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“Jurisprudence and Economics”

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Editor
Mr Aron Ping D'Souza
Editor
The Journal Jurisprudence

Archaic Criminal Codes and Penitential Indulgences
Mr Benjamin Taibleson
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Law and Economics: Theoretical Puffery, Exaggerated Claims and Counterfactual Models
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The Jurisprudential Niche Occupied by Law and Economics
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A Framework for Measuring the Costs of Paths to Justice
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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, *The Journal Jurisprudence* has now evolved into a more diverse form. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people tackle the any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, philosophical arguments or any other method that answers philosophical question applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

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**Length:** Any length is acceptable, although readability to non-specialist is key.


**Submission:** You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.


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Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.
The Journal Jurisprudence, as an idea, was born nearly two years ago, when I felt that jurisprudence, as a discipline, was dying a slow death. With our first issue, last September, I came to know that jurisprudence does have a following, and quite a loyal one at that. With time and effort, the celebrity of our journal has grown, with that an affirmation of the life and strength of our discipline.

After the success of our first edition, we have gained new publication and distribution avenues. I am pleased to welcome the many subscribers who have committed to ensuring the journal’s long term viability. Furthermore, William S. Hein & Co. Inc. will be carrying Jurisprudence in their electronic database, HeinOnline.

The major news, I am pleased to report, is the decision of our publishers, the Elias Clark Group, to increasing the number of issues per year from two to four. Instead of a bi-annual edition, Jurisprudence will now be published four times per year. In a nod to the anglophiles among us, these four issues will coincide with the four terms of the legal year – Hillary (February), Easter (May), Trinity (August) and Michaelmas (November).

This move is a vote of confidence in the Journal and a reflection of the vast amount of submission we have received. Every day, I wake up to an inbox filled with wonderful new jurisprudential insights, interest from the far ends of the world and the comradery of legal philosophers of many persuasions. In one day this February, we received eight submissions and we have generally averaged one or two per day, which is extraordinary for a journal which originally aimed to publish only six articles per year.

This is an overwhelming expression of faith in legal philosophy and I deeply enjoy reading each submission. With our expanded number of annual editions, we will be able to accommodate even more opinions, insights and original research.

In this edition, we are pleased to publish four dynamic articles on the topic of “Jurisprudence and Economics.” In setting the theme many months ago, I worried that it was too specific. In fact, it may be too broad – the richness and depth of economist working in law and legal philosophers dabbling in economics is genuinely unbelievable.

Mr Benjamin Taibleson of Yale University, a young scholar of obviously great potential, writes on the topic of *Archaic Criminal Codes and Penitential Indulgences*. One does not think of theology giving insight into jurisprudence and
economics, but we must remember that the roots of civil law are in canon law, at least in western, particularly English, jurisdictions. Mr Taibleson is an able and original scholar, and The Journal Jurisprudence is pleased to publish his work.

Dr. Jur. Eric Engle of Harvard University, who published in the inaugural edition of Jurisprudence, delivers a commanding critique of the Law and Economics school in his article Law and Economics: Theoretical Puffery, Exaggerated Claims and Counterfactual Models. Dr Engle is a scholar of command stature and one is inclined to remember Law as Lex vs Ius (2008 J. Juris 31) and realise that he is diligently critiquing modern legal methods. Engle’s challenge to typical jurisprudential rationales is the foundation of his development of original and substantial theory.

In contrast to the challenge posed by Dr Engle, Professor Nicholas Mercuro of Michigan State University’s James Madison College gives an authoritative history of the Law and Economics (L&E) movement. He walks us through the history and evolution of L&E and foregrounds the void created by legal realism. It is a pleasure to publish The Jurisprudential Niche Occupied by Law and Economics, a paper of diligent scholarship that, I am certain, will be of importance to scholars for years to come.

Finally, Dr Martin Gramatikov of Tilburg University forges a new path in the study of jurisprudence and economics. He uses the one-two punch of intelligible language and excellent research to illustrate the impediments to justice experienced by so many. I am certain that his insights will be of great importance, not only to legal scholars, but also to courts and to practitioners. Lawyers, through little fault of their own, often forget that many obstacles lie in the path to justice for many people, particularly the poor. Dr Gramatikov’s article proposes a framework for measuring these costs and foregrounds issues that are easily forgotten in the world of six-minute billing increments. The Journal Jurisprudence is honoured to publish such a meaningful and important work as A Framework for Measuring the Costs of Paths to Justice.

Mr Aron Ping D’Souza
Melbourne, Australia
12 February 2009
The intersections between several ancient criminal codes and Christian indulgences are striking. Both systems regulate human behaviour by imposing money penalties on wrongdoers. Further, both appraise harm, restore religious harmony, regulate markets, provide restitution and are heavily status dependent. This is not to say, of course, that there are no significant divergences. While it was less extreme in the eleventh than the sixteenth century, the revenue generating function of penitential indulgences was considerably more important than that of the ancient criminal codes. Indulgences were also, at least ostensibly, voluntary. While there were elements of choice in the criminal codes, their penalties were certainly not self-imposed. Ultimately, though, the two systems have intertwined histories and purposes, and are rife with commonality.

This Article will first discuss the origins and purposes of composition in “archaic criminal codes.” While Hammurabi’s Code, the Twelve Tables and the Lombard Laws emerge at wildly different times and in different places, they share a set of common principles. Section I.A will discuss the emergence of the commutation of punishment into money payments in these codes. Section I.B will go on to describe the apparent purposes of price-setting (as listed in wergeld tables) in these sets of criminal law. Chief among them are apparent efforts to regulate markets, monopolise violence, provide restitution and restore religious harmony and balance. These purposes prove remarkable not just because of the similarities between codes, but because they foreshadow the underpinnings of indulgences so well.

Section II.A maps the emergence of indulgences – with particular attention paid to purgatory and monastic penitence. The nature of indulgences changed dramatically between the time they became prevalent and the Protestant Reformation. Although they were initially primarily tools of personal salvation...
for Catholic sinners, they, fairly or not, came to be understood as a revenue generating device for the church (and state). Indulgences, did serve other purposes, though, and the most obvious of these was restoring what can be styled as individual religious harmony. This, and the market regulation and restitution involved in the selling of indulgences will be explained in Section II.B. The central purpose of this Article, however, is to examine the intersection of composition in early criminal codes and composition in the penitential system (which takes the form of indulgences).

Section III elaborates on the commonalities of origin and purpose in the codes and indulgence system. Both systems seek to restore religious harmony and social balance; both regulate markets and compensate victims; and both pay strict attention to the status of the actors they regulate. These systems may also signal movement away from punitive shaming (or at least a system in which it is the only option) – with indulgences as part of a move from public to private penance and with composition as an alternative to shaming mutilation.

Section III also outlines crucial differences in the nature of the two systems. The criminal codes appear less concerned with generating revenue than indulgences (especially 16th century indulgences), and indulgences are likely less concerned with monopolizing violence than the codes. There is also a crucial difference between the designated recipients of the forfeited money— a fundamental element of both systems. While indulgence payments go to the church (and, as will be discussed, to public, secular purposes), the criminal codes largely call for payments directly to the individual harmed. This may speak both to the nature of the wrongs done and to divergent cultural and religious understandings of to whom behavioural obligations are primarily owed. Despite these differences, though, it is the common means and ends that are most remarkable. Both sets of regulations seek to maintain and restore order. That they both do so through a system of money payments for disorderly behaviour is remarkably interesting.

I. Price-Setting and Composition in Hammurabi’s Code, the Twelve Tables and the Lombard Laws
A. Nature and Origins of Composition in Ancient Criminal Codes

Before judging whether a meaningful comparison can be made between the dictates of the ancient criminal codes identified in the introduction and the requirements of Catholic indulgences, it is important to establish that the criminal codes can be meaningfully grouped together. This grouping is largely dependent on James Whitman’s _At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices_. Whitman supports discussing these codes collectively as follows,

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7 _Id._
The Germanic “barbarian codes,” the Twelve Tables of Roman Law, the “Book of the Covenant” preserved in Exodus, the ancient Near Eastern Codes, and a number of others . . . derive from a startling variety of times and places . . . [yet] these archaic codes do indeed show some remarkable uniformities across early cultures. In particular, they tend to display two different kinds of regulation, both strikingly widespread . . . regulation involving what we may call “mutilation and mutilation penalties”; and regulation involving money penalties.

The codes, then, all regulate behaviour through systems of mutilation penalties (the talionic system) and money penalties (with specific prices chosen for specific harms). While establishing the relationship of talion and price setting is crucial to this Article’s argument, talionic justice is otherwise outside the Article’s scope.

This is ultimately a discussion of price setting, and what that price setting is meant to achieve. In the Code of Hammurabi, as an example, talionic penalties are listed alongside money damages as punishment for criminal acts. While there has been much discussion of an evolution in criminal penalties away from the violence of talionic penalties and toward the leniency of composition, it is more likely they coexisted. It appears, in fact, they could often be substituted for one another in specific instances (as differentiated from an understanding of composition replacing talion in a broad scale, multigenerational evolution).

The Twelve Tables, which emerged in Rome some 1300 years after the Code of Hammurabi was compiled in Babylon, also “set out to offer an exhaustive account of the law.” It too put money compensation and talionic penalties side by side, and the two forms of recompense “were constantly interrelated, with composition as a way for the offender to ransom himself out of talionic punishment at the victim’s option.” Further, The Twelve Tables represented a system of Roman law based in a “religious system tied to the invocation of the aid and intervention of the gods.” The importance of gods, religion and spiritual balance will be returned to in the discussion of the purposes of money.

8 Id.
10 J.K. Mikliszanski ‘The Law of Retaliation and the Pentateuch’ 66 J. BIBLICAL LIT. 295-303, 297 (1947). (“It has therefore been inferred that for all other injuries offenders could purchase their peace and that the stipulated penalty – an eye for an eye – fixed the appropriate measure of alternative compensation.”).
11 Whitman, supra note 4, at 75.
13 Whitman, supra note 4, at 72.
penalties in the criminal codes and in the discussion of similarities between the roots and dictates of composition and indulgences.

It should also be noted, and will be returned to, that the imposition of criminal money damages (and talionic penalties) were a powerful expansion of state control. Further, it is likely that the state, in criminalizing private violence, also sought a monopoly on violence. The self-help model of the development of criminal law holds that states stepped in and enforced money penalties for crimes as society lost its taste for vengeful feuding and violence. Whitman points out, however, that talionic penalties (characterised by punitive physical harm and mutilation) did not simply evaporate as human beings reached a higher developmental plane and came to prefer the gentility of compensatory fees. Instead, the penalties are coexistent and interrelated (as in the Twelve Tables, for example). What is true, however, is that the states were highly concerned that the penalties, either talionic or pecuniary, be just.

These codes must also be understood within the context of broader attempts by authorities to control markets. “[T]he setting of composition is only a sub-category of . . . the more general category of price-setting. Many of the composition enactments are associated with other forms of price-setting both of commodities and of wages. Price-setting is thus a particularly prominent feature of the Laws of Hammurabi . . . .” These ancient states appeared highly interested in setting just prices – both for commodities and for harms – and it appears they believed the market, left to its own devices, would not generate them.


As mentioned above, the forbearers of these codes were likely concerned with both controlling violence and regulating market activity (two fertile areas for expanding state power and imposing order). Both talionic equivalence and just prices serve to limit the severity of retaliatory punishments – and preclude escalatingly violent feuds. Hegel took human beings to be naturally violent, and crafted the enormously influential argument that they undergo a slow civilization toward nonviolence (as illustrated by the replacement of violent talionic punishments with humane financial penalties). Human beings are

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14 Id. at 43 (citing Max Weber, Wirtschaft und Gesellschaft: Grundriss Der Verstehenden Soziologie 516 (5th ed. 1976)).
15 Whitman, supra note 4, at 41-43.
16 Id. at 51.
17 Id. at 81. “On their face, the archaic codes belong, not to a modern world characterized by the policing of the streets, but to a pre-modern world characterized by the deeply felt need to set just prices. What early authorities arguably clamped down upon was, not violence, but the market . . . .”
simply moving from one stage to the next in a progression toward the current status quo (which, conveniently, is the highest state humanity has ever attained). This paradigm is rendered unlikely by the fact that wergeld coexisted with talionic penalties. Further, “Most have concluded that the original meaning of an ‘eye for an eye’ in the Pentateuch related to monetary compensation for the injured eye, rather than the infliction of an identical (or even similar) injury on the wrongdoer.”

Regarding market control, “composition is not a general category of primitive regulation; like talionic mutilation, composition is a sub-category of a broader and more widespread category -- in this case the category of price-setting and market policing.” It may simply be that state actors believed that if wrong-doing was compensated by just prices, order and harmony would follow. It may not have been, however, that it was strictly a sense of social order that was desirable. Whitman holds that the appropriate context in which to understand just prices is within “the ever-mysterious psycho-social dynamic of money -- a dynamic easily linked to magico-religious beliefs.” Punitive fines could have been a method of restoring a sense of social harmony, a social harmony necessarily dependent on religious harmony. The authorities who crafted these criminal codes were “often closely connected with religious and temple functions as they were, may very well have aimed at all kinds of theological and cosmological ordering.”

Finally, wergeld was explicitly intended to compensate the injured party – and was not exclusively intended as a form of retaliation. Wergeld tables are fascinating both for the proposition that money can compensate a physical injury and in determining exactly how much money is appropriate. These punishments are necessarily both compensatory and retaliatory, and Daube believed “that the biblical understanding of retaliation itself included an element of compensation . . . [a]nd he identified various Rabbinical opinions that ‘punishment includes restitution’ in the sense that ‘punishment itself compensates the party wronged for his loss.’”

These criminal codes serve a number of interests. Through them, the state may have sought to monopolize violence and control markets by setting and

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19 Whitman, supra note 4, at 80.
20 Id. 81.
21 Money penalties as a means to religious harmony will be discussed extensively in Section IV.
22 Whitman, supra note 4, at 76.
23 Though it seems reasonably straightforward that a victim is made worse off when physically harmed and better off when given money.
enforcing just prices (for harms, just as they would for goods). The codes also formalize a system in which victims receive restitution and a sense of community wide social order is established. This social order is, crucially, rooted in magico-religious beliefs, and money itself (as integrated into the criminal justice system) may have had independent sacrificial and religious significance. Wrong-doers were either required to forfeit money or could ransom whichever of their body parts was in jeopardy by paying a fine. In so doing, they restored an inherently religious social order. This paradigm echoes loudly when coins clink in the indulgence chest.

III. Indulgences
A. Origins

Penance, the repentance of sins, has a long history in Christianity. “While early evidence is not abundant, it seems that in its first millennium Christianity featured some form of penance for serious sins.” These penances likely originated in monasteries, and in these monasteries, each sin was assigned its own particular penance. Initially, penances took the form of “varying numbers of strokes or blows,” though “in time physical sanctions became more diversified and non-physical sanctions were added.” This system evolved, however, and ultimately it became established that,

[T]he penances imposed by individual confessors, almost universally expressed as a set number of days or years to be spent fasting on bread and water, might be commuted, on occasion through the payment of a forfeit, either in money or in kind, or elsewhere by the substitution of a shorter but sharper penitential ‘shock.’

The sale of indulgences thereby grew out of the doctrine of purgatory and penance. This system necessarily relied on the Christian conception of individual guilt, and the understanding that sins must be atoned for. That sinners could put themselves back in good socio-religious standing by suffering physical punishment or paying a fee is striking. It is also interesting that penance and indulgences came from, in large part, a desire to lessen the time that would need to be spent in Purgatory (before ascending to heaven). Put

25 See note 19.
26 Levine, supra note 11, at 366 (citing Richard P. McBrien, 2 CATHOLICISM 777-78 (1980)).
28 Id.
simply, “one who shared in the indulgence would have a shorter time in purgatory.”

It was ultimately the church that meted out these punishments and set these prices, however, and Christians believed the church had full power to remit sins. “The explanation that was to become widely accepted was that indulgences were a gift placed at the Church's disposal through the sufferings and good works of Christ and his saints.” Priests absolved Christians of their sins, and Priests came by this capability when Christ transferred “the keys of the kingdom” to St. Peter – “with the power to bind and to loose.” Individuals performing penance, and, as will be discussed below, purchasing indulgences, were tapping into the store of good will Christ had accumulated.

Penance was initially extremely harsh, though, and indulgences emerged as a commutation of physical forms of penance. Strictly speaking, “[an] indulgence is not a forgiveness of past sin . . . on the contrary, an indulgence is merely a remission, by the application of Christ’s merits, of the whole or a part of the temporal punishment due to forgiven sin.” This is possible because the guilt of a sin and the “temporal punishment due for a violation of God’s order” are distinguishable. For this reason, both confession and penance are necessary to lessen the time people must otherwise spend in purgatory. Penance and indulgences evolved conceptually between the eleventh and sixteenth centuries, so it can become difficult to pin down a succinct and comprehensive definition. The description above is perhaps best characterized as “thirteenth-century scholastic theory,” though it does ultimately describe the ostensible purpose of indulgences (even when they veered toward blatant fund raising).

B. The Nature of Indulgences

30 Dr. Nikolaus Paulus, Indulgences as a Social Factor in The Middle Ages 15 (J. Elliot Ross trans., 1922).
31 Id. at 51.
32 BERMANN, supra note 26, at 172 (citing Matthew 16:19).
33 PAULUS, supra note 29 at 9.
34 Id.
35 Id. “The guilt of the sin may be forgiven [by confession] while the temporal punishment remains (to be dealt with in either purgatory or through penance.” Further, “one who shared in the indulgence would have a shorter time in purgatory.” Id. at 9. Paulus goes on to point out that theologians relied on scripture to justify this dichotomy. “Thus David’s sin with the wife of Urias was forgiven, but nevertheless he had to make satisfaction for it through the sorrow of losing the child (II Kings, XII, 13, 14).
36 Vincent, supra note 28, at 27. Indulgences can be difficult to describe in large part because they rely on controversial and fuzzy theology. Even St. Thomas Aquinas, while “certain of the salutary effects and the authority by which indulgences are granted” was not certain of “the precise benefits that they confer: an attitude in which he follows most earlier commentators.
Indulgences “in the present form” emerged in the eleventh century. They were exceptionally rare before 1140, though “the apparent increase in the issue of indulgences after 1140 may be more a function of archival practice than a proof of any real increase in the issue of such documents.” In the eleventh century, however, penitential manuals, “which provided numeric formulas for how much penance each particular sin required” began spreading “from Ireland, Wales, and Scotland to the Anglo-Saxon and Frankish kingdoms . . . to Spain, to Lombardy, to Rome itself and to Scandinavia.” With the spread of these manuals came the spread of the practice of commuting penance into a purchased indulgence. It is also worth noting that penitential manuals included a great deal of “what would later be called secular crimes.” It is here that the link between penitential manuals (price lists for purchasing indulgences after sinning) and ancient criminal codes with wergeld tables (price lists for crimes) becomes clear.

The replacement of temporal punishment with a purchased penance required that indulgences initially be given in fractions of the imposed penance.” Ultimately, though, “these commutations finally came to be specified in days corresponding to the amount of satisfaction that would be made by doing penance for that number of days according to the ancient discipline.” Every sin had its own penance and according indulgence price. Further, although indulgences have become infamous, they were initially widely accepted. The “great doctors of the medieval church” established a doctrinal foundation for indulgences, and

For once the practical experience of the English Church, the theology of the Paris schools and the legislative powers of the papacy appear to have been distilled into a single canonical formula. The effect of this formula is clear. Henceforth, the indulgence was established as a customary and properly licensed instrument.

In order to reach heaven, Christian sinners must repent, and repentance in the form of traditional penance was exceedingly difficult. Beginning in the eleventh

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37 See, e.g., id. at 23; PAULUS, supra note 29 at 14.
38 Vincent, supra note 34, at 39.
39 Levine, supra note 11, at 366.
40 BERMAN, supra note 26, at 69.
41 Id.
42 This comparison will be the subject of Section IV.
43 PAULUS, supra note 29 at 10.
44 Id.
46 Vincent, supra note 34, at 55.
century, it became widely accepted doctrine that such penance could be commuted into the purchase of indulgences.\footnote{It is also possible there were recruitment benefits to the indulgence system beyond lower penitential standards. “During the first millennium of the Christian church, there was no separate sacrament of reconciliation. Forgiveness of sins was the function of baptism, and while the effects of venial or less serious sins could possibly be overcome by other means, the commission of a mortal or very serious sin after baptism was highly problematic. To overcome this problem, individuals often waited until they grew old before receiving baptism. Eventually, however, the church developed the sacrament of reconciliation, allowing individuals to feel confident in being baptized early in life without the fear of committing a major sin before death. Perhaps this change allowed the church to retain post-baptism sinners and give individuals the incentive to become a full member of the church early in life.” Klick, Salvation as a Selective Incentive, 26 INRLEC 15 (2006).}

C. Restoring Religious Harmony

Indulgences, as “fines for a sinful life,” were believed to facilitate salvation.\footnote{Kiermayr, supra note 43, at 303} They simply restore “God’s order” after it has been violated by a sin. In this sense, indulgences are a tool to restore religious harmony. Christians inevitably stray and must repent and be punished. The penitential requirements of early monastic communities, however, were exceedingly harsh. As explained in Sections I.A and I.B, the church had the biblical authority to commute this penance into an indulgence, and by purchasing an indulgence, sinners could restore the religious order they had upset.

Indulgence doctrine (and the conception of purgatory it relied on), however, became distinctly unpopular in the sixteenth century. “Lutherans condemned with special vehemence the Roman Catholic doctrine of purgatory, with its theory of specific penalties to be paid, either in this world or the next, in proportion to the sinfulness of acts.”\footnote{Harold J. Berman, The Transformation of Western Legal Philosophy in Lutheran Germany 62 S. CAL. L. REV. 1573, 1582-83 (1989).} One anti-Catholic pamphlet, in describing indulgences sold in penitential manuals, charged that “all the Arts of Man could not have invented more gross or villainous sins than the Popish Clergy do put to sale.”\footnote{The book of rates now used in the sin custom-house of the Church and Court of Rome : containing the bulls, dispensations, & pardons for all manner of villainies & wickednesses : with the several sums of monies given & to be paid for them – Reprinted and sold by J. Eedes at A2 (I have no idea how to cite this).} It went on to characterize the sale of indulgences as blasphemous greed on the part of imposters and Catholic Church leaders alike.\footnote{Id. “if a man shall acknowledge himself guilty of any such [sin], in confession to an ordinary Confessor, He can only tell him where the Popes Bankers reside, who are to absolve him, and will gladly receive him, for he bring with him the price of his sin.”}
Lutherans went on to say that the doctrine had no Biblical foundation, and that it implied “that people could work off their sins, so to speak, and thus earn eternal salvation. God, said Luther, will accept the faithful person ‘just as he is,’ still a sinner but faithful and hence liberated from his or her alienation.” The indulgence system was ripe for abuse, and was, accordingly, abused. Despite abuse and theological bickering, the truth is likely that indulgences were meant to serve the causes of both personal salvation (and order restoring) and fundraising. To deny the latter in defence of the former is to deny reality. Legitimately or not, indulgences were widely used to generate revenue.

D. Raising Revenue

Indulgences have been characterized as both “revenue generating instruments as well as agents of Christian Justice.” As an example, the primary motivation behind the Mainz-Magdeburg indulgence was “to raise money for a papal dispensation (of questionable legitimacy) and for St. Peter’s Basilica” Stating explicitly that one can facilitate salvation by making money payments creates very strong charitable incentives, and while such donations remain voluntary (as will discussed further in Section III), empirical examination has shown that the incentives proved effective. The discussion above referred to the fact that indulgences were a highly controversial phenomenon by the time of the Protestant Reformation. “In Article 28 of the Ninety-Five Theses, Luther singles out for special criticism Tetzel’s famous ‘sales pitch:’ ‘the moment the coin clinks in the bottom of the chest, the soul flies to heavenly rest.’” Beyond the normative issues, however, the more important point is that indulgences were intended to raise revenue.

The money raised was used to fund grand buildings (as with St. Peter’s Basilica) and many other public works. As such buildings were intended to glorify God, it stood to reason that an individual contribution would act to

52 Berman, supra note 48, at 1596 (citing M. LUTHER, NINETY-FIVE THESSES (1517), ARTICLE 36, IN LUTHER’S WORKS (J. Pelikan et al. trans. & eds. 1955-1976), at 28.).
53 Kellogg and Haselmayer fairly point out that, “It should also be noted, though, that “The truth would seem to be that our impressions of the pardoner are derived so completely from representations of his abuses that we are in danger of forgetting that they are abuses—that under canon law very few indeed of the pardoner’s actual practices were permitted.” Alfred Kellogg & Louis Haselmayer, CHAUCER’S SATIRE OF THE PARDOER, 2 PMLA, 66 (1951).
54 Kiernmayr, supra note 43, at 303.
55 Id. at 308.
56 Klick, supra note 46, at 15. (“Catholics contribute significantly more to their churches as they approach death than do members of Protestant denominations. More generally, this Article suggests that church doctrines influence behavioural incentives, and religious leaders may be able to capitalize on these behavioral effects for the benefit of their church.”).
57 Berman, supra note 48, D. Martin Luthers Werke, Kritische Gesamtausgabe (1883-1974), at 234. (Note 15)
58 See generally PAULUS, supra note 29 (describing all manner of public works funded by indulgence revenue).
forgive sin. Interestingly, however, indulgences have also been described as “based on the principle of revenue sharing” between the religious and secular, as money was often divided between the church and local secular authorities. As Paulus puts it, “Fasting or some other such penance was changed into a contribution of money or service to some useful public undertaking.” Individuals need clear a lower bar to reach salvation, and society benefits as well.

E. Ancillary goals of indulgences

Penitentials did not just call for direct pay to the church, but often instead demanded “compensation of victims and assistance of their relatives.” Indulgences were hereby intended to restore order from multiple directions. One particularly apt example occurs “in cases of beating, the offender might be required to pay for medical treatment of the victim, to do his work, and to make compensation.” Stolen property “was also subject to restitution.” This explicitly compensatory ingredient in indulgences is strikingly similar to the demands of the ancient criminal codes, and will be addressed in Section IV.

Finally, there are, as in the criminal codes, elements of market control in the practice of indulgences. It is no coincidence that a (harshly critical) anti-Catholic pamphlet called penitential manuals “The market of the man of sin.” Through the indulgences system, churches established and controlled a market in which sinners purchased blocks of time they would otherwise spend in purgatory. That the church manufactured this market does not belittle the significance of the market itself, or the church’s control over it.

III. The Intersection of Indulgences and Composition in the Archaic Criminal Codes

A. Convergences

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59 Kiermayr, supra note 43, at 305.

60 PAULUS, supra note 29 at 7. Paulus goes on to list “Churches, schools, hospitals, and other charitable institutions; bridges dams, roads, harbours, and fortifications, and the stimulation of such important social movements as Crusades and Truce of God.” Id.

61 BERMAN, LAW AND REVOLUTION, supra note 26, at 70.

62 Id.

63 Id.

64 Sodom fair: or, The market of the man of sin [electronic resource] : Containing, a true account of the prices of the Pope’s pardons and dispensations; being a treatise very useful and necessary for all young English papists who intend to take Holy Orders, or travel through Italy; and all such as intend to be cheated both out of their souls and money. To which is added, the history of adultery; as it is now at Rome by law established; with the life of Clement the Sixth, and blasphemous bull which he published for the year of jubele, 1350 (published 1688) available at http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:37343
There is a clear conceptual overlap between composition in the archaic criminal codes and indulgences. Both are fundamentally concerned with countable, monetary punishments which imply a reliance on the individual guilt of the rule-breaker. Criminals and sinners owe a debt to society, and Nietzsche, among others, conceived of guilt as inextricably linked and dependent on the concept of debt. Wrong-doers must then repay their debt in order to return themselves to good standing and restore order. Shaming punishments like mutilation or public penance did not deal in the countable or in terms of debt, but were instead concerned with shifting status. In the archaic codes, however, people could ransom their limbs and avoid such mutilation by making a payment to the individuals they harmed. By purchasing indulgences, Catholic sinners were similarly replacing physical suffering (an extended fast, a number of lashes) with financial payment.

In the codes and the indulgence system, the seeming impossibilities of identifying the appropriate quantities of recompense in combination with the confidence with which they were actually calculated, speaks to divine intervention. In both, legitimacy is necessarily dependent upon divine authority. As Whitman puts it, “The real difficulty in understanding the early codes, arguably, is understanding the origins of the idea of value-equivalence.” Early authorities were highly concerned that the equivalences they chose be just, and it is “plausible that the early authorities meddled as a way of setting magico-religiously, or “scientifically,” proper rates.” This was also true for indulgences, “the Roman Church…through its judicial organs…and through its scholars, has steadily aimed at making precise what it has all along felt could never lend itself to precision.” Penance must necessarily “be susceptible to precise numerical measurement.” Each sin required a particular period in purgatory, and each purchased indulgence relieved such a period. Though Thomas Aquinas noted that some “believe[d] that God alone can know the period of penance owing

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65 “Society” likely includes both secular and religious communities – and the desire for social and spiritual order.

66 Levine, supra note 11, at 369 (citing Friedrich Nietzsche, On the Genealogy of Morals 44 (Douglas Smith trans., Oxford Univ. Press 1996) (1887) (bracketed German inserted by Smith) Nietzsche: “[H]ave the previous exponents of the genealogy of morals had even the slightest inkling that the central moral concept of ‘guilt’ [Schuld] originated from the very material concept of ‘debt’ [Schulden]?"

67 This asks both why anyone would exchange valuable goods for metal and why a particular quantity of metal is appropriate.

68 Whitman, supra note 4, at 82.


70 Vincent, supra note 34, at 30. This was particularly interesting because it was true “at a time when the average man or woman is assumed to have had only the vaguest idea of their own age measured as a span of years, of the complex mathematical calculations that had to be made if a sinner were to assess their own chances of salvation.” Id.
for any sin,”71 and although it ultimately received severe Lutheran criticism, the Catholic Church claimed broad authority to set such prices.72 “Canon lawyers were concerned above all with measuring the offense against God,”73 and ancient authorities were concerned with measuring offenses against “magico-religious” order. Both then appraised harm and set their calculations down in code form.

1. Restoring Order

The idea of bringing the world back into religious harmony (semi-magical) is central to both systems. For the ancient criminal code, “Robertson Smith in particular analyzed the system of money penalties as closely linked to the system of sacrifice: Atoning payments were made, not only to human victims of violence, but also to the gods.”74 Further, “Authorities, often closely connected with religious and temple functions as they were, may very well have aimed at all kinds of theological and cosmological ordering.”75 While not well understood, there was clearly a sacred element to money and the just regulation of markets through prices setting. Whitman continues,

“Our sources show the tradition that the Twelve Tables (451/450 b.c.) were promulgated at the same time as, and somehow in connection with, two price-setting statutes: the lex Aternia Tarpeia of 454 b.c. and the lex Menenia Sestia of 452 b.c. Both of these statutes were concerned, in somewhat mysterious ways, with setting the correct bronze equivalents for animals. Both also had some, again somewhat mysterious, connection with controlling the assessment of fines by magistrates.”76

Even rules that appear secular “for example that one who slays a freeman should pay 100 shillings wergeld and one who slays a nobleman should pay 300 shillings wergeld – were in fact wholly bound up with the moral and religious rules of the society.”77 Systems “of pecuniary compensation for injuries” were inextricable from “the system of fate and honour which fused law with religion.”78 Money was sacred, and the religiosity of the restoration of order is plainly evident.

