain degree, social science methodology.

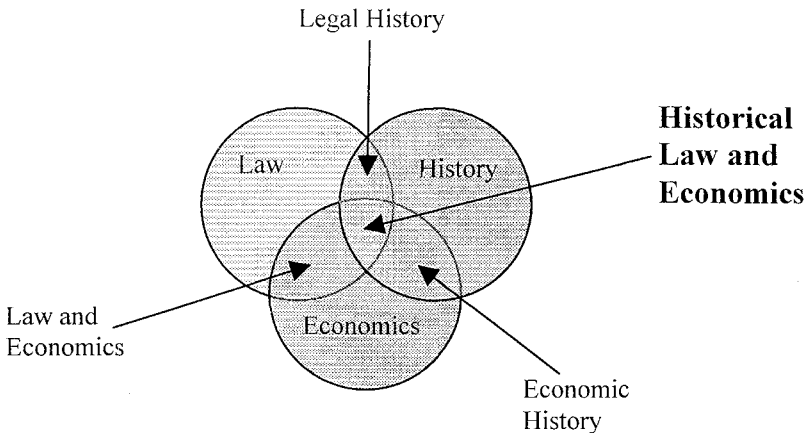
A triangular structure can be formed from the three interdisciplinary fields. This structure provides a comparative perspective when law and economics is placed beside the two other contemporary "meetings" of fields: law and history and economics and history. This facilitates addressing law and economics within its disciplinary dimensions. The encounter of the legal discipline with the economic discipline in law and economics can be examined both in its legal context (in its interaction with legal history) and its economic context (in its interaction with economic history). In fact, there are two triangles, on two levels: one created by the three interdisciplinary fields and the other created by the three original disciplines. This broad perspective is best demonstrated by the interplay within and between the two triangles:

Figure 1: Interaction of Fields — Triangles

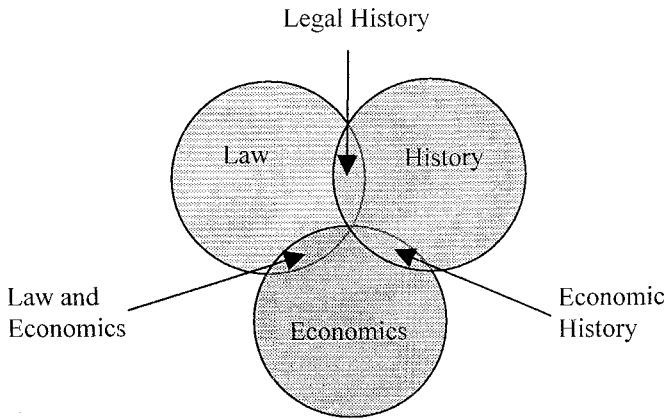


Another way to visualize the interaction is by means of a Venn diagram. Figure 2 below presents the anticipated relationship among the three interdisciplinary fields as well as among the three original disciplines. The shaded area in the center is where the interaction is anticipated to occur.

Figure 2: Venn Diagram — Interaction among Fields



Finally, Figure 3, below, presents the actual outcome. There is no overlapping or shaded area in the center, which means that no interaction developed among the three interdisciplinary fields or between any two of the three. For our purposes, this means that law and economics did not interact with either economic history or legal history.

Figure 3: Venn Diagram — No Interaction among Fields

In the first edition of *Economic Analysis of Law* (1972), what Posner termed "the economic logic of the common law" was the first theoretical argument in law and economics to draw the attention of scholars in the emerging field of the history of law. Strangely, this promising start did not lead to early interaction between law and economics and legal historians or to an early turn to history in law and economics. Posner based his thesis that common law exhibits a tendency toward efficiency on a few historical examples from nineteenth-century America, including: enterprise liability for faulty products; industrial accidents; railroad-crossing accidents; damage caused by train engine sparks; and the impossibility doctrine in contracts.¹³ He claimed that these examples, when viewed in the framework of his positive theory of common law, confirm his thesis. These examples also serve to counter arguments that common law is either irrelevant to economic growth or encourages economic growth by subsidizing big business and increasing social inequality.

Posner did not base his claims on thorough historical research, but he most decidedly challenged historians. His positive theory of the law was historical in nature. It purported to explain how law changes over time. This explanation was too deterministic for most legal historians. It subjected their micro-historical interpretations to his macro theory and, in a sense, made them secondary to it. Furthermore, he used concrete examples rooted in time and place that are central to the work of many American legal historians. In doing so, he called into dispute concrete historical studies. It

13 Richard Posner, *Economic Analysis of Law* 98-102 (1st ed. 1972).

is not surprising that several legal historians, in response to this challenge, criticized Posner for misunderstanding the history of legal doctrines and their social and economic effects. In each of the editions of *Economic Analysis of Law*, Posner's discussion of the positive theory of common law's tendency toward efficiency grew in length, increasing from the four-and-a-half pages in the first edition to six-and-a-half pages in the 1977 second edition to nine-and-a-half pages in the 1986 third edition. There was a corresponding increase in the number of references to legal historians, from one reference (Grant Gilmore) in the first edition, to two (Gilmore and Morton Horwitz) in the second edition, to six in the third edition.¹⁴ These increases in length were not the result of more historical studies conducted to test or confirm the theory. Rather, greater space was devoted to criticizing legal historians for not understanding economic theory, including the theory of the common law's tendency toward efficiency and the concept of efficiency. Legal historians became more critical of Posner, and Posner became more critical of legal historians, particularly those who viewed the law as subsidizing business, redistributing wealth, and oppressing the weak.

Posner had to answer not only to legal historians, but also to other legal scholars, even some with an economic orientation. These legal scholars questioned his thesis on a theoretical rather than empirical-historical level. What in the common law, they asked, could lead it to produce efficient rules? Some law and economics scholars tried to support Posner's claim and counter the growing criticism against it, by explaining its theoretical logic. Some suggested that judges are the agents who steer the common law toward efficiency; even if they are not aware that they maximize efficiency, they behave as if they are doing so. Justice and common sense considerations lead to efficient judgments. Other scholars saw litigants in general (losing litigants or repeat litigants) as the agents of the drive toward efficiency:¹⁵ inefficient rules will be rooted out by ongoing litigation. By the mid-1980s, the debate over the tendency of the common law toward efficiency, both on the historical and theoretical levels, had exhausted itself.

Though law and economics and the field of new economic history emerged at about the same time and used the same theoretical tools of neo-classical economics, the two did not interact. This can be explained by, among other

14 Richard Posner, *Economic Analysis of Law* 179-85 (2d ed. 1977); Richard Posner, *Economic Analysis of Law* 229-38 (3d ed. 1986) [hereinafter Posner, *Economic Analysis* (3d ed.)].

15 See, e.g., George Priest, *The Common Law Process and the Selection of Efficiency Rules*, 6 J. Legal Stud. 65 (1977); Paul Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977).

things, the fact that while early cliometricians focused on applying economic theory to markets, Posner and his colleagues applied the same theory to a non-market setting. But by the 1980s, more economists were interested in non-market settings and in institutions. This shift is generally referred to as the institutional turn in economics. As part of this "turn," a new school emerged in economics called the New Institutional Economics ("NIE"). The one branch of this school, headed by Oliver Williamson, was contemporary in orientation; the other, headed by Douglass North, was historical in bent and can be regarded also as an institutional branch within economic history. The institutional turn could have opened up an opportunity for interaction between law and economics and NIE, particularly its historical branch. Indeed, the Chicago School of Law and Economics, at least according to Posner, has an ambivalent attitude toward the Williamsonian branch of NIE.¹⁶ However, it almost totally ignores Douglass North's historical version of NIE.¹⁷ Interestingly, Williamson recently indicated that he views his own work and that of North and other institutional economic historians as belonging to the same school, the NIE, without drawing any distinction between branches or sub-schools within the school.¹⁸

Studies conducted by legal historians, Hurst and the Wisconsin School of Legal History, and later by externalist and functional legal historians placed more emphasis on the economy than on older, pre-1950s, doctrinal and internalist legal history. Nevertheless, they were not received favorably by the Chicago law and economics scholars. Richard Posner was as clear as one can get:

I once tried to read Willard Hurst's magnum opus, a massive tome on the history of the lumber industry of Wisconsin, but didn't get far. The

16 On the one hand, it deplores the divergence from the neoclassical paradigm as bearing no merit, but, on the other, presents Williamson's work as indistinguishable, except in terminology, from law and economics — indeed, as merely the other side of the same coin.

