

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

ERIC M. FINK†

INTRODUCTION

Socio-legal scholarship's distinctive contribution consists in offering a constitutive theory of law *in* society.¹ This theory posits that law is neither autonomous of,² determined by,³ nor determinative of⁴ society. Rather, law and society are mutually enmeshed in an ongoing process of structuration,⁵ in which social action—by individuals and groups—

* Cf. FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991).

† Attorney at Eckert, Seamans, Cherin & Mellott in Philadelphia, Pennsylvania. J.D., New York University School of Law, 1997; M.Sc., London School of Economics, 1985; B.A., Johns Hopkins, 1984.

1. See John Brigham, *Rights, Rage, and Remedy: Forms of Law in Political Discourse*, 2 *STUD. AM. POL. DEV.* 303, 304 (1987).

2. Examples of legal theories positing the radical autonomy of law from society are legal positivism, see, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 181–82 (1961), and autopoiesis theory, see ROGER COTTERELL, *THE SOCIOLOGY OF LAW* 65–70 (2d ed. 1992).

3. Social determinist theories of law include the economic determinism associated with Marx, see, e.g., KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1970), as well as those versions of Law and Economics that posit a structural/evolutionary tendency toward efficiency in the law. See Lewis Kornhauser, *L'Analyse Economique du Droit* [*Economic Analysis of Law*], 16 *MATERIALE PER UNA STORIA DELLA CULTURA GIURIDICA* 233, 244–45 (1986) (discussing evolutionary claim of Law and Economics).

4. Instrumentalist theories portray law as structuring social action and institutions, but fail to explain why law is able to do so, and ignore the power of social forces in driving law to do so. See, e.g., JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 33 (1956); COTTERELL, *supra* note 2, at 135 (discussing versions of Marxist analysis that locate law within the determinative economic base); Kornhauser, *supra* note 3, at 237–38 (discussing instrumentalist claim of Law and Economics). For a socio-legal critique of instrumentalist theories, see generally Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (Gerald L. Geison ed., 1983).

5. See generally ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984). Giddens uses the term “structuration” to describe the mutual constitution of social structure and human agency. *Id.* at 281–84. For a brief explanation of structuration theory, see *What are the Central Concepts of Structuration*

simultaneously plays out within and (re)produces a structured social terrain. In the socio-legal imagination, law is “a generative force of our public life,” it is “both agent and object.”⁶

One problem that is ripe for socio-legal inquiry is the emergence and diffusion of the Law and Economics movement.⁷ A socio-legal approach would consider Law and Economics not simply as a style of legal analysis or a school of thought within law, but as a discursive project, constituted by and constitutive of an emergent socio-legal matrix. That approach would be attentive not only to the instrumental significance of Law and Economics, but also what difference, if any, Law and Economics makes in deciding legal cases; who employs and benefits from Law and Economics; and similar concerns. This approach would additionally be particularly attentive to its constitutive significance for socio-legal praxis—how Law and Economics frames meaning and action across the multiplicity of socio-legal fields. In order to more closely examine this breadth, this Article represents an attempt to sketch the outlines of a socio-legal analysis of Law and Economics, and to suggest some starting points for socio-legal research into the Law and Economics movement.

I. LAW AND ECONOMICS AND ITS DISCONTENTS

The Law and Economics movement comprises

a diverse group of legal scholars who are cognizant of each other's writings, and who at a minimum share the view that the principles of neoclassical economic analysis—particularly the principles of price and allocation theory that rest upon the concepts of methodological individualism, rational maximization, and marginalism—can fruitfully be applied to aid in understanding and evaluating the operation of legal rules and institutions.⁸

Theory?, London School of Economics and Political Science, at <http://www.lse.ac.uk/Giddens/FAQs.htm#StructQ2> (last visited Feb. 18, 2004).

6. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15 (1986). Fiss's formulation, however, retains a subject-object dualism that socio-legal theory abjures.

7. Both proponents and critics have identified Law and Economics as the most “significant” and “influential” movement in contemporary legal scholarship. See, e.g., Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law 2* (Univ. of Chi. Law Sch., John M. Olin Program in Law & Economics, Working Paper No. 53, 2d Series, 1998), at http://www.law.uchicago.edu/Lawecon/WkngPprs_51-75/53.Posner.Values.pdf (“Economic analysis of law is generally considered the most significant development in legal thought in the United States since legal realism petered out a half century ago.”); Anthony T. Kronman, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 160 (1995) (“The law and economics movement . . . today continues and remains the single most influential jurisprudential school in this country.”).

8. Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 231 n.2 (1991).

While economic theory has long informed legal analysis,⁹ the Law and Economics movement as such is a more recent phenomenon. General consensus dates the origin of the movement to the 1960 publication of a germinal article by Ronald Coase, *The Problem of Social Cost*.¹⁰

A. CLAIMS OF LAW AND ECONOMICS

Proponents maintain that Law and Economics is positivist in its analysis,¹¹ and portray it as a non-political, value-free scientific approach.¹² Law and Economics practitioners typically eschew considera-

9. See Randal C. Picker, *Law and Economics: Intellectual Arbitrage*, 27 *LOY. L.A. L. REV.* 127, 128 (1993) (locating the roots of Law and Economics at the University of Chicago in the 1930s).

10. 3 *J.L. & ECON.* 1 (1960). *The Journal of Law and Economics*, in which Coase's article appeared, had been launched at the University of Chicago Law School two years earlier. See 1 *J.L. & ECON.* (1958). For examples of work identifying Coase's article as the genesis of modern Law and Economics, see Posner, *supra* note 7, at 2; Picker, *supra* note 9, at 128; Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 *HOFSTRA L. REV.* 905, 906 (1980); RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW* 237 (1996); Neil Duxbury, *Is There a Dissenting Tradition in Law and Economics?*, 54 *MOD. L. REV.* 300, 300 (1990); Lewis Kornhauser, *The New Economic Analysis of Law: Legal Rules as Incentives*, in *LAW AND ECONOMICS* 27 (Nicholas Mercuro ed., 1989); Nan Aron et al., *Economics, Academia, and Corporate Money in America: The 'Law and Economics' Movement*, 24(4) *ANTITRUST L. & ECON. REV.* 27, 27 (1992-1993).

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

Notwithstanding the appearance of "isolated but seminal articles," including Coase's, in the 1950s and 1960s, at least one Law and Economics scholar locates the birth and development of the movement in the 1970s. Thomas S. Ulen, *Law and Economics: Settled Issues and Open Questions*, in *LAW AND ECONOMICS* 201 (Nicholas Mercuro ed., 1989).

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

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

tion of distributional claims, consigning those to the political realm.¹³ They insist that the movement's influence is methodological, articulating formal theoretical models of legal phenomena resting on explicit behavioral and factual assumptions derived from economic theory.¹⁴

Three premises underlie Law and Economics argument: that rational individuals pursue preference-maximizing actions and exchanges;¹⁵ that rules of law impose prices on (or subsidize) individual action, such that those rules alter the nature and amount of activity;¹⁶ and that common law rules are efficient (in a Pareto¹⁷ or Kaldor-Hicks¹⁸ sense), in that they reach the results that rational actors would reach through a process of free exchange.¹⁹

On the basis of these premises, advocates of Law and Economics contend that efforts to regulate individual behavior through the law are likely to be futile or have perverse or dangerous consequences.²⁰ The argument against regulation is twofold: first, the costs (anticipated and unanticipated) of regulation often outweigh its benefits;²¹ second, regulation is a form of rent-seeking behavior by cartelizing groups seeking to gain a

note 10, at 910 (criticizing the movement's "effort to create a system of legal thought that is objective, neutral and apolitical," claiming the mantle of science).

13. See PERITZ, *supra* note 10, at 238-41; Horwitz, *supra* note 10, at 910.

14. Charles Goetz, *The Courtship of Law and Economics*, 12 *HAMLINE L. REV.* 245, 249 (1989).

15. Richard Posner, *The Law and Economics Movement*, *AM. ECON. REV.*, May 1987, at 1, 5; Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 *NOTRE DAME L. REV.* 817, 818-20 (1989); Kornhauser, *supra* note 3, at 234; Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 *MO. L. REV.* 1, 23 (1995); Mark Tushnet, *Idols of the Right: The "Law and Economics" Movement*, *DISSENT*, Fall 1993, at 475.