71 Id.
72 Here the church took its authority from the Biblical passages: “Christ told the Apostles, “Whose sins you shall forgive, they are forgiven them” (John, XX, 23) and ‘Whatsoever you shall loose upon earth, shall be loosed also in heaven’ (Matt., XVIII, 18).” PAULUS, supra note 29 at 11.
73 BERMAN, LAW AND REVOLUTION, supra note 26, at 189.
74 Whitman, supra note 4, at 67 (citing W. Robertson Smith, Lectures on the Religion of the Semites (1889) at 378-379).
75 Id. at 72.
76 Id. at 53.
77 Berman, Law and Revolution, supra note 26, at 80.
78 Id.
This is remarkably similar to the indulgence system’s conception of “temporal punishment due for violating God’s order” – which is then ultimately commuted into a purchased indulgence.\(^{79}\) As Levine puts it, “Hegel believed that the purpose of punishment is to “annul” crime by inflicting an injury on the criminal to cancel out the injury that criminal had inflicted on society.”\(^{80}\) This is a distinctly Christian conception of atonement – although, for the purposes of penitence, the injury should be self-inflicted. An individual who does wrong must atone and suffer for it; by making an indulgence payment (as commuted suffering), he does exactly that.

2. Creating more attainable, humane standards

In commutation, both systems move toward a more humane, attainable restoration of divine order. Physical suffering is replaced with money payments. Coins can be substituted for mutilation and self-flagellation. Clearly, in archaic codes, the replacement of mutilation with monetary payments signalled a more permissive standard. Use of the term “ransom” is not accidental, and the alternative to such money payments was often profoundly ghastly. The question then becomes whether the same phenomenon is present in the penitential indulgence system. Unsurprisingly, it is.

Early Christianity was exceedingly demanding. With the introduction of “tarrifed penance,” however, salvation became distinctly more attainable. “In Anglo-Saxon and Frankish practice, for example, a year’s fasting on bread and water might be redeemed for the payment of twenty-six solidi, the price of a slave or the recital of 300 masses.”\(^{81}\) Very few people could reasonably have been expected to fast for a full year. Further, it was entirely possible that the penance an individual owed, as measured in days, exceeded the period he could reasonably expect to live.\(^{82}\) This strictness was nearly impossible to maintain, but “the ecclesiastical authorities” wanted to preserve the “theoretical value” of the “traditional penitential regulations.”\(^{83}\) Commuting long fasts to prayers and alms for good works was an attempt to maintain this theoretical value while expanding the population of individuals who could bear the penitential burden.

3. Status

\(^{79}\) PAULUS, supra note 29 at 9.
\(^{80}\) Levine, supra note 11, at 355 (citing George Hegel, Philosophy of Right 71 (T.M. Knox trans., Clarendon Press 1967) (1821)).
\(^{81}\) Vincent, supra note 34, at 30 (citing “Vogel, Ennmissiodne spechis, ch. 5, pp. i8, 25-6, 31”).
\(^{82}\) Examples include a man referred to in the Anglo-Saxon Council of Clovesho (747) whose diverse offences had earned him 300 years of fasting. Alexander Murray, Confession before 1215, 3 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 60 (1993).
\(^{83}\) PAULUS, supra note 29 at 14.
Both systems are also meaningfully differentiate penalties based on the status of the offender. Hammurabi’s Code and the Twelve Tables impose wildly different penalties on high status and low status people (though, for the most part, money damages are more likely to be imposed when a higher-status person commits a crime against a lower-status person). Also, many early Germanic laws demonstrate a pronounced “keying of price to status.” In these criminal codes, social standing was of paramount importance in determining the appropriate sanction for crimes. This keying is again mirrored in indulgence prices.

The wealthier a sinner was, the more he paid for indulgences. This is consistent with the broader doctrine that an indulgence purchased for the same price by a rich man and a poor man implies unequal suffering. Levine elaborates on this,

> The relationship between offense and penalty is not one of simple exchange, of a mathematical proportion that provides the correct deterrence or that properly annuls the guilt of the crime. Actors who are willing to pay the penalty for their offense may understand and accept the mathematical proportions involved; but they downplay the other factors--remorse, reconciliation, respect for the moral determinations of law--and decide for themselves which factors are and are not worthy of respect. Thus, ex ante willingness to pay the penalty for an offense can sometimes be a justifiable reason for increased punishment or blame, as a vindication of legal norms that go beyond deterrence and retribution but are nonetheless a crucial part of our sense of guilt and punishment.

Further, clergy and lay people, who clearly occupied different socio-religious strata, faced different penalties for committing sin. “[I]t was a firm principle of canon law that a cleric who commits a criminal act commits a greater sin than a layman who commits the same criminal act.” Both archaic criminal codes and the penitential system are, then, heavily status dependent. Interestingly, though, the archaic codes impose lesser penalties on high status people while high status people face stiffer fines when purchasing indulgences. This is an important reminder that the systems, despite their conceptual similarities, have meaningful differences as well.

B. Divergences

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84 Whitman, supra note 4, at 52.
85 Kiermayr, supra note 43, at 302.
86 Levine, supra note 11, at 378.
87 BERMAN, LAW AND REVOLUTION, supra note 26, at 191.
The most obvious of these differences is that, in the archaic codes, the money paid as fines goes to the victim, while indulgences are paid directly to the church. Also, it is true that, as mentioned above, there are elements of restitution in indulgence payments, and some money may go to the individual harmed, but the church receives the vast majority of these funds. Indulgences restore God's order, because a sin that harms another person is ultimately conceived of as a sin against God. Wergeld, on the other hand, restores social order by directly compensating an injured party. While the archaic codes, and the penalties they impose, are infused with religious significance, they require a person to person transaction. This difference is particularly striking because, as mentioned in Section II.D, one of the primary purposes of indulgences was to generate revenue (both for the church and for secular authorities). Such a purpose appears largely absent from the criminal codes.

Further, criminal penalties in the archaic codes were enforced by the state (and, therefore, involuntary). While victims may have had the option of “demanding payment in place of mutilatory vengeance,” these penalties were not self-imposed. The will of the party making amends is, then, not as important as the compensating act (here, making a wergeld payment) itself. The church, however, stressed that indulgence money was given entirely voluntarily – this was the only way in which it could have any moral force. Were such payments involuntary, they would not signal true repentance and no time in purgatory would be forgiven. Thomas Aquinas, for example, stated “that charity and good works, necessary for salvation, were voluntary and could be considered man's own.”

A final difference is the extent to which wrong-doers were aware of the penalties they had accumulated. The Twelve Tables were progressive in that they alerted the general public to the specific laws that governed them. They represented a movement from arbitrary punishment toward punishment only in cases of personal guilt. An individual only paid fines for which a crime was readily known. This stands in contrast with indulgences, which could compensate for “sins which had been forgotten and which were therefore unconfessed.” Even more interestingly, there were suggestions that the church may not always have done the penitential calculations right. It was, therefore, better to purchase additional indulgences, as “God would honour the indulgences, but not necessarily concur with the penances decreed on earth, excess indulgences would serve to offset any penance decreed in the court of heaven which the sinner had not been made aware of before death.” This quote suggests not only that churches may not always have done the

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88 Whitman, supra note 4, at 56.
89 Klick, supra note 46, at 21.
90 Vincent, supra note 34, at 44.
91 Id. at 56.
commutation conversion as God would have, but also that people may be responsible for sins they did not know they had committed. This stands in stark contrast with the archaic criminal codes.

IV. Conclusion

Wergeld tables and penitential manuals are superficially similar. They list harms, and each harm has a specific value. The individual who perpetrated the harm must then make amends by forfeiting the designated sum of money. The functional similarities between these two systems, however, are even more striking than their similarities in form. Both the ancient criminal codes and the indulgences system was concerned with restoring socio-religious order. Crimes (or sins) created disharmony, and the payments specified by their respective tables restored that harmony. The criminal codes and indulgence system were also meant to control violence (which can, perhaps, be subsumed into enforcing order) and regulate markets. In doing this, both systems reflect a heavily status-dependent world view. Individuals with different statuses suffered different repercussions for their actions. In the criminal codes, a higher status person was treated more leniently, while the penitential system held higher status people to a higher standard.

Indulgences were meant to generate revenue in a way archaic criminal penalties were not, and did not require particularized knowledge of wrongdoing, while the criminal codes did. Indulgences were also ostensibly voluntary, while the criminal penalties were not. Ultimately, though, while these differences are significant, and should be acknowledged, they do not carry the day. If Hammurabi’s Code, the Twelve Tables and the Lombard Laws can all be included in the same genetic tradition, it appears that medieval penitential indulgences are part of that tradition as well.

The tradition continues to the present day, and the links between ancient criminal codes, penitential indulgences and contemporary criminal codes are evident. Standards of proportionality in criminal law are a foundational a principle of modern law – and formed the heart of composition in these historical codes as well. Criminal statutes that call for either a period of incarceration or the payment of a fine are also familiar to modern criminal law. Contemporary law still seeks to restore social order through retributivist punishment, and it still relies on lawmakers to determine exactly how much money a wrongdoer should forfeit for vandalism or assault or arson. That the principles undergirding, and the purposes of, ancient criminal codes and penitential indulgences are plainly logical to a modern reader speaks to their centrality to modern philosophies of criminal law. The genetic tradition of the Hammurabi’s code and medieval penitential indulgences is alive and well.
Abstract: Economic analyses of law predominate in the United States because they can claim to be objective and scientific thus verifiable and the basis of predictions and reproducible experiments. However, several of the claims of economic analysis of law go too far and are entirely unrealistic. This explains why economic analysis of law has not been taken up outside of the U.S. to the extent it has in the U.S. This article points out the unrealistic presumptions within law and economics theory (homo economicus and efficient markets, mostly) and the unrealistic claims of law and economics (that the law is and should be a mirror of the economy). Economic analysis of law cannot and should not serve as a general basis of legal decision making. However, as a special theory applicable as a method for determining certain issues, economic methods can well inform legal decision making helping judges to shape justice correctly. This article exposes the competing schools within law and economics and presents a defensible version of economic methodology applied within legal discourse.

I. INTRODUCTION

Economic theories of law are relevant in the very least to budgetary and tax policies. Though law is not - and should not be- a mirror of the market, there are places where economic methods of analysis can be useful for judges, for examples when balancing competing interests, when determining objective monetary values. A comprehensive theory of law and justice cannot ignore economic theories of law, particularly because economic theories of law currently dominate American legal theory, with a corresponding global influence, and this since at least 1980.

There are several competing schools of thought within law and economics. This article will outline their differences and try to draw out the differing implications they have for legal interpretation. I will especially try to point out the weakness of the various theories in order to make clear their limits.
There are real methodological and prescriptive differences within the various schools of law and economics. However, they share at the broadest level a similar outlook and method: liberal individualism and distrust or outright hostility toward the state. At a narrower, but less defensible level they also share a model of homo economicus (the rational profit maximizer) and/or of efficient markets and/or a model of perfect information (cost-free, instantaneous, global information flow, facts known or at least knowable to all), though the more specific these propositions become the greater the divergences within the various schools of law and economics become evident. The differences among the schools will be exposed both to show the development of this complex of thought and to show the possibilities and limits of economic analyses of law.

The position I take is that some methods of economic analysis, such as cost-benefit analysis and economic evaluation of balancing tests, can be usefully applied to law. Economic valuation of competing interests to be balanced renders tractable otherwise indeterminate legal decisional methods such as “interest balancing” by making the weighing of competing interests at least explicit, if not objective.

However, while there clearly is a place for economic models of valuation, there are also definite and serious flaws in the strongest assertions of the law and economics school of thought. Purely economic analysis of law does not in fact adequately describe or predict legal decision making because economic analysis of law is founded on invalid presumptions about the nature of the market.

Because of the limits of economic analysis of law arising out of unrealistic presumptions about the nature of markets and market participants, economic theories of law have only met mixed reception outside the U.S. and other common law countries, and rightly so. General theories attempt to describe all cases of a given phenomenon and even to provide insights into phenomena peripheral to their object of focus. Special theories limit themselves to a subset of one field and do not claim any general applicability beyond their object of focus. General theories seek to be universal, whereas special theories are limited and particular. Economic methods of analysis can have a valid application to legal decision making as a special theory confined to particular cases. However, economic theories of law are not valid descriptors for a general theory of legal decision making. Thus, in the end, law and economics, like most efforts at a general systems theory of the last century (e.g., Einstein:

1 E.g., Judge Learned Hand’s Test finds a duty in tort where the cost to prevent an injury would be less than or equal to cost to cure the injury Richard Posner, Economic Analysis of Law, Boston: Little Brown (1977) p. 5.
general theory of relativity; Keynes: general theory of employment, interest and money; Kelsen, General theory of law and the State), collapses from a grandiose failed effort at a unified theory with universal validity back into a special theory with valid application only in specific instances and not generally.

The economic theories of law split from each other to varying extents because of splits between classical and neo-classical economic theories. These are outlined below. Essentially, I hope by explaining those theories and their flaws in detail to help the reader understand both what are sound budgetary, tax and monetary policies (telos for legal interpretation and application) and also to understand the practical possibilities and limits of methods of economic analysis in law generally. Economic analyses of law can be useful but are no panacea to the problems of interpreting and applying laws.

II. THE HISTORICAL ORIGINS OF CONTEMPORARY L&E IN CLASSICAL ECONOMISTS

A. Adam Smith

Adam Smith illustrates well how an aggregation (induction) of multiple individual data points can result in the attainment of a complete aggregate that is, the interplay between atomism and holism. Smith only implicitly treats methodological issues concerning holism and atomism in The Wealth of Nations. In general, his thinking appears to be atomistic: society is broken down into individual elements (i.e. individuals) who buy the goods needed to attain their individual well-being as they see fit. Their motivation is purely selfish. However, the sum total of their individual self centred decisions results, according to Smith, in the best possible social situation. For Smith, the aggregation of individual self interest results in the attainment of the best collective interest. In his example of the daily market - where the brewer and the baker attain their own well-being by offering those goods necessary to meet the needs their customers - we see a perfect example of atomism. From this point of view, the collective does not exist, only its components. Yet, out of that individual interest a best possible collective interest results.

2 WN: B.I, Ch.2, Of the Principle which gives Occasion to the Division of Labour in paragraph I.2.2
Smith also presents an example of the famous pin factory. Here, he shows that cooperation and specialization of workers allow 10 people to collectively produce 48000 pins a day – even though in isolation these same people could not produce that 20 each. From an apparently atomistic position Smith has induced collectivist conclusions. Smith discovered that specialization increases productivity. That discovery is problematic for atomism and demonstrates why holism is the more accurate theory. Smith has identified that specialization of individuals in the collective is more productive than individual artisanal production.

**B. David Ricardo**

Ricardo affirms and deepens the point that specialization through trade results in peace and prosperity. Trade leads to interdependence and prosperity and thus makes war less likely. Ricardo’s main contribution was proving that free trade is good for both parties even where one party has an absolute advantage in all goods traded so long as a relative advantage remains between at least one of the traded types of goods. Together, Smith and Ricardo form the common backbone of liberal trade and economic theory.

**III. LAW AND ECONOMICS: RICHARD POSNER**

The equivalence of economic and political theory, the idea of a school of political-economy, finds its roots in English in Ricardo. In contrast, the conflation of law and economics is a newer phenomenon. The leading advocate of law and economics is Judge Richard Posner.

Posner offers a purely economic analysis of law. He is one of the representatives of pragmatic materialistic thinking which is fairly widespread in the English speaking world. As such he is not an “anarcho-capitalist” - he is statist. Starting from unrealistic neo-classical assumptions – that economic

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3 WN: B.I, Ch.1, Of the Division of Labour in paragraph I.1.3
4 Ibid.
7 Ricardo, at 7.13-7.16.
actors are rational profit maximizers\(^9\) operating under conditions of perfect information.\(^10\) Posner argues for even less tenable conclusions. Posner argues that the common law is developed based on its ability to maximize social wealth.\(^11\) According to Posner, law seeks to maximize economic well-being of citizens.\(^12\) Alone, that would not in itself be a problematic assertion. However, Posner goes on to argue further that the law mirrors,\(^13\) and should mirror, economic processes.\(^14\) Those views are not tenable. Essentially, the legal theory proposed by Posner can be summed up as law being swallowed whole by economics.

My first criticism of Posner is methodological. His theory - that law is developed to maximize wealth - must ultimately define and measure this wealth. But measuring the economy with precision is a very difficult task (the greater the precision the greater the difficulty). Furthermore, money is not the only indicator of individual or social well-being. Posner however bases his theory on economic market values and so his theory is one dimensional. All goods cannot be monetized. For example, air cannot realistically be bought or sold yet is vital. Likewise a scenic view from one’s own property onto another’s cannot be bought or sold – the legal issue of “spite fences” exemplifies the problem.

My second criticism of Posner is also methodological. His method is reductionist.\(^15\) If we adopt his position then legal decisions become a question of economic interests, only. But that view would completely ignore teleology, hermeneutics, and exegesis when interpreting legal texts. Interest balancing – whether using abstract vague and manipulable “utilities” or concrete economic values does not consider exegetical and teleological interpretations of law which escape yet can shape marketplace evaluation. Further, Posner’s method

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\(^10\) Ibid. p. 5. - “a free market operating without significant externality, monopoly, or information problems.”
\(^11\) Ibid., p. 4 - “the common law is best explained as if the judges were trying to maximize economic welfare.”
\(^13\) Posner, above n 9, p.5
\(^14\) “The hypothesis is not that the judges can or do duplicate the results of competitive markers, but that within the limits set by the costs of administering the legal system (costs that must be taken into account in any effort to promote efficiency through legal rules), common law adjudication brings the economic system closer to the results that would be produced by effective competition - a free market operating without significant externality, monopoly, or information problems.” Richard Posner, Economic Analysis of Law, Boston: Little Brown (1977) p. 4-5
doesn’t provide reasons why society does or whether society should in fact maximize wealth. Moreover, he begs the questions of: maximize wealth for whom? and why?

My last critique of Posner deepens the methodological weaknesses that we have just discussed. Posner’s method confounds and confuses justice and wealth and overemphasizes economic factors in legal decision making. His troubling equivalence between justice and wealth confuses wealth and morality. He thinks that markets are “efficient” - but efficient for whom? For those who hold wealth of course. Making the wealthy wealthier may be a good thing but the point is this goal is simply assumed and goes unquestioned in Posner’s purely market driven universe.

Axiological cognitivism enables us to criticize the assimilation of morality to market values; Posner is confusing cause and effect, as well as means and end. Law and economics shape each other as superstructural justification and rationalization (law) of a material base of productive forces (economics). They are in a mutual feedback situation which is generally determined by the economy. Aristotle makes clear that, as concerns distributive (social) justice, the economic system (the principle of distribution) is positive and conventional – it is determined by the laws of man, not those of nature. That is, the economic framework (communism, socialism, capitalism, feudalism etc.) is selected by the legal system. In contrast, for Posner, the economic system is and should be strictly determinative of the legal system. Posner also confuses the means (wealth - goods) and the end (a satisfying life - the good). Moreover, Posner hasn’t accounted for Marx’s views on the relation between productive base and ideological justificatory superstructure. Posner also doesn’t take into account the views of Aristotle on distributive (social) justice and commutative justice (justice in transactions; corrective justice) – he focuses all his energy on justice in transactions, i.e. commutative justice. Thus, he champions a reductionist theory which can only partly explain the phenomena of the relation between economic forces of production and juridical relations about production. Determining whether and where Posner is atomist or holist could improve the quality of Posner’s contribution to legal science as would meeting these criticisms.

To conclude, Posner suffers from a sort of reductionist thinking. He overemphasizes the market. In the end, Posner’s theory is yet another example

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16 Id. at 431.
17 Richard Posner, The Economics of Justice, 1983 in Id. at 526 - "I have tried to develop a moral theory that goes beyond classical utilitarianism and holds that the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society."
of a crisis in Anglo-Saxon thought resulting from a poorly integrated theoretical atomism and fixation on empiricist methodology, the inability to see a forest where there are trees. That view is incomplete, even from the liberal individualist economic point of view: The value of a community is - according to capitalists like Smith (specialization),

Ricardo\(^{19}\), (trade) Aristotle (humans are a rational, social, talking, animal), and Hayek (money as resource allocation signal) - more than the value of its members due to synergies such as specialization\(^{20}\) and economies of scale. But this is contrary to the atomist ontology characteristic of Anglo-Saxon thought. That contradiction leads to theoretical confusion in the case of Posner. Law can and should give all members of a society the means to the end of a good life. Part of the good life consists in adequate wealth to live decently. However, Posner does not seem to see Aristotle’s position, that wealth is a means to the end of the good life and not an end in itself. The good life is made possible by wealth - but wealth, though a necessary means is not sufficient to attain the end of the good life.\(^{21}\)

IV. THE CHICAGO SCHOOL (SUPPLY SIDE THEORY): MILTON FRIEDMAN

Supply side theory is a reaction to the failures of Keynesian theory and essentially antithetical to Keynesianism. Supply side thinking dominated the American scene between 1980 and 1992 and remains very powerful and influential. This theory of the Chicago school can be summarized as an affirmation of the market and a radical critique of state intervention.

A. Supply determines demand

Supply side theory suggests that the balance between supply and demand is determined by supply - unlike Keynes; supply in this perspective creates its own demand. In fact, for supply side theory, supply disequilibria are relevant

\(^{18}\) Smith also presents the famous example of a pin factory. He shows that cooperation and specialization of workers allow 10 people to collectively produce 48000 pins a day – even though in isolation these same people could barely produce 20 pins each. WN: B.I, Ch.1, Of the Division of Labour in paragraph I.1.3

\(^{19}\) Ricardo takes and deepens Smith’s view in his analysis of comparative advantage in international trade. Ricardo stresses the consequences of a policy of free trade: that free trade results in more wealth even for countries which are relatively inferior in all terms of trade. David Ricardo, *On the Principles of Political Economy and Taxation*, Ch.7, On Foreign Trade para. 7.16 http://www.econlib.org/library/Ricardo/ricP.html

\(^{20}\) Adam Smith, *Wealth of Nations*, B.I, Ch.1, Of the Division of Labour in paragraph I.1.3

only in the specific case of a crisis - and even then, monetary policy can prevent and correct the imbalances. The supply side view is correct because the information economy constantly creates new consumer goods which are not basic necessities yet which are at times capital goods and also greatly improved and continues to improve coordination of supply and demand for traditional products. Thus, supply side theory holds true, at least in the IT branch. Greatly improved coordination of demand and supply brought about by instant global communication explains the constant decrease in inventory stocks during the last thirty years. “Just in time trade” strongly confirms the supply side theory shows how improving the flow of information augments productive capacity.

B. The General Theory as a special theory

According to Milton Friedman, Keynesian theory is partially incorrect. For Friedman, Keynes’s theory in fact is focussed on one particular case - a major crisis - and is not valid as a general theory. That can be seen from the stagflationary failure of Keynesian theory in the 1970s. Friedman rightly criticises the Keynesian proposition that a rise in employment can result from an increase in the supply of money – true in the short term, but false in the mid and long term. Hayek and Friedman are very similar in their rejection of the Phillips curve.

C. Primacy of the Market

1. The role of prices

The Chicago school argues that:
1) Economic behaviour can be best explained by the neoclassical theory of prices.
2) The competitive market is the best form of economic organization.
3) Hence, the state must refrain from any significant change in the allocation of resources.
The market is regarded as the best regulator and more effective than the state because prices play the role of signals that make economic calculation rational and optimally allocate resources by avoiding waste. Money is seen as a quantum of information.\textsuperscript{26} Prices transmit information, they encourage resource users to be guided by this information,\textsuperscript{27} and they encourage owners of these resources to take account of this information.\textsuperscript{28}

2. Monetary Policy

Supply side theory is defined then by the key role given to supply as determining aggregate equilibria, as creating its own demand. Supply side theory also defines itself by its positions on taxation, monetary policy and fiscal policy. As a tax theory, supply side theory suggests that taxation does not acting on a static economy – rather, the economy reacts to any taxation. Thus, an increase in tax does not necessarily mean a transfer of wealth or increase in state revenues. Taxes can encourage or discourage the wealth creation - which is the condition of its previous distribution. Supply side theory emphasises production of wealth and points out the risks that are inherent to a redistributive tax policy (which is not equivalent to a \textit{fiscal} policy of redistribution). What are its positions on monetary and fiscal policy? To understand this should appreciate that supply side economics is also a theory of currency.

a. Money as a signalling system

\textsuperscript{26} F.A. Hayek, \textit{The Use of Knowledge in Society}, 35 AM. ECON. REV. 519 (1945).
\textsuperscript{27} M. Bruce Johnson, \textit{Hayek and Markets}, 23 SW. U. L. REV. 547, 548 (1994) (“Hayek argued that markets coordinate the various bits of information and knowledge scattered among individuals spontaneously, without design or comprehension by any human mind.”). This might seem to be what Adam Smith said. However, Smith focuses on self love as the driving economic force reasoning inductively. For Hayek, in contrast, the driving economic force is information. Thus, Hayek would reject the labour theory of value. Money to Hayek is just information. Smith, like Locke and Marx, argues that money is but crystallized labour (the labour theory of value). For Hayek, money is reified. It may represent labour, in its origin, but in its ends it is more than just labour. It is labour applied to projects. Hayek thinks this is best coordinated by decentralized market transactions. Money, for Hayek, has both a past (the labour it represents) and a future (the investments it will fund) and is also a signal (a quantum of information). This is why Hayek does not, in my opinion, reject the labour theory of value. His theory of money and trade, in my opinion, goes beyond what Smith, Locke and Marx were saying.

According to Friedman, the role of money in the capitalist economy is to set standards of production, to organize production, and to channel and coordinate production. Currency serves to maintain and increase the productive apparatus and adjusts short term consumption to production. Currency is used as a signal in the economy. Thus, distortions of that signal are very bad. For this reason, Friedman proposes an anti-inflationary monetary policy. Inflation is bad for the economy, a 'disease' because it is distortionary. The cause of this disease is bad monetary policy.

b. Money as an instrument of economic management

But currency plays a second role, because it is also a good. It is both use value and exchange value. The price of money is measured in its interest rates. It has both a stable demand and is inelastic -- according to Keynes demand for currency is elastic. An increase in the amount of money (an increase of M1) will have the effect of triggering inflation, but ultimately will not have an effect on reducing unemployment. According to Milton Friedman, a change in the price of money -- that is, a change in interest rates - to address the exogenous shocks is valid as a solution to unemployment only under conditions of a deep general crisis such as in 1929.

c. Monetary policy must prevent inflation (and deflation)

Due to the fact that the market for money is not neutral, that money is both a means by which other goods are exchanged and itself a good, inflation (as

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30Id.
36Ibid. p 51.
37Ibid. p 62.
38Ibid. p 143.
39Ibid. p 142.
40Ibid. p 95.
41Ibid. p 96; p. 106.
42Ibid. p 107.
well as deflation) is by nature bad for the economy. For this reason budgets must be balanced. And, if inflation must be controlled, the mechanisms to attain stable growth with minimal cyclical downturn are monetary and fiscal policy, not regulation of prices or wild printing of fiat currency (M1). Moreover, monetary and fiscal policy is linked because an inflationary policy will have an effect of being a hidden tax. In other words, distortionary market interventions, such as controls on wages and prices, are unproductive. Governmental economic interventions cannot create a stable level of full employment. Fortunately, effective remedies for the disease of inflation exist: indexing prices and interest rates to take into account inflation, and fiscal discipline.

Inflation cannot be used effectively to address unemployment and in fact even increases unemployment according to Milton Friedman. Thus Friedman – like Marx – believes in a natural rate of unemployment. As to exchange rates, they must be freed from artificial regulatory standards and determined by the free market. Thus the collapse of the Bretton Woods system was not inherently problematic according to supply side economics.

**d. Opposition to state intervention**

The logical consequence of a preference for markets is an opposition to state intervention. However the Chicago school does not argue for anarchism, it too is statist. Opposition to State intervention is however reflected in supply side monetary theory: The creation of currency and the manipulation of interest rates alone cannot stimulate economic growth. The exactitude of these

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44 Ibid. p 265.
46 Ibid. p 264.
48 Ibid. p. 25.
49 Friedman, *The Optimum Quantity of Money*, p 264. "Monetary and fiscal measures are the only appropriate means of controlling inflation."
50 Ibid. p 117.
findings is verified by the experience of the 70s. The controls on wages and prices then only encouraged inflation and unemployment by causing distortions in the price structure which reduced the effectiveness of the system. The resulting decrease in production increases the adverse side effects of the fight against inflation rather than reducing them. Controls on prices and wages waste manpower.  

The manipulation of money supply - or the interest rate - does not lead to increased employment. This is not to say that there is no role for the state in the economy. Under the condition of a non-inflationary monetary policy and a balanced budget the state can allocate, lend or borrow in order to make effective collective economic policies. Thus, fiscal policy is a better tool for state intervention than monetary policy. Monetary policy is "defensive" assuring stability, a condition precedent for prosperity. Fiscal policy in contrast is "active" and allows effective State interventions.

V. THE VIENNA SCHOOL

Contemporary Anglo-Saxon legal thinking is dominated by echoes of the theorists of the Scottish enlightenment in social contract thinking (Hobbes, Locke) and in economic theories of law (Smith, Ricardo). However, within economic thinking about law, the Austrian school of economics attempts, unsuccessfully, to present alternatives to the intellectual progeny of the Scottish enlightenment. Although the Vienna circle started in the 1920s in Vienna, most Vienna circle theorists went into exile during the Second World War. After the war most intellectuals remained in exile settling in the USA - including Kelsen, and Hayek; further, most of the Vienna circle’s post war publications were in English.

The Vienna Circle is defined around an attempt to create a new epistemology. Vienna epistemology denies the existence of ideal and metaphysical entities, so it is consistent with modernity (materialism) and expresses the same atomism and scepticism that we have already seen since William of Occam.

The Vienna circle is essentially hostile to government because of atomism and radical individualism, a tendency reinforced by the experiences of

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totalitarianism during the second war. The Vienna circle’s attempts to build an innovative epistemology – whether by considering entities only in their relationship with each other and not in terms of themselves, or by an attempt at deconstruction of thought, or by a rejection of the empirical were ultimately abandoned as too obscure and ultimately failed to serve as the basis for a way of thinking independent of the modernity from which it issued.