17 See Richard Posner, *The New Institutional Economics Meets Law and Economics*, 149 *J. Institutional & Theoretical Econ.* 73 (1993); Kenneth Scott, *The New Institutional Economics Meets Law and Economics*, 149 *J. Institutional & Theoretical Econ.* 92 (1993); Ronald Coase, *Coase on Posner on Coase*, 149 *J. Institutional & Theoretical Econ.* 96 (1993); Oliver E. Williamson, *Transaction Costs Economics Meets Posner's Law and Economics*, 149 *J. Institutional & Theoretical Econ.* 99 (1993); Richard Posner, *Overcoming Law* 426 (1995) [hereinafter Posner, *Overcoming Law*].

18 Williamson categorized the school based on the types of institutions in which various scholars were working. See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 *J. Econ. Lit.* 595 (2000).

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.¹⁹

Along with his dismissal of Hurst's thick contextualized historical narratives as lacking a theoretical framework, Posner rejected Morton Horwitz's legal history as offering an implausible theory. Posner made no reference to Horwitz's evidence and line of argument, nor did he examine the legal and economic history literature that might call Horwitz's thesis into doubt. Rather, he settled for simply refuting it a-historically, by referring to neo-classical theory as he applied it to the law.²⁰

E. The Marginality of Empirical and Comparative Research

Two characteristics unique to law and economics within the discipline of economics dampened its interest in history: the one, the small number of empirical studies conducted until recent years and, the second, the strong focus on the American legal system. Theory was considered more prestigious than empirical studies in both law and economics. But while mainstream economics had a long tradition of empiricism, which was motivated by natural science aspirations, backed by theoreticians, and funded by institutions, there was no such persistent tradition within the law schools.²¹ Law and economics inherited its attitude vis-à-vis empirical studies from its legal genitor.²² Although law and economics scholars increasingly are trained in both disciplines, they cannot achieve the breadth of training in each that uni-disciplinary students can and have had to compromise. In respect to economics, the tradeoff made by graduate students pursuing law and economics is in favor of theoretical tools and

19 Posner, *Overcoming Law*, *supra* note 17, at 427.

20 Posner, *Economic Analysis of Law* (3d ed.), *supra* note 14, at 233-38.

21 On the interest of legal realism in empirical studies, see John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995). On the interest of law and society scholars, see Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 *Law & Soc'y Rev.* 911 (2000).

22 Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 *U. Chi. L. Rev.* 1 (2002). Epstein and King argue that although in the broad sense, there is ample empirical research in the legal discipline, in the narrow sense (namely, that of rigorous, quantitative, and statistical research) that meets the standards of the social sciences, law produces a very small number of empirical studies.

the foregoing of extensive training in econometrics, statistics, and empirical research methods.²³ In addition, in the field of law and economics, no attempt is made to systematically gather basic data. Furthermore, the field produces fewer hypotheses that can be empirically examined, as compared to other areas of economics. Indeed, abstract normative discourse is not a good basis for empirical studies. Nor are policy recommendations, most of which are not implemented by the formal legal system and cannot otherwise be simulated in practice. The positive hypotheses that seem to have more potential for empiricism than normative, and prescriptive, law and economics are at a disadvantage in terms of the possibility of determining their empiric validity as compared to hypotheses in other areas of economics, because they are situated in non-market settings, are not easily testable quantitatively in isolation from other parameters, and suffer from the above-mentioned lack of systematic data gathering on the legal system (as compared to the economy). Until the past decade, what could be found in the literature was mainly illustration of hypotheses by examples and anecdotal verification by the formulators of the hypotheses, but no systematic attempt at falsification, in the Popperian sense, by later critical researchers.²⁴ Consequently, the marginalization of empirical research was more evident in law and economics than in other areas of economics.

The second characteristic is that unlike economics, which claims to be a universally valid science, law is a local phenomenon.²⁵ When the two disciplines came together in Chicago, the first dictated the theory and the

23 For the difficulties and complexities involved in advancing the empirical study of a single theoretical model (that of agency contracts within hierarchical firms), see W. Bentley MacLeod, *Incentives in Organizations: An Overview of Some of the Evidence and Theory*, in *Trends in Business Organization* 3 (Horst Siebert ed., 1995). Here, the author surveys the variety of types of empirical evidence that can be analyzed, including structural estimations, reduced form estimates, experimental data, case studies, non-quantitative evidence, and personal observations. The accumulation of such empirical evidence requires a well-established tradition in the field, developed measurement tools, well-trained researchers, and systematic gathering of data. Even then, the yields of the empirical literature are still equivocal and gradual.

24 Herbert Hovenkamp, *Positivism in Law & Economics*, 78 Cal. L. Rev. 815, 882-83 (1990).

25 For recent observations on the problematic state of the field of comparative law, see Basil Markesinis, *Comparative Law — A Subject in Search of an Audience*, 53 Mod. L. Rev. 1 (1990); Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 Iowa L. Rev. 1025 (1999); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 Tul. Eur. & Civ. L.F. 49 (1996); Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int'l L.J. 411 (1985).

second the locality. Ever since this revolutionary meeting of disciplines, most of the literature in the field, including that written by non-Americans, has focused on applying the universal theory to the unique, even exceptional, characteristics of the American legal system.²⁶ Much of the theory evolved on the basis of an underlying legal structure of constitutionalism and federalism. The vertical and horizontal checks and balances, separation of powers, and constitutional rights and the resulting unique structure and function of legislative, judicial, and administrative institutions were the prototypes analyzed by the newly imported theory. Non-American and comparative work is still at the nascent stage. The huge variation among localities in terms of culture, political and economic institutions, phase of modernization, economic performance, and behavior of individuals has set a major challenge for economic history and economic theory over the last few decades, which has yet to be addressed seriously by law and economics theory.

In sum, the combination of four major factors made law and economics particularly a-historical. First, the research agenda of law and economics, as shaped in Chicago, was essentially limited to economic analysis of the law. Second, law and economics adopted and applied to the law that aspect of economic theory that was most a-historical at a stage when economic theory was most a-historical in nature. Third, because it was based in law schools and on the American legal system, law and economics was less empirical and less comparative than other fields of economics were. Fourth, and as a partial consequence of the three preceding factors, law and economics has never had meaningful interaction with either legal history or economic history. Thus, at a time when some fields and schools in both law and economics were turning toward history — the 1980s and 1990s — law and economics became entrenched in its a-historical orientation. As law and economics was particularly successful during this period, its practitioners did not seem concerned with this peculiarity.

II. AN HISTORICAL TURN IN LAW AND ECONOMICS?

A. The Integration of Dynamics and Change into Economic Theory

During the 1980s and 1990s, mainstream economic theory began to exhibit more interest in change and in the past. The stage was set for the integration of history, time, and change into economic theory.

