

INTRODUCTION: IS LAW AN AUTONOMOUS DISCIPLINE?

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Is law an autonomous discipline?¹ A key issue of this Symposium is whether legal scholars have been relying too heavily on law and economics, seeing it as infallible. Although law and economics is a valuable tool, it is an imperfect one, often disconnected from reality.² As Philip Tetlock, a prominent social scientist, has noted,

The preponderance of the evidence currently favors a moderately pessimistic assessment of our skills as both intuitive psychologists and economist[s] [W]e often ignore variables to which normative theories say we should attend. In many situations, people are as oblivious to opportunity costs as they are to sunk costs [The reason for these shortcomings is that we] are limited-capacity information processors.

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1. See generally Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761 (1987) (asking if law is an autonomous discipline).

2. Although I focus on the limitations that human irrationality imposes on law and economics, I do not mean to undervalue law and economics. I only mean to suggest that law and economics may benefit by being cautious of results that are reached by assuming rationality. See JACK HIRSHLEIFER & AMIHAI GLAZER, *PRICE THEORY & APPLICATION* 6 (5th ed. 1992) ("With the prevalence of human irrationality, how can rationality be assumed in economics? Clearly, postulating rationality is justifiable only to the extent that doing so correctly predicts how people will behave. Economists have found that theories assuming rationality function better than theories that do not.").

3. Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 331, 334-35 (1992). Accord ROBERT H. FRANK, *MICROECONOMICS AND BEHAVIOR* xxii (2d ed. 1994) (noting "recent research show[s] that people often systematically violate the prescriptions of the rational choice model"); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991) (arguing that economics should try to take into account the irrationality of human behavior); cf. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989) (arguing that the practitioners of law and economics "should increasingly look to psychology and sociology in order to enrich the explanatory power and normative punch of economic analysis A richer model for positive analysis . . . would look to

Modern economics recognizes this and increasingly attempts to model such "soft" phenomena as psychology, social and community norms, and similar issues.⁴ Law and economics, however, is only in the process of catching up.⁵

This disconnect between theory and reality often is compounded where law professors and other theorists have little real-world experience and therefore, at times, are unable to step back and assess the rationality of the solutions they propose in the context of the world around them.⁶ Empirical studies might

psychology to develop a more realistic view of cognitive processes, and also look to sociology to obtain a more accurate picture of social influences on human behavior.").

4. See, e.g., HIRSHLEIFER & GLAZER, *supra* note 2, at 8 ("Social biologists argue that human tastes and preferences are the product of evolution over the long period in which the human species developed. Partly stimulated by this line of social scientific work, economists have more recently begun to study the cultural and biological sources of preferences."); see also the following sources cited throughout Ellickson, *supra* note 3.

ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985) (modeling individual concern for relative position and relative wealth); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982) (modeling how cognitive resistance to dissonant information might cause workers to systematically underestimate job risks); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986) (finding evidence that firms sometimes sacrifice profit to act 'fairly'); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984) (finding evidence that legislators' ideology influences their votes); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in the Theory of Rational Choice*, 74 AM. ECON. REV. PAPERS & PROC. 1 (1984) (modeling the problems of impulsiveness and self-control); Richard H. Thaler & H. M. Shefrin, *An Economic Theory of Self-Control*, 89 J. POL. ECON. 392 (1981) (modeling the same).

Cf. Steven L. Schwarcz, *A Fundamental Inquiry Into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 988 n. 278 (1995) (arguing that "[t]he use of psychological methodology to shed light on law can be compared with law and economics").

5. This gap between law and economics and modern economic theory was the subject of a program at the Association of American Law Schools' January 1997 meeting, "Rethinking Thinking: Using More Complex Models of Human Behavior in Law and Economics." The AALS brochure introduced the topic as follows: "The assumption that individuals are rational expected utility maximizers is a cornerstone of law and economics. There is ample empirical evidence, however, that people do not invariably maximize expected utility." Association of American Law Schools 1997 Annual Meeting Program, at 34. At that meeting, the author asked how legal scholars can institutionalize advances in economic theory into law and economics. Should more law schools hire economists on the law faculties, or should legal scholars work closely with economics departments? In the latter case, what is the motivation for an economics department to help a law school? The irony is that universities are sometimes so compartmentalized that law and economics would predict a failure of members of different departments to work together!

