

THE INFLUENCE OF LAW-AND-ECONOMICS ON THE IDEOLOGICAL CENTER OF CIVIL SOCIETY: THE NEW AMERICAN FORMALISM WITH A EUROPEAN COUNTERPOINT

*“Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world”*
W.B. Yeats¹

ARGUMENT ROADMAP

The struggle to identify the ideological “true center” of any society is daunting.² There are as many approaches as there are political interests, and none can truly claim absolute impartiality.³ However, it is empirically settled that civilizations have an increased chance to experience golden ages and flourish when their institutions, customs, and practices most accurately represent the ideals that a significant majority of the population espouse, or can reasonably agree on.⁴ Those values will always have their most perfect expression in a societal “temperate” zone, what I will call throughout this Note the “true center,” since only in the middle the disparate interest groups may find common ground, and strive for a consensus.⁵ Working backwards from this assumption, the extremely

1 W.B. Yeats, *The Second Coming*, in YEATS’S POEMS 294 (Macmillan 1989).

2 See Dan Balz, *What’s Left of the Political Center?* WASH. POST (July 5, 2014), [https://www.washingtonpost.com/politics/whats-left-of-the-political-center/2014/07/05/37122966-0447-11e4-8572-4b1b969b6322_story.html?](https://www.washingtonpost.com/politics/whats-left-of-the-political-center/2014/07/05/37122966-0447-11e4-8572-4b1b969b6322_story.html?hpid=hp_hp-top-table-main-politics%3Awhat%27s-left-of-the-political-center%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-politics%3Awhat%27s-left-of-the-political-center%3Ahomepage%2Fstory)

3 Scott Eric Kaufman, *Noam Chomsky: The Problem with US Politics is the Spectrum is “Center to Extreme — Way off the Spectrum — Right,”* SALON (Jan. 6, 2016), https://www.salon.com/2016/01/06/noam_chomsky_the_problem_with_us_politics_is_the_spectrum_is_center_to_extreme_way_off_the_spectrum_right/.

4 See generally 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 188, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112072200139;view=1up;seq=24>.

5 Lee Drutman, *We Need Political Parties. But Their Rabid Partisanship Could Destroy American Democracy*, VOX (Sept. 5, 2017), <https://www.vox.com/the-big-idea/2017/9/5/16227700/hyperpartisanship-identity-american-democracy-problems-solutions-doom->

polarized political climate currently present in the United States may provide a clue that the social and political discourse has indeed moved far from its “true center.”

Throughout this Note whenever I refer to the “true center” of society, the meaning I wish to convey will be precisely tied into a positive confluence of social phenomena that, in the aggregate, facilitates cooperation and synergy and, implicitly, the thriving of a civilization.⁶ It will be my assumption as well that it is desirable to have as much “centrist” discourse as possible, both in the name of stability and order (which the “right” highly values) and for the sake of true progress and equality of opportunity (satisfying the basic needs of the “left”).⁷

loop (“We now have two political parties with very different and increasingly irreconcilable ideas about what it means to be American, and, perhaps more saliently, what it is to be un-American.”).

6 The concept of a “true center” may appear to be itself a normative proposition; who can say what is the appropriate center of a whole society at any point in time, and how is one to find a methodology to properly support the existence of such a concept? However, I believe that there is sufficient empirical data that may support the existence of an identifiable “temperate zone” of societal discourse as well as that zone’s positive influence on the development of a society. The very idea of a civilization’s “Golden Age” seems to imply that there are certain conditions of fact that facilitated the emergence of that “age.” Pericles’ Athens did not just randomly happen; there were significant factors that contributed to that explosion of enlightened thought and action. These “golden age” conditions can be investigated empirically, even though such an endeavor is beyond the scope of this Note. *See, e.g.,* Thomas T. Thomas, *Formula for a Golden Age*, POL. & ECON. (Dec. 24, 2011), http://www.thomasthomas.com/Formula_for_Golden_Age_122411.htm. For an European comparison evidencing a similar idea, *see also* Neil Clark, *The Modern Left Has Much to Learn from Austria’s Golden Age*, THE GUARDIAN (Jan. 2011), <https://www.theguardian.com/commentisfree/2011/jan/21/modern-left-austria-bruno-kreisky>.