The opportunity to do so arose when the 1993 Nobel Prize was awarded

26 For a notable exception, see Ugo Mattei, *Comparative Law and Economics* (1997).

to two of the leading economic historians of the second half of the twentieth century, both dominant figures in the cliometric revolution: Robert Fogel and Douglass North. Not surprisingly, both Fogel and North stressed in the opening sentences of their Stockholm addresses the importance of history. Fogel noted that "[e]conomic history has contributed significantly to the formulation of economic theory Failure to take account of history ... has often led to a misunderstanding of current economic problems"; while in North's words, "The object of the field [of economic history] is not only to shed new light on the economic past, but also to contribute to economic theory by providing an analytical framework that will enable us to understand economic change."²⁷ The Nobel Prize provided both scholars with the opportunity to broadcast their conviction that history is relevant to economic theory at the highest levels.

The endeavors of these two Nobel laureates joined developments in other areas of economic theory. They combined with the historical and theoretical insights of Paul David and Brian Arthur, who introduced the concept of path dependency into the theory of change,²⁸ as well as with the growing awareness of the relevance of time and change that derived from evolutionary theories, the attempts to integrate learning into economic models, and, less directly, the concepts of multiple equilibria, endogenous growth models, non-linear dynamics, increasing returns, complexity, chaos theories, and other theoretical innovations.²⁹ The specifics aside, these theoretical concepts share something in common with historical observation: they all hold that though a given economic system may have moved from point *A* to point *B*, the move was not predetermined at point *A*. The fact that the system arrived at *B* does not mean that *B* was the sole equilibrium point. There could have been other equilibrium points, *C* or *D*. The explanation for the selection

27 Robert Fogel, *Economic Growth, Population Theory, and Physiology: The Bearing of Long Term Process on the Making of Economic Policy*, 84 *Am. Econ. Rev.* 369 (1994); Douglass North, *Economic Performance Through Time*, 84 *Am. Econ. Rev.* 359 (1994).

28 Paul David, *Clio and the Economics of QWERTY*, 75 *Am. Econ. Rev.* 332 (1985); Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (1994).

29 Richard Nelson, *Recent Evolutionary Theorizing about Economic Change*, 33 *J. Econ. Lit.* 48 (1995); Douglass North, *Cliometrics — 40 Years Later*, 87 *Am. Econ. Rev.* 412 (1997); Nicholas F.R. Crafts, *Exogenous or Endogenous Growth? The Industrial Revolution Reconsidered*, 55 *J. Econ. Hist.* 745 (1995); Nicholas Crafts, *The First Industrial Revolution: A Guided Tour for Growth Economics*, 86 *Am. Econ. Rev.* 197 (1996); Paul Romer, *Why, Indeed, in America? Theory, History and the Origins of Modern Economic Growth*, 86 *Am. Econ. Rev.* 202 (1996); Avner Greif, *Cliometrics After 40 Years*, 87 *Am. Econ. Rev.* 400 (1997).

of *B* as the equilibrium and the particular path from *A* to *B* can be found in factors that were present before the arrival at *A* or in idiosyncratic or systematic interventions after *A* or in the selection of one of several potential mechanisms of change. These theoretical innovations and the questions they raise place time, change, and history in a somewhat less marginal locus within the theoretical discourse of the discipline of economics.

B. The Methodological Background of the Turn to History

Though not one of the first fields within economics to apply theoretical novelties, over time, law and economics adopted extensions and modifications of the basic models of price theory to account for, among other things, transaction costs, risk sensitivity, and information asymmetry. A main new feature of research in the 1980s and early 1990s was the addition of game theory tools to the law and economics analysis. Another was the gradual opening up of law and economics to public choice analysis. More recently, interest in behavioral theories has developed. Law and economics has become more empirical and more comparative in recent years.³⁰ But these trends in themselves have not yet grown into an explicit and direct interest in history.

Contrary to these trends in economic theory and the research agenda of law and economics, some Chicago law and economics scholars still view price theory as the sole economic tool for analyzing the law. They believe that despite its imperfections, it cannot be successfully replaced by any other theoretical framework. Moreover, they argue that the use of multiple theoretical frameworks will cause incoherence and complications, which would result in less rigorous tools, more limited applicability, and less insightful conclusions.³¹ They view the future of their field as developing along three main trajectories: first, sophistication within the neo-classical price theory paradigm, by employing heavier mathematical, game theoretic, and micro tools; second, expansion into the relatively neglected areas of public law; and third, the filling in of the remaining gaps in the analysis of private law.³² This process is a self-generating one since some areas of law are developed and made more sophisticated by using more powerful and

30 For a call for change in these two respects, see Robert Cooter & Thomas Ulen, *Law and Economics* 1-8 (2d ed. 1997).

31 See Gregory Carespi, *Does the Chicago School Need to Expand its Curriculum?*, 22 *Law & Soc. Inquiry* 149 (1997), and the responses that follow.

32 Thomas Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 *Wis. L. Rev.* 443, 449-55.

up-to-date tools, other areas are bound to drop behind. Such a future does not allow much room for historical research.³³

A tension between the two contradictory trends — on the one hand, the growing sophistication of the static analysis of established subjects and, on the other hand, the development of new research subjects such as history — is evident. Different law and economics scholars turn to history for different purposes. As law and economics scholars realize (as other economists have done) that part of the complexity of the contemporary world derives from its past and the dynamics of change over time, more of them turn to history to improve their theories and policy recommendations; indeed, some even develop a non-instrumental interest in the past. This should not be understood as a prediction that law and economics in general will become historical in orientation. Rather, this is simply the observation that some scholars in the field are turning to history. The majority will definitely not turn to history, because the field's basic paradigms and objectives in the near future, as in the past, will not be much related to history.

C. Types of Uses of History

In the sub-sections below, I offer a typology of the uses of history in law and economics literature. These types of uses (or at least some of them) can be reviewed as genres of scholarly writing as well. I begin with two types of uses that appeared in the early days of law and economics, but are currently still viable to a certain extent. I then identify four recent types of uses of history in law and economics studies.³⁴ This list, of two older types and four new types of uses, does not purport to be exhaustive. However, it does serve to bolster one of my main claims in this article, namely, that although it is possible to find a few scattered indications of the use of history in law and economics literature as early as the 1960s and 1970s, the intensity and purpose of the shift toward history has changed dramatically since the 1990s.

The works presented below were not necessarily published in law and economics journals; indeed, some were published in law reviews. The criteria for selection were primarily the intellectual upbringing of the scholar and his or her discursive group of reference. Thus, the research of economic

33 In addition, such a conservative agenda sustains the central role of the founding fathers in the fields. Chicago brought about the revolutionary breakthrough, and the rest are merely pursuing their tedious mission of repeatedly filling the gaps.

34 See also Daniel M. Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. Ill. L. Rev. 1167, for a presentation of four articles that apply economics and statistics in researching legal history.

historians and new institutional economists is not included in my discussion, nor is the work of legal historians who make no explicit use of law and economics theory and do not view themselves as part of the discursive group of law and economics. What is included is the work of legal scholars who do not subscribe fully to the neo-classical paradigm, but are, to some degree, influenced by it, as is the work of legal scholars who conduct some of their work in the field of law and economics alongside work in, for example, legal history or corporate law.