16. Posner, *supra* note 15, at 5.

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

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

19. Posner, *supra* note 15, at 5; ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 492-96 (1988).

20. Cf. ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991). See, for example, Bogus, *supra* note 15, at 29 and Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199 (1988), discussing and critiquing examples of Law and Economics arguments that employ the various prongs of Hirschman's rhetorical triad.

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

premium over the market price for their activity.²² Legal intervention in private interaction is justifiable only when it restores a dysfunctional market to efficiency and facilitates free individual exchange.²³

Law and Economics does not limit its analysis to areas of law that are most obviously economic in nature, such as antitrust, bankruptcy or taxation.²⁴ Rather, like other forms of “economic imperialism,”²⁵ Law and Economics extends its reach into criminal law, torts, family law, constitutional law, environmental law, jurisprudence, and the legal process, to name but a few.²⁶ For traditional legal scholars, who often assume that the application of market logic outside the formal economic realm is limited or inappropriate, the imperialism of Law and Economics is often especially troubling.²⁷ Yet advocates of Law and Economics denounce, as untested and ill-founded, the assumption that market reasoning has little applicability outside the economic realm.²⁸ The decision whether to apply market analysis and commodity valuation, they assert, should rest on a dispassionate assessment of the benefits and costs of doing so in a particular case.²⁹

22. See Kelman, *supra* note 20, at 236–38.

23. See PERITZ, *supra* note 10, at 258–62; Duxbury, *supra* note 10, at 309–10; Bogus, *supra* note 15, at 18. For Law and Economics scholars of the Chicago School, the argument against legal regulation of or interference with private interaction arises out of the conception of “wealth maximization” and “freedom of contract” as the fulfillment of liberty and personal autonomy. PERITZ, *supra* note 10, at 238–39 (citing ROBERT BORK, *THE ANTITRUST PARADOX* 116–33 (1978), and RICHARD POSNER, *ANTITRUST LAW, AN ECONOMIC PERSPECTIVE* (1976)). See also Bogus, *supra* note 15, at 18 n.66 (discussing Posner’s endorsement of products liability doctrine as an “efficient mechanism for transmitting information . . . from manufacturers to consumers”).

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

25. “Economic imperialism” refers to the “practice of extending the domain of economic explanation to all spheres of human activity.” Kelman, *supra* note 20, at 206; see also Nicholas Mercurio, *Toward a Comparative Institutional Approach to the Study of Law and Economics*, in *LAW AND ECONOMICS* 17 (Nicholas Mercurio ed., 1989). Mercurio and Kelman both cite GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976), as the exemplar of economic imperialism.

26. Posner, *supra* note 15, at 4–5.

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

28. Neil Duxbury, *Law, Markets & Valuation*, 61 *BROOK. L. REV.* 657, 662–63. Duxbury insists that even the most imperialistic legal economists, such as Posner, do recognize limits to market reasoning. *Id.* at 662.

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

Within the Law and Economics movement there are various tendencies or strains that differ with respect to their claims and methodology. First, it is possible to distinguish four distinct claims in Law and Economics scholarship:³⁰ the behavioral claim holds that microeconomic analysis can predict how individual actors will respond to different legal rules;³¹ the normative claim asserts that considerations of efficiency ought to determine legal regimes;³² the descriptive claim suggests that "common law . . . legal rules in fact induce efficient behavior";³³ and the evolutionary claim identifies social forces as the driving mechanism behind law's tendency toward efficiency.³⁴ In addition, as the movement has developed, alternative forms of Law and Economics have emerged, which depart in various ways from the premises or methodology of the Chicago School.³⁵

Notwithstanding these differences in argument and approach, it remains meaningful to speak of a Law and Economics movement, albeit not as an hypostatized, coherent and discrete corpus. Instrumentally, the divergences within Law and Economics are significant; different versions of Law and Economics may hold different implications and yield divergent conclusions with respect to any given legal question.³⁶ Law and Eco-

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

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

32. *Id.* at 240-42. Two prominent statements from outside law of the normative claim for neo-classical economics are F.A. HAYEK, *THE ROAD TO SERFDOM* (1944), and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); see also PETER L. BERGER, *THE CAPITALIST REVOLUTION: FIFTY PROPOSITIONS ABOUT PROSPERITY, EQUALITY, AND LIBERTY* (1986). Posner identifies "normative" Law and Economics as scholarship that "tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences, whether on economic efficiency, or the distribution of income and wealth, or other values." Posner, *supra* note 7, at 3.

33. See Kornhauser, *supra* note 33, at 243-44.

34. See *id.* at 244-45.

35. See Duxbury, *supra* note 10, at 302-05. Of particular significance has been work drawing on the neo-institutionalist and public choice schools. See generally Symposium, *Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 3 (1989); *Introduction to Non-Posnerian Law and Economics Symposium*, 12 HAMLINE L. REV. 195-96 (1989); *LAW AND ECONOMICS* (Nicholas Mercuro ed., 1989).

36. See Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 ANN. SURV. AM. L. 73, 100-02 (suggesting the "practical indeterminacy" of economic analysis in application to particular legal cases); Kornhauser, *supra* note 3, at 237-46 (discussing the logical independence and varying implications of four Law and Economics claims).

nomics in any form is nonetheless constitutive of neo-Liberal³⁷ ideology to the extent that it reproduces economic discourse.³⁸

B. CRITIQUES OF LAW AND ECONOMICS

Law and Economics has been subject to considerable critique, from both proponents and opponents of the movement. There have been two principle lines of critique: challenges to the foundations of economic analysis, and criticism of the ideological nature and implications of economic legal theory.³⁹

Celebrating the “Courtship of Law and Economics,” Charles Goetz observed that “acceptance of a model must rest largely on pragmatic ground: How well does the model work?”⁴⁰ It is not surprising then that both critics of and adherents to Law and Economics have given considerable attention to the practical weaknesses in its model. An early statement of the foundational challenge from within the ranks of Law and Economics is Arthur Leff’s critical review of a leading Law and Economics treatise, Richard Posner’s *The Economic Analysis of Law*.⁴¹ Leff sharply questioned the view of *homo economicus* on which Posner’s analysis relied, and argued for a richer model of human behavior drawing on psychology and sociology.⁴²

Subsequent assessments of Law and Economics echo and extend Leff’s critique. Along with finding the microeconomic model inadequate or questionable as a depiction of human behavior,⁴³ critics have observed

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

38. Even work critical of Law and Economics may be indicative of—and contribute to—its hegemony, to the extent that it is Law and Economics that the critics are criticizing (rather than safely ignoring it). See William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study 7* (Univ. of Chi. Law Sch., John M. Olin Program in Law & Economics, Working Paper No. 9, 2d Series, 1992), at http://www.law.uchicago.edu/Lawecon/WkngPprs_01-25/09.wml-rap.econ.pdf (“Scholars rarely bother to criticize work that they don’t think is or is likely to become influential. They ignore it.”).

39. Mercurio, *supra* note 25, at 17–20 (identifying two predominant criticisms of Law and Economics: inappropriateness of microeconomic assumptions and narrowness of efficiency concern).

40. Goetz, *supra* note 14, at 250.

41. Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1973)).

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

43. See, e.g., Kelman, *supra* note 20, at 202–03. For example, the assumptions of rational and informed consumers have been challenged with respect to goods that are inherently dangerous to use

that Law and Economics models ignore or distort the nature of legal and social institutions and their implications for human behavior.⁴⁴ In addition, critics challenge the positivist claim of Law and Economics, maintaining that empirical research fails to bear out the theoretical hypotheses that the microeconomic model begets.⁴⁵ As Goetz feared, such critics are apt to conclude that Law and Economics is of little value to practical legal concerns.⁴⁶

Partly in response to such criticism, some Law and Economics scholars have embraced Leff's call for an enriched foundational model. Some neo-institutionalist⁴⁷ Law and Economics scholars in particular have urged that the movement draw on insights from other disciplines such as

(e.g., cigarettes), unlikely to provide satisfaction (e.g., lottery tickets), or difficult to assess (e.g., automobile safety). Bogus, *supra* note 15, at 23–25, 27–38.