6. Judge Richard Posner has argued that pragmatism, liberalism, and economics are needed to systematically think about law. See RICHARD A. POSNER, *OVERCOMING LAW* 4-7 (1995). Judge Posner defines pragmatism, essentially, as a taste for fact and respect for social science and a desire to be practical and skeptical. He argues that a theory, such as economics, is only a tool, not a vision of reality. See *id.* at 9.

provide a way of testing solutions but even the best-designed studies often cannot offer dispositive results. Whether a particular empirical study is helpful, marginal, or even counterproductive would depend on its design and the reliability of its data. Furthermore, law professors often lack both training in empirical methods and the funding necessary to perform empirical studies.⁷

The physical sciences, in which I was originally trained, provide another way of testing solutions. After solving a problem, a prudent scientist will step back and ask whether the answer makes sense. If it does not, there is more likely to be a mistake in the assumptions or methodology than a paradigm shift in how the problem should be viewed. Again, theory always must be tied to a measure of pragmatism.

Yet that tie is often overlooked. For example, a recent law and economics article in the *Yale Law Journal* argued that full priority secured debt is inefficient.⁸ Based on that analysis, efforts have been made to amend the Uniform Commercial Code and the Bankruptcy Code to impose a mandatory partial priority rule for secured debt. Other scholars, however, argue that a partial priority rule would dry up credit, thereby causing more bankruptcies and hurting unsecured creditors.⁹ Perhaps the parties to this debate—indeed, parties to any law and economics debate—should ask a more fundamental question: Should a technique that has endured time and experience (such as the creation of full priority collateral)¹⁰ be rejected by pure theory?¹¹

7. Training legal scholars in empirical methods and funding empirical studies on a wide-scale basis are propositions not yet mainstream to the legal academy.

8. See Lucian Bebchuk & Jesse Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996).

9. See, e.g., Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 83 CORNELL L. REV. (forthcoming 1997); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L. J. (forthcoming Dec. 1997).

10. See, e.g., *Deuteronomy* 24:12 (discussing the pledge by a poor man of his cloak).

11. [D]evices that have survived in many firms for extended periods are particularly unlikely candidates for challenge as mistakes [T]he durability of a practice both enables people to gauge its effects and allows competition among firms to weed out the practices that do not assist investors. There is no similar process of weeding out among academic ideas or regulations. Quite the contrary, mandatory terms prescribed by law halt the process of natural selection and evaluation. Unless there is a strong reason to believe that regulation has a comparative advantage over competition in markets in evaluating the effects of corporate contracts, . . . there is no basis for displacing actual arrangements as 'mistakes,' 'exploitation,' and the like.

Sir Isaiah Berlin, one of this century's most influential thinkers, questioned elevating theory over experience. He reasoned that our "common sense beliefs, which at least have the merit of having been tested by long experience,"¹² should prevail over theories that are based on inadequate data.¹³ In the debate over secured debt priority, theory should at least be tempered by experience.

For these reasons, any conclusions drawn from law and economics that do not accord with the real world should be viewed with restraint. Restraint, however, is easier to talk about than to achieve. It is unlikely, at least in the short term, that law professors who espouse law and economic theory will voluntarily choose to adopt an attitude of restraint in interpreting their findings. Law professors, and indeed lawyers in general, have not cherished humility as a prime virtue.¹⁴ More importantly, and ironically, there is an economic bias against humility: a modest interpretation of one's theoretical law and economic results means a lower probability of publication in a top law review whose student editors eternally seek paradigm shifts.

The danger of legal scholars veering away from reality is not that they are so influential that their theories automatically will be enacted into law—there are too many countervailing forces. The danger of impracticality is that the impact of legal scholarship will be marginalized. Part of the inquiry in this Symposium is how we can prevent that from happening.

FRANK H. EASTERBROOK & DAVID R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (discussing changes to corporate governance rules).

12. ISIAH BERLIN, *THE HEDGEHOG AND THE FOX* 33 (Elephant Paperback 1993) (1953).

13. *Id.* (explaining Tolstoy's view that our ignorance of how things happen in life is not due to the inaccessibility of their causes but to our inability to know and coordinate the infinite multiplicity of causes).

14. Professor Chuck Mooney of the University of Pennsylvania Law School recognized the lack of academic humility in a remark he made at Harvard's recent secured debt conference on the subject of the Bebchuk and Fried article. At that conference Professor Ted Eisenberg of Cornell argued that law and economic proponents of a partial priority rule should adopt an attitude of humility in the absence of empirical findings. Professor Mooney cynically quipped, "If you want humility, you've come to the wrong group."