1. The Efficiency of Common Law

As mentioned above, the claim regarding the common law's tendency toward efficiency was central in the early stages of shaping the field of law and economics. It gave rise to considerable theoretical and speculative literature and led legal historians to construct historical accounts that contradict it. The claim even drew several law and economics scholars, including Landes and Posner, to confirm the tendency toward efficiency argument on the basis of historical studies that demonstrate the increasing efficiency, over time, of areas of common law or specific common law rules.³⁵ These historical studies were more historically ambitious than studies belonging to the third genre I will discuss, that of testing theories, and thus the first deserve to be categorized as a distinct genre. They aimed at more than just testing one or another contemporary law and economic thesis in the laboratory of the past. They offered a grand, all-encompassing historical theory of change over time for the common law, and they aimed at both confirming and refining that theory. The origins of this genre are distinct from those of the genres to be described below. It appeared early, in the 1970s, as part of Posner's initial project, but, by the mid-1980s, had already lost momentum. The harsh criticism leveled by legal historians and others at this kind of historical work contributed to its discreditation and disappearance and deterred a younger generation of law and economics scholars from pursuing this disreputed argument; indeed, only a few recent examples can be found of the use of this genre.³⁶

In *The Bondsman's Burden*, Jenny Wahl has argued for the efficiency of the common law of slavery.³⁷ She based her research on a quantitative study of almost 11,000 cases and a qualitative analysis of several of them. The branch

35 William M. Landes & Richard Posner, *The Economic Structure of Tort Law* (1987); Richard Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29 (1972); Duxbury, *supra* note 2, at 409-14.

36 Mark F. Grady, *Towards a Positive Theory of Antitrust*, 30 *Econ. Inquiry* 225 (1992).

37 Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (1998).

of law she investigated is a very important one. Slavery had been a basic form of property and transactions in slaves a major issue of litigation in antebellum America. Establishing the efficiency of the common law of slavery could provide crucial confirmation of Posner's conception of the common law efficiency tendency. But by 1998, the year of the book's publication, such confirmation could no longer convince many legal historians or law and economics scholars that the common law, in general, was efficient. The book was published too late to affect the debate, which had peaked around 1980 and waned by the late 1990s. Wahl's research does not provide new insights into the mechanism by which common law tends toward efficiency. Furthermore, as Wahl candidly admits, common law in respect to slavery was efficient for slaveholders. Their wealth was within the equation, whereas the wealth of the slaves, by definition, was not. Though excluding the effects of the law of slavery on slaves can be justified, this bias is likely to make the confirmation unconvincing in the eyes of many. Wahl's book can be understood more clearly when not viewed as a test of the common law efficiency theory. The efficiency theory should be seen as a framework rather than as a thesis. It helps to organize and analyze various components of slavery law and compare it to non-slavery law. Because this framework lacks an element of concrete time, it does not help explain the timing of the legal change or its contours.

Another line of research motivated by the common law tendency toward efficiency theory is still trying to correct and refine the theory. Oona Hathaway combines this theory with the path dependence theory regarding common law change.³⁸ While the tendency toward efficiency, or evolution toward efficiency, is not explicitly discussed as such in her study, it is nevertheless assumed as a major force of change. Hathaway, in dealing with the path dependence theory, does not aim to undermine the tendency toward efficiency theory, but, rather, to build upon and correct it. She identifies three types of path dependence: increasing return path dependence; evolutionary path dependence; and sequencing path dependence. She explains how each type of path dependence affects the course of common law change and diverts it from a direct evolution toward efficiency. Her work is mostly theoretical and analytical and does not involve substantial historical research.

Another recent example of this line of investigation to refine theory is Todd Zywicki's work, the novelty of which lies in his development of a supply-side explanation for the common law tendency toward efficiency. He claims that a doctrine of weak precedent in the common law and

38 Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 Iowa L. Rev. 601 (2001).

the polycentric order of the common law judicial system encouraged the production of efficient rules. He also notes a decline in the common law's tendency toward efficiency, which he explains as deriving from the growing centralization of the judicial system and the strengthening of the *stare decisis* doctrine. Zywicki's analysis combines historical observations with theoretical considerations.³⁹

All in all, however, although a few works connected to the common law tendency toward efficiency genre of scholarly writing are still being written, the heyday of this genre is over.

2. Famous Examples from History Used by Leading Theoreticians

Some of the leading contributions to economic theory in general and law and economics in particular have included references to historical stories, as early as in the work of Adam Smith and that of nineteenth-century classical economists. In law and economics, such stories have been present since the birth of the field. I will mention four of the most familiar examples: the early modern English grazing commons tale used by Garrett Hardin in his discussion of the failure of collective action and common property;⁴⁰ the seventeenth- and eighteenth-century Hudson Bay hunting rights used by Armen Alchian and Harold Demsetz in their classic article on the creation of property rights;⁴¹ the nineteenth-century train engine spark damages to adjacent crops used by Ronald Coase in his discussion of transaction costs;⁴² and the 1926 General Motors acquisition of Fisher Body used by Benjamin Klein, Robert Crawford, and Armen Alchian in the context of industrial organization discussions on vertical integration.⁴³ The classic articles that first introduced these four examples into the theoretical

39 Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply Side Analysis*, available at <http://www.gmu.edu/departments/law/faculty/papers/docs/02-21.pdf>.

40 Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).

41 Armen Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 *Am. Econ. Rev.* 777 (1972).

42 Arthur C Pigou, *The Economic of Welfare* 183 (4th ed. 1932); Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960); Posner, *Overcoming Law*, *supra* note 17, at 413; Brian Simpson, *Coase v. Pigou Reexamined*, 25 *J. Legal Stud.* 53 (1996); Ronald Coase, *Coase on Posner on Coase*, 149 *J. Institutional & Theoretical Econ.* 96 (1993). *See also* Ronald Coase, *The Firm, the Market and the Law* 1-31 (1988).

43 Benjamin Klein et al., *Vertical Integration Appropriate Rents, and the Competitive Contracting Process*, 21 *J.L. & Econ.* 297 (1978).

discourse are among the most frequently cited articles in legal (and economics) journals.⁴⁴

Why did the celebrated theoreticians use historical examples? The stories were not used for an empirical examination of the theory. The theorists did not test or justify the selection of the given anecdote, nor did they systematically or rigorously gather and analyze data on the episodes. The use of the stories never led to a refutation or confirmation of the theoretical hypothesis in question. They were used solely for illustration and demonstration purposes. They were a rhetorical, not scientific, tool.

These famous examples drew the attention of numerous future economists, economic historians, and law and economics scholars. Later contributions to the theoretical discourse in these fields often echoed them. Moreover, these examples also are found in basic law and economics textbooks and recounted in various law school classrooms. From where does this obsession with these stories derive? Why, in addition to being retold, are they examined historically? These examples have appeared in some of the most widely read and cited articles, attracting scholars with their simplistic yet theoretically significant and often exciting narratives. They ignited the imaginations of less famous scholars who hoped, in retelling them, to share in some of the glamour enjoyed by the original users. Although there is an element of empirical theory testing in some of these studies, it is marginal. First, since the original theoretical innovations did not rely upon the examples, they could not be refuted by a single, arbitrarily selected example. Second, because the theoretical frontier had already moved forward, the original contribution was left far behind as the classic and canonical initiator of a new line of research. A scholar who wished to contribute to the current theoretical debate had to confront the discourse at the research frontier, not with examples taken from twenty- to forty-year-old classic articles.