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

Scholars in other disciplines, notably sociology and anthropology, have offered strong theoretical and empirical challenges to the microeconomic model on this ground. Mark Granovetter, for example, offers a theory of the social embeddedness of economic action in reply to the arguments of Coasean transaction cost economists. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 481–83 (1985); *see also* Immanuel Wallerstein, *Capitalist Markets: Theory and Reality*, 30 SOC. SCI. INFO. 371 (1991) (arguing that the market model in neo-classical economic theory does not reflect historical economic practice); Paul Hirsch et al., "Dirty Hands" Versus "Clean Models": Is Sociology in Danger of Being Seduced by Economics?, 16 THEORY & SOC'Y 317 (1987).

For examples of empirical studies in sociology and anthropology that demonstrate the significance of interpersonal relations and social structure to even archetypal market behavior, *see generally* Wayne E. Baker, *Market Networks and Corporate Behavior*, 96 AM. J. SOC. 589 (1990); Wayne E. Baker, *The Social Structure of a National Securities Market*, 89 AM. J. SOC. 775 (1984); Cecilia Formichella & J. Stephen Thomas, *Rational Exchange and Trust: Business Relationships in a Fishing Community*, 9 SOC. SPECTRUM 259 (1989); Stuart Plattner, *Economic Decision Making of Marketplace Merchants: An Ethnographic Model*, 43 HUM. ORG. 43 (1984); Stuart Plattner, *Economic Custom in a Competitive Marketplace*, 85 AM. ANTHROPOLOGIST 848 (1983).

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

46. *See* Bogus, *supra* note 15, at 29.

47. "Neo-institutionalist" economics focuses on the significance of institutions in directing economic behavior and outcomes. *See generally* EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS (2001); THRAINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS (1990).

sociology and psychology to augment or refine their microeconomic assumptions.⁴⁸

Other critiques of Law and Economics challenge the movement's ideology, which the critics perceive as destructive of law. For these critics, Law and Economics "distort[s] the purposes of law and threaten[s] its very existence."⁴⁹ The ideological objection to Law and Economics is twofold, taking issue with its economic imperialism and with its conception of value.

The first aspect of the ideological objection to Law and Economics is a variety of what sociologist Viviana Zelizer terms the "boundless market" critique.⁵⁰ This critique "centers on the destructive social, moral, and cultural effects of commoditization" as the market model extends beyond the scope of the economy itself.⁵¹ The "boundless market" critique does not necessarily reject the premises of microeconomic theory. Rather, it focuses on the (usually unacceptable) social outcomes as the market paradigm spreads out from the economic realm to govern social relations as a whole.⁵²

The economic imperialism of Law and Economics asserts two claims that trouble "boundless market" critics. On the one hand, under the influence of Law and Economics and related movements, "the political sphere has come to be identified as an economic domain."⁵³ On the other hand, Law and Economics scholars "contrast the beneficent market with the corrupt democratic state."⁵⁴ Turning the first of these claims against the second, Mark Kelman argues that the flaws that Law and Economics scholars identify in action by the democratic state in fact reflect the state's embeddedness in and subordination to "the acquisitive capitalist culture they extol."⁵⁵ He contends that, rather than representing a scien-

48. See generally Ulen, *supra* note 10; Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors*, 65 CHI.-KENT L. REV. 23 (1989).

49. Fiss, *supra* note 6, at 1.

50. Viviana A. Zelizer, *Beyond the Polemics on the Market: Establishing a Theoretical and Empirical Agenda*, 3 Soc. F. 614, 618 (1988).

51. *Id.*

52. *Id.* A leading critical work in the "boundless market" tradition is KARL POLANYI, *THE GREAT TRANSFORMATION* (1957). Polanyi's thesis is that modern market exchange is radically cut off from existing social relations with the result that "[i]nstead of economy being embedded in social relations, social relations are embedded in the economic system." *Id.* at 57; see also PIERRE BOURDIEU, *FIRING BACK* (Loic Wacquant trans., The New Press 2003) (2001); PIERRE BOURDIEU, *ACTS OF RESISTANCE* (Richard Nice trans., The New Press 1999) (1998); ENZO MINGIONE, *FRAGMENTED SOCIETIES* (Paul Goodnick trans., 1991); ANDRE GORZ, *CRITIQUE OF ECONOMIC REASON* (Gillian Hordyside & Chris Turner trans., 1989); Bernard Barber, *The Absolutization of the Market*, in *MARKETS AND MORALS* (Gerald Dworkin et al. eds., 1977).

53. PERITZ, *supra* note 10, at 302.

54. Kelman, *supra* note 20, at 268.

55. *Id.*

tific extension of value-free economic analysis to law, Law and Economics "is, in the deepest sense, partly about particular views of family life, childrearing, ambivalence, ambition, asceticism, irony, the meaning of time, learning, leisure, and love."⁵⁶ Yet these views do not follow logically from the premises of economic argument; rather, they are "cultural," an outcome of the worldview that market logic engenders.⁵⁷

Even some advocates of Law and Economics recognize that market reasoning has limits. For instance, Neil Duxbury disparages resistance to extending the market domain and insists that "[c]reeping commodification . . . is not necessarily insidious commodification."⁵⁸ Yet he concedes that conclusions derived from economic analysis of some forms of human activity "might be considered inappropriate because market reasoning is able to provide only a limited or impoverished account of the particular issue at stake."⁵⁹ But, in contrast to the "boundless market" critics of Law and Economics, Duxbury would place the burden of proof on those who would restrict the application of market logic to show that the costs of doing so would outweigh the benefits.⁶⁰

The second type of ideological critique objects to "reliance on economic efficiency as the touchstone or guide to legal-economic policy making."⁶¹ Particularly where the conception of efficiency is "wealth maximization," critics object that this is "not an adequate basis from which to assess and make suggestions concerning the law."⁶² Rather than maximizing social well-being and satisfaction in general, such critics insist, the Law and Economics conception of value as wealth favors certain groups, notably producers over consumers and the rich over the poor.⁶³ The ostensibly positivist welfare claim of Law and Economics turns out, on closer inspection, to be "an ideological, and frequently objectionable" position.⁶⁴

56. *Id.* at 270-71.

57. *See id.* at 270.

58. Duxbury, *supra* note 28, at 700.

59. *Id.* at 662.

60. *Id.* at 700.

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

62. C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 47 (1975); *see also* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 191-94 (1980); Ronald M. Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 573-90 (1980). Kelman faults the "evaluative term" in Law and Economics argument, whether expressed as "wealth maximization" or "efficiency," for its "ambiguity." Kelman, *supra* note 20, at 203.

63. Baker, *supra* note 62, at 9-32.

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

Representing a ligature between the foundational and the ideological challenges to Law and Economics, a third strand of critique takes aim at the movement's positivist claim. For positivist Law and Economics, the mantle of science is what confers legitimacy and acceptability to its analysis.⁶⁵ To test whether the movement was true to its positivist aspiration, Christopher Bruce examined contributions to a leading Law and Economics journal over a seventeen year period.⁶⁶ Contrary to the assertion of positivism, Bruce found a substantial degree of normative argument, little rigorous testing of models, and little effort to contrast economic with other models of law.⁶⁷ He suggested that the infidelity of Law and Economics to its own positivist image would impede its acceptance.⁶⁸ Conversely, Donald McCloskey urges Law and Economics to dispense entirely with the claim to be a positivist science, characterizing this assertion as a "rhetorical practice" that intimidates non-economists and narrows the scope of inquiry.⁶⁹

II. LAW AND ECONOMICS IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE

While the theoretical foundations and ideological implications of Law and Economics have received substantial critical attention, the existing literature does not offer an account of the historical sociology of the movement. Indeed, few discussions, whether friendly or oppositional, seriously consider that Law and Economics has a history.⁷⁰ Yet the significance of the movement becomes fully apparent only by locating Law and Economics against the historical-sociological background within which it has emerged and spread, and to which it has helped give form and direction.