7 The “values” each side espouses are intentionally presented in this schematic form. The intention is not to encapsulate in a simplistic definition all that it means to be on the “right” or the “left” of the political spectrum. The range of belief in any individual will rate on a continuum anyway; there is no true “right-wing person” or true “left-wing person.” This, however, plays into my main point, buttressing the need for a significant portion of the societal discourse to take place in the center where the two “sides,” such as they are, can meet. For a disturbing example of anti-centrism views, see Gladstone, *How the Word “Centrism” Became an Insult (And Why It Should Be)*, PASTE MAG. (Aug. 31, 2017), <https://www.pastemagazine.com/articles/2017/08/how-the-word-centrism-became-an-insult-and-why-it.html> (“[T]here’s a very good reason so many in the growing progressive movement

This Note is mainly concerned with the unfortunate influence the law-and-economics methodology is having on contemporary legal discourse and adjudication in the United States.⁸ The main drive behind my critique is the desirability⁹ of promoting legal discourse that helps ground the “true center” of society. This Note argues that the law-and-economics movement, both in its normative and descriptive applications to legal analysis, has significantly aided the derailment of American society from its “true center.” By contrast the relatively peaceful and constant progression towards “true center” values in Europe is not being countered by a judicial method of analysis predisposed to conservative values. I discuss several reasons for this divergence throughout the Note, pointing out the irony of a nominally formalist European jurisprudence that is in fact enacting the core values of the American legal realist agenda, while the law-and-economics methodology, a purported descendent of the

find centrism so ethically devoid. That’s because it’s incredibly bizarre to think of centrism as a belief system in the first place.”).

8 This Note does not argue that law-and-economics, by itself, has brought about the current state of affairs in the United States. No single phenomenon can hold that dubious honor, but it is, in my view, incontestable that the practice and advocacy grounded in the methodology of law-and-economics have significantly “helped” the overall societal process of abandonment of its “true center” for a new “false center,” far to the “right.” These concepts will be fleshed out further throughout this Note. See Kaiser, *infra* note 9.

9 Robert G. Kaiser, *How Republicans Lost their Minds, Democrats Lost Their Souls and Washington Lost Its Appeal*, WASH. POST (Feb. 28, 2014), [https://www.washingtonpost.com/opinions/how-republicans-lost-their-mind-democrats-lost-their-soul-and-washington-lost-its-appeal/2014/02/28/2ef5429c-9d89-11e3-9ba6-800d1192d08b_story.html?](https://www.washingtonpost.com/opinions/how-republicans-lost-their-mind-democrats-lost-their-soul-and-washington-lost-its-appeal/2014/02/28/2ef5429c-9d89-11e3-9ba6-800d1192d08b_story.html?hpid=hp_hp-top-table-main-obamacare-split%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-obamacare-split%3Ahomepage%2Fstory) (remarking on the absurdity of some of the partisan rhetoric present in Congress: “[W]hen global-warming deniers hold forth on the floors of the House and the Senate, and numerous Republicans merrily denounce our *moderate president* as a “Socialistic dictator[.]”) (emphasis added).

realists, is instituting a new limiting and conservative formalism in the United States.

This Note proceeds in five parts. First, in the introduction section, I will lay out the general state of legal commentary and adjudication looking at both law-and-economics in the United States and the modern European jurisprudence.¹⁰ Second, I will conduct a brief historical survey of the evolution of jurisprudence in the United States, focusing on the law-and-economics movement's eventual dominance of legal discourse.¹¹ Third, a similar brief survey of the European history and development of jurisprudence will be outlined.¹² In the fourth part, I will present the main issue driving this Note,¹³ and in the final section I will sketch out a few ways the situation I have identified may be ameliorated.¹⁴

I. INTRODUCTION

The law, as an influential normative social phenomenon, must endeavor to be impartial, so it may remain one of the principal anchors of a well-balanced civil society.¹⁵ I believe that most other human institutions can, will, and arguably should swing with the pendulum of civilization, thus avoiding stagnation and decay; but the practice and commentary of law should avoid becoming just another political tool. The proper role of

10 *See infra* Part I.