The initial critical examination of these famous examples was based mainly on theoretical considerations and factual conjectures. Those that followed were based on basic primary sources or secondary sources. Gradually, law and economics scholars studying these historical episodes devoted more and more effort to the systematic research of the primary

44 Daniel Spulber recently collected some of these stories, which he termed fables, and added studies that critically examine their accuracy. His list of stories is broader than mine and covers all sorts of market failure fables, including those of the lighthouse, the bees, the keys, and the Liberty shipbuilders. His objective with this collection was to promote empirical investigation in economics. Daniel F. Spulber, *Famous Fables of Economics: The Myths of Market Failures* (2002) (particularly the Introduction at 1-31).

historical records. A recently published issue of the *Journal of Law and Economics* devoted no less than four articles to the Fisher Body story. Some of the articles included very thorough research into primary and even archival records, including trial records, business records, and contemporary automobile-industry magazines. This theme issue serves as a good example of the viability of this genre of scholarly writing.⁴⁵

3. *The Past as a Laboratory for Testing Law and Economics Theory*

This genre of writing has developed considerably in recent years as part of the wider trend in law and economics toward empiricism. Most empirical studies in law and economics are contemporary and based on the gathering of current data on stock markets, litigation, legislation, and the like and even conducting lab tests (in the behavioral branch of law and economics). But some of the more interesting empirical studies turn to the past, to history, where they find a better setting than the present for examining the theories of interest to them.

Mark Weinstein collected empirical data from California during the period of 1928-1931 on how limited liability contributes to the value of public corporations.⁴⁶ These data are highly relevant to the ongoing debate in law and economics and corporations scholarship regarding the desirability of limited liability and, in particular, of corporate tort liability. Weinstein turned to the past because he could not find relevant evidence in the present. In all major jurisdictions, the limitation of liability, along with other corporate features, is already embodied in the business corporation. Weinstein viewed California as good empirical ground because it was the last major jurisdiction to adopt limited liability. Thus, in this case, the effect of limited liability could be isolated from the effects of other features. Share prices before and after the transition from one liability regime to another in California could be compared. Data from one period alone could not serve the purposes of a comparison of the situation before and after a legal regime change, which is what Weinstein sought. Furthermore, California's late transition enabled an examination of the effect a liability regime change within an environment of

45 Ronald H. Coase, *The Acquisition of Fisher Body by General Motors*, 43 J.L. & Econ. 15 (2000); Robert Freeland, *Creating Holdup through Vertical Integration: Fisher Body Revisited*, 43 J.L. & Econ. 33 (2002); Ramon Casadesus-Masanell & Daniel Spulber, *The Fable of Fisher Body*, 43 J.L. & Econ. 67 (2000); Benjamin Klein, *Fisher-General Motors and the Nature of the Firm*, 43 J.L. & Econ. 105 (2000).

46 Mark I. Weinstein, *Share Price Changes and the Arrival of Limited Liability in California*, 32 J. Legal Stud. 1 (2003).

large publicly-held corporations of the Berle and Means type. Corporations of this type were not yet widespread when other legal jurisdictions made the transition to limited liability. The recentness of the transition also meant the availability of good quantitative records that were unavailable with regard to previous centuries.⁴⁷

Dan Klerman's work on thirteenth-century criminal disputes in England also uses history for testing theory.⁴⁸ He examined George Priest and Benjamin Klein's theory that predicts the circumstances in which litigants will settle and the circumstances in which they will go to court.⁴⁹ Klerman's study was not the first to test this theory, which had already received considerable empirical attention. Rather, his was the second such study of the period before 1950 and the first to test it for the period before 1870. But the scarcity of historical studies of the dispute settlement theory does not make the turn to history essential from a theoretician's perspective. What makes Klerman's historical study valuable for testing the Priest-Klein theory is that in this case, full records of both litigated and settled disputes are available. Other studies of the Priest-Klein theory usually were confined to records of litigated disputes, as non-litigated cases did not produce court records. This shortcoming forced law and economics scholars to make various manipulations and assumptions and constrained their ability to accurately test the Priest-Klein model. Klerman found archival sources, unparalleled by modern standards in that they preserved information on non-litigated cases as well. Furthermore, because English thirteenth-century private criminal prosecution still had both civil and criminal characteristics, it was unique in that the records of the litigation detailed post-settlement verdicts. Thus Klerman could provide final court verdicts for dropped, settled, and litigated cases for the period of 1239-1263, something no modern tests of the theory could provide.⁵⁰

47 The selection of California is not devoid of difficulties. The lateness of the transition in California might indicate that the minor effect observed there is not representative of other jurisdictions.

48 Daniel Klerman, [Economic Analysis and Legal History:] *The Selection of Thirteenth-Century Criminal Disputes for Litigation* (2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=240515.

49 George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984).

50 Klerman does not use thirteenth-century criminal litigation only for purposes of theory testing. In other works, he uses the analysis of this litigation to shed light on English society of the period and to improve social and legal history methodology. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 *Law & Hist. Rev.* 1 (2001).

To test the desirable dispute-resolution regime for futures markets, Mark West selected the Dojama Rise Exchange that operated in Osaka for nearly three centuries.⁵¹ West's theoretical question was, Under which regime does the market perform better, that of "private ordering" by the exchange institutions or that of "public ordering" by the central government? The Dojama Futures Exchange provided a good testing-ground for this inquiry because its dispute-resolution regime changed back and forth from a public-ordering regime to a private-ordering regime. Until 1773, the central Japanese government had refused to enforce contracts made at the Exchange. In that year, a senior Shogunate official issued a decree that he would hear futures-related suits in a central government court. Eleven years later, in 1784, this decree was repealed and a reversal was made to the pre-1773 private-ordering regime. In addition, a long series of price quotes for spot and future rise was available to researchers. The combination of a regime change, sufficient price data, and a long-standing futures exchange provided West with the necessary setting for conducting his inquiry.⁵²

4. Public Choice Analysis of the Origins of Modern Legislation

Public choice analysis was not one of the standard tools of Chicago School of Law and Economics. Rather, this analysis originated in the Virginia School, which was more focused on the interaction between economics and political science than on that between economics and law. Gradually, however, public choice notions became integrated, at least partially, into mainstream law and economics.

Public choice analysis is used by law and economics scholars to investigate the origins of legislation. Public choice is more a perspective than a tool, directing scholars toward the study of the influence of interest groups rather than of other factors, such as intellectual conceptions. It also directs them to study legislation, which is susceptible to public choice analysis, at the expense of common law judgments and administrative decrees. The public choice approach leads to a static analysis rather than to the study of change over time. But public choice is not used only to study the original intention of legislators. Rather, it is often employed to judge the desirability of the legislation under scrutiny, seeking to uncover the supporters of a certain bill

51 Mark D. West, *Private Ordering at the World's First Futures Exchange*, 98 Mich. L. Rev. 2574 (2000).

52 For an analysis and criticism of West's study, see Omri Yadlin, *A Public Choice Approach to Private Ordering: Rent-Seeking at the World's First Futures Exchange*, 98 Mich. L. Rev. 2620 (2000).

to know who gained from its enactment. The next step is then a discussion of the normative desirability of the particular legislation.

David Bernstein's study of post-Civil War restrictions on interstate migration highlights several methodological and ideological facets of the application of the public choice approach to history.⁵³ While other legal historians focus on straightforward examples of discrimination against African-American laborers, Bernstein analyzes the more subtle example of emigrant agents. He submits that law and economics scholars are the first to realize that emigrant agents reduced the information costs for emigrants. Emigrant agent laws imposed high taxes and license fees on agents and in fact prevented agents from engaging in their profession. In this way, the laws increased the costs of migration for African-Americans within and from the South to the North and curtailed the development of a free labor market. This is no surprise to public choice theorists like Bernstein. The emigrant agent laws that were enacted in Georgia, Alabama, and North Carolina are examples of special-interest legislation. The legislatures in these states were successfully lobbied by white employers who resorted to legislation after they had failed to shrink the wages of African-Americans in the free market, which was created during the Reconstruction period, and after they had failed to create effective employers' cartels.