Thus, Mises and Rothbard are marginalized because of their radical subjectivist epistemology, whereas Hayek moved to prominence because he abandoned his attempt to adopt or apply Vienna circle methodology to neoclassical theory. The Austrian school’s attempt to break from the epistemology of late modernity via a radical constructivism and its consequence, a pure theory, failed as seen most clearly in the irrelevance of Kelsen. The need for theory to be grounded in the praxis, in the real world of every day life (Marx) explain the empirical failure of the Austrian school’s economic theories and Hayek’s choice to abandon the more radical positions of the School of Vienna.60

Whatever the differences within the theory of law and economics between the school of Chicago, Virginia, and Vienna, their proposals on the practical level are similar. Theorists of the Vienna school are against any state intervention in the economy. They presuppose that economic choices are sound and are done in the framework of free competition. They oppose state economic planning and collective action because, in their view, these acts impede the flow of information, increase transaction costs and hinder individuals61 from achieving all they can. They believe everyone is motivated by profit.62 In other words, the presuppositions of the differing schools of economic thought are sufficiently similar allow them to be analyzed under one rubric, law and economics.

The economic wing of the Austrian School includes anarcho-capitalists such as Rothbard and Mises but also statists like Hayek. The Vienna school also includes Freud, Jung, and Kelsen who, though opposing state power, do not seem to be anarchists. The anarchism wing of the Vienna school must be qualified as but a partial anarchism - which brings to mind Nozick, underscoring our position that the similarities among the schools of Virginia and Chicago on the one side and the school Vienna on the other are greater than the differences.


62 Id. at 295.

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A. Mises and Rothbard

Sometimes Rothbard is characterized as an anarcho-capitalist because he proposes the replacement of the State by a total privatization of public functions. Rothbard's is very hostile toward the State. He regards the state as an armed gang of criminals and rejects the state as legitimate form of social organization. Yet David Friedman, who is also an anarchist, is not in the Vienna school for methodological reasons - his economics are neoclassical.

Should the Austrian school be regarded as a serious alternative to neoclassical thought?

The Austrian school offers a subjectivist methodology and a constructivist epistemology. Classical economic theory is in contrast objective. Subjectivism condemns the Vienna school to powerlessness, isolated from practical experience, as clearly illustrated in the case of Kelsen’s pure theory of law. Subjectivism leads to a rejection of statistical reliability. The epistemology of the Vienna School is materialist, but it cannot be verified by material experiences due to subjectivism. Thus, Viennese positions are purely formal. Statistical methods, rejected by the Vienna school, are a prerequisite for a verifiable study of the past and also for predictions. The ability to predict is abandoned by the Austrian theory. The Austrian school, despite its rejection of epistemological realism, should be seen as purely formal representation – and thus, this is doomed to sterility.

Rothbard and Mises also reject certain presuppositions of neoclassical economics; in particular that agents are rational economic actors, that human needs have no limits, but also the ability to objectively measure market values. Their methodology is unique as it is a priori and non-empirical. This method cannot verify propositions and so must be rejected -- it cannot propose pragmatic solutions to real problems. Starting from their rejection of the neo-

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64 Ibid.
65 Ibid.
67 Ibid.
classical approach, the Vienna school tries to develop a new methodology,\textsuperscript{70} without success.\textsuperscript{71} In the end a rejection of a statistical methodology\textsuperscript{72} dooms the Vienna circle to irrelevance.\textsuperscript{73} The most striking example of irrelevance and impotence is Kelsen – who, incidentally, is strongly criticized by Hayek.

\textbf{B. Hayek}

Hayek’s positions are prudent and reasonable, in part because of the fact that Hayek breaks with the positions of other issues Austrians. Hayek, who opposes the totalitarian state, had no objection to the State itself and can not be considered an anarchist.

\textbf{1. Hayek on inflation}

Hayek's position on inflation is quite clear: inflation, at the macro-economic level, especially over time, is disastrous for the economy. The experience of Germany between 1923 and 1930 is empirical evidence of this. The American inflation between 1973 and 1981 - which triggered hyperinflation, for example in Argentina and Israel - are other examples of what is now orthodoxy: that inflation distorts economic signals. A neutral monetary policy - zero inflation - encourages productivity.\textsuperscript{74}

\textbf{2. Hayek on epistemology}

Hayek’s epistemology is noteworthy.\textsuperscript{75} Sometimes his epistemology brings him closer to the other theorists of the School of Austria; usually it far surpasses them by its brilliance.

For Hayek the question of the economy is in fact a question of information.\textsuperscript{76} The problem of economic science is to develop a heuristic to manage

\begin{flushright}
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
\textsuperscript{75} Bryan Caplan, \textit{The Austrian Search for Realistic Foundations}, http://www.gmu.edu/departments/economics/bcaplan/ausfin2.doc
\end{flushright}
information disseminated and known only partially. In other words, the information economy is far from perfect - which condemns both socialism (a planned economy is impossible due to complexity) - and the theory of efficient capital markets. The Chicago school’s efficient theory capital markets hypothesis proposes that markets function perfectly and thus information flow is also perfect (instantaneous, global, with no transaction costs). Hayek sees however that in reality information flow is imperfect, that there are always transaction costs (e.g., translators, lawyers) and communication is neither cost-free nor instantaneous. His perception of the limits to information explains both the need for minimal regulation but also the impossibility of an effective planned economy. Hayek’s epistemology will have further implications, and must be examined in depth yet to identify them. We begin with a deepening of Hayek’s theory on information, i.e. his epistemology.

According to Hayek:
* There is a vast amount of information -- it is impossible for any one agent to know all information.
* Information known by a company is greater than the information held by any individual person.
* There is little difference between the absolute difference of a well-informed person and an ill-informed person (This is a questionable proposition – Warren Buffet would disagree with it).
- However, the relative difference between the knowledge of an ill-informed and well-informed person is crucial to economic acts. Despite the fact both are ill informed relative to any company and the market as a whole the better informed person can outperform the less well informed person)

These epistemological points explain in detail why a planned economy or an anarchic state are less productive than an unplanned economy in a State. A planned economy cannot manage all the information available and will produce too much or too little. But an entirely anarchic economy will be unable to efficiently distribute information and face heightened transaction costs: for example in an anarchist system transaction costs will be raised by the need to employ private agencies for security and other similar conflicts will reduce the availability of information. It seems that Hayek has managed to achieve Aristotle’s golden mean, literally, in the field of economics.

Hayek’s epistemology allows him to surpass other Austrians, and lead him to the following conclusion:

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77 Friedrich Hayek, *The Use of Knowledge in Society*, Reprinted from the American Economic Review, XXXV, No. 4; September, 1945, 519-30.

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* The formation of consciousness operates at a level below the conceptual\(^78\) level and not at the symbolic level.

Rather than compare our sensory perceptions with our concepts (whether innate – materialism - or learned - behavioralism), our perception is triggered by the object. If that object is quite distinct, (sensory impression > threshold of perception) it is conceptualized as an object our conscience. The objects of understanding, from this perspective, are built for and by us. This form of constructivism is not subjective but ultimately denies the opportunity of verification – some objects will exist but not be cognized as such due to being below the requisite perceptual threshold. This radical subjectivity brings Hayek epistemologically closer to Rothbard and Mises, but was ultimately abandoned by Hayek in practice for the simple reason that its consequence is the erasure of knowledge and its replacement by subjectivity. I reject the Vienna school on constructivism because truth exists outside the observer as an objective fact.

Despite the criticism of Vienna style constructivism, Hayek’s theory influences theories of artificial intelligence especially in cognitive science and it is radically different from a materialist conception (where the object of perception will have a real existence apart from the observer, for example Marx), or idealistic (where the object of observation is in fact an instance of a noetic emanation, e.g. Plato). Hayek’s epistemology is consistent with one of the final positions of the School of Vienna: that knowledge is subjective, and created by the observer (which is not my position).

The aporia raised by this theory is that the epistemology of the subjectivist Vienna circle,\(^79\) which also refers to values,\(^80\) is contradictory to a nomothetic economic theory. Thus, Vienna economic propositions, if consistent with Vienna school epistemology, must be purely formal. For this reason a consistent Vienna economics cannot have a practical application - which makes the Vienna school powerless in practice. This impotence is more

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evident in Rothbard and Mises than Hayek, obviously. However, it should be remembered that Hayek essentially broke from the Vienna school as outlined above.

In summary, for Hayek, information is unevenly distributed and only partially known. That is to say: there is a plenitude of information, but this vast "ocean" of information is known only partially by any economic agent - including a government. He is correct there. An obvious implication of that fact is that transaction costs exist, and are inevitable. Another is a healthy scepticism toward universalist proposals. Hayek rejected planned economies because of the fact that information available to the planner will be too limited to meet the needs of consumers. But he also rejected the Chicago theory of the efficient capital market because that theory proposes that information is perfect and that regulation of capital markets is ineffective which isn’t the case.

Verifying Hayek’s epistemology directly is difficult if not impossible. Our verification is indirect and consists of a determining the correspondence between his economic model and the empirical reality. Hayek’s position on inflation is exact. The empirical verification comes from historical experiences, notably in Germany in the 1930s. The verification shows Hayek’s theory is correct. Rectitude here is defined as a correspondence between reality and a description developed from reality. Hayek’s descriptive conclusions are correct: the difficulty is that they are based on an epistemology which appears, in a theoretical sense, contradictory. This contradiction - which we believe is only apparent – arises because of the fact that the epistemology of the School of Vienna is subjective. But this contradiction is only apparent. Hayek does not insist that Austrian economics is fundamentally different from neoclassical economics. Thus he can use statistical methods and other tools of neoclassical economic analysis. He could also explain this contradiction by using the distinction between practical reason (phronesis) and theoretical reason. Hayek’s epistemology will then be theoretical rationality, but his economic thinking will be practical reason (phronesis). By way of either of these two loopholes the theoretical contradiction in Hayek’s work disappears.

82 Id. at 820.
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3. Hayek’s Prescriptions

As to his prescriptions, Hayek, like other neoclassical theorists, advocates privatizing certain state functions.\(^ {86}\) Yet, Hayek reserves a role for the state to provide essential goods.\(^ {87}\) In contrast to other neoclassical economic theorists, Hayek appears to be holist – he recognizes that human society is more powerful than one man alone. Hayek notes that freedom and equality are concepts in tension and even opposed. He proposes privatization of the monetary function of the State. Of the neoclassical theorists his thinking is definitely the most interesting and is likely influenced by Schumpeter.

VI. THE SCHOOL OF PUBLIC CHOICE: JAMES BUCHANAN

Is there a democratic path to move from individual preference to a rational collective choice where citizens are not victims of external pressures, such that everyone is free to make choices?\(^ {88}\) The School of public choice tries to find (affirmative) answers to this question. Public Choice aims to apply the tools of economic analysis to policy issues. Thus, one can speak of a "political marketplace"\(^ {89}\) of "electoral prices", "fiscal prices"\(^ {90}\) and "fiscal markets."\(^ {91}\) In this market, one can distinguish supply (a policy) and demand (the vote of citizens or their representatives).\(^ {92}\)

Public choice is based on three fundamental assumptions. First, only property rights can best ensure the rights of individuals in the framework of the market.\(^ {93}\) Second, the existence of market failures in resource allocation does not justify government intervention, except in a very few cases. That is why it is necessary to allow individuals to establish "quasi-markets" that could lead to an optimal situation. Third and finally, according to Public Choice, the market is the real factor of stability in "social systems".\(^ {94}\) Are these views valid?

\(^{89}\) Ibid. at 137.
\(^{90}\) Ibid. at 226.
\(^{91}\) Ibid. at 225.
A. The analysis of "political markets" \cite{95}

Public choice is a neoclassical individualistic theory.\cite{96} It can be compared to Posner’s theory of law and economic because it establishes equivalence between the economic and the political. However, it differs from Posner in that it does not create an analogy between justice and economy. Instead, it makes an analogy of politics and the marketplace.

Buchanan proposes an anarchical individualist theory based on the social contract directed to an anarchic individualist utopia.\cite{97} However, Buchanan admits the social contract model is unrealistic.\cite{98} Buchanan justifies this contradiction, by arguing that the social contract is ‘just a simplified model’.\cite{99} Buchanan recognizes the fact that man is a necessarily social animal - in spite of the individualism he advocates. He takes up the atomist model conscious of the alternative organic and holist model.\cite{100} Buchanan adopts a clear atomist perspective while also considering the possibility of a holistic model which he nevertheless rejects. He does not prove his atomism, rather he sees the choice of atomism or holism as an indemonstrable postulate.

He proposes then to study policy phenomena with an analysis based on an analogy between the market and the "public choice".\cite{101} Taxes are similar to the purchase price of services and public goods.\cite{102} In this perspective, the government is akin to a household: it must develop its own financial policy based solely on its resources.\cite{103} If one considers the fact that resources are limited and needs endless – the model of homo economicus - the government faces a dilemma: by asking voters whether to increase spending, the latter will always respond in the affirmative.\cite{104} On the other hand, whenever the government asks the voters whether to raise taxes, voters will always adopt a negative response. Buchanan's position is simply that these two issues of

\begin{thebibliography}{99}
\bibitem{99} *Ibid.* p. 3.
\bibitem{100} Buchanan, *The Calculus of Consent.*, p. 318.
\bibitem{105} Buchanan, *The Calculus of Consent.*, p. 323.
\end{thebibliography}
employment and taxation should be considered simultaneously. Public choice offers the public a principle of resource allocation to avoid otherwise inevitable fiscal illusions such as retention at source of income tax.

Regarding procurement policies, Buchanan proposes that the legislation is tantamount to a property purchased - directly or in the form of donations, contracts, etc. However, this proved to be a rather ambiguous position that indirectly condones corruption - which seems paradoxical. We see here the problem the (supposed) equivalence made between economics and law. If pressure groups use their economic power to make tacit or implied contracts, crooked or otherwise, with voting representatives and essentially buy legislation how can one distinguish what is legitimate from what is not? In all events, public choice admits that the markets do sometimes fail, including political failure, but argues that political processes also fail and are not necessarily any better or worse than market processes and can in fact be modelled in market terms.

1. Political failure

From the economic analysis of politics, public school finds failures in public institutions analogous to those encountered in private institutions. Thus, the inevitable problems of externalities, monopolies and transaction costs - resulting from the imperfections of information - must also be considered in the "political marketplace". Public choice rightly questions whether and how the state can be neutral and if not what that implies for legitimacy of the state. However, public choice does not question the existence of externalities - unlike the Austrian School - because political markets also suffer from externalities!

109 Ibid. p. 97.
110 Ibid. p. 72-73.
111 Ibid. p. 97.
112 Ibid. p. 139.
116 Ibid. p. 182.
2. Bureaucracy

Public choice argues that the government's main customers are in fact lobbyists and bureaucracy who seek after their own interests. Thus, public choice is consistent with supply side theory. Although the School of Vienna and public choice are both opposed to state intervention - and support its privatisation - their presuppositions are different.

3. Public goods

The School of public choice affirms the existence of externalities and imperfect trade because of transaction costs and because money influences the political processes. Public choice affirms the existence of externalities and that trade is imperfect due to transaction costs. Public goods do exist, according to public choice, and they are defined by the characteristic of their collective benefit (impossibility to exclude). Thus, public goods such as the administration of justice, defence, coining currency and minting money are legitimate functions of government. That is why we believe - despite his criticism of the state - that Buchanan does not reject ultimately the state itself - unlike the anarcho-capitalists.

4. The Political Market

If the political market, populated by the homo politico-economicus, is a market like any other, with its own law of supply and demand the instrument to bring the supply and demand curves into equilibrium is money and the vote. Thus the vote is one of the key for comprehending economic cycles.

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121 Ibid.
124 Ibid. p. 19-21
Voting cycles and economic cycles are 180 degrees out of phase according to public choice because representatives try to schedule their re-election at economic peaks or economic peaks at the time of re-election.\textsuperscript{127}

Given the political influence on the economy the school of public choice asks if political influence is neutral. Public choice admits the existence of market failures.\textsuperscript{128} At the same time, it asks whether the political market also has failures\textsuperscript{129} and answers in the affirmative.

\textbf{B. Consequences of the analysis}

\textbf{1. Balanced Budget}

Given the trend of electorates to want public services without paying corresponding taxes there is a definite tendency towards debt financing by government.\textsuperscript{130} However, budgetary imbalance encourages inflation; balanced budgets discourages inflation.\textsuperscript{131} A balanced budget allows stability for economic business planning.\textsuperscript{132} This is the tension in budget policy which should have implications for prudent legal interpretations of tax and budgetary laws. Ultimately, public school choice advocates fiscal responsibility\textsuperscript{133} - one of the pillars of the new economic orthodoxy. Inflation in effect operates as a hidden tax pushing taxpayers upward into higher tax brackets.\textsuperscript{134} Thus balanced budgets and zero inflation are desirable economic goals.

\textbf{2. Privatization of legal functions}

The school of public choice concludes from applying economic methods to political phenomena that that efficiency goals are generally better served by a privatization of public functions and budget transparency. Their logic is:

1. States are at least as flawed as markets as allocation mechanisms.

\textsuperscript{129}\textit{Ibid.} p. 365.
\textsuperscript{131}\textit{Ibid.} p. 88.
\textsuperscript{132}\textit{Ibid.} p. 122.
\textsuperscript{133}\textit{Ibid.} p. 139.
\textsuperscript{134}\textit{Ibid.} p. 359.
2. Public goods do not exist, or if they do, non-public goods are at least as well distributed by markets as by the state. Since public goods are rare to non-existent and since states are no better at allocation than markets then why should one rely on the state as an allocation mechanism? Thus, privatization and non-intervention is the implicit conclusion from public choice theory. This is not in contradiction to libertarian anti-statist policies.

C. Critiques of the School of public choice

Within its own terms, public choice is coherent. However, I critique the school public choice on three points: 1) I reject utilitarianism because utility, divorced from money, is not objectively able to be measured. 2) I question certain presuppositions of neoclassical theory taken up by public choice. 3) The theory of public choice is anti-democratic.

1. Public choice is a utilitarian theory. However, the Vienna school is correct on utilitarianism. The incommensurability of utilities - because of their subjectivity - indicates that utilitarian analysis is subjective and invalid scientifically. Utility cannot be the foundation of a scientific demonstration - because it cannot be measured nor verified.

2. The theory of public choice presupposes - like all neoclassical thought - the existence of a homo economicus. This model is often criticized as unrealistic simplification. Buchanan even acknowledges that it is reductionist.

3. The theory of public choice is anti-democratic.

Questioning democracy is not in itself a "heresy". But implicit in public choice is the uncomfortable idea that democracy is only an illusion, which implies that

135 Birgir Runolfsson Solvason, supra note 113.
140 Ibid. p. 123.
143 Birgir Runolfsson Solvason, supra note 113.
the political system is finally determined by wealthy and for the wealthy. Thus, public choice can be criticized as merely a defender of oligarchic plutocracy. At this level, at least, it loses its ability to legitimacy in a system based - at least in theory - on the general consent and democracy.

**VII. CONCLUSIONS:**

**A. Valid Applications of Economic Methods in Law— “Weak” Law and Economics**

**1. Balancing Tests**

Because the ideas of Smith\textsuperscript{144} and Ricardo\textsuperscript{145} are, with qualifications, basically accurate, law and economics as a special theory to resolve particular cases can well be valid. Economic analysis can be used to ground otherwise vague and manipulable balancing tests via market values back into the real world. The monetization of competing and conflicting interests of plaintiffs, defendants and third parties to a legal conflict allows vague and manipulable balancing tests to be coerced into objective forms, provided monetary valuation is possible - a saleable good with adequate buyers and sellers to constitute a market is a necessary precondition to accurate market valuation.

**2. Cost-Benefit Analysis**

The economic valuation of costs and benefits is another way economic analysis can be used to determine the weight of competing interests. Hand’s test is the most famous example of an economic argument used to determine a real world legal problem – if the cost to prevent the damage is greater than the damage that would result then, according to Hand’s test, there is no duty at tort. Cost benefit analyses are a defensible method brought to legal decision making from economics and is certainly more objective than the indeterminable manipulations of legal realism or post-modernism.

\textsuperscript{144} People are self interested, but by achieving their own self interest the best collective interest is obtained thereby. WN: B.I, Ch.2, Of the Principle which gives Occasion to the Division of Labour in paragraph 1.2.2

The use of economic analytical methods such as market valuation of competing interests, cost benefit analysis and even actuarial tables, present value of future income stream calculations as well as the law of supply and demand are valid ways to help decide legal cases because, though specific, they can be applied in context of other values which escape market valuation, often due to market failure (no buyers, or sellers, imperfect information, transaction costs, disequilibria of supply and demand etc.). I call the limited and specific use of economic methods weak law and economics. Weak law and economics, the limited use of certain methods of economic analysis to help solve legal disputes, is a perfectly defensible method of resolving at least some legal disputes. Economic methods of “weak” law and economics such as those described have a place in legal decision making.

I now however wish to explore and expose the stronger claims of law and economics as a general theory of law, a general method for resolving any legal dispute – those propositions, which I call strong law and economics are simply untenable.

**B. Invalid Claims: “Strong” Law and Economics**

Economic theories of law arose in the late 20th century to try to deal with the problems presented by legal realism – a general indeterminacy arising from a) moral relativism b) linguistic prescriptivism c) epistemological relativism d) a general crises in the economy, namely two depressions and two attendant world wars. Of course, the economic facts which created a crisis of confidence in legal determinicity are well known: but strong law and economics is not arguing that economic forces are the material base upon which the juridical superstructure is erected – that would be Marxism -- and, moreover, a perfectly defensible position. Rather, strong law and economics argues that laws mirror the market, that all legal conflicts resolve into economic conflicts and the position that law and economics provides a general method for resolution of all legal disputes. However that last point is indefensible.

Law and economics grew out of the mixed bag of economic thought sketched above. On the one hand Smith and Ricardo, who are well thought out, are the basis for the unrealistic claims of Pareto and Coase. The result of this mish-mash is a theory unable to maintain its totalizing claims.

Law and economics theorists argue that law is developed as a function of its tendency to maximize social wealth and that legal mechanisms parallel economic mechanisms. The “strict” or “strong” view of L&E argues that law
reaches economically efficient outcomes and essentially mirrors results that would have been reached had laws and outcomes been negotiated on an open market.\textsuperscript{146} The weaker version of L&E in contrast only looks to economics for methods of analyzing the law in order to inform the law as to what decision would be best. As a description, economic theory of law argues that all rights are \textit{de facto}, and should be, \textit{de jure}, fungible because they believe that the competition to buy and sell rights leads to wealth maximisation. Law and economics relies on untenable presumptions about the nature of man, the market and information which are exposed and refuted below.

Economic analysis of law, as a general theory, is severely flawed due in part to a contradiction at the ontological level between holism on the one hand and atomism on the other. Economic analysis of law tends to be atomistic not holistic. Holistic theory argues that entities should be studied in toto. A study that is not starting by encompassing the individual in their entire social context is inevitably doomed to failure; essentially, for holists, the whole is greater than the sum of its parts. According to the holistic perspective, the collective forms its members who can then flourish within the collectivity and even survive outside it.

Strong L&E is demonstrably false because it is based on erroneous theories about information and markets. Thus, legal processes cannot, do not, and should not mirror outcomes on an open market. You say “unregulated open market” and I respond: 1929. That is not the only example of market failure, just the most famous one.

1. \textbf{Homo Economicus – An Unrealistic Model of Human Behaviour in the Real World}

Law and economics, at least in its strong version, assumes the existence of a homo economicus. Homo economicus is a rational profit maximizer.\textsuperscript{147} That assumption is questionable.\textsuperscript{148} Economic actors are often irrational.\textsuperscript{149}

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\item[149] \textit{Id.} at 143.
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Maximization of well being is highly individual and may be generally beyond (and at times surely is beyond) objective monetary evaluation. The better theorists admit the homo economicus is unrealistic and not a reflection of reality. Profit maximization is only one of many possible goals of an economic actor and maximization of well being, utility or even income may well be incapable of market evaluation. Finally, just as there may be no buyers and sellers to constitute a market, the relevant goods may not be divisible and fungible. Market failure happens.

2. Presumptions about Markets – And Failure to Account for Market Failure

Neoclassical economic thought presupposes that goods are able to be evaluated in monetary terms and that they are fungible. To function, markets also require willing buyers and willing sellers. Without an adequate number of buyers and sellers trading in fungible goods markets don’t exist. And without markets no economic solution is possible. Wherever markets fail law and economics would also fail which alone should explain what law and economic is no realistic contender for the role of total unifying theory of law and justice. Not all goods are fungible. Certain goods cannot in fact be priced even by a market economy. Other “goods” (“bads” in fact) should not be marketable and other goods are inalienable. Markets do not always exist and even when they do sometimes markets fail to allocate goods efficiently – gluts, shortages and depressions are part of the economy.

In sum, strong law and economics is descriptively incorrect. Courts are not mini-markets mimicking or mirroring the marketplace nor should they be both due to the methodological limits of economic analysis and due to the non-economic character of much in the law (e.g., inalienable rights, interpretation of texts).

Because of the weaknesses in economic analysis of the law, which inevitably arise from any simplified descriptive model, strong L&E is not very useful as a tool to describe legal reality and is quite useless as a prescriptive model of how legal reality ought to be. Yet, a weak form of L&E, borrowing some methods of classical economics, can be a useful tool for legal analysis. For example, the cost-benefit analysis in law is a result of weak L&E.

3. Information Theory

For law and economics, money is simply a quantum of information – monetary flows reflect information flows (Hayek). This is one of the contributions of L&E to social sciences. Other aspects of L&E information theory are however problematic.

Strong L&E embraces the pernicious and inaccurate view that information flow is perfect (i.e. instantaneous and complete) and that there are no transaction costs, such as lawyer’s fees, brokers commissions, translation fees, etc.¹⁵¹ Likewise neoclassical economics argues that information is perfect with no transaction costs - that is simply not the case.¹⁵² The Chicago school's efficient capital market hypothesis is built on this of this erroneous theory of information (perfect information, no transaction costs).¹⁵³ Though information is almost instantly available at very low costs, finding and using that information is neither instant, nor costless, nor evenly distributed. Further, the Chicago theory ignores the existence of false and misleading information, as well as the inevitability of transaction costs such as legal formalities and translations.¹⁵⁴ The Chicago theory also ignores market entry costs. Although thinly capitalized start up companies are normal in the English speaking world, this is not the case in civil law jurisdictions. Moreover, even if a thinly capitalized company can enter the market with low costs, it is still limited by material capital requirements for production, such as machinery, vehicles, and land. So while information costs are dropping all the time, entry costs and transaction costs have not been eliminated. Thus capital markets are not perfectly efficient.¹⁵⁵ The ECMH is in fact only partially correct because some market imperfections are inevitable due to the inevitability of cyclicity and unemployment and is just one example of how law and economics fails as a theory either to describe what reality is or to prescribe what it should be. In sum, information flow is not perfect. Transaction costs are inevitable. Thus strong l&e cannot hold.

C. Why Law and Economics?

Economic analysis of law rose to prominence in the common law in part because of the common law’s tendency to pragmatism and tendency to monetise. Economic analysis was one response to indeterminacy in legal realism’s proposed solution to formalism, multipronged interest balancing tests. Balancing tests are flexible, so flexible as to be indeterminate. Flexibility permits the court to decide cases on their individual merits but can also be criticized as capricious, unprincipled, and prone to abuse— a critique which can be levelled at balancing tests generally. However, economic analyses are sometimes only pseudo-empirical because it is at times difficult or even impossible to objectively evaluate worth. Economic analyses of law can be superficial and are in all events no judicial panacea. Some values defy market valuation (no market, either due to lack of buyers or sellers), other values are not fungible (fundamental human rights are inalienable) and several of the presumptions of economic analysis are questionable when not outright wrong. However, economic analyses at least appear objective and this explains why they rose to prominence to meet the problem of legal indeterminacy brought about by moral relativism.

D. A Reductio to Refute Strong Law and Economics

The limits of economic reasoning about the law can be shown by a reductio: If there were no personal sphere of existence apart from the economic than slavery and contract killing would be permitted as leading to the efficient use of slaves and the useful elimination of uneconomic actors. Similarly: if the act of executing an innocent person would increase collective wealth, Posner’s logic would, at least on the face of things, affirm the death penalty for the innocent person.

In sum, Posner’s thinking is reductionist. He argues that all legal principles can and/or should be able to be derived from an economic analysis. His over-

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determinism deserves to be criticized. Hopefully this refutation is adequate.


THE JURISPRUDENTIAL NICHE OCCUPIED BY LAW AND ECONOMICS

Nicholas Mercuro*

Abstract: This paper describes the jurisprudential niche occupied by the several schools of thought that comprise the field of Law and Economics in present-day legal scholarship. It begins by providing a brief history of law in the U.S.; it highlights the void left in law by the Legal Realists; it then very briefly explores some of the theories that attempted to fill that void including critical legal studies, feminist jurisprudence, and critical race theory. The paper then turns to its main focus – describing the several schools of thought that comprise the field of Law and Economics that has also helped fill the void. These include the Chicago approach to law and economics, public choice theory, institutional law and economics, the new institutional economics, social norms and law and economics, the New Haven school, and Austrian law and economics.

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I. INTRODUCTION

Most academics in law, sociology, psychology, philosophy, and political science who have heard something about “law and economics” or the “economic analysis of law” often react in the same manner, with an almost knee-jerk response – “Oh, that’s those Chicago types promoting their conservative market agenda.” The names that immediately come to mind typically include Ronald H. Coase, Richard A. Posner, Robert Bork, Gary Becker, Henry Manne and a few others who are at the core of the Chicago approach to law and economics. Discussions of the Coase theorem, more deregulation, a vast expansion of market-like remedies, rent-seeking behavior ... etc. are all viewed with some suspicion. Without full appreciation of the true scope of Law and Economics, they have come to believe the field is irredeemably conservative, probusiness, and anticonsument – in general “not for them.”

The purpose of this paper is to describe the jurisprudential niche that is occupied by the several schools of thought that comprise the field of Law and Economics within present-day legal scholarship.¹ The focus here is not just on

¹ Throughout this paper “Law and Economics” (capital L and E) is used as an eclectic title to refer to all seven of the identifiable, coherent schools of thought that deal explicitly with the interrelations between law and economy.
the Chicago school that often invites the response described above, but also on the six other schools that contribute to the field, each of which places significant emphasis on the interrelations between law and economy. The aim is to clarify the scope of “Law and Economics” for those in law as well as those involved in fields contiguous to law. Hopefully, this will provide the reader a broader and deeper understanding and appreciation of ways to think about the relationships between the nation’s legal institutions and their impact upon the performance of the economy.

Law and Economics can be defined as the application of economic theory—primarily microeconomics and the basic concepts of welfare economics—to examine the formation, structure, processes, and economic impact of law and legal institutions. Various schools of thought compete in this rich marketplace of ideas beyond the Chicago approach to law and economics. These include public choice theory, institutional law and economics, the new institutional economics, social norms and law and economics, as well as the New Haven school and Austrian law and economics.