A. THE RISE OF LAW AND ECONOMICS: PREVIOUS EXPLANATIONS

Scholars within the movement have employed the economic analysis of supply and demand to account for the emergence and diffusion of Law and Economics.⁷¹ The supply of economic arguments "refocused the research interests of many legal scholars and even altered classroom dis-

65. See Goetz, *supra* note 14, at 248–50; Christopher J. Bruce, *A Positive Analysis of Methodology in the Law and Economics Literature*, 12 *HAMLIN L. REV.* 197 (1989).

66. Bruce, *supra* note 65, at 219–20. Bruce analyzed 126 articles from the first seventeen volumes (1972–1988) of *The Journal of Legal Studies*, published at the University of Chicago.

67. *Id.*

68. *Id.*

69. Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 *MICH. L. REV.* 752, 763–66 (1988).

70. Recognition of the history of Law and Economics is typically limited to acknowledgment of early examples of Law and Economics scholarship. See *supra* note 10 and accompanying text.

71. See, e.g., Goetz, *supra* note 14, at 257–58; Mercurio, *supra* note 25, at 17.

cussion.”⁷² The diffusion of Law and Economics, as well as its failure to penetrate into some areas or to gain more adherents, is a product of the demand side.⁷³ Yet these analyses offer no mechanism, beyond the “inherent ‘imperialistic’ nature of economics,”⁷⁴ to explain why the supply of economic argument should have come to market when it did. Nor do they consider the extent to which supply, whatever its source, may create its own demand.⁷⁵

Other accounts of the rise of Law and Economics are more historical. One explanation notes “the almost simultaneous emergence” of Law and Economics and Critical Legal Studies in the 1970s.⁷⁶ These two movements, despite the common perception that they are opposing tendencies with contrary political orientations, share roots in the legal realist tradition.⁷⁷ They arose when they did in response to the perceived failure of “legal process” jurisprudence, which both Law and Economics and Critical Legal Studies critique (though in different terms and with different conclusions).⁷⁸ Some credit social events and cultural change as the

72. Goetz, *supra* note 14, at 257.

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

74. Mercurio, *supra* note 25, at 17. To economic imperialists, “[p]ractically all forms of activity, including love affairs and intellectual inquiry, are subject to the laws of supply and demand.” Goetz, *supra* note 14, at 257. The fact that these scholars employ the concept of supply and demand to explain the diffusion of economic theory into law is itself a further illustration of the hegemony of economic discourse.

75. The most famous version of the belief that supply creates its own demand is “Say’s Law,” named for the French political economist J.B. Say, who held that “there could not be a shortage of purchasing power in the economy.” JOHN KENNETH GALBRAITH, *MONEY: WHENCE IT CAME, WHERE IT WENT* 218 (1975); ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 97 (1961). Say’s Law, which was hegemonic within economic theory from the early nineteenth until the early twentieth century, “stands as the most distinguished example of the stability of economic ideas, including when they are wrong.” GALBRAITH, *supra* note 75, at 219.

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

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

ROGER FRIEDLAND & A.F. ROBERTSON, *BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY* (1990).

76. Gary Minda, *The Law and Economics and Critical Legal Studies Movements in American Law*, in *LAW AND ECONOMICS* 87 (Nicholas Mercurio ed., 1989); see also Fiss, *supra* note 6, at 14.

77. Minda, *supra* note 76, at 88–89, 95; Mercurio, *supra* note 25, at 17. Others who note the intellectual link between Law and Economics and Critical Legal Studies are Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 *HARV. L. REV.* 761, 768–69 (1987), and Martha L. Minow, *Law Turning Outward*, 73 *TELOS* 79, 90–91 (1986).

78. Gary Minda, *Antitrust at Century’s End*, 48 *SMU L. REV.* 1749, 1778–79 (1995); Minda, *supra* note 76, at 99–100, 104; Fiss, *supra* note 6, at 2, 13–14; cf. Mercurio, *supra* note 25, at 17 (stating that

driving force behind the upheaval in legal theory.⁷⁹ Others point to fundamental changes in the nature of the economy during the same period.⁸⁰

B. LAW AND ECONOMICS IN THE TRANSITION TO LATE CAPITALISM

The timing and trajectory of the Law and Economics movement's birth and development coincide with a set of economic, political and cultural developments that numerous scholars have argued represent a fundamental social transformation on a global scale.⁸¹ The specific trends

Law and Economics "filled the void left by the legal realist movement," which had failed to fulfill its own agenda); Posner, *supra* note 7, at 3 ("Economic analysis of law is generally considered the most significant development in legal thought in the United States since legal realism petered out a half century ago.").

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

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

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

On economic restructuring, see generally BENNETT HARRISON, *LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY* (1994); *WORKING UNDER DIFFERENT RULES* (Richard B. Freeman ed., 1994); RICHARD BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* (1994); SASKIA SASSEN, *THE GLOBAL CITY*: NEW YORK, LONDON, TOKYO (1991); *DUAL CITY: RESTRUCTURING NEW YORK* (John H. Mollenkopf & Manuel Castells eds., 1991); DAVID HARVEY, *THE URBAN EXPERIENCE* (1989); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989); MANUEL CASTELLS, *THE INFORMATIONAL CITY* (1989); JOYCE KOLKO, *RESTRUCTURING THE WORLD ECONOMY* (1988); BENNETT HARRISON & BARRY BLUESTONE, *THE GREAT U-TURN* (1988); SCOTT LASH & JOHN URRY, *THE END OF ORGANIZED CAPITALISM* (1987); CLAUD OFFE, *DISORGANIZED CAPITALISM* (1985); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984); ERNEST MANDEL, *LATE CAPITALISM* (1975).

On the politics and culture of postmodernity and globalization, see generally BOURDIEU, *FIRING BACK*, *supra* note 52; BOURDIEU, *ACTS OF RESISTANCE*, *supra* note 52; SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: SELECTED ESSAYS 1984-1998* (1998); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1996); Bruce Pietrykowski, *Consuming Culture: Postmodernism, Post-Fordism and Economics*, *RETHINKING MARXISM*, Spring 1994, at 62; POST-FORDISM AND SOCIAL FORM: A MARXIST DEBATE ON THE POST-FORDIST STATE (Werner Bonefeld & John Holloway eds., 1994); George Steinmetz, *Regulation Theory, Post-Marxism and the New Social Movements*, 36 *COMP. STUD. SOC'Y & HIST.* 176 (1994); Margit Meyer, *Politics in the Post-Fordist City*, 91(1) *SOCIALIST REV.* 105 (1991); JAMESON, *supra* note *; Sharon Zukin, *Socio-Spatial Prototypes of a New Organization of Consumption: The Role of Real Cultural Capital*, 24 *SOCIOLOGY* 37 (1990); MICHAEL B. KATZ, *THE UNDESERVING POOR* (1989); Joachim

that others have identified as the driving force behind the diffusion of Law and Economics are encompassed within this broader transformation.⁸² Yet previous explanations of the emergence of Law and Economics are inadequate to appreciate the movement's significance as a socio-legal phenomenon. Instead, a critical socio-legal theory would locate Law and Economics as a constitutive element in a restructuring regime of capital accumulation and social regulation.⁸³ Such a theory would simultaneously identify the socio-economic relations and interests that both give impetus to the project of reconstituting capitalism and foster Law and Economics as a theory of law in harmony with a neo-Liberal hegemonic project.⁸⁴

Like the late twentieth century, the late nineteenth century was a period of fundamental economic and social transformation. In that period, a new ideology of Liberalism gained ascendancy over social thought and policy.⁸⁵ Law, no less than other social institutions, came under Liberalism's sway.⁸⁶ Dominant explanations of the rise of Liberalism identify law as a tool that particular social actors wielded to reconstruct social in-

Hirsch, *The Crisis of Fordism, Transformations of the "Keynesian" Security State, and New Social Movements*, 10 RES. SOC. MOVEMENTS, CONFLICT & CHANGE 43 (1988); FRED BLOCK ET AL., *THE MEAN SEASON: THE ATTACK ON WELFARE* (1987); David Harvey, *Flexible Accumulation through Urbanization: Reflections on "Post-Modernism" in the American City*, 90 ANTIPODE 260 (1987); *THE CAPITALIST CITY: GLOBAL RESTRUCTURING AND COMMUNITY POLITICS* (Michael Peter Smith & Joe R. Feagin eds., 1987); JEAN-FRANÇOISE LYOTARD, *THE POSTMODERN CONDITION* (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984); ANDRE GORZ, *FAREWELL TO THE WORKING CLASS* (Michael Sonenscher trans., South End Press 1982); SHARON ZUKIN, *LOFT LIVING: CULTURE AND CAPITAL IN URBAN CHANGE* (1982); DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY* (1973).