At this stage we can see the connection that Bernstein makes between public choice theory, history, and ideology. Regulation is injurious because it is controlled by interest groups. The free market, however, does not facilitate discrimination or exploitation. It allowed for discrimination in the South only because interest-group legislation enabled the formation of employers' cartels and monopolies and curtailed the free movement of labor. The normative ideological message is twofold and contradictory. First, the state should suffice with removing obstacles to a free market and ending state discrimination. This is in line with the Virginia School of Public Choice, the Chicago School of Law and Economics, and Richard Epstein's libertarian view. But this ideological message does not necessarily rely on the use of history: it can also be based on present-day case studies. The second ideological message is historical in nature. Because the discrimination of African-Americans in the South was not created by the free market (e.g., by inequality in bargaining power), as many on the left would argue, but,

53 David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 *Tex. L. Rev.* 781 (1998); David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations and the Courts from Reconstruction to the New Deal* 8-27 (2001).

rather, by state-imposed barriers to the market, the states bear a moral responsibility for the inequality. Thus, it can be argued that to compensate for past sins, the states and federal government (which neither overrode the state legislation nor declared it unconstitutional) should implement affirmative action programs and even reparations.

Jonathan Macey and Geoffrey Miller's study of the Blue Sky laws constitutes an example of an application of public choice to legislation involving multiple interest groups.⁵⁴ The Blue Sky laws regulated the issuing of securities at the state level, in some states, prescribing review of the merits of such stock issues and, in others, requiring disclosure of information to potential investors. These laws were formulated and legislated between 1911 and 1917. Only in 1933-1934, as part of the attempt to recover from the 1929 crash, did federal regulation of the stock market begin to overshadow these state laws. Macey and Miller employ public choice insights in order to criticize a view prevalent among historians, arguing that the Blue Sky laws were not public-spirited legislation aimed at protecting investors against the prevalence of fraud, but, rather were the product of a struggle between two coalitions of vested interests. The Blue Sky regulation was advanced by smaller banks that were threatened by the big financial institutions, by state bank regulators who wanted to expand their empires, and by farmers and small businesses that wished to enhance their access to credit. Elite investment banks opposed the laws. They did not want to deal with the administrative quagmire generated by regulation and, as national institutions, did not want to be dependent on state officials. Big business, which relied on the markets for raising funds, and large banks also opposed these laws. Macey and Miller bring as support for their public choice interpretation of the legislation the fact that fraudulent issuing of stock was not widespread prior to 1911, pointing to the actual involvement of the abovementioned interest groups in the legislative process and the different rates and timing of the diffusion of Blue Sky laws in states with different interest groups (for example, agricultural states versus states with flourishing financial centers). They conclude that the overreaching laws — those that did not settle for disclosure and sought review of the merits of the stock issues — could not be justified as advancing public good or efficient markets.

The public choice analysis in the Macey-Miller study reiterates the distributive effects of legislation. It also recalls the rent-seeking attempts that lead to it. This regulation does not benefit the public in general, but, rather, specific interest groups at the expense of others.⁵⁵ There is an element of

54 Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 *Tex. L. Rev.* 347 (1991).

55 A recent public choice analysis of the Securities Act of 1933 reaches similar

theory testing in this study, but it is secondary to the authors' interest in a policy message: "Beware of regulation!" After examining another type of regulation that was considered beneficial to the public, we, the authors, discovered that this was not the case. A second historical message, complementary to the first, is that prior to stock issuance regulation (in this case, prior to 1911), the stock market functioned quite well. This is definitely a message welcomed by Chicago School of Law and Economics. But the Macey and Miller study also demonstrates an interest in the historical period and historical debates surrounding that period. Other law and economics scholars did not demonstrate such an interest, and many are still not interested in historical accounts, but absorb them on the way to the policy message.

In another article, Miller applied public choice to a seemingly esoteric topic: the butter-versus-margarine war.⁵⁶ The winner in this war, the American dairy industry, successfully lobbied for regulation that would restrict the growth of the newly-emerging margarine industry. This case is of interest because of the challenge it poses to public choice theory. Preliminary analysis suggests that the margarine industry should have won because it was composed of a small number of industrialists who, theoretically, could have formed a more effective lobby than the five million small farmers who produced butter. The dairy lobby, on the other hand, was occupied with the far more significant problems of collective action and free-riding. This puzzle motivated Miller to take a more sophisticated approach and go beyond the stage of the interplay between lobbies in the legislatures and examine the formation and organization of the interest groups, amongst other things, examining the resources of the opposing interest groups. Of particular interest is his analysis of their tactics with respect to the decision as to when to move forward, whether to take action at the state or the federal level, and which branch of government to lobby. Public choice is not enlisted in this example of the promotion of free market ideology. It is used primarily to provide insight into a historical puzzle.⁵⁷

conclusions. Here, the challenge was even more substantial because the Act only required disclosure without allowing review on merit by the regulators. Furthermore, this Act is widely regarded as one of the great successes of the New Deal. However, Paul Mahoney has showed that it benefited not only the public but also separate wholesale investment banks and retail dealers at the expense of integrated wholesale/retail investment banks. Paul Mahoney, *The Political Economy of the Securities Act of 1933*, 30 J. Legal Stud. 1 (2001).

56 Geoffrey P. Miller, *Public Choice at the Dawn of Special Interest State: The Story of Butter and Margarine*, 77 Cal. L. Rev. 83 (1989).

57 My own use of public choice to study the basic statutes that shaped English company law is not used here as an example because it was inspired by economic

5. *How Did We Arrive at the Prevailing Law?*

Prior to prescribing remedies and reform for the prevailing law, which is common practice among law and economics scholars, they often need to evaluate the normative desirability of that law. If the law is efficient, why enact reform? Ascribing a high tendency toward efficiency to the common law renders redundant a considerable part of the policy-oriented prescriptive project of law and economics. Ascribing to the legislative elements of the legal system a high evolutionary tendency renders other parts of the project redundant. But if evolutionary and efficiency forces are not as dominant as once believed, history becomes important for understanding how current law evolved and examining its efficiency. Furthermore, history constrains the ability of current legal players to make legal rules more efficient. Law and economics scholars, who originally held no interest in history or even in positive law and economics, have recently discovered history and its importance for their prescriptive projects.

A good example of this new use of history can be found in the context of corporate law. The opening up of this field to comparative perspectives soon raised the question of why corporate governance and corporate law in Japan and Germany are fundamentally different from Anglo-American law. Were this the case with regard to less-developed economies, one could argue that they have less efficient corporate law, which causes slower economic growth. But this does not explain the situation in Germany or Japan, particularly not with regard to periods when their growth rates were faster than those of the United States or Britain. In the early 1990s, Mark Roe advanced a public choice explanation.⁵⁸ According to Roe, U.S. law historically was negatively affected by interest groups, which prevented the formation of large integrated national banks. As a result, corporate governance in the U.S. developed along the lines described by Berle and Means, with a large number of small shareholders, no controlling blocks, and strong managers. In Japan and Germany, however, the interplay between interest groups was much different, and a more efficient regime, with large banks as the monitors of managers, emerged. Thus far, Roe's study could fit into the

history applications of public choice more than by such applications in law and economics. See Ron Harris, *The Bubble Act: Its Passage and Its Effects on Business Organization*, 54 J. Econ. Hist. 610 (1994); Ron Harris, *Political Economy, Interest Groups, Legal Institutions and the Repeal of the Bubble Act in 1825*, 54 Econ. Hist. Rev. 675 (1997).