Today, much of the conventional study of law is organized around modern doctrinal principles and concepts drawn from legal theory and political theory. The “Law and Economics” movement is an attempt to place economic theory alongside of (or in place of ?) the legal and political theory that presently informs law; to place efficiency alongside of (or in place of ?) the concepts of justice and/or fairness that presently help fashion legal rules and doctrines. None of its proponents come to the marketplace of ideas without their particular way of thinking about economics and/or the law. They all bring with them their own tendencies and biases regarding: the naming and framing of the legal issues that come before them; the role of efficiency in describing and prescribing law; how to balance ex post versus ex ante thinking in the law; the degree to which there should be an emphasis on inductive or deductive thinking, or on positive or normative analysis; and the degree to which social norms should be included in the economic analysis of law. Each school of thought has its own unique perspective – each looks into the room that houses the economy and our legal system through a different window. Their views of what is in that room (even within a particular school of thought) are by no means homogeneous; these schools of thought are in some ways competing and in other ways complementary approaches to the study of the development and the reformulation of law. In all this, each school of thought contributes to our understanding the complex interrelations between the economy and the law and thereby helps us come to grips with the implications of legal-economic policy, ultimately by stating: i) what the law is, ii) to discern a basis for law’s legitimacy, and/or iii) to say what the law should be.
II. A VERY BRIEF HISTORY OF LEGAL THEORY

In order to understand the jurisprudential niche occupied by Law and Economics in law today, it is important to see Law and Economics as part of the evolution of law, more particularly, the evolution of ways to think about the law. To that end, this section highlights the history of American jurisprudence by describing the several approaches or ways to think about the law so the reader can better appreciate how law – as it has evolved over time – opened its doors to (or got them knocked down by) the imperialism of economics.

A. Natural Law

In looking back to the ways we have thought about law, the obvious starting point is with natural law. There are two prominent conceptions of natural law: one is based on reason and the ‘nature’ of man, while the other is based on reason in relation to God. From the perspective of advocates of the natural law (in either form), law stands above and apart from the activities of human law makers. Whether the legitimacy of the natural is said to rest with “reason” or “divine inspiration,” natural law theorists argue that individuals in society have a moral obligation to make and obey law consistent with these overarching natural law principles.

B. The Positivists

Against this metaphysical approach came the positivist scientific attitude toward the law, circa 1820-1830, a movement born out of the success of the natural sciences in the nineteenth century and the attempts by the social sciences to apply the methods of the natural sciences. The positivists were led by John Austin; he was later joined by the continental positivist, Hans Kelsen. Positivists as a group actively distanced themselves from the natural law advocates who they thought confused legal norms and moral ideas; they rebelled against the concept of natural law in all its forms. This is reflected in the positivists’ assertions that i) law is the command of the sovereign and nothing more (Austin), or owes its origins to the “Grundnorm” together with a determinate logical structure from which legal outcomes can be reached

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4 Austin’s more important works include Lectures on Jurisprudence or The Philosophy of Positive Law (1885) and The Province of Jurisprudence Determined (1861).
5 Kelsen’s more important works include General Theory of Law & State (1945) and The Pure Theory of Law (1967).
(2009) J. JURIS 63
without reference outside factors (Kelsen); ii) law exists only to the extent that it is capable of being enforced; and iii) ethics, politics, morals, and customs are outside of the domain of jurisprudence.

C. Doctrinalism

The mid-nineteenth century witnessed the development of a second movement attempting to mimic the methodology of the natural sciences – doctrinalism. Within doctrinalism, law is not a search for some natural or divinely inspired principles, but rather a scientific enterprise which “takes as its starting point a given legal order and distills from it by a predominately inductive method certain fundamental notions, concepts, and distinctions.” It was Christopher Columbus Langdell, Dean of the Harvard Law School, who, within American law, perhaps came to be most closely associated with this view. Together with James Barr Ames, Joseph Beale and others, Langdell considered the judicial opinion to occupy a place of preeminence in law, inasmuch as he believed that the corpus of judicial opinions embodied “a handful of permanent, unchanging, and indispensable principles of law” that revealed themselves in different guises in different cases. The task of legal reasoning became that of the careful and exacting study of judicial opinions to discern these fundamental doctrines. Thus, formalism became the dominate paradigm – once the principles and doctrines were revealed, it would then be possible to render decisions in new cases through the use of syllogistic reasoning from the precedential principles set forth in previous like cases.

D. Sociological Jurisprudence

In the late nineteenth century a reaction against doctrinalism began to emerge. This alternative way to think about the law has been termed sociological jurisprudence and included such notable legal thinkers as Roscoe Pound,”

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6 Bodenheimer, above n 3, 95.
9 It has been observed that: “Contrary to the caricature, formalism did not begin with Langdell.” Marcia Speziale, ‘Langdell’s Concept of Law as Science: The Beginning of Anti-formalism in American Legal Theory’ (1980) 5 Vermont Law Review 1, 4 at note 10.
Benjamin Cardozo, and Oliver Wendell Holmes Jr.  

Pound was considered the leader of sociological jurisprudence and a strong advocate of reforming law by taking social reality into account. As a group, advocates of sociological jurisprudence claimed that law is not to be seen as an autonomous discipline, believing instead that the law can not be fully understood without reference to the social and economic conditions of the day. They believed that judges should be aware of the social and economic conditions which affect the path of law and that the legal decision-making process must necessarily employ the tools – the insights from the social sciences – necessary to enhance such awareness.

E. Restatements of Law

It must be noted that the advocates of the formalist, doctrinal approach did not simply roll over and play dead in the face of criticism leveled by the proponents of sociological jurisprudence. Doctrinalism remained alive and well at Harvard and in 1923, academics banded with judges and lawyers to form the American Law Institute in an effort “to project the scientific study of law into the very center of professional life.”

This project took the form of publishing Restatements of Law that would provide a clear statement of common law principles and doctrines for use in guiding and evaluating judicial decisions. All of this toward the goal of promoting and facilitating free enterprise, the fluid operation of which (as believed by large numbers of academics and judges alike), would enhance economic growth and maximize social welfare.

F. The Legal Realist Challenge

The efforts of the sociological jurisprudences notwithstanding, the most influential of the challenges to doctrinalism was the Legal Realist movement which reached its zenith in the 1930s. The Realists, following on the work of those within sociological jurisprudence, cracked the edifice of doctrinalism and thereby helped to turn law outward in their effort to make law attuned to the social realities of the day.

However united they were in their rejection of formalism and doctrinal law, their particular interests ultimately took them in different directions never attempting to set forth a coherent alternative theory, thus creating a jurisprudential void. In doing so, they affected both the process of legal education, the intellectual life of the law, and in many ways, opened the

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law to a variety of new jurisprudential movements – efforts to fill that jurisprudential void.\textsuperscript{13}

The Langdellian system, in all of its manifestations, was an anathema to the Realists. The reverence for the traditions and purported unique doctrines of the law, so central within doctrinalism, held little sway among the Realists. Karl Llewellyn, a leading Realist, suggested that the role of legal rules within the lawmaking process was far less important than generally assumed, and that the “theory that rules decide cases seems for a century to have fooled, not only library-ridden recluses, but judges.”\textsuperscript{14} In a similar vein, Jerome Frank asserted that, contrary to the logical cloak in which they are enveloped, judicial decisions are largely informed by “emotions, intuitive hunches, prejudices, tempers, and other irrational factors.”\textsuperscript{15} For the Realists, the judge, rather than the logic of the law, was the central factor in the resolution of legal cases. This human factor underlying judicial decision making was necessarily determined by subjective value judgments rather than by logic.\textsuperscript{16} It is from this view of things that we get the caricature that legal decision making has less to do with logic, rules, and precedent than with what the judge ate for breakfast.\textsuperscript{17} They further argued that because decisions rested on the judge’s conception of right and wrong, social, political, and economic considerations became important variables.\textsuperscript{18}

Along with the idea that law cannot be a logical, self-contained, scientific discipline came the prescription that it should cease all pretensions of being so, and that law should become more overtly attuned to social ends. Given their strong instrumentalist conception of law, the law was, and had to be seen as, a “working tool.”\textsuperscript{19} As every legal decision was understood to have social, ethical, political, and economic implications, the Realists maintained that these should be recognized and explicitly dealt with by judges, not hidden behind a

\textsuperscript{13} Friedman, above n 7, 591. It should be noted that there is no settled position as to the boundaries and contours of Legal Realism. For surveys of various issues related to the Legal Realist movement see William W. Fisher, Morton J. Horwitz, and Thomas A. Reed. \textit{American Legal Realism} (1993); and Neil Duxbury, \textit{Patterns of American Jurisprudence} (1995) chapter 2.

\textsuperscript{14} Karl N. Llewellyn, ‘The Constitution as an Institution’ (1934) 34 \textit{Columbia Law Review} 1, 7.

\textsuperscript{15} From Bodenheimer, above n 3, 125.


\textsuperscript{17} Minow, above n 12, 93.


\textsuperscript{19} Friedman, above n 7, 592.
veil of logical reasoning. The corollary was that to better understand these implications, it is necessary to explore the interrelations between law and the other social sciences, including sociology, psychology, political science, and economics.

For present purposes, it is important to note the Realist interest in using economics to understand and to guide the development of law.\textsuperscript{20} They argued that the importance of the interrelations between economics and the law can be seen in the twin facts that i) legal change is often a function of economic ideas and conditions, which necessitate and/or generate demands for legal change, and ii) that economic change is often governed by legal change.\textsuperscript{21} Given the important interdependencies that they saw between law and economy, it is not surprising that Realists such as Llewellyn considered economic analysis a useful tool for understanding law and legal change and for devising laws that would improve the social condition.\textsuperscript{22} Indeed, Samuel Herman went so far as to assert that “[t]he law of a state never rises higher than its economics” and expressed the hope that “‘a disciplined judicial economics’ might become ‘a realistic and tempered instrument for solving the major judicial questions of our time.'”\textsuperscript{23}

\textbf{G. Legal Process Movement}

In the 1940s (until about 1960), we witnessed a renewed belief in the autonomy of law, this time in the form of the legal-process movement. This was a new movement that emphasized that certain principles of process were neutral, and hence immutable. The main exponents of the legal-process approach were Lon L. Fuller, Henry M. Hart, Albert M. Sacks, and Herbert Wechsler.\textsuperscript{24} Unlike the Realists, proponents of the legal-process approach generally advocated a return to the view of law as an autonomous discipline,

\textsuperscript{20} For surveys of the intersection between Legal Realism and economics, see Warren J. Samuels, ‘Law and Economics: Some Early Journal Contributions’ in Warren J. Samuels, Jeff Biddle, and Thomas W. Patchak-Schuster (eds) \textit{Economic Thought and Discourse in the Twentieth Century} (1993) 217; see also Duxbury, above n 12, chapter 2.
\textsuperscript{21} See, for example, Karl N. Llewellyn, ‘The Effect of Legal Institutions upon Economics’ (1925) 15 \textit{American Economic Review} 655; Mark M. Litchman, ‘Economics, the Basis of Law’ (1927) 61 \textit{American Law Review} 357; and W. S. Holdsworth, ‘A Neglected Aspect of the Relations Between Economic and Legal History’ (1927-28) 1 \textit{Economic History Review} 114.
\textsuperscript{22} Karl N. Llewellyn, ‘The Effect of Legal Institutions upon Economics’ (1925) 15 \textit{American Economic Review} 655.
\textsuperscript{23} Samuel Herman, ‘Economic Predilection and the Law’ (1937) 31 \textit{American Political Science Review} 821, 831.
with law’s legitimacy and objectivity now preserved by focusing on the process and institutions by and through which the law evolved. Against debates over whether a particular decision conformed to principles of natural law or the scientifically-culled principles of doctrinalism, the legal-process approach argued that law’s legitimacy was embedded in neutral, institutional structures and legal procedures, that is, within the very process by which the society had chosen to govern itself. If a decision is purposive and the result of an established, accepted, neutral legal process, the outcome was said to be legitimated.

III. THE NEED TO FILL THE VOID

By 1960, one could not ignore the impact the Legal Realists had in cracking the edifice of doctrinalism. Recall, the Realists rejected the doctrinal approach that would continue to have law schools train their students to objectively uphold the purported authority of earlier, bygone cases. They believed that jurists should act creatively, imaginatively and intelligently to reach just results; they should reach out to the social sciences to make informed choices. They aspired to have lawyers become active participants in the purposive process of law. They viewed legal decisions, fundamentally, as policy choices, and, as such, thought lawyers should be informed by the best legal, humanities, and social science knowledge of the day – to “look outward.”

One manifestation of the disillusionment with the idea that law was a science and an autonomous discipline was a wide-ranging search for other bases on which to ground legal analysis leading to the growth of numerous “law and _____” movements which have continued to evolve over the past forty years. But even more significant was the fact that scholars from a variety of disciplines began to come together and form movements to bring particular insights and new ideas into the law. Critical legal studies, feminist jurisprudence, and critical race theory, and, of particular importance here, economics, all began to have something to say about what the law is, to discern a basis for law’s legitimacy, and/or to say what the law should be.

As a group, critical legal studies, feminist jurisprudence, and critical race theory were heavily influenced by European philosophers, such as the German social theorists Karl Marx, Max Weber, and Friedrich Engels; from the Frankfurt School of German social philosophy, in particular Max Horkheimer and

26 Note that this need or tendency to “look outward” is by no means universal among legal scholars; for example see Earnest J. Weinrib, The Idea of Private Law (1995).
Herbert Marcuse; by the Italian Marxist Antonio Gramsci; and certainly by such poststructuralist thinkers, Michel Foucault and Jacques Derrida. The plethora of ideas and the zeal of their advocates has made legal analysis highly politicized and interwoven with the social sciences and humanities.\textsuperscript{27} In order to gain a fuller appreciation of the jurisprudential niche ultimately occupied by Law and Economics, a brief description of critical legal studies, feminist jurisprudence, and critical race theory is provided here. In this way, we come to see Law and Economics as part of the evolution of law, more particularly, the evolution of ways to think about the law so as to better comprehend the evolving nature of the law into which Law and Economics so firmly insinuated itself.

A. Critical Legal Studies

Critical legal studies set forth a Marxist critique of mainstream liberal jurisprudence and political thought, a critique that is largely based on the premise that the logic and structure of current law grew out of the power relationships of the society.\textsuperscript{28} Some of the movement’s leading contributors include, Duncan Kennedy, Roberto Unger, Karl Klare, and Mark Kelman. At the heart of the critical Marxist critique of liberal jurisprudence is the idea that law is radically indeterminate.\textsuperscript{29} Their’s is an effort to reveal conflicts between principles and counter principles in legal theory by exploring the fundamental

\textsuperscript{27} Minow, above n 12, 79; see also Robert W. Gordon, ‘New Developments in Legal Theory’ in David Kairys (ed) The Politics of Law: A Progressive Critique (1990), 413, 413. While critical legal studies, feminist jurisprudence, and critical race theory are being treated here as three distinct movements, they are in fact interrelated; and so one finds, “CLS includes several subgroups with fundamentally different, even contradictory, views: feminist legal theory, which examines the role of gender in the law; critical race theory, which is concerned with the role of race in the law.” See the website: Cornell Law School – Legal Information Institute / Critical legal theory: an overview. [http://topics.law.cornell.edu/wex/Critical_legal_theory]


\textsuperscript{29} There are two Marxist strands of critical legal studies – Critical Marxism and Scientific Marxism. On this point see Alvin W. Gouldner, The Two Marxisms, (1980). The description here is that of Critical Marxism as it is more prevalent in the CLS literature. Unlike Critical Marxism, Scientific Marxism emphasizes the determinative importance of class-based ownership of the means of production, along with the determination of the content of the political, legal, and other ideas (the superstructure) by the social relations and structures (the base) that follow from the pattern of ownership of the means of production. The relationship among the advocates of the Law & Society Movement, the Critical Marxists, and the Scientific Marxists (the so-called “three-corner catch”) is summarized in John Henry Schlegel, ‘Notes toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies’ (1984) 36 Stanford Law Review 391.
oppositions such as public and private, substance and form, as well as the political and legal hierarchal bureaucratic structures and the patterns of domination and subordination that are contained therein. From their vantage point, the inevitable outcome of legal conflicts is a profound inconsistency permeating the deepest layers of the law. Given this pervasive inconsistency of law, they argue that legal doctrines are fundamentally indeterminate and manipulable thus giving rise to the radical indeterminacy in the law. Further, insofar as the law is inconsistent, a judge can justify any of a number of conflicting outcomes leading them to conclude that “all law is politics.”

B. Feminist Jurisprudence

Feminist jurisprudence is quite diverse being comprised of several theoretical approaches. The main focus of scholars, lawyers, and activists who contribute to feminist jurisprudence, regardless of their approach, is to raise questions about the meaning of law and the impact of law on women’s lives. Each approach evaluates and critiques the law by examining the relationship between gender, sexuality, power, individual rights, and the judicial system from its own, unique vantage point. All approaches are concerned with both: i) law as a theoretical enterprise and its practical effects on women, as well as, ii) law as an academic discipline thus including issues regarding pedagogy. Some leading contributors to feminist jurisprudence include Catharine A. MacKinnon, Martha Minnow, Patricia Smith, Mary Joe Frug, Kathryn Abrams, Drucilla Cornell, and Martha A. Fineman

A common theme among the several approaches to feminist jurisprudence is to see the existing system of interconnected legal, political, and social relations together with the supporting institutions (together with their workings), as oppressive to women and consequently, an unacceptable state of affairs. These several approaches to law and legal issues notwithstanding, at base, their argument is that the language, logic, and structure of the law are male-created and reinforce male values. Feminist legal scholars often use women’s experiences – engaging in experiential discourses for analyzing gender hierarchy, sexual objectification, and social structures – to describe the male-


31 Three of the major approaches within feminist jurisprudence are: i) traditional (sometimes labeled liberal) feminists; ii) cultural feminists; and iii) radical (sometimes labeled dominant) feminists. These are taken from and fully described in “Feminist Jurisprudence: An Overview,” [http://topics.law.cornell.edu/wex/Feminist_jurisprudence] (2009) J. JURIS 70
dominated power structure and to demonstrate the need for change. From this vantage point they probe the fundamental question: What is implied in traditional legal categories, distinctions, or concepts of law? Its aim is to make gender, especially entrenched inequality connected to gendered roles, a focus of discourse by which to reconstitute legal practices that have excluded and/or oppressed women.

C. Critical Race Theory

Although critical race theory began as a movement in law, it has rapidly spread and has impacted the more established fields of anthropology, sociology, history, philosophy, and politics. It is a movement that has helped transform our understanding of the relationship among race, racism, and power. Those who have contributed to the discourse and scholarship include Derrick Bell, Alan Freeman, Mari Matsuda, Richard Delgado, Kimberlé Williams Crenshaw, and William Tate, several drawing from the writings of one of the fields pioneers, W.E.B. DuBois.

Critical race theory emphasizes the socially constructed nature of race and considers judicial conclusions to be the result of the workings of power; it opposes the continuation of all forms of subordination. That is, critical race theorists within law emphasize how legal rules and regimes look from the perspective of the disempowered and outsider groups by addressing a broad array of issues having to do with race. It is critical of both liberal incrementalism and conservative color-blind philosophies. While there are several approaches to critical race theory, all approaches place central importance on power, economics, and social construction, that is, how the structure of legal thought or culture influences the content of the law. Critical race theorists pay particular close attention to context and historical situation, valuing the individual over the universal in social and legal analysis. They reexamine America’s historical record, replacing comforting majoritarian interpretations with interpretations that are more recognizable to minorities and their shared experiences. In addition, many critical race scholars advance the idea of interest convergence where white elites are documented to tolerate or even encourage racial advances for blacks only when such advances also promote white self interests. They also credit the use of alternative

methodology in the expression of theoretical work, most notably the use of "narratives" and other literary techniques.

In summary, each of the movements described above represents an attempt to turn law outward, and in doing so, each seeks, overtly or not, to fill the void left by Legal Realism. The pre-World War II consensus regarding how to think about and to resolve important legal questions has all but disappeared. For many in critical legal studies, feminist jurisprudence, and critical race theory, the social arrangements sanctioned by law have come to include an array of hierarchies of economic power and pernicious social distinctions protected as rights by the very legal system created to establish individual freedom and equality. No longer is law seen as able to, on its own, generate results that constitute objective truth—to state what the law is, to discern a basis for law’s legitimacy, or to say what the law should be. Advocates of critical legal studies, feminist jurisprudence, and critical race theory see a compelling need to restructure our social order. Their common belief is that the law must be reinvented to give it a new purpose; efforts must lead the dismantling of the various hierarchies of power and privilege that through perversions of the legal process have come to threaten what they see as the higher values of our society—namely freedom and equality.

IV. SCHOOLS OF THOUGHT IN LAW AND ECONOMICS

For our purposes here, it is essential to note that not only did critical legal studies, feminist jurisprudence, and critical race theory try to fill the void left by the Realists, but as Edmund Kitch among others, has noted, it was the Legal Realists who created an environment that was receptive to the introduction of economics into the law school curriculum. And, while it remains unclear as to whether critical legal studies, feminist jurisprudence, or critical race theory has had, or will have a lasting effect on law, economics surely has had a significant impact. The scholarship emanating from the field


of Law and Economics is a product of a diverse group of scholars who contribute to this increasingly rich marketplace of ideas. The following seven sub-sections will briefly describe the intellectual origins, identify some of the main contributors, outline the respective principles and ideas of each of the schools of thought that comprise the field of Law and Economics.

A. Chicago Approach to Law and Economics

1. People, Places and Ideas
While the roots of Law and Economics go back at least to David Hume, Cesare Beccaria, Adam Ferguson, Adam Smith, and Jeremy Bentham, it became formalized as an intellectual discipline at the University of Chicago in the 1960s and the 1970s. Within both economics and law, the core of the Chicago approach to law and economics took form through the work of such notable figures as Frank Knight, Aaron Director, Ronald H. Coase, Henry Manne, Gary Becker, and Richard A. Posner. Of all of the schools of thought that comprise the field of Law and Economics, it is the Chicago approach to law and economics that has come to dominate scholarship within the economic analysis of law and thus invites the response described in the introduction. While some of the early history and subsequent success of Chicago law and economics is attributable to scholars in its department of economics, much of the credit in building this intellectual edifice was provided by the Law and Economics Association, Greek Law and Economics Association, Italian Society for Law and Economics, and Asian Law and Economics Association.

The number of leading publications dedicated to publishing the scholarly contributions to this field includes journals such as: Journal of Law and Economics; Journal of Legal Studies; American Law and Economics Review; Journal of Law, Economics & Organization; Public Choice; Constitutional Political Economy; International Review of Law and Economics; European Journal of Law and Economics. There are also research annuals - Supreme Court Economic Review; Research in Law and Economics, The Economics of Legal Relationships; and New Horizons in Law and Economics - devoted to the field. Traditional economics journals and law reviews now regularly publish Law and Economics’ articles. Also attesting to its impact is the fact that some seven Nobel Prizes in economics have been awarded to those working in the field; and many of the top-tied U.S. law schools now have active Law & Economics Centers.


Coase, Calabresi, Manne, and Posner were honored as the “four founders” of law and economics at the Plenary Session of the American Law and Economics Association on May 24, 1991.

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by the faculty of the law school (beginning circa 1939). The various points of contact between those at the law school and those within the economics department enabled the fundamental ideas of the Chicago school of economics to permeate into the law school and thereby help create the Chicago approach to law and economics which has since been formalized and transmitted to subsequent generations.\(^\text{39}\)

With respect to the department of economics, there were really two Chicago schools of thought, roughly divided in time by World War II.\(^\text{40}\) The perspective of the prewar-Chicago school is evidenced in the scholarship and teachings of Frank Knight, Jacob Viner, Paul Douglas, and Henry Schultz. While by no means a homogeneous group, they generally accepted the propositions that embody the core of neoclassical economics – within a liberal democracy, the rational pursuit of economic self-interest by individuals was taken as given, competition was seen as inherent within and intrinsic to economic life, and market-generated outcomes were said to be generally superior to those resulting from government interference with the market mechanism. It was Frank Knight who had the most impact on what has come to be known as Chicago law and economics. While his writings were a significant force, his greatest influence came through the perspective that he imparted to his students – most importantly, for present purposes, Milton Friedman, George Stigler, and Aaron Director. In contrast, “[t]he post-war Chicagoans were more intent on elaborating and extending these insights.”\(^\text{41}\)

This latter generation of Chicago economists undertook to demonstrate, in formal terms, the detailed nexus between competitive markets and efficient outcomes. Their empirical research emphasized the efficacy of the competitive market system, arguing for less government intervention, fewer wealth redistribution policies, reliance on voluntary exchange with a concomitant reliance on the common law for mediating conflicts, and an across-the-board promotion of more private enterprise – which, based on the evidence provided by their empirical research, would facilitate a more efficient allocation of resources.

Within the law school, the origins of Chicago law and economics go back to the 1930s, when the faculty, under the deanship of Wilber Katz, instituted a four-year interdisciplinary legal studies curriculum that included courses in


\(^{41}\) See Duxbury, above n 13, 368.
Then, in 1939, the law school made a discernable commitment to economics as a subject relevant to the study of law with the appointment of Henry Simons to the law faculty. Simons had been a lecturer in the department of economics and was a former student of Frank Knight, who (as noted above) was in many respects the father of the price-theoretic tradition of Chicago economics. Thereafter the law school appointed other economists to their faculty, including Aaron Director, Ronald H. Coase, and William Landes, and with that, the Chicago approach to law and economics began in earnest.

2. Events that Shaped the Chicago Approach to Law and Economics

There were several signature events that contributed to the formation of the Chicago approach to law and economics, and were, at the same time, manifestations of it early success. These events include the following:

First and foremost (as outlined above) was the complex interaction between the faculties of the law school and the economics department, particularly the law school’s interest and success in attracting economists to their faculty.

Second, the *Journal of Law and Economics* (sponsored by the University of Chicago Law School) was initiated in 1958 under the auspices of Aaron Director whose teachings had a substantial impact on the field of antitrust. Ronald H. Coase subsequently took over the editorship of the journal. In 1972, the University of Chicago Law School launched the *Journal of Legal Studies* under the guidance of its first editor, Richard A. Posner. These two professionally edited journals did much to propagate the core ideas and applications of the Chicago approach to law and economics. Following their lead, over the next decade student-edited law reviews began publishing Law and Economics’ articles as well.

Third, was the publication of two articles that marked the beginning of the so-called “new law and economics.” Ronald H. Coase’s “The Problem of Social Cost,” serves as the cornerstone of Chicago law and economics literature. While it was written several years before he arrived at Chicago, it was published in 1960 in the *Journal of Law and Economics*. The other equally important article was “Some Thoughts on Risk Distribution and the Law of Torts” published in the *Yale Law Journal* in 1961 by Guido Calabresi. These two articles made clear to both economists and lawyers that legal rules and

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judicial decisions across many traditional fields of law beget both benefits and costs, and thus are (and should be) amenable to rigorous economic analysis.

Fourth, was Gary S. Becker’s initiative to use the Chicago price-theoretic framework to analyze non-market behavior, including an analysis of such non-traditional economic topics as racial discrimination in labor markets; criminal behavior and law enforcement; the organization of the family, including marriage and divorce; the decision to have children, and the division of labor within the household ... etc. All of this illustrates Becker’s (indeed, Chicago’s) distinct approach – to extend the “economic way of thinking” into non-market behavior and thereby establish what has come to be known as “economics imperialism.”

Fifth, was the 1977 publication of the 2nd edition of Richard A. Posner’s Economic Analysis of Law. The second edition moved Posner away from his earlier reliance on utilitarianism (indeed, in the first edition he had equated Bentham’s utilitarianism with economic theory) and moved him to instead argue for the use of economic efficiency (wealth maximization as distinct from utilitarianism). It quickly became the textbook of choice (and remains a standard) by those developing law school courses and became a significant vehicle by which the ideas of Chicago law and economics were transmitted from one generation to the next.

Finally, in 1976, Henry G. Manne, (the former Dean of the George Mason University School of Law) organized and hosted the Law and Economics workshops for judges, law professors, and economists. Since its inception (Manne moved from the University of Miami to Emory University to George Mason University) the workshops have remained in tact. Over four thousand professors and judges have attended the workshops thereby revealing to a broad legal audience the economic nature of many of the questions posed within legal analysis and the potential for the application of economic analysis to the law to help resolve them.

3. Defining Characteristics of the Chicago Approach to Law and Economics

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The defining characteristic of the Chicago approach to law and economics is the straightforward application of microeconomic (or price-theoretic) analysis to the law. The approach can be characterized by the following seven elements:

i) Individuals are assumed to be rational maximizers of their satisfactions in their nonmarket as well as their market behavior. The actions of producers, consumers and government decision makers are the product of choices – purposeful choices – made by individuals who are able to perfectly process all relevant information about the alternatives available to them, and can then rank all possible outcomes according to their relative desirability.

ii) Individuals respond to price incentives in nonmarket as well as market behavior. Just as changing product and factor prices in the market affect the behavior of consumers and producers, respectively, within the legal arena legal rules establish prices (such as fines, community service, and incarceration) for engaging in various types of illegal behavior. The rational maximizing actor, then, will compare the benefits of each additional unit of illegal activity with the costs, where the costs are weighted by the probability of detection and conviction.

iii) Ex ante thinking (in addition to law’s traditional ex post thinking) becomes an important element for those making or contemplating legal change given the fact that changed legal rules alter incentives, future behavior, and thus performance.

iv) Legal rules and legal outcomes can be assessed on the basis of their efficiency properties. One criterion employed is Pareto efficiency. However, in the arena of public policy where there are typically both winners and losers, the prohibitive cost of compensating all losses makes it virtually impossible to conceive of changes in legal rules that would satisfy the Pareto criterion. As a consequence the standard definition of efficiency employed in Chicago law and economics is Kaldor-Hicks efficiency, or wealth maximization: a legal change is efficiency-enhancing if the winners could (conceptually) compensate the losers (to make the latter whole once again) and still remain gainers.

v) Chicago law and economics purports to have uncovered the efficiency of the common law.\(^47\) This notion was first raised within the Chicago tradition by Ronald H. Coase in “The Problem of Social Cost” and later extended by

\(^{47}\) This is merely an application of Gary S. Becker’s distinct approach to the economic analysis of law (now used here to analyze the workings of the common law judiciary).
Richard A. Posner and others.\textsuperscript{48} Simply stated, the hypothesis is that the development of the common law can be explained “as if” the judges who created the law through decisions operating as precedents were trying to promote efficient resource allocation.\textsuperscript{49}

vi) Those ensconced in the Chicago approach engage in positive analysis to assess whether a law or regulation enhances or reduces efficiency. Within the positive realm of analysis, the focus of the Chicago school is to develop generalized models that predict the operation or the outcomes of judicial, legislative, political, and administrative institutions. While the areas of antitrust and economic regulation were the early focus of concern, the scope of Chicago approach to law and economics now encompasses all fields and areas of law.

vii) When law is seen to depart from the dictates of efficiency, or when new legal issues present themselves, the concern becomes one of fashioning and adopting legal rules that are efficiency enhancing. And, since market-determined outcomes are consistent with advancing social welfare, (whereas government interventions in market processes are thought likely to reduce social welfare), the normative Chicago approach to law and economics argues that decision makers should, to the extent possible, rely on market remedies, or mimic the market when market remedies are not feasible.

In sum, the Chicago approach to law and economics is almost indistinguishable from the Chicago school of economics in general. Chicago economists, buttressed by their empirical research, emphasized the efficacy of the competitive market system, arguing for less government intervention, fewer wealth redistribution policies, reliance on voluntary exchange with a concomitant reliance on the common law for mediating conflicts (as opposed to direct regulation), and an across-the-board promotion of more private enterprise – which, based on the evidence provided by their empirical research, would facilitate a more efficient allocation of resources.