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

83. See *generally* ALAIN LIPIETZ, *MIRAGES AND MIRACLES: THE CRISIS OF GLOBAL FORDISM* (David Macey trans., 1987); MICHEL AGLIETTA, *A THEORY OF CAPITALIST REGULATION* (David Fernbach trans., 1979).

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

85. See *generally* Gordon, *supra* note 4.

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

stitutions to suit their needs.⁸⁷ As an alternative to this instrumentalist conception, legal historian Robert Gordon offers what he terms an “ideological’ approach.”⁸⁸ In this view, the work of legal elites brings legal theory into play through legal practice: articulating clients’ problems and legal cases in terms of operative categories of legal discourse.⁸⁹ The emergence of a new mode of legal theory and ideology is thus significant not merely because of the instrumental force it might exert over legal outcomes, but because it reorients consciousness among attorneys, judges, clients, and other legal actors.⁹⁰ Moreover, legal ideology does not exist in a distinct space bounded-off from the rest of society. In the period that Gordon studies, “transformations in legal ideology were paralleled in all other spheres as well.”⁹¹

During the early 1970s, the global capitalist economy experienced a profound crisis of accumulation.⁹² This crisis manifested itself not only economically, but politically and culturally as well.⁹³ Law and Economics, which emerged and grew to prominence during this period, is a constitutive element of the social and economic transformation emergent in the wake of this crisis. The significance of Law and Economics in this sense is not, however, merely its instrumental utility in serving the functional needs of capital accumulation. Even more significant is the movement’s influence on the terms and categories of legal discourse. That is, Law and Economics is most fully understood in socio-legal terms as constitutive of neo-Liberal ideology in and through legal theory and practice. In this sense, Law and Economics does serve to “legitimate and justify the newly emergent forms of domination” of late capitalism.⁹⁴ Yet it does so not in a blunt instrumental way, but by contributing to the hegemony of neo-Liberal ideology such that pro-corporate capitalist outcomes come

87. *Id.* at 70–71.

88. *Id.* at 71.

89. *See id.* at 71–72.

90. *Id.* at 72.

91. *Id.*

92. *See* JAMES O’CONNOR, ACCUMULATION CRISIS (1984) (leading work on the concept of a crisis in capital accumulations and its social and political effects); *see also* Mary Zey & Brande Camp, *The Transformation from Multidimensional Form to Corporate Groups of Subsidiaries in the 1980s: Capital Crisis Theory*, 37 SOC. Q. 327 (1996); CAPITALIST DEVELOPMENT AND CRISIS THEORY: ACCUMULATION, REGULATION AND SPATIAL RESTRUCTURING (Mark Gottdiener & Nicos Komninos eds., 1989); John Bellamy Foster, *Restructuring the World Economy in a Time of Lasting Crisis*, MONTHLY REV., May 1989, at 46; Paul M. Sweezy, *Marxian Value Theory and Crisis*, MONTHLY REV., July–Aug. 1979, at 1; Andre Gunder Frank, *World Crisis and Underdevelopment*, INSURGENT SOCIOLOGIST, Spring 1976, at 19; Erik Olin Wright, *Alternative Perspectives in Marxist Theory of Accumulation and Crisis*, INSURGENT SOCIOLOGIST, Fall 1975, at 5.

93. *See generally supra* note 81.

94. *Cf.* Gordon, *supra* note 4, at 93.

to appear universal, rather than particular, and as common sense, rather than contested.⁹⁵

On the cusp of the crisis of late twentieth-century capitalism, neo-Liberal actors launched a tactical "war of position" to rearticulate the terms of debate over economic and social policy.⁹⁶ This project began to take shape before the capitalist crisis was fully apparent; even while interventionist hegemony was at its apex, a counter-hegemonic movement was taking shape.⁹⁷ But it would not come into full flower for another decade.⁹⁸ By the mid-1980s, the corporate investment had borne fruit, as conservatives secured social hegemony and political power.⁹⁹

Central to this hegemonic project is a reorientation of popular conceptions of the economy. Neo-liberal discourse postulates the "free market" ideal as a model not only for political economy but for social life in general.¹⁰⁰ Law and Economics grows out of, and helps to form, this

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

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

96. See Mark Tushnet, *Foreword* to JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK-TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA*, at ix (1996). Tushnet borrows the concept of "war of position" from Gramsci. GRAMSCI, *supra* note 84, at 238-39. The term refers to the development of "ideological stances" in preparation for a "war of maneuver" in which a would-be hegemonic group moves to seize control over policy. See Tushnet, *supra* note 96, at ix.

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

98. Stefancic and Delgado credit William Simon, a trustee of the John M. Olin Foundation, with promoting corporate capital's full-court press to support conservative intellectuals. STEFANCIC & DELGADO, *supra* note 96, at 3 (citing WILLIAM SIMON, *A TIME FOR TRUTH* (1978)).

99. *Id.* at 4. Stefancic and Delgado report on the success of the corporate-conservative hegemonic project in a range of areas, including the backlash against affirmative action, the campus culture wars, and tort reform. *Id.*; see also WILLIAM M. DUGGER, *CORPORATE HEGEMONY* (1989) (tracing the influence of corporate capital in reshaping economic, political, cultural and social thought, institutions and practices).

100. Albert Hirschman expressly links the turn in economic discourse with the aftermath of the accumulation crisis of the early 1970s:

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

hegemonic discourse.¹⁰¹ In this sense, Law and Economics not only “codif[ies] the biases and dominant ideology, the common sense, of the historical period in which common law developed,”¹⁰² but also crafts and codifies the biases, dominant ideology, and common sense of a new historical period as it unfolds.¹⁰³ More than just the application of economic theory to law, Law and Economics is a “form of political action” aimed at creating “communities, shared references, commonsensical stories that help shape and order an amorphous world.”¹⁰⁴ Law and Economics plays

go by the labels “monetarism” and particularly “new classical economics” or “rational expectations.”

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

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

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

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

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

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

104. Kelman, *supra* note 20, at 270.

a twofold role in this project: the movement's scholarship advances economic discourse as the basis for framing and addressing social problems, and judicial opinions adopting Law and Economics precepts enforce economic conceptions as law.¹⁰⁵

"To the extent that many businesses oppose many government activities," Kelman observes, "there will always be an active market for politically plausible, if academically shoddy, antiregulatory work."¹⁰⁶ Law and Economics has indeed been the beneficiary of "well-funded efforts to promote it" both within the legal academy and to the judiciary.¹⁰⁷ Large corporations and corporate foundations have lavished millions of dollars on Law and Economics centers, programs, professorships, and fellowships at law schools throughout the United States.¹⁰⁸ Outside the academy, corporate donors have funded numerous "efforts aimed at shaping views toward modern capitalism,"¹⁰⁹ including studies supporting

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

106. Kelman, *supra* note 20, at 269.

107. Bogus, *supra* note 15, at 17.

108. The largest contributors have been the John M. Olin Foundation, which has dispensed more than \$13 million in support of Law and Economics, and the foundations associated with Richard Scaife, which have spent about \$3 million. *Id.* at 18 n.62; see also Eric Alterman, *The Troves of Academe*, THE NATION, June 24, 1996, at 22; *It Pays to Think Right*, NAT'L L.J., Aug. 15, 1992, at 1923; *Law Schools: Yale Notes*, NAT'L L.J., July 7, 1986, at 4; *Joint Law Program Receives \$354,700*, L.A. TIMES, Jan. 13, 1991, at J7.