58 Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 Colum. L. Rev. 10 (1991); Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (1994).

genre of public choice analysis of legislation. But here certain elements are added that can justify classification into a separate genre of writing. First, corporate law is a mixture of legislation and judge-made law. Second, the comparative theme is central to this research topic. Advanced economies are sharply at odds and view each other with anxiety and hope. Third, an additional theme emerges: How do competition among states (within the U.S. and elsewhere) and economic globalization in general affect the development of different corporate regimes? Do corporate law regimes converge or diverge globally? Fourth, an important conception is borrowed for this purpose from economics and economic history: path dependence.

Henry Hansmann and Reinier Kraakman argue that we have reached the end of history in corporate law.⁵⁹ The leading legal systems are all converging into a common model. This is the efficient outcome of a long evolutionary process in which the basic agency problems that appeared with the rise of the modern business corporation were contended with and reduced to a minimum. However, one important problem still awaits resolution: the damaging effects of the limitation of corporate liability in torts.⁶⁰

Bebchuk and Roe attack this argument.⁶¹ They claim that path dependence dominated the development of modern corporations and distinguish between two kinds of path dependence: structure-driven and rule-driven. The initial structure of ownership had a direct effect on the future ownership structure. Thus, the original dispersion of U.S. ownership created path dependence that could be overcome, but at a cost. Because German ownership was initially concentrated in big banks, a different path of development emerged. Moreover, the initial structure of ownership had a secondary effect on legal rules, to create path dependence in the development of these rules. Thus, in the U.S., investment banks lobbied the legislature for rules that would prevent the formation of concentrated ownership. In Germany, large integrated banks and labor unions lobbied for rules that would maintain their dominance in corporations. The combination of these two sources of path dependence created divergence among the world's advanced economies.

Does this conclusion signify that modern corporate law, the field of law in which one would expect efficiency considerations to be most dominant,

59 Reinier Hansmann & Henry Kraakman, *The End of History for Corporate Law*, 89 *Geo. L.J.* 439 (2001).

60 In a way, this article can be classified as belonging to the first genre of writing mentioned above — namely, studies that confirm the efficiency of the law. As it is part of the debate discussed here, I present it in this Section.

61 Lucian Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 *Stan. L. Rev.* 127 (1999).

is inefficient? The answer is yes, to a certain degree, due to public choice and path dependence.⁶² But, one also can conclude from Bebchuk and Roe's analysis that it *is* efficient. It is inefficient to transform Japanese ownership and government to follow the American model, and vice versa. Each model efficiently suits the history, society, and political system in which it developed. Even if the historical outcome in a given state is not efficient, there is not much to be done. Law and economics scholars should appreciate the constraints placed on legal reform by history and politics. Developing a perfect model of corporate governance based on abstract law and economics theory would be an exercise in futility. Awareness of this superior model on the part of managers, judges, and legislatures will not change the actual outcome. History should help law and economics scholars understand how prevailing law evolved, discuss its desirability, and appreciate the real obstacles to changing it.

John Coffee investigates a similar set of issues but arrives at different conclusions.⁶³ Though he does not explicitly say so, he holds that there is a normal and natural path of development for large public corporations, a path shaped by the advance of modern technological and financial environments. The Continent and Japan, in contrast to the U.S., deviated from this path. For a somewhat unclear reason, the common law legal systems provided adequate protection for small shareholders, while civil law systems, such as those in Germany and Japan, did not. It was not the U.S. that failed to follow the "normal" path due to the activities of interest groups that prevented large institutions (notably banks) from controlling public corporations. The failure was on the part of other systems. The success of the U.S. is attributed to its securities regulation laws more than to its corporate laws. Asserting the normalcy and superiority of the American model of corporate governance does not guarantee success. Coffee posits that convergence toward the American model is likely but not inevitable. It is likely for two main reasons: First, the signs of economic crisis toward the end of the 1990s were more apparent in Japan and Germany than in the U.S., and these countries are now more responsive to American-inspired legislative reform. Second, corporations

62 I do not relate here to my own study of the history of English joint-stock companies and other types of business associations, because, as noted above, I believe that it was influenced by economic history considerably more than by law and economics. It nevertheless touches upon related problems and uses similar methodological and theoretical tools. See Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720-1844* (2000).

63 John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 Nw. U. L. Rev. 641 (1999).

migrate in larger numbers, and though reincorporation by foreign companies in the U.S. is uncommon, raising capital in U.S. markets, which involves being subject to U.S. securities regulation, is common. Harmonizing with the American model does not have to occur at the level of state law; it can, and does, occur at the level of self-selection by individual business corporations.

But how does Coffee use history? He uses it in the title of his article: *The Future as History*. He uses it in the article's concluding sentence: "History may be beginning to repeat itself."⁶⁴ This is indicative of his sense of the importance of history when writing the article. To Coffee, the past explains the present and assists in predicting the future. But it does not constrain it in the strong sense that Bebchuk and Roe contend.⁶⁵

Mark West's article is the most empirical article of those presented in this Section.⁶⁶ He seeks to examine empirically, rather than theoretically or speculatively, the question of whether corporation laws are diverging or converging. He compares the Model Business Corporation Act and the Japanese Commercial Code, both of which borrowed heavily from the Illinois Business Corporation Act of 1933 and both were drafted in 1950. This is a dream experiment in West's view, as an almost identical corporation law was transplanted, at the same time, into two different institutional environments. Will national differences prevail and lead to divergence, or will globalization force similarity and thus support the convergence thesis?

How does one quantify similarities and differences? Economic historians and economic methodologies have developed very crude methods for dealing with statutes, often settling for counting complete statutes and trying to learn something from the timing of their enactment. West further developed a methodology and database initially developed by others, that allows provision-by-provision comparison of 142 important provisions in four jurisdictions (the Model Code, Japan, Illinois, and Delaware) over a fifty-year period (1950-2000), for a total of 28,400 observations. West concluded that American and Japanese corporate law diverged from a common baseline to take different paths. Had West stopped at this statement, his article could have been classified as theory testing. But he also tried to explain the

64 *Id.* at 707.

65 Coffee's emphasis on the level of the firm at the expense of the level of the legal system does not fully address Bebchuk and Roe's path-dependence argument. Firm managers are also subject in their decision-making to path dependence. In addition, Coffee holds that part of the convergence takes place at the legal level, but does not explain fully how Germany and Japan escaped their century-old path.

66 Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. Pa. L. Rev. 527 (2001).

outcome that he observed, an explanation that is independent of the theories he tested. This explanation rested on the institutional difference between Japan and the U.S.: Japan has a unitary system with no competition among jurisdictions and in which lawyers play a limited role in amending corporate law. Thus, whereas in the U.S. there is a continuous, incremental, and often internal dynamic of legal change, change in Japan resulted from exogenous shocks and involved abrupt reform. West's policy message is to foreign legal advisers who are trying to transplant American corporate law into the transition economies of Eastern Europe and East Asia. Imposed convergence with the American regime might seem workable in the short-run, but over the long term, institutional differences will reintroduce tendencies toward divergence. Does this mean that American legal imperialism of this sort is nevertheless desirable, because it creates efficient institutions at least in the short-term? Or that it is harmful because it introduces law that cannot function efficiently in a transition economy or in a non-Western culture? Or that it is not overly damaging because its effects will not last? West does not take his empirical study and theoretical discussion far enough in this direction.⁶⁷

6. *Social Norms and History*

Since the first genre of scholarly writing I discussed dealt with the efficiency of common law associated with the Chicago School of Law and Economics, it seems appropriate to complete the circle with a discussion of the social norms genre identified attributed to the New Chicago School. This order of presentation makes sense chronologically, since the efficiency genre was the first to emerge and the social norms genre the most recent one. The New Chicago School is considerably more historical in its theoretical and empirical orientation than was the original Chicago School.⁶⁸ The social norms school has a strong empirical orientation, and as we have seen, empiricism often leads to an interest in history. Like Historical New Institutional Economics, the social norms school is interested in merchant law and merchant norms and practices.⁶⁹ This common interest, which does not

67 For his initial discussion, see *id.* at 594-601.

68 For the origins of this school, see Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989); Robert C. Ellickson, *Order Without Law* (1991). For accounts of the development of this school, see Robert C. Ellickson, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. Legal Stud. 537 (1998); Mark Tushnet, *Everything Old Is New Again: Early Reflections on the "New Chicago School,"* 1997 Wis. L. Rev. 579.