\section*{B. Public Choice Theory}

\subsection*{1. People, Places and Ideas}
Public choice theory is defined as the economic analysis of nonmarket decision making—a body of theory that treats individual decision makers as participants


\textsuperscript{49} There are several threads of this argument, see Paul H. Rubin, ‘Micro and Macro Legal Efficiency: Supply and Demand’ (2005) 13 Supreme Court Economic Review 19; and Paul H. Rubin, The Evolution of Efficient Common Law (2006).
in a complex interaction that generates political outcomes.\textsuperscript{50} Some assert that “[p]ublic choice analysis is to governments what economic analysis is to the markets”\textsuperscript{51}; as to its significance in law, others go on to contend that public choice is “the single most successful transplant from the world of economics to legal scholarship.”\textsuperscript{52}

Simply put, public choice theory is the application of economic analysis to political decision making, including theories of the state, voting rules and voter behavior, party politics, logrolling, bureaucratic choice, policy analysis, and regulation. Most of the scholarship concentrates on the creation and implementation of law through the political process, with scant attention paid to the judiciary.\textsuperscript{53} Like most of the contributors to the other schools of thought in Law and Economics, some public choice theorists engage in positive political analysis while others normatively engage in (re)designing political institutions or promoting legal reform/policies.

What emerges from their combined positive and normative work is a general theory of government failure – in a sense, an analogue to the economic models and analyses that previously explored the sources of market failure and the resultant inefficiencies. As Coase observed at the inception of public choice, at that time he thought there appeared to be an imbalance in the theory of economic policy: “we find a category ‘market failure’ but no category ‘government failure.’”\textsuperscript{54} This recognition later led Daniel A. Farber and Philip P. Frickey to describe public choice as “a jaundiced view of legislative motivation” with very explicit implications: “If the descriptions of public choice scholars are correct, certain normative conclusions seem inevitable, and those conclusions are generally not happy ones.”\textsuperscript{55}


\textsuperscript{53} The latter being more of a concern for the Chicago approach to law and economics.

\textsuperscript{54} Ronald H. Coase,‘Discussion: The Regulated Industries’ (1964) 54 \textit{American Economic Review} 194, 195.

\textsuperscript{55} Farber and Frickey, above n 50, 22, 2. Judge Abner Mikva, a U.S. Circuit Court Judge, U.S. Court of Appeals for the District of Columbia and former Illinois state legislator, offered an even more stinging assessment: “Not even five terms in the Illinois state legislature—the last vestige of democracy in the ‘raw’—nor my terms in the United States Congress, prepared me
The formal inception of the public choice can be marked with the establishment, in 1957, of the Thomas Jefferson Center for Studies in Political Economy at the University of Virginia by James M. Buchanan and Warren Nutter. Buchanan had been a student of Frank Knight at the University of Chicago; his early work was also very much influenced by the writings of Knut Wicksell. A subsequent series of conferences on issues in non-market decision making organized by the Buchanan and Nutter led to the founding of the Public Choice Society in 1963 (initially under the title “Committee on Non-Market Decision-Making”). In 1966 an economic journal titled, Papers on Non-Market Decision Making was established under the editorship of Gordon Tullock (shortly thereafter its title was changed to Public Choice). In 1969, following a period of controversy at the University of Virginia, Buchanan and Tullock moved their operations to Virginia Polytechnic Institute and established the Center for Study of Public Choice. Then, in 1982, the Center shifted its entire operations to George Mason University where it continues to prosper. In 1986 Henry Manne was appointed Dean of George Mason School of Law and successfully recruited a faculty that continues – alongside of the Center for Public Choice – to operate today with a thriving law and economics program which reflects the influences of public choice, Chicago, and Austrian perspectives.

2. Defining Characteristics of Positive Public Choice

a. Positive Public Choice – Roughly stated, there are two distinct facets of public choice; i) positive public choice, and ii) catallaxy. Those engaged in positive public choice theory analyze the demand for law and the supply of law within the political arena. Unlike the market, here the major players are the voters, lobbyists, politicians, and the bureaucrats, with the voters and lobbyists on the demand side and, (within the context of a representative democracy), politicians, legislators, and bureaucrats, functioning on the supply side. The positive public choice theorists attempt to develop logical, descriptive, consistent theories that link individual behavior to collective action. Their


56 Space does not allow for a discussion of catallaxy (or constitutional economics). The central thrust of the catallactic approach is to take individual decision makers as the basic unit of analysis and to view both politics and the political processes in terms of the exchange paradigm and develop models that reflect this phenomena. The focus is on all processes of voluntary agreements among persons – not only those in the more familiar economic arena, but also extended into the political arena. As Buchanan, its leading proponent states: the catallactic approach to public choice theory constitutes a “genuine theory of law.” James M. Buchanan, The Limits of Liberty (1975) 53.

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methodology encompasses the standard maximizing paradigm of microeconomics – *homo economicus* – where individuals in both political and economic arenas are assumed to behave as if they are maximizing utility. It was Gordon Tullock who brought the hard-nosed *homo economicus* perspective to public choice. Tullock and others showed how this approach is readily amenable to the positive analysis of a wide range of political behavior. The goal of positive public choice is straightforward – it is an attempt to understand, describe and explain the political, legislative and bureaucratic outcomes that can be expected to follow from the rational utility-maximizing behavior of those engaged in the political, legislative and bureaucratic choice-making processes. They demonstrate that political outcomes ultimately reflect the choices of individuals within the incentive structure created by the prevailing constitutional rules, statutes, and regulations. More importantly, public choice explores the implications of political, legislative and bureaucratic choices of government and the impact of those choices on the overall economic performance of the nation.

b. Demand-Side Logrolling – On the demand side of the political marketplace, the analysis focuses on the voting mechanisms and criteria that should be used to pass laws or structure public policy for both i) direct democracy, where individuals vote on ballot initiatives, and ii) for a representative democracy, where individuals vote on political candidates and those political candidates, as legislators, vote on legislation. This demand-side analysis takes two forms: the positive description of the effects of alternative voting rules of the extant legislative processes, and the normative determination of the appropriate baseline voting rules (typically at the constitutional stage of choice) where the basic “rules of the game” are being framed.

One of the major phenomena given attention on the demand side is that of logrolling (i.e. vote trading). It arises due to the inability of voters to register the intensity of their preferences in both direct and representative democracy. This phenomena may rear its head with regard to preferences for or against: i) candidates, ii) ballot initiatives, iii) legislation, iv) government regulations, or v) tax–expenditure proposals. One way to overcome the problem of registering the intensity of preferences is through logrolling. While it is recognized that vote trading is technically illegal in the US, nonetheless, it is understood that logrolling is a common phenomenon that takes place during each and every legislative session.\(^{57}\) The descriptive models of logrolling attempt to make clear the economic implications of this political behavior.

\(^{57}\) As Tullock has noted, “In the U.S. Congress logrolling is fairly open and aboveboard. Although the bulk of the negotiations takes place in committee sessions, cloakrooms, and..."
c. Supply-Side Legislatures / Politicians – On the supply side of the political market, the concern is with the behavior of politicians who pass laws and those bureaucrats who are charged with implementing the programmatic goals contained in the legislation. With respect to the politicians, some of the models within this branch of public choice theory focus on the behavior of voters in selecting and supporting legislators; other models look at the behavior of political parties and legislators during political campaigns; some models focus on the behavior of legislators while in office, and still others look at the behavior of legislators and their relationship to the bureaucrats. The primary goal of the analysis here is to accurately model political behavior and to analyze the efficiency properties of the outcomes of the action of these various groups within the political process.

The two concepts that are at center stage in these several supply models are: i) the rationally ignorant voter, and ii) politicians as self-interested legislators. A brief comment on each. First, voters are assumed to exhibit rational ignorance. Under majority rule, voters have little reason to invest the time, money, or energy that is required to cast a well-informed vote because they know that there is only the slightest of chances that their vote will be decisive in any given election. Second, the self-interested politicians (both candidates for office and sitting legislators) are assumed to make decisions that maximize their utility, which, in turn, are a function of factors such as votes, power, and political income. In contrast to the conventional field of political science, in public choice, legislators are assumed to be vote maximizers in an effort to win re-election and certainly not motivated by any desire to enhance the public interest or the common good. In short, the contention is that “parties formulate policies in order to win elections, rather than win elections in order to formulate policies.”

Some of the models assume that legislators act to maximize their appeal to their constituents, the latter of whom are assumed to vote based on their own economic self-interest. Other models assume that legislators vote for those programs or laws that are most responsive to the desires of special interest groups – for example, major financial supporters, those energizing effective publicity, or those providing politically meaningful endorsements – thereby enhancing their prospects for (re)election. The descriptive models of self-interested politicians attempt to make clear the economic implications of their behavior.

congressional offices, there is no particular secret as to what is actually going on. People realize that the art of legislation involves bargaining, haggling, and efforts made to sweeten deals.” Gordon Tullock, Arthur Seldon, and Gordon L. Brady, Government Failure: A Primer in Public Choice (2002) 30.

d. The Bureaucracy – Once legislation is passed or ballot initiatives are approved, the task of implementing the programmatic goals falls to the bureaucracy. The issue of bureaucratic choice is somewhat complicated by the fact that gaps (whether or not intentional) often exist in legislation. That is, legislation that specifies certain goals, may not be fully specific with respect to implementation thus allowing for the possibility of an extensive divergence between the legislative intent and final bureaucratic implementation. Public choice theorists argue that in order to gain a more complete understanding of the implementation of legislation by bureaucrats it becomes necessary to analyze and understand the role of the incentives facing, and the resulting actions of, bureaucrats, as well as the problems relating to information with respect to costs and evaluation of bureaucratic output.

The public choice analysis of the bureaucracy was pioneered by Gordon Tullock and William A. Niskanen.\(^{59}\) Their theories recognize that bureaucrats have relatively weak incentives to consider the social welfare implications of the institutions they serve, namely the so-called public interest, and, at the same time, have relatively strong incentives to improve their own positions within the bureaucracy in which they work.\(^{60}\) While their models have some subtle differences, they employ rational-actor models in an attempt to shed light on the supply-side, bureaucratic decision-making process and its political-economic consequences essentially arguing that bureaucrats will make institutional decisions with a view to maximizing their utility—subject to the institutional constraints they confront. The bureaucrat’s utility is assumed to be a direct function of things like “salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau.” And, as Niskanen notes, “All except the last two are a positive function of the total budget of the bureau during the bureaucrat’s tenure.”\(^{61}\) Hence, their models typically suggest that in maximizing their utility, bureaucrats will make those choices that will maximize their bureaus’ budgets. Those in public choice also focus on developing models that describe the interrelationships among i) the various bureaus of the government, ii) the bureaucracy and the surrounding special interest groups, and iii) the bureaucracy and the legislature, all in an effort to make clear the economic implications of the behavior of bureaucrats.

e. Rent Seeking – One of the concepts given special attention in public choice is the theory of rent seeking. This issue arises under the recognition that


\(^{60}\) Typically, the argument is not that bureaucrats are idle, lazy, and inefficient; the problem, rather, centers on the question of incentives that give rise to this behavior.


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interest groups work to implement or alter laws and/or regulations to affect transfers to themselves from the larger population. Within the political arena, these legal changes may result in special privileges, monopoly positions, and other forms of transfers granted to certain individuals or groups through the aegis of the State. The efficiency consequences of these activities are analyzed using the concept of rent-seeking.

More specifically, for goods and services whose quantities cannot expand to meet demand, especially in those cases where the available quantity is held in check by the government, the competitive process cannot dissipate the rents. It is the process by which these rents come about that have become a major concern of public choice theorists. Rents “exist wherever information and mobility asymmetries impede the flow of resources. They exist in private good markets, factor markets, asset markets, and political markets. When rents exist rent seeking can be expected to exist.” The focus of the analysis in the rent-seeking literature is not on the rents themselves, or even on the resource misallocations associated with the rent-generating positions instituted by the rent seekers. Rather, it is on the use (or as they prefer to call it, the “waste”) of resources expended to acquire or maintain these privileged positions. Resources are used up on costly lobbyists, lawyers, accountants, press agents, and economists by politically astute parties attempting to get a piece of the scarcity-induced rents. Matters are further complicated by the fact that public choice theorists recognize that the “wastes” associated with rent seeking may well be the product of political investments that are consistent with rational behavior on the part of all participants. That is, from the rational entrepreneur’s standpoint, it may well be that the “legislative” payoff exceeds the payoff from alternative investments in demand promotion, technological innovation, or attempts to lower production costs ...etc. However, from society’s standpoint, proponents of public choice argue that the resources used for wasteful rent seeking could have instead been used in more economically productive activities.

In summary, the positive, descriptive supply and demand theories and analysis of logrolling, the self-interested politician and/or bureaucrat, as well as rent seeking behavior – the integral components of positive public choice – all attempt to make clear their implications for government and its impact on economic performance.

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C. Institutional Law and Economics

1. People, Places and Ideas

Unlike the Chicago approach to law and economics and public choice theory, institutional law and economics has no identifiable launch date. It gradually emerged over time, building on the work of institutional economics who were, from the beginning, inherently interested in the interaction between legal and economic institutions and legal-economic questions. The institutional approach to law and economics has its roots in the work of economists such as Henry Carter Adams on economics and jurisprudence, Richard T. Ely on the relation of property and contract to the distribution of wealth, John R. Commons on the legal foundations of the economic system, and Wesley C. Mitchell on the role of the price system and its place in the modern economy. Important elements of the institutional approach to law and economics can also be traced to the work of Thorstein Veblen (in many respects, the founding father of institutional economics); to the economist Clarence Ayres; lawyer-economists such as Walton H. Hamilton and Robert Lee Hale; and of legal scholars such as Karl Llewellyn, Jerome Frank, and Roscoe Pound.

The label “institutional economics” is said to have been coined by Walton H. Hamilton in 1919. It is essentially an American contribution to economic thought that, like Legal Realism, is said to have “had its heyday in the 1920s and early 1930s.” It has often been described as part of “a revolt against formalism,” a revolt that took place in law, history, and economics at about the same time. As part of that revolt, institutional economics, was led by a group of young American scholars who, after World War I, engaged in a critique of the formalistic doctrines central to the economics of the day. It represents a system of thought that has as its central premise the idea that economic institutions motivate all economic activities. The institutionalists focused their efforts on inductive analyses of specific institutional aspects of the American economy. While their principal emphasis was on using the inductive method to describe the constituent elements of the economy, they never took this method to extremes and thereby were still able to make substantive theoretical generalizations.

64 This short overview borrows from Nicholas Mercuro and Steven G. Medema, Economics and the Law: From Posner to Post-Modernism and Beyond (2006 2nd ed), Chapter 4.
Three distinct influences have been identified that are said to have contributed to the emergence of the institutionalist school of thought.\(^{67}\) One was the German historical school, founded by Wilhelm Roscher and later dominated by Gustav von Schmoller. The German historical school emerged, at least in part, as a reaction against natural law as well as the classical economic thinking in the mid-nineteenth century. For the advocates of the German historical school, law was to be regarded as an expression of the convictions of the community, in the same manner as language, customs and practices were expressions of its people. Thus, the goal became to create a legal order based on the character and spirit (the volkgeist) of the people. The second influence was from American pragmatic philosophy as set forth by, among others, Charles Sanders Peirce, William James, and John Dewey. While there were differences among their respective versions of pragmatism, at the core of the movement, pragmatists embraced i) the process(es) of ongoing inquiry and ii) the transformation of knowledge as part of the basic tasks of human societies. They believed that truth is modified as discoveries are made and that the truth is relative to the time, place, and purpose of inquiry. As to its methodology, pragmatism stands opposed to belief systems that hold that truth can be reached through deductive reasoning from a priori grounds. Instead, it argues for inductive investigations and constant empirical verification of hypotheses, concluding that what ultimately should be taken as true is that which most contributes to the human good over the longest course of time. Given the conditional nature of truth, the proponents of pragmatism thus recognized an uncertainty inherent in understanding which served to provide an epistemological foundation and a social philosophy upon which to erect the basic tenets of institutional economic thought. The third influence came through Thornstein Veblen’s turn-of-the-century writings focusing on the evolutionary facet of economic development, within which one can trace many of the origins of and early insights into institutional economic thought.

Others who contributed to the institutionalist approach include Robert Lee Hale, Clarence Ayres, and John R. Commons. Hale earned both a law degree and a doctorate in economics; initially he had a joint appointment in the economics department and the law school at Columbia University (thereafter he moved to the law school on a full-time basis). His emphasis on the integration of economics and law was reflected both in his teaching, particularly his course on “Legal Factors in Economic Society,” and in his writings, much of which dealt with the regulation of railroads and public utilities, fields in which an understanding of the interface between economics and law has always been fundamental.

In the post-World War II period, it was Clarence Ayres who became the chief exemplar of institutionalist economic thought from his base at the University of Texas-Austin. He and his students developed the Veblenian-Ayresian perspective within institutionalism. Ayres’s perspective is perhaps best reflected in his treatise *The Theory of Economic Progress*, in which he undertook to both explain and apply institutional economic thought with respect to the field of economic development.

It is the work of John R. Commons that is of particular importance in the ultimate development of institutional law and economics. Like Veblen, Commons was a student of Ely, who instilled in his students the inductive method of study and emphasized both i) the historical facets of and ii) the legal issues within the study of economics. Commons became interested in and a leading scholar in the field of labor; he moved to the University of Wisconsin where he spent most of his academic life focusing his research on industrial relations, labor reform legislation, public utility regulation, and price stabilization. He was also very involved in public life and served on an array of state and federal commissions. It was while at Wisconsin in 1934 that Commons published *Institutional Economics: Its Place in Political Economy*.

Commons rejected the exclusive emphasis on methodological individualism reflected in orthodox theory; instead he gave collective and corporate action its due place in economic analysis. Likewise, Commons rejected the economics of a harmony of interests and instead centered his analysis on the nature of the disputes and conflicts of interest inherent in a modern economy. He optimistically believed that primary economic institutions could be formed and reshaped (as needed) to conform to the social changes and confront the problems inherent within society. In his efforts to develop institutional economics, Commons’ central concern was with uncovering the development, evolution, and workings of the institutions that ultimately impact the performance of the economic system.

It was from the writings of these (and other) early institutionalists that there gradually (circa 1970’s and 80s) emerged an institutional approach to law and economics with Commons standing as its central figure (carrying forth the Wisconsin tradition). Rather than the strict application of microeconomic theory to the law that was the hallmark of the Chicago approach to law and economics and public choice theory, the thrust of this emerging institutional approach was in analyzing economic society with a focus on the relations between legal and economic processes – on government and the economy.

The tradition was extended beyond the University of Wisconsin, principally by two of its graduates, Warren J. Samuels and A. Allan Schmid who spent their
careers at Michigan State University. Both took a deep and abiding interest in the interrelationships between law and the economy; their contributions to institutional law and economics are avowedly positive. Samuels and Schmid are clear that their principal goal is quite simply “to understand what is going on—to identify the instrumental variables and fundamental issues and processes—in the operation of legal institutions of economic significance,” and to promote “the development of skills with which to analyze and predict the performance consequences of alternative institutional designs.”

In this regard, one distinguishing feature of the institutionalist approach from the other schools of thought was the lack of a normative / political agenda.

Schmid’s work brings to the forefront the many varieties of human interdependence, focusing both on i) the various types of transactions – bargained, administrative, and status and grant transactions, and ii) the varied interdependencies that emerge – technological, pecuniary, and political externalities. His analysis takes place under a situation-specific structure-conduct-performance paradigm, in which alternative institutional structures (e.g., different definitions and assignments of property rights) are identified, together with the (dis)incentives created, their consequences for individuals, firms, and government behavior are identified, and their effects on economic performance and quality of life are assessed. As such, it reflects a “total approach to policy analysis” that poses such questions as: “How do the rules of property structure human relationships and affect participation in decisions when interests conflict or when shared objectives are to be implemented? How do the results affect performance of the economy?”

The work of Samuels, in contrast, has tended to concentrate on describing the interdependence between individuals and groups and legal-economic performance. For Samuels, the organizing concept is that of the legal-economic nexus where “[law and economy] are jointly produced, not independently given and not merely interacting”... wherein “the law is a function of the economy, and the economy (especially its structure) is a function of law.” It is through describing the intricacies of these interrelations that a true understanding of the legal-economic nexus emerges – where the law and the economy are seen as both dependent and independent variables in the construction of legal-economic reality.

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2. Defining Characteristics of Institutional Law and Economics

The central elements of institutional law and economics are as follows:

i) A focus on the evolutionary nature of the economic system, and, most importantly, the role of the evolution of law in structuring the evolution of the economic system.

ii) The ever-present tension between continuity and change, particularly the interaction between the groups supporting the respective forces of continuity or change and the power that each can bring to bear on this process, together with the impact of their success (or failure).

iii) The view that the legal-economic system is a system of mutual interdependence rather than atomistic independence, a view that raises questions as to pervasive conflicts and the problem of order. Given the fact of mutual interdependence, the emphasis is on who plays and what are the starting points, hence on conflict rather than harmony.

iv) The interrelationships among rights, power, and government are fully explored where law is viewed as fundamentally a matter of rights creation and re-creation. The concern is with the positive description of the rights (re)creation process and the impact of this process on legal-economic decision making and economic performance. In this view, government becomes an object of control for those seeking private legal-economic gain or advantage, essentially “a mode through which relative rights and therefore relative market (income securing) status is given effect.”

v) The problematic nature of efficiency: the rejection of the Chicago emphasis on the determination of the efficient resolution of legal disputes or as a singular guide in changing law. The institutional approach to law and economics does not reject efficiency as an important variable in legal-economic analysis, but rather maintains that efficiency is not unique and therefore cannot determine the assignment of rights.

In summary, what is essential in the institutional approach to law and economics is a deeper understanding of the reciprocal impact between law and the economy. The advocates of the institutional approach to law and

economics believe that normative policy can be fashioned without (or at least a diminished probability of) the subsequent often heard cry of “unintended consequences” only to the extent that they can provide a non-normative, positive, description and understanding of legal-economic reality.

D. New Institutional Economics

The New Institutional Economics (NIE), like institutional economics (as described above), begins with the fundamental premise that institutions are important factors in the determination of economic structure, and hence performance. Consistent with some of the other schools of thought in Law and Economics, NIE asserts: 1) institutions do matter, 2) the determinants of institutions can be explained and understood using the tools of economic theory, and 3) the structure of institutions affects economic performance in systematic and predictable ways. While broadly concerned with the legal / government institutions, NIE emphasizes the interplay between the evolution of legal institutions and market forces.

1. People, Places and Ideas

In the past two decades NIE has played a significant role in expanding the domain of Law and Economics. It has proven quite popular not only in the U.S. but especially in Europe as evidenced by several initiatives. In 1997 the International Society for New Institutional Economics (ISNIE) was founded and presently claims societal memberships in some 46 nations; many European scholars take an active role in the ISNIE’s wide-ranging initiatives. As their mission statement states, their purpose is to conduct rigorous theoretical and empirical investigation on a broad array of topics directly related the institutions of social, political and commercial life. While their primary mode of analysis is economics, in its effort to be an interdisciplinary enterprise, it also draws from organization theory, law, political science, and sociology. In addition, as a result of a French initiative, the European Summer School on New Institutional Economics (ESNIE) was organized under the leadership of Eric Brousseau, Bruno Deffains, and Claude Ménard. Classes are held each summer on the Island of Corsica; the first classes of the ESNIE were held in the summer of 2002. ESNIE is dedicated to Ph.D. students, post-docs and

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researchers in the field with a goal of developing knowledge and research in New Institutional Economics in Europe. Finally, it should be noted that there are three ongoing institutes – The Ronald Coase Institute, the Center for Institutional Reform and the Informal Sector (University of Maryland), and the Center in Political Economy (Washington University) that support and advance research in NIE.

The theoretical foundation of NIE rests on two building blocks. The first of these flows out of the Chicago tradition and is evidenced in the work on the economics of property rights. This approach emerged in the late 1960s and 70s as economists such as Armen A. Alchian, Harold Demsetz, Steven N.S. Cheung, and Eirik Furubotn and Svetozar Pejovich began to appreciate that the various types of legal-institutional arrangements that constrain the behavior of individuals and firms may, in fact, have a significant impact on the allocation of society’s scarce resources. The emphasis of their work was on exploring the nexus between politics (especially the political structure) and market performance. As Barry Weingast observed: “In the language of the new institutional economics, providing a secure and predictable political foundation for the markets requires a form of governance structure” with a clear focus on “the design of political institutions that credibly commit the state to preserving markets” (emphasis in the original). With this as their focus, proponents of the study of alternative property right regimes undertook empirical studies regarding the development of property rights and the economy in an effort to provide significant insights and ultimately to formulate policies to enhance the performance of the private market economy.

The second of the building blocks of NIE emanates from a group of economic historians who attempted to explain the development and economic significance of property rights throughout history. This facet of new institutional economics is exemplified by the work of Douglass C. North and

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Lance E. Davis,\(^7\) Douglass C. North and Robert Thomas,\(^7\) as well as Harold Demsetz,\(^8\) and John R. Umbeck.\(^9\) As they quickly came to understand, “[a]nyone forced to consider economic growth in the medium and long run finds it hard to take rules and institutions as fixed.”\(^2\) Unlike the earlier economic historians who were interested in describing the sources of economic growth (focusing on macro-economic variables and national income accounts), these “new economic historians” were more geared towards price-theoretic and comparative institutional/economic analysis. Their common focus was in trying to identify the key transmission mechanisms between evolving legal institutions and the emerging economy – a search for a dynamic theory that could explain the evolution of economies through time, often focusing on the proposition that the efficiency of a market is directly shaped by the surrounding institutional framework.

### 2. Defining Characteristics of New Institutional Economics

Building on the work of those contributing to the economics of property rights and the economic historians, NIE is marked by its two foundational principles. The first is that individuals are assumed to rationally pursue their self-interest subject to constraints that are more numerous and severe than those assumed in neoclassical economic theory. For example, they include the existence and definition of property rights and transaction costs, as well as a recognition of the limited computational capacity of the human mind that gives rise to the concept of “bounded rationality.” As a consequence, many within NIE argue against models that assume formal rational behavior, opting for the use of models based on the concept of bounded rationality.

The second foundational principle of NIE, at least within many quarters, is the idea of wealth maximization—the search for institutional structures that enhance society’s wealth-producing capacity. Here it is argued that the value of resources is tied directly to the bundles of rights that run with the resource. In short, the more complete and definite the specification of property rights (that is, the less attenuated is the rights structure), the more uncertainty is

\(^7\) Douglas C. North and Lance Davis (with the assistance of Calla Smorodin), *Institutional Change and American Economic Growth* (1971).


\(^2\) Drobak and Nye above n 72, xvii.
diminished, which, in turn, tends to promote a more efficient allocation of resources.

Given these two foundational principles, NIE has largely been dominated by positive theorizing and empirical work that analyzes the role of different institutional structures and how these structures systematically affect economic performance across time. Their analysis proceeds at two different levels: one, the institutional environment which is more macro-oriented; the other, institutional arrangements or governance, which is more micro-oriented. A brief word on each.

**a. The Institutional Environment** – The first level – the institutional environment – constitutes the framework within which human interaction takes place. It provides the so-called “rules of the game” which, in effect, are the institutional background constraints under which individuals in society make choices. They constitute the set of fundamental political, legal and social ground rules that, by guiding individual behavior, establish the basis for macro-level production, exchange, and distribution. At this first level, NIE’s positive analysis focuses on the effects that various institutional environments have on macroeconomic development and performance as well as explaining how various institutional environments evolved, often using theories and rationales that emphasize the spontaneous nature of their evolution, and eschewing explanations that concentrate on the deliberate actions of the collective or government. Of particular concern is the legal environment comprised of the formal, explicit rules manifested in the constitutions, statutes, common law doctrines, as well as rights and rules. From this, the legal environment is seen to play an important role in determining the allocation of resources in society, in part through its impact on the cost of transacting. When transaction costs are positive and significant, the structure of institutions matter in terms of economic performance. The normative thrust of NIE is to find and structure an institutional environment—a precise structure of formal legal institutions—that will lower transaction costs and thereby facilitate trade through efficient contracts.

**b. Institutional Arrangements or Governance** – The second level of analysis within NIE deals with institutional arrangements (or the “institutions of governance”) that exist within a given first-level institutional environment. This second level is devoted to a microeconomic analysis of the choice of governance structures of private actors. An institutional arrangement is a specific arrangement between economic units that governs the ways in which these units can cooperate or compete. The governance structures are often designed by the trading parties themselves in order to mediate particular economic relationships, all “in an effort to craft order, thereby to mitigate conflict and
realize mutual gains.” At this level of analysis, the fundamental challenge for NIE is in trying to determine the solution to the problem of coordinating economic transactions between individuals by mutual agreement, where relational contracts are the focus of concern. With markets and hierarchies as the two extremes, one goal of NIE is to determine which institutional arrangement is economically preferable and in which circumstances. NIE has explored a variety of institutional arrangements including: i) the structure of corporate governance, ii) vertical integration of firms, iii) the organizational rules of public bureaucracies and non-profit organizations, and iv) long-term contracts, highlighting the impact that each may have on the overall economic performance. At the governance level, NIE tries to determine “under what conditions exchange will be secured at least cost via the market and under what conditions it will be secured within organizations or, i.e. firms,” going on to point out that, in the more recent literature, “the concept of the firm has now been extended to a variety of hybrids to reflect a continuum of governance structures.”

c. Transaction Cost Economics – Given NIE’s concern over governance structures, perhaps it was only natural that some within NIE developed what has come to be known as transaction cost economics (TCE). Through the efforts of Oliver E. Williamson (and others), TCE has become an integral part of the NIE tradition and draws on the literatures of law, economics, and organization to study governance institutions within the economic system. The TCE approach analyzes the emergence of governance structures within the economic system and does so largely from the perspective of economizing on transaction costs. As Ronald H. Coase described it: “The costs of exchange [i.e. transaction costs] depend on the institutions of a country – the legal system (including property rights and their enforcement), the political system, the educational system, the culture. These institutions in effect govern the performance of the economic system.” Simply put, TCE is “the study of alternative institutions of governance,” and it “tries to explain how trading partners choose from the set of feasible institutional alternatives, the arrangement that protects their relationship-specific investments at least cost.” The correct (read “least-cost”) governance structure comes about because the background market forces – the ongoing exchange relationships –

work to cause an efficient sorting among the possible alternatives by adhering to behavior consistent with transaction cost economizing.

While the two levels of analysis presented above – the institutional environment and the institutional arrangements – are described as separate entities, in fact, NIE recognizes that they are interactive: the institutional environment sets the general framework within which institutional arrangements take place, and institutional arrangements, their effects, or the difficulties in devising them, may effect pressures for changes in the institutional environment. In addition, transaction cost economics plays an essential role in analyzing these interactions and the impacts of alternative institutional environments and/or governance structures have on the overall economic performance of the economy.