Among the institutions boasting Law and Economics programs, chairs, or fellowships—all of them supported by corporate foundations—are such elite law schools as Yale, Chicago, Harvard, Stanford, Virginia, Pennsylvania, Cornell, Georgetown, and Berkeley, as well as the law schools at the University of Miami, Emory, University of Kansas, and University of Southern California (the latter in conjunction with Cal-Tech), and the business schools at MIT and Washington University. Eric Alterman, *The Troves of Academe*, THE NATION, June 24, 1996, at 22. One law school, George Mason University School of Law, which also receives substantial funding from Olin, Scaife, and other corporate foundations, has elevated Law and Economics to a central organizing principle of its curriculum. See Chris Klein, *Law and Economics Finds its Niche*, NAT'L L.J., Oct. 14, 1996, at A1; Bogus, *supra* note 15, at 18 n.62.

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

deregulation,¹¹⁰ tort reform,¹¹¹ and reduced antitrust enforcement.¹¹² They have also sponsored Law and Economics seminars for judges.¹¹³ Supporters of these programs defend them as “simply about making the law more efficient and fair”;¹¹⁴ but critics aver that the corporate patrons of

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

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

112. See Mueller, *supra* note 109, at 71.

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

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

In the past, corporate sponsors directly bore much of the cost of immersing judges in Law and Economics. Aron et al., *supra* at 10. In the face of criticism, the Law and Economics Center has replaced direct corporate funding with grants from private foundations, many of which were themselves “established with corporate money and remain wedded to their creators’ staunch ‘free market’ ideologies.” *Id.* (citing Olin and Bradley Foundations). One observer muses that “[t]he fact that corporations fund ‘Manne’s initiative’ to essentially persuade federal judges on the wisdom of minimal antitrust enforcement policy is rather curious and troublesome.” Minda, *supra* note 76, at 1755 n.31. Another notes that some corporate donors are themselves parties in “cases before the very judges attending” the seminars. Mueller, *supra* note 109, at 71.

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

114. Jay Mathews, *Business Tries to Shape Legal System, Report Says*, WASH. POST, May 19, 1993, at F4 (quoting Nan Aron, executive director, Alliance for Justice).

Law and Economics seek to use the movement to reshape the legal regime in contours more facilitative of capital accumulation.¹¹⁵

An early product of the Law and Economics Center illustrates the return that the movement's underwriters have realized on their investment. Responding to "strong, even strident, antibusiness and anticorporate sentiment," the Center published a volume of essays espousing "free-market" analyses of various legal, social, and economic issues of concern to large corporations.¹¹⁶ The volume was intended as a "quick fix" to "anti-free-market attitudes."¹¹⁷ Contributors deployed Law and Economics argument to rebuff calls for corporate social responsibility, workers' rights legislation, insider trading controls, wage and price regulation, stricter antitrust enforcement, and similar measures inimical to unrestrained accumulation of corporate profits.¹¹⁸

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

Aided by the largesse of its sponsors, Law and Economics has assumed its place as a "mainstream element of academic discourse" in the contemporary law school.¹¹⁹ In the estimation of Yale Law School Dean Anthony Kronman, Law and Economics is "the intellectual movement that has had the greatest influence on American academic law in the past quarter-century."¹²⁰ Whether measured by the number of law school professors holding a Ph.D. in economics,¹²¹ the number of law school chairs, fellowships, or programs in Law and Economics,¹²² or the inclusion of

115. *Id.*

116. Foreword to THE ATTACK ON CORPORATE AMERICA: THE CORPORATE ISSUES SOURCEBOOK, at xiii-xv (M. Bruce Johnson ed., Univ. of Miami Sch. of Law, Law and Economics Center 1978).

117. *Id.* at xi, xiii.

118. See generally THE ATTACK ON CORPORATE AMERICA, *supra* note 116.

119. See Kovacic, *supra* note 80, at 99.

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

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

122. See *supra* note 121.

Law and Economics in the law school curriculum,¹²³ the movement's prominence is evident. The precise scope, extent, loci, and patterns of its influence are less clear.

C. THE JUDICIARY AS A SITE OF LAW AND ECONOMICS PRAXIS

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

By most accounts, Law and Economics has not had the “pervasive” influence within the judiciary that it has in the legal academy.¹²⁴ Earlier in the movement's history, one federal judge asserted that “in eleven years as a district judge and almost one year as a judge of the Court of Appeals, I have never heard a case in which law and economics analysis has been applied.”¹²⁵ A more recent commentator has predicted that the lack of penetration by Law and Economics into the courts is “unlikely to change.”¹²⁶ Echoing the ideological critique of Law and Economics, the lack of impact by the movement on the judiciary is attributed to the limited practical utility of economic analysis in judicial decision-making.¹²⁷

Yet the judiciary has not been entirely immune to the charms of Law and Economics. In various ways, Law and Economics has gained a judicial following and enlisted judges in its hegemonic project. Law and Economics scholarship diffuses directly into judicial decision-making in two ways. First, judges may read and adopt the arguments of the Law and Economics literature.¹²⁸ Second, Law and Economics scholars themselves

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

124. See, e.g., Farnsworth, *supra* note 120, at 227; Bogus, *supra* note 15, at 17–18. Examining “The Influence of Economics on Law,” Posner contends that Law and Economic “is not merely an ivory-towered enterprise,” but has “influenced legal reform in an [sic] number of important areas.” Posner, *supra* note 7, at 3.

125. Becker, *supra* note 128, at 309.

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

127. See *id.* at 29; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 47–48 (1992).

128. Cf. Kovacic, *supra* note 80, at 83 (citing legal scholarship as an influence on judicial opinions in antitrust cases); PERITZ, *supra* note 10, at 282–84 (noting judicial adoption of “contestable market”

may move from the academy to the bench.¹²⁹ Indirect transmission may also occur via other legal actors. Judicial Clerks who have been immersed in Law and Economics while in law school may draft opinions that cite to and follow the analysis of the Law and Economics literature.¹³⁰ Attorneys may introduce judges to Law and Economics by citing

theory from Law and Economics literature); Becker, *supra* note 113, at 310 (noting adoption by at least some federal appellate courts of “Areeda-Turner marginal cost/average-variable-cost theory of predatory pricing”).

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

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

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

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

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

to the literature in their briefs,¹³¹ or employing Law and Economics scholars as expert witnesses.¹³²

The judiciary likewise fosters the diffusion of Law and Economics to others. Legal scholars read and analyze judicial opinions, interpreting them in terms of, or deriving from them, the categories of economic analysis. Opinions expressly or implicitly adopting Law and Economics principles may find their way into law school casebooks, thereby socializing law students into the discipline.¹³³ Attorneys, particularly when appearing before judges associated with the movement, may draft their briefs and frame their arguments accordingly.¹³⁴

III. EMPIRICAL INVESTIGATION OF LAW AND ECONOMICS AND ITS DIFFUSION

Empirical, and especially quantitative, research remains uncommon within legal scholarship.¹³⁵ It is therefore not surprising that there has been no comprehensive account of the scope and pattern of diffusion and influence of Law and Economics. There have, however, been a few em-

131. Kovacic, *supra* note 80, at 100.

132. Becker, *supra* note 113, at 306–08; Posner, *supra* note 7, at 3 (noting that “the use of economists as expert witnesses has become conventional in a range of important fields”). One consulting firm, LEXECON, has provided expert witnesses on economic issues in numerous cases. *E.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); *Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 290 (7th Cir. 1997); *Vitug v. Multistate Tax Comm’n*, 88 F.3d 506, 514 (7th Cir. 1996); *FTC v. Freeman Hosp.*, 69 F.3d 260, 265 n.10 (8th Cir. 1995); *Schwartz v. Sys. Software Assocs.*, 32 F.3d 284, 287 (7th Cir. 1994); *Boca Investorings P’ship v. United States*, 167 F. Supp. 2d 298, 350 (D.D.C. 2001), *rev’d*, 314 F.3d 625 (D.C. Cir. 2003); *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 891 (N.D. Ill. 2000). Among the principals in LEXECON is Daniel R. Fischel (President and Chairman of LEXECON), a leading Law and Economics scholar. *See Endo v. Albertine*, 863 F. Supp. 708, 723 n.21 (N.D. Ill. 1994); *see also* Daniel R. Fischel Biography, at <http://www.lexecon.com/content.cfm?contentalias=bio&id=34&ugi=6> (last visited Feb. 18, 2004).