69 Grief Avner, *Cultural Beliefs and the Organization of Society: A Historical and*

exist between other branches of law and economics and economic history, may lead to an interaction that could further enhance the attention paid to history by the social norms school.

Lisa Bernstein is a leading scholar of the social norms school, and her work demonstrates some of the school's uses of history. Her four major articles in this field, published between 1992-2001, all deal with the functioning of social norms and business practices in several industries, notably: the diamond industry, the grain trade industry, and the cotton trade industry. Her interest in these norms and in the private legal systems that sustain them is primarily contemporary. Her empirical research focuses on norms and institutions as they currently exist and their relationship with prevailing state law. Nevertheless, she turns to the past frequently and for several purposes. The first use of history she makes relates to the change in the norms themselves. Bernstein refers to how the social norms she discusses evolved over time only in passing. In her analysis of the cotton industry, she proceeds to compare "then" (a century ago) to "now."⁷⁰ Less attention is paid to the process and timing of the change and its direct causes. Occasional attention is given to the changing content of the norms and their relationship to changes in the environment. More frequently, she deals with the institutional framework in which the norms operate and enhances their benefits.

The second use of history relates to the historical duration of the norms. When arguing for the sustainability and benefits of extra-legal social norms, Bernstein recalls that these norms have functioned for generations (with respect to the grain trade industry) and even for centuries (with respect to the diamond industry). Furthermore, the number of disputes over these norms, measured by the amount of arbitration cases per year, is very low. If they have functioned for such a long period of time, without constant conflicts and disputes with the legal system, during periods of economic growth, and are not overruled by the legal system of the state, these norms must be beneficial. In this context, Bernstein does not turn to historical

Theoretical Reflection on Collectivist and Individualist Societies, 102 *J. Pol. Econ.* 912 (1994); Grief Avner et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 *J. Pol. Econ.* 745 (1994); Paul Milgrom et al., *The Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *Econ. & Pol.* 1 (1990).

70 Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 *Mich. L. Rev.* 1724 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992).

research, nor to historical explanation, but, rather, demonstrates historical sustainability.

A third type of reference to the past Bernstein makes is related to the codification of norms, for the purpose of their application in arbitration tribunals, studying such codification in the period between the 1890s and the mid-twentieth century in several key industries.⁷¹ Bernstein claims that codification committees often found it difficult to produce agreed-upon codes because they did not find any agreed-upon norms. Committees regularly chose to draft new standards and norms rather than promulgate existing ones. This claim is of relevance because it undermines the view held by drafters of the UCC, according to which business codes are a developed form of business norms, which can be readily incorporated by judges into the UCC.

The fourth and final type of reference Bernstein makes to the past relates to the history of the UCC itself. After devoting much attention to the text and its current application, Bernstein makes instrumental reference to the enactment of the UCC. She demonstrates that trade associations were not enthusiastic about the proposal to include an article incorporating business norms into the UCC and state law; indeed, some were explicitly opposed. The drafters of the Code, notably Karl Llewellyn, did not respond to business needs, instead applying their own legal conceptions when drafting the Article 2 incorporation clauses.⁷² By establishing the framers' intentions and intellectual sources, Bernstein paved the way for criticism from an empirical and theoretical perspective. She delegitimized the modern situation by claiming that the past was better and that an undesirable bias brought us to the present situation. This leads to her policy recommendation to amend UCC Article 2.

While there are a few other examples of the use of history in social norms literature, Bernstein's studies constitute the most multipurpose example of such use. Her four articles share common features with some of the other genres of scholarly writing discussed above. She discusses the efficiency of legal and social norms and institutions; she uses the past as a laboratory both for testing theory and identifying, defining, and refining theory. In this sense, empiricism guides her theory. She examines the history of modern legislation in search of biases, but applying very few public choice notions. She does not use comparative law to direct her research or to challenge the

71 Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999).

72 Lisa Bernstein, *Merchant Law in a Merchant Court*, 144 U. Pa. L. Rev. 1765 (1996); Bernstein, *supra* note 71.

modern American state of affairs. Some of her empirical research is based on primary historical records, but much of it is based on interviews with practicing merchants in the fields she investigates. Despite all her incursions into history, the explanation of change over time and of historical problems is not central to her project. Rather, at its core are policy recommendations regarding the augmentation of social norms and institutions and regarding their incorporation into law by the UCC. Thus although Bernstein and the social norms school in general have opened several channels to history, they by no means have exhaust these channels.

CONCLUSION

Until recently, law and economics, the most influential post-World War II jurisprudential movement, was a-historical in its methodology and research agenda. The first objective of this article was to call attention to this neglected characteristic of law and economics and to explain its causes. The last decade has witnessed a change in this respect, a turn toward history in law and economics, which has gone unnoticed by scholars both within the field and outside because it was not advanced by any distinct group of scholars within the field nor was it an intended consequence of a newly introduced methodology. The second objective of this article was to identify this change-in-the-making and its characteristics. The change comprises both qualitative and quantitative elements. Scholars have turned to history more often and for new purposes. The third purpose of this article was to identify the set of factors that brought about this turn to history, which allows us to evaluate the likelihood of this trend intensifying or subsiding in the near future. The new greater awareness of past burdens in economic theory, as epitomized in the path-dependence conception, is here to stay. So is public choice analysis, which is now an integral part of law and economics and is often found in the study of past legislation. Empirical research is a recent trend, whose intensity and sophistication still remain to be seen. But the correlation between empirical research and greater interest in history is already evident. Many law and economics scholars have no objection to be surprised by facts; they are likely not to exclude historical facts from their horizons. Many will agree that more comparative law and economics is desirable. But few outside the U.S. and only a handful of Americans actually practice comparative law and economics. Thus far, the impact of comparative concerns on law and economics in general and on its interest in history in particular has been almost exclusively confined to the comparison between Japan, Germany, and the U.S. in the realm of corporate law. The

interaction between law and economics and New Institutional Economics is still limited, despite the growing overlap in research topics. Moreover, there are yet to be signs of the awakening of an interaction between law and economics and legal history.

History is not going to be the hottest trend within law and economics anytime soon. Trends originating from other disciplines and fields will surely be more inspiring to law and economics scholars. No more than one or two law and economics scholars devote most of their energy to history, thus justifying their identification as law and economics historians. Most scholars turn to history instrumentally, for presentist purposes. For some, the selection of their methodology or historical setting is a pragmatic choice. Others are confined from the outset by their primary methodology or by the setting of the debate in which they are involved. Some turn to history to test static positive theories or to develop dynamic theories of change. Others endeavor to explain how modern law, or a specific piece of legislation, evolved. Some scholars turn to history in order to establish, criticize, or legitimize policy recommendations. Whatever their sources or purposes, studies that touch upon history today are thriving more than in any other period in the history of law and economics. A turn to history is unmistakably evident. Appreciation of this phenomenon can nourish an instructive organizing framework for the wide range of research interests and specific studies that have recently emerged. Awareness of this turn to history, its contours, and its literature can, I believe, enlighten law and economics scholars, economic historians, legal historians, and modern jurisprudence scholars. In turn, this awareness can, itself, enhance and enrich the turn to history.