E. Social Norms and Law and Economics

1. People, Places and Ideas
The Chicago approach to law and economics expressed little or no concern for social norms (as social norms were typically considered both autonomous and exogenous). By the early 1990s, it was becoming increasingly apparent to many at, or associated with, the Chicago school that, in fact, law and social norms both worked to regulate behavior by inducing patterns of behavior that ultimately impacted economic performance. 87 The scholars most responsible for describing and advancing theories regarding the role of social norms within Law and Economics include Robert Ellickson, Richard H. McAdams, Eric Posner, Lessig, Lawrence, and Cass Sunstein among others.

2. Defining Characteristics of Social Norms and Law and Economics

a. First-generation of Social Norms Theory – A social norm is typically defined as “a rule that is neither promulgated by an official source, such as a court or a legislature, nor is enforced by the threat of legal sanctions, yet is regularly complied with.” 88 Those within this first-generation of social-norm theorists recognized (consistent with the Chicago school) that people not only complied with legal rules because of their unwillingness to bear the costs associated with non-compliance (usually fines or incarceration), but went on to ask – what about social norms? What is it that caused people to comply with social norms absent the forms of legal punishment that we witness in the legal

arena? They found that social norms and the law rely on different mechanisms for inducing subjects’ compliance. Generally, in the case of law, subjects comply under the will or sanction of the sovereign; in the case of norms, subjects comply under the will or sanction of the community.

The first-generation of law and economics theorists to incorporate social norms into their analysis and to analyze their influence, came from those closely tied to the Chicago approach to law and economics. Like their predecessors, they continued to use rational choice, wealth maximization models, and considered both law (in the doctrinal sense) and social norms to be relatively autonomous phenomena. However, what marked their departure from neoclassical economics of Chicago was the realization that internally and externally enforced social norms created a separate set of incentives that also impacted economic performance. As Robert Ellickson observed, the legal-economic models – particularly those advanced in the Chicago school – constructed on a neoclassical framework featured “unsocialized individuals in their analysis of hypothetical legal problems.” Ellickson went on to argue that models that suppressed the role of socialization – intentionally or unintentionally – exaggerated the focus, and thus the importance, of law and legal sanction. His point being, that some social norms impact (indeed, may have a significant impact on) economic performance and may do so without reference to the prevailing.

The first-generation of law and economics literature recognized that there are external (community imposed) social norms and internal social norms. Whether internally or externally generated and imposed, what was significant was the fact that these social norms set up a parallel structure of incentives (along side of the prevailing legal incentives) that induces members of society to behave in accordance with these norms which in turn can impact economic performance. That is, social norms, independent of prevailing law, provide signals as to what we should or should not do under a given set of circumstances and are therefore obligatory upon those individuals who wish to participate in the society which is at least partly constituted by such social norms. Some brief comments on each set of norms.

First, externally enforced norms rely on the efforts of the norm-generating community, and, like internally enforced norms (see below), they have a direct bearing on individual behavior and thus, on economic performance. Simply
put, in many cases, individuals comply with social norms because the community has told them to do so. Externally imposed social norms arise through the community and are part of the prevailing background law and social norms within which individuals make choices; they create a set of both negative or positive incentives. On the negative side, the community will punish those who do not comply by inflicting some form of disapproval or admonition, for example via the psychic cost in suffering guilt through a sense of ‘letting down the community.’ On the positive side, for those who do comply, the community rewards them in several ways by allowing conforming individuals to feel that they have lived up to their duty or obligation, or to enjoy the praise of the community and experience an enhanced sense of esteem.

Second, compliance with internally enforced social norms also comes about through the socialization process – with the internalization of social norms through education, religion, peer behavior, family ...etc. The self-enforcement comes about because individuals internalize the normative component of the adopted norms and thereby respond to the incentives (self-administered feelings of guilt and disapproval, pride and status) that induces them to behave in accordance with these norms. That is, individuals behave in a manner consistent with the incentives fashioned by the internally enforced social norms.

Social norms matter in Law and Economics for a number of reasons. Richard H. McAdams offers an instructive matrix of three possible impacts on performance. 91 First, social norms can matter because they sometimes control individual behavior to the exclusion of law. Second, norms and law may work independently to influence behavior in the same direction. And finally, law may intentionally or unintentionally influence social norms themselves. The recognition of these several possible impacts on economic performance is vitally important because it brings to the fore the point that the effects of legal change (or policy) will depend on the nature of the proposed legal change and the community of social norms to be engaged. More specifically, the effects of a proposed change in law will likely vary, depending on whether the legal change (or policy) is running with, running against, or altering prevailing social norms. As a consequence, in their attempts to alter economic performance through legal change, policy makers, if not in tune with the interaction of social norms and legal rules in the area impacted by a proposed legal change, may drastically mis-estimate the effects of alterations in law and thus, be less than successful in accomplishing their aims.

The lesson the first-generation of social norm theorists transmitted to legal-economic scholars was that, like law, norms bring forth a set of incentives that do indeed regulate behavior. However, in this early work, social norms were considered independent of the law and appeared fixed, essentially unmovable, and unyielding to the influences of law. As a consequence, since it is the forces outside law – namely the complex process of socialization – that were demonstrated to have a significant impact on generating social norms, consistent with Chicago thinking, there was little or no role for government to play.

b. New Chicago – In the latter part of the 1990’s a new movement began to emerge and with it, important policy implications. This so-called “new” Chicago school included such scholars as Cass Sunstein, Dan Kahan, Lawrence Lessig, Richard McAdams, Kenneth Dau-Schmidt, and Richard Pildes. While most of their work continued to employ rational choice, individual maximization models, the focus of their approach was on the interdependence between law, social norms, and other ‘regulators’ of behavior. New Chicago recognized that since social norms were malleable and endogenous, they thought government should have a more active role in fashioning social norms in its quest to bring about wealth maximizing outcomes.

Proponents of the New Chicago approach recognized that “just because law cannot directly or simply control norms, it does not follow that there is not an influence in both ways—norms influencing law and law influencing norms—or that one cannot be used to change the other.” 92 Sunstein argued that since law can strengthen the norms it embodies and weaken those it conflicts with or condemns, the government is in the unique position of being able to advance desirable norms and undermine unwanted ones. 93 Indeed, this possible law-norm nexus led McAdams to conclude that, “arguably, the most important relationship between law and norms is the ability of law to shape norms” (emphasis added). 94 He went on to say that “[i]f legal rules sometimes change or create norms, one can not adequately compare an existing legal rule with its alternatives without considering how a change in the legal rule may affect the relevant norms.” 95 Sunstein referred to the use of law to influence norms at “norm management,” a practice that he defended as “an important strategy for accomplishing the objectives of law, whatever those objectives may be.” Given that “behavior is pervasively a function of norms” and that “norms account for many apparent oddities or anomalies in human behavior,” the best way to

93 McAdams, above n 91, 346.
94 Ibid 354.
95 Ibid 349.
improve social welfare may be via changes in norms. And government, he says, “deserves to have, and in any case inevitably does have, a large role in norm management.”

New Chicago’s focus was on enhancing our understanding of the mechanisms through which the reciprocal influence of law and social norms is effected, and more significantly, with fashioning social norms as part of solutions to questions of public policy. For New Chicago, this significance could not be overstated: the fact that law can and does affect social norms, far from diminishing the role of the government, it offered an expanded opportunity for state activity or regulation—here, to alter social norms in ways that would enhance economic performance and ultimately, social welfare. In doing so, New Chicago “identifies alternatives as additional tools for a more effective activism. The moral of the old school is that the state should do less. The hope of the new is that the state can do more.”

c. Sympathetic Critics – Some “sympathetic critics” who were not entirely content with what was transpiring in the field began to have their voices heard. They criticized those who advanced theories of social norms within the context of a behavioral approach that maintained a rational choice perspective—including the Chicago approach to law and economics, the first-generation norm theorists, and even New Chicago. These critics argued that merely recognizing that social norms are malleable and endogenous is not enough—one needs to know how the social norms arise. And, it would be only then, when this process is uncovered and understood, that policy makers could effectively use government to fashion social norms.

In a thoughtful critique of the entire social norms movement, Lawrence E. Mitchell and other critics characterize much of this work as a ‘black box’ approach; one that seems content to start with extant social norms and then proceed to investigate the impact of changing social norms on incentives, on behavior, and ultimately on economic performance. The critics argue that by

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97 Lessig, above n 92, 673 and 661.
98 As Lessig, himself a proponent of the New Chicago approach, notes that the New Chicago School has not completely jettisoned the underpinnings of Chicago law and economics; rather, the New Chicago “shares with the old an interest in alternative modalities of regulation ... and adopts as well as rational choice perspective.” Ibid 666 and 665.
99 This section is drawn from his ‘friendly critique’ of what he terms the “new norm jurisprudences”; see Lawrence E. Mitchell ‘Understanding Norms’ (1999) 49 University of Toronto Law Journal 177.
100 In advancing this notion he is joined by Ellickson who observed, “Although methodological individualism invites a theory of how actors manage to reform norms, many
continuing to invoke a rational choice perspective (consistent with their backgrounds in rational choice theory and law and economics), these new norm jurisprudes will accomplish little in bringing about an understanding of the underlying values and the evolving, nuanced obligations, duties, or compulsions that underlie the formation of social norms. Mitchell argues that this “unrelenting behavioral approach to norms, winds up narrowing instead of broadening their understanding, distorting instead of improving this explanation of norms.”

As a result, Mitchell and others have argued that “[the] relentlessly, behaviouralist accounts of norms provided by the new norms jurisprudes can barely begin to explain the emotionally, psychologically, intuitively, morally, and socially complex questions” underlying why individuals or groups adopt or conform to particular social norms.

These critics firmly believe that one can not come to a true understanding of the role and impact of social norms by focusing merely on how people behave, and not why they act as they do. In that vein, McAdams observed that while law and economics scholars may be deeply interested in how law can influence norms [a la New Chicago], “if we do not know how norms first arise, it would seem implausible to think we could predict how legal rules might change a particular norm.” They conclude by saying that in order to understand anything meaningful about behavior, and ultimately performance, we need to explore how norms initially arise; that is, we need to understand the nature and source of the obligation that leads one to feel the need, the duty, or the compulsion to comply with social norms – in short, we need to open the ‘black box’ and focus attention on how underlying values lead to social norms creation and, from there, proceed to try to understand how the likes of the New Chicago norm managers could alter existing norms to better society. To this end, some in the new institutional economics have initiated work in neuroeconomics – an integration of the neural sciences with philosophy, psychology, and economics. Simply put, it is an effort to explore “how the mind works, that is, how human learning occurs.”

F. New Haven School of Law and Economics

of us have ducked that challenge, in effect relegating norm change to a black box.” Ellickson, above n 90, 550.


102 Ibid 180.

103 McAdams, above n 91, 349, 354.

104 Douglas C. North, in “Prologue,’ in John Drobak and John V. C. Nye (eds), The Frontiers of the New Institutional Economics (1997), 3, 11. For example, see two recent books, Peter Politser’s Neuroeconomics and Michael Shermer’s The Mind of the Market; see also the Center for the Study of Neuroeconomics at George Mason University [http://neuroeconomics.typepad.com]; Neuroeconomics at Caltech - The Camerer Lab [http://www.neuro-economics.org]
1. People Places and Ideas
The origins of the New Haven school can be traced back to the seminal contributions of Guido Calabresi. Two of his early articles — “Some Thoughts on Risk Distribution and the Law of Torts” in 1961 and, with A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” in 1972 — are classics in the economic analysis of law. The former article attempts to provide a detailed economic analysis of tort law focusing on the relationship between rules of liability and the spreading of loss. Calabresi and Melamed’s article on property rules and liability rules actually takes off from Coase’s analysis in “The Problem of Social Cost” (1960) to analyze the choice of remedies for resolving disputes over incompatible property uses. In 1970 Calabresi published his now classic book, The Cost of Accidents: A Legal and Economic Analysis, which further developed the ideas in his 1961 article. In it Calabresi provided an economic analysis of the goals and functions of liability rules leading him to conclude that liability should be placed on the least-cost avoider—that is, on the person who is in the best position to undertake cost-benefit analysis as between accident costs and accident-avoidance costs and act on this information once the relative costs have been determined.

His efforts proved pivotal in laying the foundation for further explorations into the economics of tort law. But just as important, while clearly concerned with the cost-related aspects of tort law, Calabresi’s writings, as well as the writings of other contributors to the New Haven school, have not focused exclusively on efficiency, but, rather, have evidenced a continuing concern for justice and fairness—this being one of the hallmarks of the Law and Economics scholars at Yale University (or those that have had some past affiliation with the institution), hence the moniker – the New Haven school.

2. Defining Characteristics of the New Haven School
Proponents of the New Haven view suggest that their approach to law and economics is necessitated by the increasingly prominent role played by the regulatory process and administrative law within the modern welfare state. This legal transformation, as Susan Rose-Ackerman points out, has “forced both judges and legal scholars to reexamine the roles of Congress, the agencies, and the courts” The New Haven school takes as its field of study the entire

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106 Susan Rose-Ackerman, Rethinking the Progressive Agenda: The Reform of the American Regulatory State (1992) 8.
modern regulatory welfare state and thereby views the task of law and economics: i) “to define the economic justification for public action,” ii) “to analyze political and bureaucratic institutions realistically,” and iii) “to define useful roles for the courts within this modern policymaking system.” Like the Chicago and public choice approaches, the New Haven approach to law and economics recognizes the important role played by the problem of scarcity in legal-economic problems; it also recognizes the virtues of relying on the market in allocating resources. However, unlike the more anti-interventionist approaches of Chicago and public choice, the New Haven school emphasizes the presence of multiple sources of market failure and a much wider need for regulation both of which necessitate a wider scope of government action.

In their positive, descriptive work they look at a wide array of legal institutions and their potential impact on the economy. The New Haven school’s emphasis is on the study of all aspects of the governmental policy process. This necessitates a model of governmental behavior, and the model used is that of the rational actor and thus shares certain commonalities with both Chicago and public choice. What is absent from the positive New Haven approach, however, is the normative presumption favoring the status quo distribution of wealth and property inherent in both the public choice and the Chicago approach to law and economics. Rather, the proponents of the New Haven school “recognize that the existing distribution of property rights [and hence wealth] is highly contingent and lacks strong normative justification.”

They argue that policy analysts should endeavor to determine the various available policy options in dealing with situations of market failure, and that they should do so without privileging the status quo, as in the case of public choice, and without a presumption in favor of common law resolutions, as in the case of the Chicago school.

On the normative side, the New Haven approach argues that legal-economic policy should work toward the correction of market failures, but with a recognized concern for both allocative and distributional impacts. That is, along with efficiency analysis should come a continuing concern for distribution and with that, a concern for justice and fairness. As such, proponents of the New Haven approach “provide a more balanced view of modern work in political economy that bears on the evaluation and reform of legal doctrines and

107 Ibid 3.
109 Ibid 3,16. Rose-Ackerman. She also calls the Chicago approach to law and economics “deeply flawed” as “a comprehensive view of the relationship of law to economic analysis.” Ibid 20.
110 Ibid 6-7 ,9.
Moreover, they assert that market-failure-correcting policies should be set in place based on cost-benefit analysis whenever possible, and this process should include the evaluation of all benefits and costs (e.g., lives saved, acres of wilderness preserved, and so on), not just those benefits and costs that can be measured in explicit dollar terms.¹¹²

From a normative perspective, this twin focus on efficiency and justice is worked out within the context of a system that establishes a presumption in favor of individual choice and the use of mechanisms that promote such choices, including the market, market-like arrangements, and the democratic political process. Thus, while in their positive work they seek a deeper understanding of the interaction between law and market incentives and with that, a deeper understanding of the interrelations between law and economics, in their normative work they see a much wider role for government to play including: i) the use of statutes and regulations, ii) a greater reliance on well-structured government institutions (i.e., an efficient bureaucracy), and iii) on taxes and subsidies, along with iv) government-established market-like arrangements to help remedy pockets of market failure in society.¹¹³ With respect to the market-like arrangements, their principal aim is to substitute incentive-based regulation for command and control regulation.¹¹⁴

The normative agenda of the New Haven school is the effective implementation of policies that efficiently achieve certain regulatory aims that serve to increase social welfare, broadly defined not to ignore distribution (while considering allocation); and not to ignore justice (while considering efficiency). They emphasize the importance of studying the operations of governmental institutions and the use of the tools of public policy analysis and social choice analysis—always with an eye on both allocative and distributional impacts—in the search for solutions to legal-economic problems. Further, New Haven scholars take the position that once one truly understands the

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¹¹¹ See, for example, Jon D. Hanson and Kyle D. Logue, ‘The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation’ (1998) 10 Yale Law Journal 1163 (with regard to the debates over smoking policy, they have proposed an ex post incentive-based regime to regulate smoking—a system of enterprise liability, which holds manufacturers liable for all the harms caused by their products).

¹¹² Generally, see Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992); Thomas Tietenberg, Environmental and Natural Resource Economic (2003); Thomas Sterner, Policy Instruments for Environmental and Natural Resource Management (2003) chapter 8; and on the distinction between economic incentives versus command and control see Winston Harrington and Richard D. Morgenstern, ‘Economic Incentives versus Command and Control’ (Fall/Winter 2004) Resources 13.
functional role of government, the modern regulatory system is revealed as superior not only to more highly collectivist alternatives, but also to its common-law predecessor. In fact, it is argued that in many contexts “the problem is one of too little rather than too much regulation.” The goal, then, from the New Haven perspective, “is a reformed administrative law that will incorporate a richer range of both empirical and theoretical concerns and will respond more effectively to the needs of public officials, politicians, and private citizens.”

G. Austrian Approach to Law and Economics

1. People Places and Ideas

The Austrian approach to law and economics, as its name suggests, derives from the work of the Austrian school of economics. The Austrian school of economics emerged in the late 1800s; it was founded by Carl Menger who taught at the University of Vienna. His work was influenced by the ideas of Franz Brentano, a philosopher who drew upon the ideas of Aristotle and the Scholastics as well as by the empiricist and positivist movements of early nineteenth century Europe. Menger developed the Austrian school as a deductive theoretical method of inquiry in direct contrast to the scientific / empirical thrust of the German Historical School. He has been described as “the true and sole founder of the Austrian school of economics proper, ... he created the system of value and price theory that constitutes the core of Austrian economic theory, ... and he also originated and consistently applied the correct, praxeological method for pursuing theoretical research in economics.”

Menger’s analysis received further development at the hands of his two most prominent disciples, Eugen von Böhm-Bawerk and Friedrich von Wieser (many of their contributions coming in the late 1800s, early 1900s). The 1920s and 1930s saw a new generation of Austrian scholars move to the forefront, including Ludwig von Mises, Friedrich von Hayek, Hans Mayer,

16 Rose-Ackerman, above n 106, 8.
18 It is not uncommon to read that the Austrian school began with the publication of Menger’s Grundsätze der Volkswirtschaftslehre (1871), translated into English as Principles of Economics (1976, reprinted in 1981).
20 Both became professors at Austrian universities.
Fritz Machlup, and Gottfried Haberler among others. Based on their contributions, Austrian economics flourished; the idea of a distinctive “Austrian approach” was solidified, and its scope extended across the field of economics and economic policy.

However, in the 1940s and 50s, the Keynesian revolution pushed the Austrian approach into the background. Some years later, circa 1970s, following the general contours laid out by Ludwig von Mises, Austrian economics reemerged as something of a force through its leading figures, some of whom had moved to the US by the end of WWII. Friedrich von Hayek taught and wrote at the University of Chicago and was later awarded the Nobel Prize in economics in 1974. Ludwig von Mises had gone on to New York University and established an intellectual center influencing students and colleagues including Israel M. Kirzner, Murray Rothbard, and later, Mario Rizzo and others. Today, George Mason University along with New York University and the Ludwig von Mises Institute at Auburn University have became the most recognized centers of Austrian scholarship and discourse. The scholars at these institutions provide both i) an outlet for Austrian economics’ (and now Austrian law and economics) scholarship (as they house the leading journals and book series in the field), and ii) a vehicle for teaching and advancing the Austrian approach. In time, given the Austrian inherent interest in institutions, it was only natural for them to branch out into law and economics. Like its direct forebearer, the Austrian school of law and economics favors “an approach that is deductive, subjective, qualitative, and market-oriented.”

2. Defining Characteristics of Austrian Law and Economics

a. Praxeology and Rejection of Efficiency

The Austrian approach is built on the belief that economics should be comprised of self-evident axioms; the operative concept is that of praxeology. It was Menger who first placed human action – and human action alone – at the center of economic theory in general, and the price theory in particular. This approach was later to be termed "praxeology" by Ludwig von Mises and remains at the core of Austrian economics (and now Austrian law and economics). Praxeology represents a scientific inquiry by meditating upon the nature of human striving to satisfy wants and then deducing its immediate implications. It is a theory that emphasizes human action – the idea that

121 A date often mentioned as its official “rebirth” is 1974 with the convening of a conference on Austrian Economics held in Vermont and sponsored by the Institute for Humane Studies.

“human beings act – engage in conscious choice actions toward chosen goals,” with the process of want satisfaction not purely cognitive and internal to the human mind, but dependent crucially upon the external world. It is an approach that is at odds with the Chicago school and public choice models where human agents are passive responders to the given constraints in an choice situation. In the Austrian school, the individual is seen not merely as a passive “price taker” but more as a purposeful actor and creator; people are regarded as instinctively social, not individualistic and it is from this perspective that the Austrian’s believe that economics should (in a manner without regard to any value judgements) focus on the ultimate ends chosen in human action.

For Austrians, the concept of efficiency becomes a “praxeological” (individual goal-seeking) problem; it is not value maximization problem. From their subjectivist approach (i.e., looking at the world from the perspective of the actor), the individual is seen to be making choices as to what ends to pursue and what means to employ, within the context of the “perceived” costs and benefits. As a consequence, Austrians view the neoclassical emphasis on efficiency as both misguided and unworkable. Given uncertainty, imperfect information, the fact that preferences and institutions are endogenous, and further, that changes in law can alter both preferences and institutions, “[i]t is meaningless ... to attempt to assess the consequences of a policy alteration with any yardsticks of ‘efficiency’ that are based upon the original institutional structure.” Since the Austrians view the world from a perspective that asserts that “value” and “utility” are both strictly subjective, then “value” and “utility” remain unobservable and unmeasurable. Since costs (and thus, social costs) are subjective, social welfare does not exist either as i) a useful theoretical concept, or ii) as a useful criterion (since unmeasurable); the same argument applies to benefits thereby highlighting the problem of tallying up benefits and costs in order to make efficiency-based judgments. Given the subjective nature of costs and benefits and with the rejection of efficiency, the Chicago normative benchmark of Pareto optimality has no place in the Austrian approach to law and economics.

124 This is Vernon Smith’s characterization of von Mises’s concept of praxeology; see Vernon Smith, “Reflections on ‘Human Action’ after 50 Years” (1999) 19 Cato Journal 195.

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b. Uncertainty and Imperfect Information – The Austrians have long emphasized the pervasiveness of uncertainty and imperfect information, and the associated inevitable limits on human knowledge. Individual preferences are endogenous and malleable, hence individual choice occurs in a dynamic, inter-temporal setting in which events can change preferences or relative desires arising from preferences. As such, the passage of time makes the choice process something that is evolving and less than stable in nature—giving rise to, among other things, the preference endogeneity and uncertainty problems. As Linda Schwartzstein described it “Austrians recognize that preferences are being formed and reformed constantly. People often have inconsistent preferences that are competing with one another and which have to find a resolution. Economics and law are part of a creative, ongoing process, in which new discoveries are always being made.”

Further, while disequilibrium is an ignorance-driven phenomena, this ignorance gives rise to opportunities for gain that can be exploited by entrepreneurial agents. This entrepreneurial activity in all its forms, in turn, generates knowledge, technology, and products that push the market in new directions. More generally, in Austrian law and economics the focus is on the goal-seeking individual and the ability of entrepreneurial economic actors to formulate and execute plans withing the context of their goals. Within the Austrian system, market prices are considered the primary mechanism for the dispersal of knowledge, and it is the market prices that provide the information regarding entrepreneurial opportunities that drive economic growth and development.

c. Government and Legal Institutions – The Austrians adopt a largely anti-interventionist approach with respect to the role of government focusing on those institutions that are best able to promote decentralized decision making with therefore, a heavy reliance on the market as the preferred system of social control.

Given the ongoing existence of interpersonal conflicts, in contrast to the more a-institutional nature of neoclassical economics, the Austrian approach emphasizes the importance of social and legal institutions—including habits, customs, and social norms as well as legal rules—in structuring the market process. Their focus is on both the contingency of outcomes with respect to alternative institutional settings and on the unsettled, evolving nature of the institutional framework. The role of government is to clearly define and/or more strictly enforce property rights in its effort to encourage individual

\[128\] Ibid 1131.
entrepreneurs to pursue their own goals efficiently. As Roy Cordato suggested, the state can do this via “legal institutions that minimize conflicts in the use of resources and allow the economic system to maximize the dissemination of knowledge.” This is best accomplished via fully specified property rights and free markets. Taken together they facilitate the dissemination of information in the broadest possible fashion and provide the sort of certainty and stability that minimizes conflicts associated with resource acquisition and use, and thereby facilitate individuals gathering the necessary physical resources to pursue their entrepreneurial activities.

The issue of the passage of time also bears heavily on the Austrian approach to institutions be they social, legal, or economic (with regard to the latter, particularly the market). Their focus is not just on their influence, but on the processes associated with their emergence and evolution. Central here is the concept of spontaneous order, which, in a nutshell, says that institutions (economic and legal) evolve through, and can only be explained in terms of, individual human action, rather than any sort of collective process of organization, design, or planning. Some of these consequences are completely unintended, others only partially so.

d. Law and the Market – The law or legal rules are said to evolve in a spontaneous manner rather than from the conscious planning of governmental entities, such as legislatures, bureaucrats, and courts. Often, this involves the evolution of legal rules out of customs and practices commonplace in society. This is not to say that judges and legislators have no law-making role to play; in fact, the evolution of social-economic activity exposes gaps in existing rules and judges and legislators must sometimes act to fill these gaps. But, Hayek argues, “the judge [is not] free to pronounce any rule he likes”; rather, “[t]he rules which he pronounces will have to fill a definite gap in the body of already recognized rules in a manner that will serve to maintain and improve that order of actions which the already existing rules make possible.”

In a like manner, the market evolves from “[t]he spontaneous order resulting from individuals adapting themselves to circumstances they perceive in the market. Prices send signals to producers and consumers, who in turn interpret this information and use it to guide their actions. It is unnecessary and impossible for any person to know or understand the full complexity of the extended order.” The Austrians employ a more dynamic disequilibrium

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130 Friedrich A. Hayek, Law, Legislation and Liberty (1973) 100.
131 Schwartzstein above n 127, 1128
process model of capitalism (rejecting the model of pure competition). Within the Austrian system, market prices are considered the primary mechanism for the dispersal of knowledge, and it is the market prices that provide the information regarding entrepreneurial opportunities that drive economic growth. The market is not in equilibrium but in disequilibrium due to uncertainty and lack of full information over time; therein lies the emergence of market opportunities and the potential for an entrepreneurial response. That is, disequilibrium gives rise to opportunities for gain that can be exploited by entrepreneurial activities which in turn, generate knowledge, technology, and products that push the market in new directions. Obviously, one of the major concern of Austrians is with the impact of governmental policy on the market. Their concern being with the individual’s ability to recognize and freedom to act upon entrepreneurial opportunities or otherwise facilitate the satisfaction of preferences. For Austrians, at the heart of the market is the entrepreneur. As Cordato uses the terms “social efficiency” and “catallactic efficiency” to describe the goal of legal economic policy. As he has put it, “the efficiency of the economic system is judged by the extent to which it encourages individuals [entrepreneurs] to pursue their own goals efficiently.” Put simply, the Austrian benchmark for normative analysis is the facilitation of the market process.

A Framework for Measuring the Costs of Paths to Justice

Martin Gramatikov♦

Abstract

The official justice mechanisms are perceived as expensive and unaffordable for the majority of people. In this article, I review the literature on barriers to justice and contemplate the identified barriers as costs that users of justice incur on their paths to justice. Then I elaborate a framework of categories of the private costs of justice, which should facilitate the measurement and comparison of costs of the paths to justice. Using the criterion of substance of the costs, the framework recognizes three main categories – out-of-pocket costs, opportunity costs and intangible costs. For each cost category, I discuss the relevant measurement and validation challenges. A conclusion of the study is that despite the focus of policy actions and research placed on the out-of-pocket costs of justice, the costs from the other two categories are a significant challenge for the accessibility of the paths to justice. The use of the framework is recommended as a more balanced approach to measuring, comparing and understanding the existing barriers faced during the paths to justice.

1. INTRODUCTION

People needing access to justice might face numerous barriers on the quest to solve their problems. As the paths to justice could take a long time, their effectiveness and efficiency could be regarded as insufficient, while courtrooms might be geographically unreachable or the people in need might fear retaliation. It is the high costs of justice, however, which epitomize the concerns of users, policy makers and service providers with the unreachable justice. In fact, no other barrier has been so frequently tackled with regulatory and institutional reforms in modern times. High costs are also blamed as the main cause of the myriad of unresolved legal problems and disputes.

An integral part of the legal culture in both developed and developing countries is the certainty that justice is expensive. In many jurisdictions, the costs of litigation are deemed prohibitive for the majority of the population, out of proportion and a major source of legal uncertainty. The increase of social and private costs of litigation has been a growing concern in the Western
world for the last four decades. Dispute resolution processes are rarely considered affordable and accessible. Namely, litigation is considered as overly expensive, unpredictable and time consuming. One of the most pressing drivers for wholesale reforms of the national legal systems is the assertion that access to justice is becoming prohibitively expensive. In Lord Woolf’s famous “Access to Justice Final Report,” costs of litigation are posited as the “most serious problem besetting our litigation system.”

Examples of the negative effects of high costs of justice are found on virtually every path to justice. A tenant who disagrees with the landlord, for example, might give up the issues when faced with the investments needed to match the landlord’s legal power, while buyers of defective consumer goods from an internet site may swallow the loss if the cost of obtaining justice outweighs the value at stake. Meanwhile, a victim of violent crime might be discouraged from seeking justice because of the anticipated stress and negative emotions. In all these hypothetical but realistic accounts of paths to justice, the costs materialize in different shapes and sizes. What is common, however, is that the costs of the paths to justice represent a significant barrier on the pathways to justice. The intention of this article is to analyze the existing costs of justice and organize them into a coherent framework. The framework will group the individual cost of items into broader categories in order to make comparisons between different paths to justice. Because paths vary enormously in their goals, structure and outcomes, each path will have a unique structure of costs which will be impossible to compare to others. How costly is a consumer dispute compared to a divorce? How are the costs of litigation over monetary debt compared to the immigration and naturalization procedure? With the developed framework I intend to group the costs of justice into broader categories, which will make the comparison between paths feasible.

The costs of justice do not exist independently from the needs of justice and paths to justice. Whenever a person faces a need for justice, she has to embark on a path to justice. A path to justice is conceptualized as a commonly applied


process which users of justice address in order to cope with their justice needs\(^4\). Both formal and informal processes could be positioned under the broad scope of the definition of path to justice. An informal negotiation, or an out of court settlement, could satisfy the users' needs for justice as much as the trial procedures do. Using the definition above, I analyze the different types of costs that a person has to make in order to travel from a beginning to an end in a path to justice. According to their properties, the costs are grouped into broader categories.