11 *See infra* Part II.

12 *See infra* Part III.

13 *See infra* Part IV.

14 *See infra* Part V.

15 *See Overview - Rule of Law*, U.S. CTS., <http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last visited Nov. 20, 2018) (“There are . . . principles that are so important . . . that the majority has agreed not to interfere [T]he Bill of Rights was passed because [these principles] . . . were deemed so important that . . . not even a majority should be allowed to change them.”).

legal decisions and commentaries is to provide a frictionless pivot, grounding society as close to the “true center” as possible, while preserving the constitutional¹⁶ values of the civilization in which they operate.

First, contrary to this desirable goal, the Chicago School’s variant of law-and-economics,¹⁷ an approach pioneered in the late seventies, has risen to a dominant position in legal commentary by employing a purely partisan approach to societal problems under the guise of an innocuous methodology.¹⁸ This strand of law-and-economics is presented¹⁹ as a

16 I use constitutional here in the sense of foundational. This concept is not necessarily limited only to the Constitution adopted at the founding of the United States, but, I believe, can and should be expanded to encompass the true Enlightenment values the Founding Fathers espoused. America is a child of the Enlightenment, a Western experiment in individual freedom and personal autonomy. As such, its practice of the law should derive its substance from these basic principles and attempt to approach legal issues with an eye on preserving their continued vitality in the American society of today. See Jacob Soll, *What Do We Owe to the Enlightenment*, NEW REPUBLIC (May 20, 2015), <https://newrepublic.com/article/121837/what-do-we-owe-enlightenment> (remarking that “[t]he ideas of the Enlightenment are going through a crisis in the very country founded on them.”).

17 Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (adducing philosophical support for the establishment of a new interpretation of law-and-economics, one that will eventually be designated as the Chicago School).

18 See John Cassidy, *Ronald Coase and the Misuse of Economics*, THE NEW YORKER (Sept. 3, 2013), <https://www.newyorker.com/news/john-cassidy/ronald-coase-and-the-misuse-of-economics>. Throughout this Note, when referring to law-and-economics I will refer to this dominant strand of the method, the Chicago School, and more precisely to the rampant abuse of that method which has helped create the current skewed and polarized American political reality. This usage does not purport to conflate *all* researchers that are using economics to illuminate the law; there are a multitude of economists/lawyers who use their cross-disciplinary training to arrive at well-reasoned and insightful commentaries and decisions. These professionals are not in the crosshairs of this Note.

19 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Wolters Kluwer Law & Business 9th ed. 2014).

natural continuation of Coasean insights,²⁰ merely a descriptive and rational approach that illuminates judicial decision-making and law in general.²¹ Of course, there were significant signs of the misuse of economics as a methodology in the law even before the Chicago School stepped in and “perfected” the method.²² However, it was the Chicago

20 See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) (setting up the groundwork for law-and-economics through the Coase theorem). See also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961) (applying the incipient law-and-economics method to the tort field).

21 Of course, there was a significant “right” bias in the initial approaches of Coase and Calabresi as well. This is evident because of their chosen starting point of analysis, the reduction of human behavior to economic models. But neither of these researchers advocated this new outlook as the only rational way of looking at the problem. On the contrary, Coase argued against such a limiting approach to the law and maintained only that it would be useful to *also* use economics to illuminate a legal problem. See Coase, *supra* note 20 at 42-44. In that limited form I believe the approach is extremely valuable and provides useful tools for a well-balanced legal analysis or decision. As argued extensively throughout this Note, however, this usage has fallen prey to a more militant approach: economics as the *only* rational way to approach a legal problem. That was not the intention of the founding members of the movement and it is just their epigones that have lost their way and now must be combated.