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

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

135. *See generally* Peter H. Schuck, *Why Don’t Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989); Richard A. Posner, *The Theory and Practice of Citations Analysis, With Special Reference to Law and Economics* 1, 1 (Univ. of Chi. Law Sch., John M. Olin Program in Law & Economics, Working Paper No. 83, 2d Series, 1999), at http://www.law.uchicago.edu/Lawecon/WkngPprs_76-100/83.RAP.Citations.pdf?abstract_id=179655 (remarking on the “[s]carcity of quantitative scholarship” in “legal research, including economic analysis of law”).

pirical investigations by legal scholars that bear on the issue. That work offers a mixed picture of the movement's impact within the legal academy and the courtroom. In light of the incomplete and inconclusive nature of previous research, further study, grounded in socio-legal theory, remains necessary to elucidate the significance of the Law and Economics movement.

A. PREVIOUS EMPIRICAL INVESTIGATIONS OF LAW AND ECONOMICS

Ernest Gellhorn and Glen Robinson assessed the permeation of Law and Economics within law schools in the early 1980s.¹³⁶ The authors noted a marked increase in the number of law school faculty members holding Ph.D.s in economics.¹³⁷ However, after surveying the inclusion of Law and Economics in widely used course books in four legal fields, the authors concluded that the movement had "scarcely penetrated legal education at all."¹³⁸

Robert Ellickson examined the diffusion of Law and Economics within law schools, across legal specialties, and into other university departments.¹³⁹ He showed that Law and Economics was established within elite law schools by 1970 and spread rapidly to other law schools across areas of law over the next few years.¹⁴⁰ But by the mid-1980s, Ellickson contended, the diffusion of Law and Economics had stalled.¹⁴¹ To support his claim, Ellickson examined the proportion of articles making Law and Economics arguments among all contributions to four elite law reviews.¹⁴² He found that this figure increased significantly between 1966 and 1970, but reached a plateau thereafter.¹⁴³ Following up on the Gellhorn and Robinson study, Ellickson found that law school course books gave no greater space to Law and Economics in the late 1980s than they had at the start of the decade.¹⁴⁴ Similarly, Ellickson noted a decrease in the frequency of publications in a series of Law and Economics "readers" by a

136. Ernest Gellhorn & Glen O. Robinson, *The Role of Economic Analysis in Legal Education*, 33 J. LEGAL EDUC. 247 (1983).

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

138. *Id.* at 254-65.

139. Ellickson, *supra* note 48, at 24-32.

140. *Id.* at 24, 26-27.

141. *Id.* at 24, 28-32.

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

143. *Id.* Specifically, Ellickson found that Law and Economics accounted for between six and seven percent of all articles in 1960-1961 and 1965-1966, increased to twenty-eight percent in 1970-1971, and subsequently fluctuated between fourteen and thirty-three percent in 1975-1976, 1980-1981, and 1985-1986. *Id.*

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

leading legal publisher.¹⁴⁵ Ellickson also compared the attendance at programs sponsored by the Law and Economics section of the Association of American Law Schools (AALS) at its annual conventions with attendance at programs sponsored by other interdisciplinary sections. While the sections on Legal History, Law & Humanities, and Law & Religion attracted an average of about five percent of convention attendees at their programs, Law and Economics attracted just slightly more than three percent of the same audience.¹⁴⁶ Finally, Ellickson measured the professionalization of Law and Economics, as indicated by the increased dominance of Ph.D. economists among contributors to leading Law and Economics journals.¹⁴⁷ On the basis of these findings, Ellickson concluded that Law and Economics had become “a technical sideshow” rather than a dominant “intellectual tide” within law schools.¹⁴⁸

Landes and Posner examined the frequency of citation to Law and Economics scholarship in both scholarly literature (both in law and in other disciplines) and appellate judicial opinions.¹⁴⁹ First, they measured citations in law and social science journals to the work of three selected groups of Law and Economics scholars.¹⁵⁰ They found that citations to that work increased during the period from 1976 to 1990, both in absolute terms¹⁵¹ and relative to “doctrinal”¹⁵² and “political theory”¹⁵³ schol-

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

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

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

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

149. Landes & Posner, *supra* note 38, at 6.

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

151. *Id.* at 10–30.

152. *Id.* at 30–35.

153. *Id.* at 35–37.

ars.¹⁵⁴ They also measured citations to articles appearing in two leading Law and Economics journals: *Journal of Law and Economics* and *Journal of Legal Studies*.¹⁵⁵ Citations to those journals also increased, both in absolute terms,¹⁵⁶ and relative to citations to other interdisciplinary law journals,¹⁵⁷ and fifteen leading law reviews.¹⁵⁸ Finally, they classified articles in five leading law reviews¹⁵⁹ by analytical approach,¹⁶⁰ and measured citations to those articles in law reviews and judicial opinions.¹⁶¹ The number of citations to "economics" articles was greater than for articles in any other category except for "doctrinal."¹⁶² On the basis of these various measures, Landes and Posner conclude that Law and Economics has had a greater impact relative to other approaches to legal scholarship since the mid-1970s.¹⁶³ The analysis sheds light on "the role of specialized journals in the propagation of a school of thought."¹⁶⁴

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

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

156. *Id.* at 43-46.

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

158. *Id.* at 48-49.

159. The sample included the 1975, 1980, 1985, and 1988 volumes of the law reviews published by Chicago, Columbia, Harvard, Stanford, and Yale law schools. *Id.* at 50.

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

161. *Id.*

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

163. *Id.* at 51-52.

164. *Id.* at 7.

Two studies shed light on the extent to which Law and Economics has penetrated into the courtroom to influence judicial decision-making. These provide a mixed picture and suggest that the judicial impact of Law and Economics may vary across areas of law. Surveying judicial opinions in contract cases, Jeffrey Harrison found scant evidence of Law and Economics influence.¹⁶⁵ Of fifty-eight books and articles that Harrison analyzed on the Law and Economics of contract, half were never cited in any state or federal opinion.¹⁶⁶ Moreover, where judges did cite to Law and Economics literature, they often did so without any detailed discussion or comment.¹⁶⁷ In contrast, William Kovacic's analysis of judicial opinions in antitrust cases in the 1980s suggests a greater influence of Law and Economics in that field.¹⁶⁸ The opinions of Reagan-appointed judges in antitrust cases were markedly conservative, embodying policy views grounded in the theories of the Chicago School Law and Economics.¹⁶⁹

165. Harrison, *supra* note 36, at 75-76. The opinions that Harrison examined included concurrences and dissents. *Id.* at 80.

166. *Id.* at 80.

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

168. See generally Kovacic, *supra* note 80, at 49.

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

B. JUDICIAL CITATIONS TO LAW AND ECONOMICS LITERATURE AS A MEASURE OF INFLUENCE

As a provisional examination of the diffusion of Law and Economics through the judiciary, I collected data on the frequency of judicial citations to Law and Economics scholarship during the period of the contemporary Law and Economics movement (1965 to the present). Citations to Law and Economics scholarship are one way that judges may incorporate Law and Economics into their opinions.¹⁷⁰ As such, the frequency of such citations provides a measure of the ideological influence of Law and Economics, regardless of whether or not there is any instrumental link between citations to Law and Economics literature and decisions reached in the citing opinions.¹⁷¹

To examine the diffusion of Law and Economics into judicial decision-making, I searched for citations in federal appellate court opinions¹⁷² to five leading Law and Economics journals: *Journal of Law & Economics*, *Journal of Legal Studies*, *Journal of Law, Economics & Organization*, *International Review of Law and Economics*, and *Research in Law and Economics*.¹⁷³

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

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

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

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

TABLE I
U.S. COURT OF APPEALS CITATIONS TO LAW AND
ECONOMICS JOURNALS, 1968-2002

	1ST	2D	3D	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	D.C.	TOTAL
2002					2		2					I	5
2001		I					4						6
2000		I					2		I	I		I	6
1999			I				2						3
1998		2			I		4					I	8
1997			I				4		I				6
1996							5					I	6
1995	2		I				4		I			I	9
1994							I						I
1993			2				5						7
1992		I	I				5		I			I	9
1991	I						2					3	6
1990					I	I	2					2	6
1989			I				2		I			I	5
1988	I	I				I	4		I				8
1987			I	I			7		2			2	13
1986	I						9		I				11
1985	I		2	I	I		5						10
1984					I		2				I	I	5
1983					2		4		I			I	8
1982							3					I	4
1981		2						I	I			2	6
1980			I						2				3
1979			I									I	2
1978								I					I
1977			I						I			2	4
1976									I				I
1975													0
1974		I							2				3
1973												I	I
1972												I	I
1971												2	2
1970					I								I
1969													0
1968		I											I
TOTAL	6	10	13	2	9	2	78	2	17	I	2	26	168