A framework for measuring the costs of obtaining access to justice should demarcate the beginning and the end of a path to justice. In real life, it is often difficult, if not impossible, to define a single moment in which the process starts or ends. For the sake of clarity, I operationalize the beginning of a path to justice as the moment when the user of justice first addresses the process. The first active and deliberative involvement of the user into the process could be explicated through different acts – a search for information, an acceptance of advice, the filing of documents, etc. With the selection of a verifiable moment to mark the beginning of a procedure, our methodology attempts to reduce the error from varying conceptualizations of paths to justice.

Similarly, an end to the procedure is defined as the moment when the party receives an outcome from the process. An outcome could be a final decision by a neutral party, a joint agreement of the parties, or one of the parties quitting the process. Our methodological framework is indifferent to the favourability of the outcome, its enforceability, or the opportunities to challenge the outcome through other processes\(^5\). A path to justice ends with a certain instance of an outcome, while our interest is to measure the costs that the user of justice incurs on this path to justice.

In order to achieve its goal, a framework for measuring the costs of paths to justice should address a series of questions. The measurement instrument has to conceptualize, break down and operationalized the different costs that users of justice face. In the next section, I discuss the costs of paths to justice and make the distinction between social and private costs. Then, I identify barriers to justice and construct them as costs. Based on the review of the barriers to justice, the individual cost categories are classified into categories that are more general. At the next stage, the identified categories of costs will be


\(^5\) Together with the costs of the paths to justice, the instrument measures the perceptions regarding the equality of the procedure and the quality of the outcome. In this framework, the extent of outcome enforceability will be accounted as a facet of the quality of the outcome.
operationalized into items of the measurement instrument. The last chapter will summarize the findings and state my conclusion.

2. **Costs of justice**

Costs of justice are a deceptively simple category. People often refer to justice as costly, which implies inherently high costs. However, what is a cost for one user of justice could be an investment for another. A busy professional could see the cost of a path to justice in the amount of hours spent, whereas an indigent person could be restrained by the monetary costs. In order to provide a valid measurement framework of the costs of justice, I have to identify the costs in an unambiguous manner. The empirical legal literature contributes little to the definition of the costs of justice.

Before proceeding with a substantial definition of the costs to justice, I have to demarcate the difference between the costs of the social problem and the costs of the dispute-resolution mechanism. A person who buys a faulty TV for a net of €500 from the local shop will register this amount as damage from the transaction. Instead of lumping the problem, the consumer might decide to take her chance and try to solve the problem with the available state or non-state justice mechanisms. Paying for legal advice, making phone calls, and spending time and emotions contacting the other party or the neutral party add to the existing damage. These costs are made because the consumer is seeking redress for her problem. Measuring the costs of paths to justice requires separating the cost of the social problem and the cost of travelling the path to justice. The latter category could be called *transaction costs* if the paths to justice are seen as forms of social transactions. Many studies identify this analytical distinction and measure categories such as transaction costs, transfers costs, total amount of money expended, total spending and total litigation costs. In criminal justice research, similar concepts could be found under the title of *average total costs per victim*, although in this domain the distinction between cost of the crime and

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the additional costs of pursuing justice has rarely been made\textsuperscript{8}. Below, I discuss this distinction as possibly being a major challenge for the measurement of the costs of justice.

Using the path to justice paradigm, the costs of justice are defined as \textit{the resources which the user needs in order to travel from the beginning to the end of a path to justice}. With this definition, I exclude the impact of the underlying social problem from the costs, and instead emphasize the need for the user to drive the justice process to a point at which an outcome is available, or some other circumstance to bring the process to an end. The definition is holistic – it embraces all costs incurred on the quest to solve the problem. As discussed above, the beginning of the path to justice is the first verifiable step of the user to solve the problem. In the case of a trial procedure, this will mean that the definition will include the pre-trial costs, where they will be made in relation to the specific path to justice. The definition does not discriminate between optional and compulsory costs. Some paths to justice require certain investments regardless of users’ discretion – i.e. the court fees in litigation are compulsory. Other costs are optional - the user sacrifices resources in order to receive a better quality of the procedure or the outcome. The total costs of path to justice include both the optional and compulsory costs of justice. I discuss the feasibility of this classification criterion below\textsuperscript{9}.

The goal of the developed framework is to facilitate the measurement of the costs of discrete paths to justice. From this perspective, a distinction should be made between the social and private costs of justice. The social costs are distributed among the members of the society or particular community whose needs are served by the justice process. There are significant social costs associated with the design and maintenance of a system of legal rules and institutions intended to deliver justice outcomes. Legal systems and, in particular, justice institutions are unique examples of public goods based on a mixed model of funding. Emanuel Savas\textsuperscript{10} uses a matrix of two factors to classify goods and services that require government intervention to maximize benefits to society from their delivery. The two criteria are consumption (whether a good or service is consumed collectively or privately) and exclusion (whether free riders could be prevented from using the resource). Another way to draw the line between the private and public costs of justice is to exclude the externalized costs from the framework. Whenever the costs of the dispute

\textsuperscript{9} See section 3.12
\textsuperscript{10} EMMANUEL S. SAVAS, Privatization - The Key to Better Government (Chatham House Publishers. 1987).
To some extent, the assumptions of Savas’ classification could be relaxed. An extreme interpretation could lead to the conclusion that justice processes are private goods because they are consumed individually (the parties in a dispute resolution improve their own welfare), and non-payers could be excluded (those who do not incur the costs do not receive justice). Both criteria, however, contradict the very foundations of the rule of law paradigm. Indeed, the disputants potentially obtain benefits from the existing path to justice. Society, however, is also benefiting incrementally from each instance of delivered justice by improved legal certainty and predictability, decreased costs for offsetting legal risks and improved trust in the institutions. Hence, the outcomes of the justice system could be seen as goods in which the benefits are consumed collectively. The immediate users of path to justice benefit directly, whereas the rest of the society/community receive indirect benefits.

Similar arguments could be developed with regard to the second criterion – excludability. Dispute resolution processes (even mass claims) involve a limited number of persons who have a certain degree of interest in a particular dispute. Free riders are prevented from frivolously joining dispute resolutions through the *locus standi* doctrine. However, as discussed above, the external effects of the functioning justice processes could not be limited to the parties in the dispute. Positive or negative effects affect various social groups in different forms and intensity.

The consequence of the mixed character of justice systems is that they are often funded as semi-public/semi-private services. Disputing parties are expected, to a varying extent, to incur these costs through expenses such as court and arbitration fees, expert witness’s fees, etc. These expenses, however, do not fully coincide with the total cost of the justice process. Through mechanisms such as public budgets or insurance products, the societies and communities mobilize public resources in order to cover the gap. Because of the public character of these decisions, one could label these costs as social costs of justice. On the other hand, the costs faced by individual users in their pursuit for resolution of their conflicts are private costs. Private costs of the path to justice are incurred by the individuals who travel on the paths to justice.

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The measurement framework will focus on the private costs of justice. Access to justice may depend on the means of the individuals to pay the private costs of the paths to justice. The decision to enter a path to justice is strongly connected with the boundedly rational assessment of costs, given the perceived probability of success and the expected outcomes. Social costs of justice processes are not usually part of this decision. I assume that when individuals weigh in the costs and the expected benefits of the justice processes, they do not include the social costs in the equation. The assumption could be relaxed, though, in specific paths to justice.

3. Costs as Barriers to Justice

Access to justice has been unequally distributed across socio-economic status, social class, level of education, geographic location, gender and many other dividing criteria. Demand for justice greatly exceeds its supply, and many disputes remain unresolved in the shadow of this imbalance. Those with more resources receive a larger and faster share of justice than individuals or legal entities with fewer resources. The very fact that justice could be unequally distributed is running against the fundamental principles of equal access, equality of arms and a fair trial. What causes the imbalance is primarily an uneven access to justice. There are numerous barriers that prevent people with justice needs from solving their problems through the official and unofficial justice processes. A prolific body of research addresses the substance, proliferation, cause and effects of the barriers to justice. Although there is no common definition of what a barrier to justice is, the term has been used as a synonym for one or more causes of inaccessibility.

In the next sections I review the most often studied barriers to justice as they are defined in the literature and analyze the associated private costs. The goal is to extract the different instance of the costs of paths to justice from the barriers. Some barriers are expected to coincide with the required resources, while others will be the causing factor of one or more types of costs. I call the former simple and the latter complex barriers. After analyzing both types of barriers, a list with the costs of paths to justice is derived. Using this list, taxonomy of the costs of the paths to justice will be developed.


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The estimation of the barriers to justice is hardly an exact science. Some barriers are specific for a certain legal problem or a particular social group, others are less contextual. The magnitude and the impact of the barriers are relative to the means of the particular users of justice. What is an insurmountable obstacle for one individual could be a nuisance for another. The general theory of the barriers to access to justice is that the have-nots overcome fewer barriers and receive less justice than the have-haves. Though, the relationship between means and access is not that simple. Examples from the publicly funded legal aid schemes from many countries reveal the well-known middle-income trap. Despite the non-linearity, the barriers of access to justice affect those people with limited resources more strongly.

A possible approach to constructing a framework of the costs of justice is to look at the barriers and translate them into costs of justice. Some of the barriers identified in literature are costs directly incurred by the users. Filing fees and legal fees are barriers, which could be directly expressed as costs of justice. However, not all barriers to justice are private costs. Some barrier-cost relationships take the form of cause and effect. For instance, the delay of justice is a barrier – many non-trivial legal problems are lumped because of the perception that dispute-resolution takes a disproportionate amount of time. Is this delay a cost of justice? According to the definition outlined above, it is not. In general, a user cannot directly invest more resources in order to decrease the duration of a path to justice. The delay on a path to justice, however, causes additional costs. If the path to justice was shorter, the user would not need to spend additional resources. From this perspective, the barrier to justice can be seen as property of the path, which increases the actual or perceived costs of justice. Apart from the delay, other examples of barriers that cause costs could be a lack of information, legal uncertainty, and inefficient procedures. These barriers hinder access to justice but are not private costs of justice. However, they could often be reliable proxies for the host of costs that are caused by them.

### 3.1. Information barriers

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15 Unless the path to justice could be accelerated at the price of additional cost. In this case, the additional costs will be the cost of avoiding delay.
At the beginning of a path to justice, a person must realize that the problem can be solved by legal means. A dispute with a service provider (such as a car mechanic) over the quality or price of the service is a problem, but its solutions would often not be seen as legal\(^\text{16}\). After all, car owners frequently argue with car mechanics, but rarely sue them. Even if a particular problem has been subjectively defined as legal, the individual may not know the required steps to solve it. In both cases, there is an informational barrier to justice. In order to make decisions, the users of justice need information regarding possible alternatives on their paths. Indeed, people ‘satisfice’ in order to overcome the shortage of information. Still, on many paths to justice, particular investments must be made in order to bridge the information gap\(^\text{17}\).

If we employ the path to justice paradigm, the cost of information will mean that the particular process requires an investment in order to be accessed. Silver\(^\text{18}\) defines the costs of information as pre-filing costs.\(^\text{19}\) Unlike the post-filing costs, these are compulsory expenditures at the time when the procedure is about to start. Therefore, acquisition of information could be a significant barrier for access to justice. In order to overcome the barrier, a person with justice needs to make different sorts of expenses, which, in this paper, are conceptualized as costs of the path to justice. Hence, the information barrier causes private costs that the users of justice incur.

Information is a scarce resource, having a price tag that could be procured from the market. To a certain extent, the legal services market could be perceived as a market of exchange of information against a price. Since information has a price, the need for information causes additional costs. The information could be purchased with different currencies. Providers of legal services charge fees, denominated in money. In addition, finding the needed information could consume a certain amount of time, which otherwise could have been alternatively used. Information could also be obtained from the social network. In the latter case, the cost of receiving information can be expressed as the exhaustion of the particular relationship. If there had not been a need for asking for information regarding the path to justice, the relationship may have been productive in some another fashion.

### 3.2. Monetary outlays


\(^{18}\) Silver at 2082

\(^{19}\) Costs incurred by the party before a formal legal action has been instituted.
Once the problem is recognized as legal, the user of justice might face numerous other barriers. Because the barrier coincides with the costs paid by the users, the need to pay money is the most tangible barrier on the paths to justice. Legal fees, filing fees, fees for expert witnesses are only a few examples of the numerous out-of-pocket expenses. Most of the existing research on costs of justice is focused on monetary expenses related to solving legal problems through litigation or some other form of dispute resolution. The concentration of both research and policy measures on the out-of-pocket expenses is understandable. Estimation of the monetary expenses is more straightforward and requires fewer assumptions compared to the costs of justice, which are expressed in different units such as time, lost opportunities or stress. Hence, the difficulties with defining and measuring the costs, which are not paid in money, could lead to the misleading conclusion that the out-of-pocket costs of justice are the single most significant barrier to justice.

In the following paragraphs I briefly review the existing empirical research on the out-of-pocket costs. The goal of the analysis is to summarize the major findings on the significance of the monetary outlays as a barrier to justice. The literature will also suggest particular examples of out-of-pocket expenditures on different paths to justice. These expenditures can be directly measured as costs. Unlike the information or delay barriers, the monetary costs are not the causing factor, but rather the effect of these factors. As such, the out-of-pocket costs are direct costs of the path to justice.

In a large scale research on civil litigation in the US, Kritzer, Sarat et al. collected data from over 3,000 court and alternative dispute resolution civil cases and conducted more than 10,000 interviews with lawyers, disputants, and potential disputants in the U.S. In terms of the costs of litigation, the researchers claim that the attorneys’ fees “constitute virtually the entire out-of-pocket costs.” The payments to lawyers in the studied cases accounted for 99% of out-of-pocket expenses for individual litigants and 98% for corporate litigants. When one factors in the value of the disputant’s time (or the value of


22 Id. at 561.
employee time for organizational litigants), the lawyer’s fee represents about 80% of the total cost in the typical (median) case. The predominance of lawyers’ fees in total litigation costs is reflected in other empirical studies on private cost of disputing. In a research on cost of arbitration claimants, Zuckerman finds that more than half of the costs of arbitration are spent on lawyers’ fees.

In some studies, the lawyers’ expenses are categorized as part of the total cost of civil litigation. Using a cross-sectional design, the researchers make inferences about the total cost of litigation. They are based on law firms’ accounts of incurred costs in a sample of civil cases where one of the parties was represented by a law firm. Analytically, the litigation costs are broken down into two categories: professional inputs and non-legal inputs. The “professional inputs” category consists of lawyers’ fees, and is further broken into five levels according to the seniority of the fee earner. In the other category of non-legal inputs (or disbursements), the authors combine fees for barristers, expert witnesses “and other disbursements.” It is clear that professional input and non-legal input categories somewhat overlap. From the perspective of the litigant who pays the expenses, the barristers’ fees should be conceived as a professional input. The authors of the study adopt the perspective of the law firm, which is regarded as a disbursement.

Hersch and Viscusi use the total defense expenses concept to study the tort liability litigation costs borne by defendants (primary insurers) in insurance cases. The total cost of defense is measured through aggregation of three sub-categories of costs: outside defense counsel, allocated expenses for in-house defense counsel and allocated loss adjustment expenses. As the authors suggest, the last category could accommodate a broad array of expenses incurred by the insurers including court fees, stenographers, etc. In fact, the expenses for outside and in-house defense counsel are variations within the broader category of attorneys’ fees. Hersch and Viscusi recognize the value of time spent by the claimant, but do not measure it.

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25 WILLIAMS & WILLIAMS at 75; ZUCKERMAN, Comparing Cost in Construction Arbitration & Litigation at 44.
26 WILLIAMS & WILLIAMS at 75.
28 Id. at 358.
Genn\textsuperscript{29} surveys a random sample of adults living in England and Wales in order to study the occurrence of and response to justiciable events. Genn splits the costs of paths to justice in two categories – legal costs and other costs. She reports that among those who incurred legal costs and paid themselves, the median amount paid was £198 (mean £829). Surprisingly, 84\% of the respondents who have incurred legal costs were not worried at any stage about the costs. Some 60\% of the respondents who reported a justiciable event incurred other legal costs (i.e. telephone calls, travelling costs, loss of earnings). However, the responses suggest that the other costs are not really burdening – the median amount is below £10.

In research on justiciable events in Scotland, Genn and Paterson\textsuperscript{30} found that respondents who experienced a justiciable problem, but did not seek advice, reported a fear of legal costs as one of the most important factors influencing their decisions not to seek professional advice. Rather, they chose to solve the matter themselves. Research from New Zealand\textsuperscript{31} reports 27\% of respondents with legal problems and 35\% with legal needs claimed that lawyer costs prevented them from obtaining help. Genn and Paterson\textsuperscript{32} draw a similar conclusion: “respondents to survey interviews and qualitative interviews expressed a pervasive feeling that obtaining legal advice was hugely expensive and that for many kinds of problems obtaining such advice was simply not an option”.

Apart from the legal fees, the justice processes require numerous other instances of out-of-pocket costs. Depending on the procedure, their proportion to the total cost of the path to justice could vary significantly. Some of the possible monetary costs of paths to justice are court, arbitration and mediation fees, jury fees, services of summons, exhibit fees, an appeal bond, court reporter fees for the trial transcript, fees for abstracting the judgment, and discovery related costs\textsuperscript{33}. Monetary outlays, which are high in absolute

\textsuperscript{29} HAZEL GENN, Paths to Justice. What people do and think about going to law? (Hart Publishing. 1999).

\textsuperscript{30} HAZEL GENN & ALAN PATERSON, Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law (Hart Publishing. 2001).


\textsuperscript{32} GENN & PATERSON, Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law at 98.

value or disproportionate to the protected interest, certainly have a negative influence over the accessibility of the path to justice.

A corrupt judiciary could increase or distort the cost of justice in many different ways. Unofficial payments add to the out-of-pocket costs of the path to justice. Corruption also increases the uncertainty of the procedure and its outcomes. The indigenous, illiterate, or those with lower education are particularly vulnerable to be exhorted for irregular payments. This form of corruption is not only compromising the integrity of the justice processes, but also challenges the accessibility of the affected paths.

3.3. Time spent

Effective redress of justice needs takes time. The time component of the paths to justice is one of its most significant barriers. As in the case of the monetary costs, the time spent is a very tangible barrier because it relates directly to expenditures, incurred by the users of justice. Most of the existing research places the emphasis on the delays inherent for litigation and other modes of dispute resolution. The amount of time that the users of justice spend on the justice procedures has been largely understudied. People spend time on collecting information, contacting professionals, travelling, awaiting hearings or waiting in queues, as well as many other time-consuming activities. Time is a valuable resource and has a price, which in turn is dependent on many objective and subjective variables. Some procedures require more time than others, and some users of justice are more vulnerable to time lost. For instance, repeat players are believed to spend less time than “one-shotters.” Better informed users of justice will be more likely to optimize their time compared to users of justice who possess less information. The value of time itself is a matter of highly subjective assessment. In general, it could be hypothesized that people with higher earnings will place a higher value on time compared to those users whose time is less valuable.

Similar to the out-of-pocket expenses, time is both a barrier and cost of justice. Other barriers, such as lack of information or ineffective models of delivery of justice, require the users to spend time on the paths to justice. What the user has to ‘pay’ in order to travel to the end of a path to justice is a certain amount

34 Winkler at 100; Zuckerman, Comparing Cost in Construction Arbitration & Litigation; Sergio Chiarello, A Comparative Perspective on the Crisis of Civil Justice and on its Possible Remedies (University of Wien 1999); Allan E. Lind, et al., The Perception of Justice. Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (The Institute for Civil Justice ed., The Rand Corporation. 1989).
35 Galanter at 168.
of hours, days, months or even years. From the perspective of the user of justice, this amount of time spent is a cost.

3.4. Delay of dispute resolution

Delays of dispute resolution processes are one of the most touted problems of contemporary justice systems. Often, the resolution of claims takes such a long time that it is considered a barrier to justice. The delay of dispute resolution relates to the concept of time, but does not coincide with the time spent on the procedure. Rather, delay is a causal factor for expenses including personal time, money and stress. It is possible that a process is not delayed, but the user is still required to make significant investments from her personal time. Rarely, the opposite is true – although the process proceeds for too long, the amount of personal time is not affected.

The delay of the legal procedures causes numerous types of losses. The ongoing dispute, and the intricacies of official and unofficial dispute resolution procedures, could make the user feel an excessive amount of stress and negative emotions. A dispute concerning real estate could thwart the chances of the litigating owner to use a resource in its most effective way. Meanwhile, a prolonged dispute over parental control will damage the relationship between a child and at least one of his or her parents. There are countless examples of how the delays on paths to justice can negatively affect the people who rely on these procedures to solve their legal problems.

Could the consequences of delays be contemplated as costs? If we take, as an alternative, an instant dispute resolution process, the effects of the delay will be framed as losses (explicit costs). The negative value of the delay is the difference between the utility of a timely outcome and the utility of a delayed outcome. This difference will be reflected in the subjective assessment of the quality of the outcome. A timely outcome will better address the need for justice compared to a delayed outcome. Our general methodological framework simultaneously measures the costs of the path to justice and the perceived quality of the outcome. Therefore, one possible approach to account for the cost of delays will be to measure it as a property of the outcome. An alternative strategy would be to use the methods suggested for valuation of time and foregone earnings.

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The delays of paths to justice cause damages and missed opportunities for the users of justice\textsuperscript{37}. A prolonged path to justice will require more out-of-pocket expenses for legal fees, travel, etc. Also, a delayed procedure will likely increase the amount of time spent and will cause additional opportunity costs such as foregone earnings and opportunities. Stress, emotions and damage, secondary victimization, and damage to relationships are other categories of costs which could be triggered by a delay in the procedure. Similar to the information barrier, delays are the causing or contributing factors of virtually all types of direct costs of justice. Delays in the disposition of cases epitomize ineffective and inefficient legal systems and processes. Many problems with potential legal solutions are not acted upon because of time concerns and the related uncertainty.

\section*{3.5. Uncertainty of the costs}

On a path to justice, some costs, such as court fees or administrative fees, are fixed. Normally these make up a small fraction of the total costs. Most of the remaining costs of paths to justice are variables – they vary as the conditions change. The time spent on the procedure or the amount of the legal fees will depend on the duration and complexity of the path to justice. This means that the user of justice can predict the size and the structure of the variable costs only within broad intervals. The wider the intervals’ bounds, the more uncertain the costs of the procedure are. Most individual users of justice are “one-shotters” and have only limited information on the frequencies or likelihoods of the varying costs of justice\textsuperscript{38}. Uncertainty of costs is a specific barrier for those with limited resources. As Kahneman and Tversky\textsuperscript{39} assert, the individuals are more willing to reduce the risks of losing than to maximize opportunities for winning. Following the prospect theory, we could expect that, individuals will be less willing to act to protect their legal rights and interests when costs of justice processes are uncertain.


\textsuperscript{39} DANIEL KAHNEMAN & AMOS TVERSKY, Prospect Theory. An Analysis of Decision under Risk, in Choices, Values and Frames, (Daniel Kahneman & Amos Tversky eds., 2000).
The uncertainty of the costs is only one dimension of the uncertainty of the paths to justice. Other questions include how long will the quests for justice last, will the procedure meet its expectations or will the outcome solve the problem? Most users of justice address these questions in one form or another because they are uncertain about the path to justice. If all the important aspects of the procedure were predictable, then the uncertainty would be regarded as low. In the real world, however, the paths to justice are largely uncertain. One path could be uncertain in terms of its duration, while another could be perceived by the users as producing random, and therefore unfair, outcomes. A user of the third path could worry if he will be the lucky one, treated with respect and politeness during the procedure. Yet, many paths to justice reveal multiple and intermingled uncertainties, which operate as barriers to justice.

The uncertainty is a complex barrier to justice and often will be impossible to disentangle from the information barrier. Many problems with potential legal resolution are lumped in the uncertainty of the inherent out-of-pocket, time or stress costs. Uncertainty itself is a barrier, but not a cost. However, it could trigger numerous types of costs. The user who is uncertain about the procedure or the outcome will be more likely to pay legal fees even if she can effectively achieve the result without spending the money. Faced with procedural uncertainty, the person who needs justice will probably spend more time to collect and process information. All these costs can be perceived as a strategy to reduce the risks stemming from uncertainty.

3.6. Inefficient delivery of justice

Geographical remoteness of justice providers, complicated procedures, and the obstruction in the physical environment are all tangible barriers to justice. People who have to travel significant distances will be more likely to leave legal problems unresolved. Disabled people or people with mental illnesses often find it difficult to reach courtrooms or offices of public authorities. In a study of access to justice for disadvantaged communities in Australia, Mulherin and Coumarelos found that long delays on phone calls, delays in getting a response and difficulties with getting an appointment are the most pressing barriers for receiving legal advice. Djankov, La Porta et al. conceptualize the

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number of procedural steps as a barrier to justice. They measure two court procedures (eviction of a tenant for not paying rent and the collection of bounced checks) in order to build an index of procedural formalism. More procedural steps to solve the problem are seen as a form of inefficiency, making access to justice more expensive and, thus, limited. In a related project, the World Bank measures the ease of doing business at a national level through assessing the number of procedural steps and the duration of each step. Again, the underlying logic is that access to justice is obscured by the increased number of procedural steps and prolonged duration of the individual steps.

Inefficiencies in delivery methods of justice processes could stop many people from pursuing justice. The inefficiencies of the provision of justice can be considered as complex barriers to justice. These barriers require the users of justice to make different sorts of expenditures - out-of-pocket expenses, lost time, increased stress, etc.

3.7. Stress and emotions

Stress and emotions are other examples of under researched barriers to justice. For victims of crime, access to justice could be significantly compromised by the expected high degree of stress and negative emotions. As a result of the institutionalized response to the act of crime, the victims could experience secondary victimization in many different forms. Feelings of rage and helplessness, fears for the personal safety and loss of security and trust are a few examples of the negative forms of secondary victimization. Similar concerns could compromise access to justice in civil and administrative matters.

Pleasence, Balmer et al. study the incidence of adverse consequences of justiciable problems in England and Wales. Stress related ill health, the breakdown of a relationship, physical assault and property damage, loss of income and failing confidence are the most frequently occurring negative effects from the experienced justiciable problems. In this study, the researchers investigated the consequences of the problems and did not try to isolate the additive effect of the procedure. Genn and Paterson report that one third of those who carried out paid work reported that there had been a negative impact on their work life, including taking time off as a result of stress or suffered relationships

43 See http://www.doingbusiness.org
with colleagues. “On the negative side almost three-quarters of those reporting some impact said that they found the experience of trying to sort out the problem stressful”\textsuperscript{45}.

If the focus is on stress and emotions which are caused on paths to justice, we can perceive stress and emotions as specific costs of justice. Indeed, these do not have natural units of measurement and the valuation is highly subjective. The amount of stress and emotions also tends to vary as time goes on. However, travelling a path to justice could require a significant expenditure of stress and emotions from the users of justice. Therefore, stress and emotions will be viewed as direct costs of the paths to justice.

3.8. Secondary victimisation

Montada defines secondary victimisation as “...violations of rights and entitlements which victims claim after having been victimized...”\textsuperscript{46}. Instead of receiving just resolution to their problems, the victims of crime often experience additional psychological harm on their paths to justice. In contrast to the primary victimisation, this time the damage could be caused by legitimate processes which are intended to provide justice. The amount of expected psychological harm on a path to justice is a significant barrier to access to justice for many victims of crime.

Secondary victimisation is not only limited to criminal justice. Similar concepts could be found in studies on the civil justice system. A victim of tort is likely to suffer process related psychological harms similar to those experienced by a victim of crime.

3.9. Social costs and damage to relationships

Michelson discusses the category of social costs as a specific barrier to justice. Here, “social cost” is used with a different meaning from the standard understanding of social cost in the dichotomy of private-social costs. Social costs in Michelson’s understanding are the consequences of the conflict and the related procedure, which could negatively affect the position of the user of justice in her social group or community.

\textsuperscript{45} Genn & Paterson, Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law.
Similar to social costs (in its narrow meaning) is the cost of broken or damaged relationships, degrading status and ex-communication. For instance, for a victim of domestic violence, the cost of the dispute resolution will be augmented by the expected further deterioration in her relationship. Pleasence, Buck et al.\textsuperscript{47} and Coumarelos, Wei et al.\textsuperscript{48} find in England, Wales and Australia that stress and sparing damage to relationships were much more serious concerns for not responding to justiciable problems than financial barriers. As in the case of stress and emotions, these costs are subjective and difficult to measure. The fact that certain cost categories elude observation and measurement does not mean that it is not negatively impacting the access to justice.

3.10. Language barrier and legal language

The language of the procedure could be a barrier to justice if a particular person is not fluent in this language\textsuperscript{49}. The user of justice who has a need for justice but does not understand the language may incur additional expenses for interpreters or translation of documents. Therefore, the language barrier could cause costs that would not have been necessary.

The complex legal language could be considered somewhat similar to the language barrier. Formalistic procedures and incomprehensible legal language could be intimidating. Again, the users of justice might be forced to spend additional funds in order to overcome this barrier, with hiring a lawyer as the most likely response.

3.11. Other barriers to justice

There are other barriers to justice, which are particularly difficult to measure and value. For instance, feelings of powerlessness\textsuperscript{50}, fear\textsuperscript{51}, unwillingness to

\textsuperscript{47} PASCOE PLEASENCE, et al., Causes of Action: Civil Law and Social Justice (Stationery Office, 2004).
\textsuperscript{48} CHRISTINE COUMARELOS, et al., Justice made to measure : NSW legal needs survey in disadvantaged areas (Law and Justice Foundation of New South Wales. 2006).
\textsuperscript{50} REBECCA L. SANDEFUR, Access to Civil Justice and Race, Class and Gender Inequality, Annual Review of Sociology 339, (2008).
complicate the matter further, distrust in or lack of credibility of the justice system or cultural barriers could effectively obstruct access to justice. However, it is empirically difficult, if not impossible, to estimate what the cost would be for an individual to overcome such abstract barriers. How much, for instance, will it cost a user of justice to overcome her distrust in a particular procedure? Both conceptually and methodologically it will be difficult to find an answer to this question. Costs of justice, which are a challenge to measure, should be recognized and assessed through appropriate proxy indicators.

3.12. Summary and classification

The review of the research on barriers to justice suggests a significant variety of obstructions and costs on the paths to justice. In order to facilitate the coherent measurement and interpretation, I map the costs in a framework. Several classification schemes could be used to categorize the costs of justice into more abstract categories. Levine breaks down the costs of conflict resolution into four categories: direct cost, productivity cost, continuity cost and emotional cost. Direct cost and productivity cost correspond to the out-of-pocket and opportunity cost categories. Under continuity cost, Levine understands “costs [that] accrue when productive relationships are changed”. Defined like this, the continuity costs overlap with the costs of the foregone earnings and the damage to relationships cost. In the context of analyzing the costs of ADR, Levine considers emotional costs as a significant barrier, but warns that “a price tag can't be placed on these emotional losses”.