No federal appellate opinion cited to any of the journals in my search prior to 1968. During the ensuing dozen years, the volume of citation remains quite small; prior to 1981, the annual number of citations never exceed four, and seldom exceeded one. In 1981, there is a small but noticeable jump, with the number of citations doubling from three to six and increasing for seven years thereafter. Following a peak of thirteen citations in 1987, the number of citations has dropped back into the upper single-digits in most years.¹⁷⁴ These data are consistent with the hypothesis of a constitutive relation between Law and Economics and a neo-Liberal hegemonic project of late capitalism in the 1970s and 1980s. Specifically, they indicate that judicial citation to Law and Economics scholarship did increase noticeably (if not overwhelmingly) once the organized efforts at promoting the movement had taken steam.¹⁷⁵

Of 168 total citations between 1968 and 2002, seventy-eight are from Seventh Circuit cases.¹⁷⁶ Moreover, that court's citations account for most of the increase in total annual citations since 1981. In no circuit other than the Seventh does the number of citations ever exceed three in a year.¹⁷⁷ Yet the Seventh Circuit never cited to these Law and Economics journals prior to 1982. Of the seventy-eight Seventh Circuit cases in Table 1, Judges Posner and Easterbrook are responsible for sixty-eight of the citing opinions.¹⁷⁸ Thus, the data supports the popular view that Judges Posner and Easterbrook are the leading judicial adherents of Law and Economics.¹⁷⁹

In light of the status of Ronald Coase's article, *The Problem of Social Cost*¹⁸⁰ as a catalyst for the Law and Economics movement, I searched for all federal appellate cases citing to that article through to

174. 1994 and 1999 stands out with only one and three citations respectively.

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

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

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

178. Judge Posner (who joined the court in 1981) authored fifty-five of the citing opinions; Judge Easterbrook (who joined the court in 1985) authored thirteen.

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

180. 3 J.L. & ECON. 1 (1960).

the end of 2002.¹⁸¹ The first such citation was in a 1968 case in the Second Circuit.¹⁸² However, that debut citation hardly signaled an embrace of Coase's theorem. Adverting to the "theoretical" possibility of Coasean bargaining between shipowners and drydock owners over the allocation of risks between them, the court opined that "this would seem unlikely to occur in real life."¹⁸³ Not until six years later did a court cite Coase approvingly for his proposition regarding the appropriate allocation of tort costs.¹⁸⁴ Another six years lapsed before a subsequent citation to Coase's article.¹⁸⁵ Altogether, federal Court of Appeals judges have cited to Coase's article in twenty-six cases between 1968 and 2002.¹⁸⁶ Of these, more than half have been in the Seventh Circuit.

Overall, these data do not contradict the conclusion of previous commentators that the explicit influence of Law and Economics on judicial practice has been modest. The fact that so sizeable a proportion of citations to Law and Economics journals are in opinions authored by two judges who are prominent as Law and Economics scholars suggests that appointment of those individuals to the bench is a particularly significant route of diffusion for Law and Economics. Yet, the colleagues of Judges Posner and Easterbrook on the Seventh Circuit Court of Appeals have been only slightly more likely than judges in other circuits to cite to Law

181. See *infra* note 186.

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

183. *Id.*

184. *Union Oil Co. v. Oppen*, 501 F.2d 558, 569 (9th Cir. 1974). Along with Coase, the court also cited GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970). *Id.*

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

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

and Economics journals.¹⁸⁷ Thus, it is not at all clear that the presence of such judges on a court substantially increases the propensity of their colleagues to adopt Law and Economics in their own opinions.

The body of Law and Economics literature is, of course, greater than that contained in the journals included in this analysis. Future investigation might examine citations to a broader body of literature, to obtain a more comprehensive picture of the extent and pattern of explicit judicial reliance on Law and Economics scholarship.¹⁸⁸ It would also be helpful to compare citations to journals and leading scholars representing other approaches to legal analysis (i.e., Critical Legal Studies, Socio-Legal Studies, etc.), to be able to gauge the relative influence of Law and Economics.¹⁸⁹

Explicit citation to Law and Economics literature may not be the only measure of the movement's diffusion through the judiciary, however. A more interesting sign of the movement's influence would be opinions in which judges adopt the discourse and categories of Law and Economics argument without expressly citing to the scholarly literature.¹⁹⁰ To the extent that the discourse and reasoning of Law and Economics attains the status of common sense, reasonable ways of deciding cases, without need of supporting authority,¹⁹¹ Law and Economics may truly be said to be hegemonic. Future research—involving close reading of a large number of judicial opinions to identify those in which Law and Economics is implicit as well as explicit—would provide an important

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

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

189. See Landes & Posner, *supra* note 38, at 30-41, 46-47, 50-51.

190. Cf. Shapiro, *supra* note 170, at 1453 ("The most interesting legacy of [influential works of legal scholarship] may well be found in subsequent work which does *not* cite them."). Shapiro observes that,

[i]mpact on terminology and discourse is a form of influence which may not always be reflected in counts of explicit citations, and thus resembles the phenomenon of "obliteration" identified by Robert K. Merton and other sociologists of science. The work of some thinkers is so influential that it is integrated into the common body of knowledge to the point where scholars no longer feel they have to cite it explicitly.

Id. (citing ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 27-28, 35-38 (1968)). Opinions in which the court takes (express or implicit) judicial notice of economic reasoning would represent a similar type of influence at play: integrating economic ideology into the common law to the point that it requires no citation to scholarly authority.

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

test of the movement's significance as a constitutive element in and of neo-Liberalism. Along with citations to Law and Economics literature, future investigation might also look at citations to precedent opinions that have relied on that literature, to see whether they adopt or comment on the Law and Economics principles incorporated into those precedent opinions. Once a body of Law and Economics opinions has been compiled, these may be analyzed and classified by subject area. The relative frequency with which opinions in different areas of law deploy Law and Economics argument will further map the reach of the movement.

CONCLUSION

I have suggested that the Law and Economics movement is best understood as an aspect of a neo-Liberal hegemonic project to restructure economic and social relations in the transition to a new regime of capital accumulation. A preliminary examination of the extent to which Federal appellate judges have cited to Law and Economics scholarship during the past thirty years, while insufficient to offer strong empirical support for the argument I have presented, does suggest that further inquiry in this direction is worthwhile.

I have already indicated some respects in which further investigation might augment and refine the data and analysis regarding judicial citation to Law and Economics scholarship. In addition, further areas for socio-legal inquiry into Law and Economics remain unexplored. Within the formal "legal system" itself, future research might examine the constitutive play of Law and Economics in professional legal practice,¹⁹² exploring whether and how attorneys incorporate or draw upon Law and Economics in developing legal theories, preparing and presenting evidence, and framing legal arguments; how legal practice (re)produces Law and Economics argument, and how economic ideology constitutes and is diffused through lawyer-client interactions. In addition, the socio-legal understanding of "law" as embedded and enmeshed in "society" suggests inquiry into the diffusion of Law and Economics through, and its constitution of, multiple legalities above, below, and beyond the formal "legal system" itself.¹⁹³

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

193. Cf. Boaventura deSousa Santos, *Law: A Map of Misreading*, 14 *J.L. & Soc'y* 279 (1987); Brigham, *supra* note 1, at 303; MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977*, at 78-108 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980 (1972)).

A fuller investigation into Law and Economics along these lines would contribute to socio-legal scholarship in two respects. First, such research would enrich the understanding of a movement that has been highly visible in legal circles for the past two decades or more, and provide an analysis of that movement that would better enable a decisive critique of its claims. Second, such work would add to the broader socio-legal understanding of law as a constitutive element of society, both agent and object of social structure and change.