Some authors use a similar classification of economic and non-economic costs. The differentiation criteria here will be the availability of markets for a specific resource. If applied to my classification, the monetary and opportunity

52 Genn & Paterson, Paths to Justice Scotland. What People in Scotland Do and Think About Going to Law;Ignite Research.
56 Kritzer, et al., Understanding the Costs of Litigation: The Case of the Hourly Fee Lawyer.
57 Levine at 248.
costs of the paths to justice should be regarded as economic costs. On the other hand, the intangible costs from the developed framework will be defined as non-economic costs.

An alternative classification approach uses the chronological progress on paths to justice as criteria. Employing the criteria of formal initiation of a legal claim, the costs could be split up in pre-filing and post-filing costs. Another use of the chronological criteria is the classification by procedural stages. There is one significant disadvantage of the chronological mapping of the costs of justice: the criterion is not applicable to the informal justice processes in which there are no discrete moments of filing a claim and no distinguishable procedural phases.

Above, I discussed that some costs of a path to justice are compulsory and others are optional. Court or arbitration fees and costs for travel for hearings are examples of necessary costs, without which many processes would not start. On the other hand, legal fees are optional costs in most procedures. There are serious challenges that require this particular criterion to be abandoned. First, the variation in the paths to justice blurs the distinction between compulsory and optional costs. Second, within a path to justice, the decision of whether a cost is compulsory or optional could be highly subjective and vary with the characteristics of the parties or the properties of the procedure.

Three milestones guide the selection of criteria for classifying individual costs into larger groups. First, it is intended to assist the process of identification and measurement of costs that reduce access to justice. The second goal of the framework is to estimate the costs from the perspective of the users of justice. The third criterion determines the level of measurability of the cost of certain items. The role of the cost as a barrier to justice and the type of the expenditure, as well as the measurability of the cost, will be used as criteria for structuring the cost framework. From the users’ perspective, the distinction will be of little significance if the resource has been spent to pay court fees or purchase tickets to travel to the courtroom. Both of these costs will be manifested as out-of-pocket expenses for the user. A common characteristic of these costs is that they are paid with money, have a common measurement and are easily comparable. People tend to associate costs with monetary costs and generally memorize these expenses more easily. Simply put, the out-of-pocket expenses do not require significant cognitive efforts to be estimated and calculated. Therefore, the monetary outlays are significantly easier to measure.

In comparison, the value of time lost is an abstract concept, and only a small
number of professionals could readily calculate the value of 3 hours, for example, lost on a path to justice. The relative feasibility of measurement and the prevalence of monetary costs in certain types of procedures (i.e. litigation and arbitration) give ground to many researchers to use these costs as a sufficient proxy to the total costs of the paths to justice.

As was discussed above, there are multiple instances of costs of justice, which are not expressed in money. Time, stress, inefficient modes of delivery, broken relationships and emotions do not use money as measurement units. People either do not measure such expenses on any replicable scale, or use units such as hours or days. In both cases, it is very difficult to account for these expenses. What is common, however, is that these costs of paths to justice belong to the category of non-monetary costs.

The non-monetary cost category is the opposite of the monetary costs of justice. Within this category, however, there are costs with marked differences. We can see that some non-monetary costs of the paths to justice are easier to express in money. For instance, the time lost and the depreciation of resources due to a pending procedure could be translated in monetary terms. There are markets for time and for goods, which could inform us of the alternative uses of these resources. The concept of opportunity costs and the second best use of time and resources will be discussed in more detail below. In the second cost category, I refer all costs of paths to justice, which are not expressed in money, to markets that provide information on the shadow price of the resource. I will term this second category of costs of paths to justice as opportunity costs. Within this category, two types of costs will be distinguished – lost time and foregone earnings.

The costs from the third category could not be expressed in money, and there are no markets for this particular type of resource. Emotions, anxiety, stress, social connections and broken or damaged relationships frequently accompany the outcomes of paths to justice. However, as many researchers warn, it is more difficult and sometimes impossible to translate these costs into money. A monetary value of the intangible costs could be derived from shadow prices where such costs exist. In the literature on the costs of crimes, these expenses are often called intangible costs. Miller, Fisher et al. define the out-of-pocket expenses and foregone earnings as tangible costs, and pain, suffering and reduced quality of life as examples of intangible costs.

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61 MILLER, et al., Costs of Juvenile Violence: Policy Implications.

(2009) J. JURIS 132
An additional challenge related to the measurement of the intangible costs of justice is its difficulty to estimate how much stress is caused by the procedure and how much is attributable to the problem that triggered the procedure. If we look through the eyes of a plaintiff in a medical malpractice case, it will be complicated to find out how much stress is caused by the tort and how much by the following procedure. In general, we can assume that the intangible costs on paths to justice prompted by relational justice needs will be more challenging. I will discuss the issue in more detail below.

It is questionable whether secondary victimisation is a cost or a barrier of justice. As discussed above, it is one of the barriers in accessing both criminal and civil justice. Secondary victimisation could take the form of violation of different rights or legitimate interests of the victims – the right to dignity, right to privacy, right to physical and mental health and other related rights. Victims could be traumatised through experiences of fear, disrespect, humiliating treatment, disbelief, etc. Two cause and effect relationships could be hypothesized here. The first relationship states that the negative aspects of the justice process cause intangible costs in the form of stress and negative emotions. Alternatively, it could be deemed that experiences with stress and emotions lead to secondary victimisation. Since there are no strict definitions of secondary victimisation and intangible costs, it is difficult to test the two hypotheses. Nevertheless, the analysis suggests that secondary victimisation and costs of justice processes are not identical concepts and, thus, should be treated differently.

From these concepts, at least three important implications of the distinction between tangible and intangible costs can be drawn. First is the question of proportions – research on costs of crime shows that intangible costs account for a large share in the overall cost of crimes. The next implication is the challenge of converting intangible costs into standardised units of measurement (e.g. money). Dolan et al. review three approaches used for quantification of intangible costs of justice – revealed and stated preferences, transferring values from other contexts and the calculation of the adjusted quality of life to a monetary value.

The third implication of the classification is the increased uncertainty associated with estimating the category of intangible costs. As Harwood, Fountain et al. suggest, the estimates of intangible costs contain much more uncertainty due to the many latent variables that could contribute to the

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62 COHEN, Measuring the costs and benefits of crime and justice; RODGERS at 261.
63 DOLAN, et al., Estimating the intangible victim costs of violent crime.
64 HARWOOD, et al. at 22
variation. Similar results are reported by Seabury based on research of jury awards in civil cases in the U.S.: “Noneconomic damages also appear to be more variable on average than economic damages.” Causality is another source of uncertainty, identified in studies of costs of crimes. Although the cause and effect relationship could seem self-evident, in many situations researchers could not be reasonably certain if the crime is the only cause of the expense, or if there is a more complex causality chain.

4. MEASURING THE COSTS OF JUSTICE

The review of research on barriers to justice implicated by several different perspectives suggests that individual costs of the path to justice can be aggregated into three larger groups. Application of the type of the invested resources and the amenability to measurement as classification criteria resulted in three categories of costs: monetary costs, opportunity costs and intangible costs. However, the division between the three categories is not absolute. Opportunity and intangible costs could also be expressed as a monetary value after additional analysis. Likewise, monetary costs could have a secondary alternative use. In the next chapter I will review the content of the three categories of costs on paths to justice, and will classify the individual cost items. Each category will be linked to the barriers to justice which are assumed to cause them. These categories will then be operationalized into items comprising the measurement instrument.

4.1. OUT-OF-POCKET COSTS

The costs of legal processes are frequently measured through the proxy of the monetary outlays made throughout the procedure. The monetary costs are easier to quantify and measure, which explains the tendency for placing the focus on them. They are expressed in money, which relieves their measurement, analysis, and comparison from most of the challenges inherent of the non-monetary expenses. Another reason for the extensive attention on monetary costs is the assumption that the out-of-pocket expenses are the most prevalent cost of litigation procedures, which in turn are the most often studied paths to justice. From a methodological perspective, the use of monetary costs as an indicator of the total cost of the process is less challenging with regard to the validity and reliability of the data.

The content of the out-of-pocket costs category largely depends on the specifics of the studied paths to justice. Upon applying the criterion of the type of the expense, I include in the list all costs paid with money. Below is a non-exhaustive list of the likely payments that the users of justice incur on their paths to justice:

- Costs for use of information (i.e. legal databases, public providers)
- Lawyers’/paralegals’ fees;
- Experts’ and expert witnesses’ fees;
- Filing (court/arbitration/mediation) fees;
- Translator’s fees;
- Bailiffs’ fees;
- Notary’s fees;
- Services for summons;
- Discovery related costs;
- Travel expenses;
- Costs for communication (mailing, calling, etc.);
- Witnesses’ compensation;
- Copying and other overheads;
- Bribes and other unofficial payments.

Some of the out-of-pocket costs are fixed costs. For instance, filing fees are usually related to the type of the procedure and/or the value of the claim. In some jurisdictions, the lawyers’ fees, expert witnesses and other payments for services of professionals are fixed with statutory provisions. If there is sufficient information on the type of process and the values at stake, most fixed costs of paths to justice could be estimated in advance.

Other components of the out-of-pocket category are variable costs. They can be estimated with different data collection methods. Collection of subjective data about the perceptions and attitudes regarding costs is an appropriate strategy when the research interest centres on private costs of the paths to justice. Content analyses of court files, case files, and other sources of data could be alternative data collection methods for estimation of monetary costs. There are advantages and disadvantages inherent to both estimation strategies. The perception based studies are sensible to ambiguous definitions and numerous threats of the internal validity – memory decay effect, cognitive dissonance, and the on-stage effect, among others. In addition, the collection of data from archival sources will inevitably omit many categories of costs which are normally not documented.
An important matter in measuring the out-of-pocket costs is the issue of the measurement scale. The out-of-pocket costs could be measured with a scale, which reflects the amount of money spent. The practical question here is the level of measurement. Two general options are possible – ordinal or interval scale. With the ordinal scale, the researchers measure the costs against some pre-defined levels. The selection of the levels requires prior information on the measurements of the central tendency of the particular cost elements. For instance, let us assume that we have prior knowledge that the mean out-of-pocket cost of a path to justice is 800 Euros, with a standard deviation of 200 Euros and a normal distribution. In this case, the measurement scale should be influenced by the central limit theorem, which predicts that about 95% of values will lie in the interval of two standard deviations from the mean (400-1200 Euros). Therefore, a measurement scale in which the lowest level is ‘less than 1000’ will provide little information – in the hypothetical scenario graphed in Figure 1 90% of the cases will be aggregated into one category. Official data, previous research or explorative data collection could be used to appropriately tune up the measurement scale.

**Figure 1: Measurement Scale**

Interval level measurement of the out-of-pocket costs of justice is an alternative to the ordinal scale. The users of justice could be asked what exact
monetary outlays were made during the path to justice. Although this device could be more appropriate if the respondent is aware of the amount, the interval measurement for many cost categories will only provide a rough estimate. Quantifying an ambiguous expense could embarrass the respondent, increase the measurement error, and lower the response rate.

The out-of-pocket costs are easier to measure in relation to the opportunity costs and intangible costs, but there are challenges involved. The presence of a lawyer, however, could obscure some expenses. In such cases, the user could merge the category of lawyer’s fees with other outlays, which the lawyer subsequently makes on his behalf. Mechanisms for identification and addressing such sources of measurement error have to be integral parts of the methodology for measuring the costs of access to justice.

4.2. OPPORTUNITY COSTS

How non-monetary resources spent on paths to justice could be classified into two categories was discussed above. The first group contains the costs for which a meaningful monetary value could be estimated from its second best use. The second category shows all other non-monetary costs of paths to justice that cannot be expressed in monetary terms without subjective transformation. The existence of markets for exchange of the resource will be the major criterion that differentiates the two sub-categories of the non-monetary costs. I will call the first category opportunity costs and the second category intangible cost. The term opportunity cost here is used to narrowly cover the non-monetary costs for which markets exists and the shadow costs for which they could be estimated.

The most vivid example of opportunity cost is the time spent by the user of justice on the procedure. Had the process not consumed the time of the user, she would have been able to earn wages, enjoy recreational activities or utilize the value of her own time in some other manner. The second best alternative of sacrificing the time determines the opportunity costs of the resource. In our example, the shadow price of time could be estimated through observation of the relevant labour markets or through valuation of the price that the same user of justice is willing to pay for recreational activities.

The monetary outlays also have opportunity costs, which could be estimated through analysis of the second best use of the resource. In the framework of costs of paths to justice, I adopt a narrower view on the opportunity cost of monetary expenses. The amount of money spent is a sufficiently good indicator of the private costs of a path to justice. Since the out-of-pocket costs
are expressed in meaningful and comparable units, I will not further investigate their opportunity costs. Estimation of the opportunity costs of the monetary expenses will unnecessarily complicate the measurement of costs of justice.

On a path to justice, one could clearly recognise the pervasive character of opportunity costs. Personal time is the resource that users of justice have to spend on every procedure in order to receive an outcome. A procedure may require many other non-monetary expenses, but these generally belong to the category of opportunity costs. I categorize these costs in the category of foregone earnings, different then personal time, spent on the path to justice. The content of the foregone earnings category will vary from path to path. With the advancement of the analytical and empirical research on the costs of justice, costs from the foregone earnings category will become more transparent and measurable.

4.2.1. Personal time as a cost of justice

Successful completion of a path to justice requires the user to sacrifice personal time. The amount of time varies significantly by the type of process, value at stake, level of involvement of the user, affordability of legal services, etc. For instance, a pro se litigant will spend significantly more time on a process compared to someone who is represented by a lawyer. In this case, the party represented by a lawyer will spend less time, but will incur larger out-of-pocket expenses. If only the monetary outlays were counted, one could conclude that the process is costly for the latter and inexpensive for the former disputant. This conclusion will not be valid, however, for the amount and value of the time invested by the pro se litigant.

There are two challenges in estimating the time component of a path to justice. First, the total amount of time spent on the procedure by the user of justice has to be estimated. Even for relatively quick paths to justice, the quantification of the time spent could prove to be difficult. The next challenge is the need to translate hours, days, months, or years into standard units, i.e. money.

As in the case with the monetary outlays, the amount of time spent on a path to justice could be inferred either from the users’ perceptions or from other sources, which could contain information on time spent. Memory decay, uncertainty, and unwillingness to answer are major challenges for the direct estimation from the users of justice. Official sources and documents will probably omit most of the time expenses, as those expenses will fall in the private domain of the user of justice.
Two strategies that have the potential to improve the reliability of time estimates will be discussed briefly. Each approach requires the collection of prior information on the likely amount of personal time spent on a path to justice. First, the measurement tool could be organized around the development of the procedure. Thus, the users will be better able to reconstruct the event and account chronologically for time spent. Another practical approach for increasing the reliability of the measurement tool would be to organize the time spendings around specific process events. Barendrecht, Mulder et al.\textsuperscript{66} suggest examples of possible sources of time spendings on a path to justice:

- Searching for an (legal) adviser;
- Interaction with the other party;
- Consultation (family, friends, etc.), seeking legal advice, deciding on strategy;
- Interaction with authorities;
- Instructing lawyers;
- Collecting evidence;
- Attending hearings;
- Amount of time spent travelling.

After the amount of time spent on a path to justice has been estimated, it must be expressed in money in order to calculate the total cost of the procedure. Time is a scarce resource and has value. The shadow price of time could be measured through an assessment of the net benefits that might be generated from the second best use of time and resources. Estimating the second best alternate use of a given resource requires choices about a range of possible alternatives and the ranking of these alternatives\textsuperscript{67}. Choices could be made by the researcher (or policy maker) or inferred from actual behaviour or stated preferences of users of justice. Two approaches are possible in estimating the second best alternative – universal and marginal approach. Under the universal approach, the researcher makes the assumption that certain alternative uses of a resource is the second best – i.e. working for a wage, or the value attached to recreation, is the shadow price of time spent\textsuperscript{68}. Another approach has been used by the Dutch Advisory Board on Administrative Burdens\textsuperscript{69} in valuing the

\textsuperscript{66} BARENDRECHT, et al., How to Measure the Price and Quality of Access to Justice? at 14.


\textsuperscript{68} KERRY V. SMITH, et al., The Opportunity Cost of Travel Time in Recreation Demand Models, 59 Land Economics 259, (1983).

\textsuperscript{69} INTERDEPARTEMENTALE PROJECTDIRECIE ADMINISTRATIEVE LASTEN, Meten Is Weten. Handleiding voor het definiëren en meten van administratieve lasten voor het bedrijfsleven available at http://www.actal.nl/actal_sites/objects/home/handleiding_meten_is_weten.pdf.
time that companies lose in administrative procedures\textsuperscript{70}. The assumption was made that a uniform value could be attached to time spent on certain activities. In the case of assessing the value of time as an administrative burden to enterprises, the authors suggest that a uniform value-of-time tariff could be defined at an organizational level (see footnote \textsuperscript{70}). The standard value-of-time approach could be applied at more general levels – professional groups, local communities, or even jurisdictions. These approaches are practically more feasible since they do not require extensive knowledge of the preferences of the particular user. At the same time, insufficient information is the greatest disadvantage of the approach. The applications of a single preference scheme to all users will inevitably result in some wrong classifications.

Several methods could be used to reveal the shadow prices of time. The supply and demand forces on the labour market produce a reliable indication of the value of time. If the user of justice is employed, the value of a lost day in court could be estimated by her regular wage. Problems arise when the labour market is imperfect; the user is not employed, or does not want to reveal her employment. It is possible that for a particular user, the second best use of time is not earning a wage, but resting, recreation, entertainment, or other modes of spending personal time that are not valued in the market. In such cases, revealed or stated preference techniques are more appropriate estimation methods.

An alternative approach for estimating preference functions of the users of justice requires that the researcher reveals the individual preferences of the second best alternative. Presumably, the second approach will lead to a more accurate estimation of the opportunity cost, but at the marginal price of obtaining additional information regarding the individual.

The willingness to pay (WTP) model is often used for estimation of the value of time\textsuperscript{71}. WTP is the maximum amount of money or other goods (measured in money) that the users of justice are willing to pay to avoid sacrificing time on a path to justice. For instance, if the procedure has an optional fast track

\textsuperscript{70} The report suggests that the valuation of the time spent should be carried out based on internal and external tariffs. The internal rates are the hourly rate of the employees according to their position. In a hypothetical case study, the report suggests that for a low-level, middle-level and high-level positions the values are respectively €30, €45, and €60. The external tariff is based on the existing information regarding the market value of professional services.

version, the additional cost for the fast track could be seen as the WTP value of the time spent. Another example could be the purchase of legal services, which prevent or reduce the loss of personal time (unrealistically assuming that the legal professional only provides services that relieve the time-burden from their clients). The legal fee in this case could be regarded as the WTP value of the amount of time required for the procedure. The rationale behind this method is that if people attach value to time, they will be willing to pay for it. Different methods exist for estimating the WTP value – i.e. stated preference methods (contingent valuation), revealed preference methods (travel cost method) and examination of market prices.

An alternative model for estimating the value of non-monetary resources is the willingness to accept (WTA)\(^{72}\). WTA is the maximum amount of money which a user of justice is willing to sacrifice for the amount of time that a path to justice takes. Compared to WTP, the WTA method usually produces larger values due to the assumed asymmetry between the perceived loss of an item and the gain of the same item\(^{73}\).

### 4.2.2. Foregone earnings

Apart from money and time, justice process could demand numerous other expenses made by the user. Due to ongoing procedures, the user might not be able to work, or might not work as effectively, as the procedure was not running. In addition, a plaintiff who has deposited certain resources will not be able to use them until the procedure is over. A lucrative business opportunity could be missed due to the ongoing procedure. The user’s human or social capital could be decreased because of the limitations of the process or uncertainty. For the same reasons, a resource could be devaluated. For instance, a restraining order could limit the owner to exercise his disposition rights. As a result, the owner could suffer losses in the forms of foregone rent, enjoyment of the estate, or access to credit or transfer. There is an infinite number of ways in which a user of justice could suffer losses during the course of a procedure. Looking at these losses from the perspective of the accessibility of the path to justice, they can be classified as barriers. Therefore, expected lost earnings have to be added to the total cost of the process.


The value of lost opportunities will be instituted in our framework as foregone earnings. These costs could be expressed as the value that users of justice give up in order to receive an outcome from a path to justice. In other words, the foregone earnings will be the difference between the actual use of the resource due to the justice process and the earnings from its alternative use.

Unlike the category of time, the foregone earnings cannot be measured in standardised units. The estimation of the foregone earnings requires placement of monetary value on the resource. Similar to lost time, the valuation could be done either through shadow prices or through stated or revealed preferences of the users of justice.

An alternative measurement approach towards the foregone earnings will be to ask the users, “How much did you lose because of the pending procedure?”. The question should clarify that it excludes monetary, time and intangible expenses. A challenge to the reliability of this method will be the difficulties for many users of justice to analytically differentiate between the various costs of justice. Placing a monetary value on the aggregated foregone earnings is highly subjective and susceptible to measurement error. In the contingency valuation method, a case study is used in order to improve the validity and reliability of the stated value of the foregone earnings. In the simultaneous estimation of diverse instances of foregone earnings, a case study method would be impractical. Showing the respondent the most likely instances of foregone earnings could stir her attention in the desired dimension, and help her to place a value on the measured cost of justice.

4.3. Intangible costs

Introduction
Dolan, Loomes et al.\textsuperscript{74} define the intangible costs of crime as the costs “[...] that are much more difficult to measure and quantify”\textsuperscript{75}. Pain, emotions, stress, suffering, and the fear of crime are examples of such costs in the context of criminal justice. Other effects of the negative perceptions on paths to justice could be lowered self-esteem, depression or self-degradation. The civil justice systems are similarly cognizant of the category of non-pecuniary damages. Most of the contemporary legal systems provide various remedies for compensation of pain and suffering damages that result from acts of tort or breaches of contract\textsuperscript{76}. Depending on the jurisdiction, damage claims could

\textsuperscript{74} DOLAN, et al., Estimating the intangible victim costs of violent crime.
\textsuperscript{75} Id. at 958.
\textsuperscript{76} MAURO BUSSANI, European tort law: Eastern and Western perspectives (Stämpfli; Sellier. 2007); MARCO LOOS, et al., ECJ, 12 March 2002, Case C-168/00 Leitner v. TUI Deutschland (2009) J. JURIS 142
ensue from emotional distress, psychiatric disturbance, embarrassment, discomfort, misery and grief, psychiatric shock and loss of enjoyment. What is common of damages in the systems of criminal and civil justice is that the law recognizes the legitimate needs for compensation of non-monetary losses.

Directly borrowing from the studies on the harmful consequences of crimes and torts are inappropriate. Normally, non-monetary losses that result from the problem itself outweigh the comparable process costs. Both criminal and civil problems can have a substantial impact on the personal integrity and health, well-being, property, dignity, and privacy of the affected person. For instance, the stress experienced by a victim of crime, a divorcée or a dismissed worker could easily cause serious psychiatric disorders. In contrast, the stress and emotions suffered on the course of a path to justice will rarely result in a medical condition.

In real life, many intangible costs of justice are difficult to assess and quantify. Even more challenging is clearly distinguishing the negative consequences of the social problems from the process related costs. Very few studies draw this distinction – for instance, Gutheil et al.\(^7\) term the emotional injury from civil litigation as *critogenic* harms. Another aspect hindering measurement efforts is the subjective character of intangible costs. Perceptions of the magnitude of intangible costs of the paths to justice are deeply contextual. Moreover, these perceptions tend to change over time, but the direction and size of change is far from predictable. Faced with this difficulty, most empirical studies on the costs of justice disregard the intangible costs due to their subjective character.

Although difficult, it is not impossible to measure some instances of the intangible costs. What are the intangible costs of the paths to justice? A review of the literature on the barriers to justice suggests several types of intangible costs. In an ideal world, all intangible costs of the path to justice would be measurable. Below, I focus on 3 categories which are assumed to comprise large parts of the intangible costs – stress, emotions, and damage to relationships.

Apparently, the difference between intangible costs and opportunity costs is slim. In fact, most intangible costs can be expressed as opportunity costs. Stress, pain and suffering could be given a value if there is sufficient information from markets such as insurance and health care. The difference is that for intangible costs the link between the actual loss and its valuation is more indirect. Therefore, the opportunity cost and the intangible cost categories are distinguished on the ground of feasibility of measurement and expression in monetary terms rather than the type of the invested resource. Again, the distinction between intangible costs and foregone earnings is relative and dynamic. With the advancement of respective knowledge domains and the invention of measurement tools, we could reasonably expect that some intangible costs will be re-classified as foregone earnings, or some other sort of cost caused by the delay of the procedure.

Dolan, Loomes et al.\textsuperscript{78} review three approaches for valuing the intangible costs of crime – a) stated or revealed preferences; b) adaptation and use of health and personal safety values from other sectors, and c) use of quality adjusted life years valuation instrument. In the criminal proceedings, a significant proportion of the emotional harm is caused during the course of the process. In this context, the intangible costs of the procedure could be even more prevalent and prohibitive from the monetary and opportunity costs. The authors discuss the acute stress disorder, mild post-traumatic stress disorder, and severe post-traumatic stress disorder. Even though a procedure is likely to cause some stress to its user, it is rather unlikely to result in a psychiatric condition such as a posttraumatic stress disorder or depression. However, there are numerous other instances of intangible negative effects, which could be attributed to the process.

**Stress**
Stress has been measured with objective and subjective scales. Cohen and his co-authors\textsuperscript{79} developed and validated the perceived stress scale (PSS) which “measures the degree to which situations in one’s life is appraised as stressful”. A significant limitation of the PSS scale is that it should be applied shortly after the event – the authors recommend a maximum time lapse of one month. As commented elsewhere,\textsuperscript{80} identifying and reaching users of particular paths to justice is a challenging task. Often, it will be impossible to collect perceptional data immediately after the outcome was delivered.

\textsuperscript{78}Dolan, et al., Estimating the intangible victim costs of violent crime.
\textsuperscript{80}Gramatikov at 24.
In order to overcome the trade off between validity and reliability, the measurement instrument will use a less sophisticated approach to measuring stress. Respondents are asked to identify the amount of stress on an ordinal scale. A disadvantage of the approach is that the stress is measured as a flat concept and, inevitably, the validity will be compromised. On the other hand, measuring the stress through a single item will give broad, but more reliable, information on the stress experienced by the users of justice.

**Emotions**

A slightly different approach will be used to measure the process-related emotions. Since it is difficult to conceptualize the impact of emotions, the instrument asks whether the particular user of justice has experienced certain emotions because of the process. A set of 5 emotions was identified on the ground of their relevance to the experiences of users of justice:
- Frustration
- Anger
- Humiliation
- Disappointment
- Hopelessness

All of the identified emotions are negative, meaning that they decrease the perceived quality of the path to justice and, consequently, impact its accessibility. It is possible that the user experiences positive emotions on a path to justice – i.e. happiness, relief, confidence or triumph. Unlike the negative emotions, those could be deemed as benefits, and will not be included in the framework of the costs of paths to justice.

**Damage to relationships**

The justice process could impair important personal relationships of one or both of the parties. Prolonged family dispute will inevitably affect the family relationships of the disputants. Relationships could be damaged in many different ways. A bitter dispute resolution process over a contractual relationship could additionally disrupt the trust between the parties. Parties could lose trust, love and affection, stop talking to each other, or get violent. In order to avoid an objective definition of damage to relationships, the framework leaves it to the respondent to decide whether they have suffered such damage on their path to justice.

Damage to relationships is more likely to occur in legal problems in which the relationship is an integral part of the dispute. Divorce is a typical example – a
dysfunctional justice process could additionally aggravate the conflict between the parties. In purely transactional disputes, like consumer problems, the relationships between the parties have little value and, therefore, the potential for damage of the relationship between the parties is lower. However, the justice process could also damage interactions with third parties involved in the dispute, such as family members, customers, friends, business associates or colleagues.

5. **Conclusions**

High costs of paths to justice are a significant barrier for unobstructed and equal accessibility to justice. Implicitly or explicitly, cost considerations shape the responses to existing legal problems. People compare the expected costs with the anticipated returns and make decisions, which directly affect their access to justice. Without adequate knowledge on the structure and dynamics of the costs of justice, researchers and policy makers are limited in their ability to contribute to the idea of equal and unobtrusive access to justice.

Using the substance of the cost and its measurability as classification criteria, I construct a framework of costs with three categories – monetary, opportunity, and intangible costs. Expanding the focus of research beyond the monetary costs largely improves the understanding of the barriers on paths to justice. As research on the costs of the crime suggest, the non-monetary costs could be a significant part of the total costs of justice. A more concentrated focus on the opportunity and intangible costs of justice could reveal new dimensions of barriers to justice.

Although it is difficult to measure the opportunity and intangible costs, it is important to integrate them in the overall assessment of the total costs of a path to justice. A major challenge for the actual measurement is to draw a distinction between the costs of the problem itself and the costs of the path to justice. This distinction is particularly difficult in relationship based disputes and conflicts.

The general purpose of the framework is to provide a coherent approach towards the costs of paths to justice. Starting from the identified barriers to justice, I group the individual cost categories into broader categories. The use of the categories of monetary, opportunity, and intangible costs provides two contributions to the studies of access to justice. First, the focus on the total cost of the paths to justice provides a more holistic approach to the barriers of justice. Research narrowly focused on the monetary costs risks failing to identify the existence of substantial non-monetary costs, which are prohibitive for access to justice. A second contribution of the framework is that it
provides comparability between the costs of different paths. The differences between the individual paths make it difficult to compare individual cost categories. On virtually all paths to justice, however, it will be possible to detect instances of monetary, opportunity and intangible costs.

Multiple inferences could be drawn from the measurement of the total costs of justice. Univariate analysis could further drive the body of knowledge on the size, variance, and distribution of the costs of paths to justice. Comparing the different categories of costs will indicate potential areas for policy and institutional responses to the gaps in accessibility. Prevalence of one of the cost categories could signal specific shortcomings of a particular procedure. Large, compulsory monetary costs are an indicator of unaffordable processes for solving the existing justice needs. Excessive foregone earnings will be a signal for prolonged procedures and prohibitive investment of resources, which could have alternative uses.

A practical question for further research is how the three cost categories could be expressed in comparable units. As discussed above, monetary and opportunity costs could be translated in monetary terms. Difficulties arise with the conversion of the intangible costs. Valuation of units of stress, emotions, or damaged relationships is difficult, if not impossible. An alternative approach to finding the total costs of the procedure would be to measure the monetary and opportunity costs on ordinal scales similar to those employed to measure the intangible costs. The downside of this approach is that it will be impossible to calculate the monetary value of the total cost of the path to justice. Instead, the measure will reflect the total costs on an ordinal scale, i.e. from 1 to 5. The advantage of the approach is that it will allow aggregation with the quality of the procedure and quality of the outcome – the other two indicators with which the project Measuring Access to Justice: The Hague Model of Access to Justice 81.

Understanding the costs of the paths to justice is critical for the feasibility of the policies and programs designed to improve the access to justice. Particularly, there is a compelling need for further research on the opportunity and intangible costs of the paths to justice.