22 For an early precursor to the Chicago School’s militant approach, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin argues that a society owning land in common (his example is a pasture) would inevitably lead to the destruction of that commons. *Id.* at 1244. As a solution, he advocates (alongside Coase for that matter) that private property should be implemented into that society. *Id.* at 1248. He proceeds by first assuming that “it is to be expected that each herdsman will try to keep as many cattle as possible.” *Id.* at 1244.

His assumption comes from importing the *homo economicus* model of describing individual behavior. As such, the desire to maximize profit is built-in as a stock trait of all possible humans. But, in this hypothetical society where people own land in common, they need not necessarily be modeled by a commercially inclined world view. It is particularly curious that an American researcher would miss this empirical point, given the history of the continent. Native Americans have held in common their hunting grounds for close to a millennium without a “tragedy of the commons” occurring. It was precisely when the colonists came, with their commercial modes of being, that the hunting into near extinction of the buffalo occurred. This goes a long way towards proving that societies who subscribe to ownership in common are also likely to “breed” the type of individual that would not impose unnecessary externalities on his community by over-using a common resource. In a common ownership society, the social pressures to be a “good neighbor,” for example, can by themselves perform the coercive function that individual property rights attempt to perform in commercial societies. Even if these pressures are not formalized into law, they are sufficient to force an individual

School that ultimately reduced judges almost exclusively to their function as rational, economically minded citizens, and it described law merely as a mechanism for transferring commodities into higher value positions.²³ As such, under this methodological paradigm, judges will and should apply the law only with a constant focus on obtaining the most efficient, and economically practical outcome.²⁴ This goal is advocated as a natural and direct consequence of a straightforward application of the “value-neutral” science of economics to law controversies.²⁵

But, the modes of analysis that economics employs within the law, even if facially “value-neutral” and rational, tend both to achieve consistent conservative results, and, more grievously, to alter, over time and because of persistent use, the very landscape of legal analysis reducing all human interaction and conflict to actuarial tables.²⁶ Thus, the law itself becomes unidimensional and is relegated to a process of “maximization of

to internalize the externalities that could be brought on her community should she choose to employ a rapacious appropriation of communal property.

23 See Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 85, 103 (1985).

24 Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 500 (1980).

25 *Id.*

26 This is a gradual process. No single misuse of economic analysis of the law can be held responsible for the deleterious effects on society's discourse that this Note argues are present. However, there is a cumulative effect of the constant use of this methodology—to the exclusion of most other approaches—in legal discourse and adjudication. This effect normalizes and justifies a commodified version of legal discourse in areas of the law where that should not be allowed. See Strauss, *infra* note 64.

utility.”²⁷ This truncated, managerial law can no longer properly perform its natural function of impartial mediator between different societal interests, since it sees all cases through the deeply distorting lens of economics,²⁸ a science that has always been the handmaiden of existing power and privilege.²⁹

Second, and by way of providing a counterpoint, the European distaste for an economic approach in the analysis of the law has kept the continent strongly in the “internal-coherence-of-the-law” camp advocated by the doctrinalist approach.³⁰ Even though some inroads have been made by law-and-economics,³¹ it nevertheless remains a fringe methodology, sparsely used by European jurists.³² This has allowed, somehow surprisingly, greater flexibility in the enforcement of European laws.³³

27 See POSNER, *supra* note 19; see also Thomas S. Ulen, *The Unexpected Guest: Law-and-economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT. L. REV. 403 (2004).

28 See Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 588 (1986) (“Economic analysis . . . would pull the underpinnings out from [laws protecting the less powerful]. . . . [A]dvocacy of law-and-economics signals a preference for the established order and an ungenerosity toward those outside of the circle of advantage and power.”).

29 *Id.* (“Since so much of the law being interpreted by the courts was designed to give a boost to the less advantaged, and since Americans today are so receptive to the claim that law should be efficient, advocacy of a generous use of law and economics sounds a political theme.”).

30 Kristoffel R. Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT’L & COMP. L. REV. 295, 296 (2008) [hereinafter *Transatlantic Divergence*].

31 See Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT’L REV. L. & ECON. 265, 271-72 (1991) (inaccurately predicting that the law-and-economics movement in Europe is just lagging behind the United States by fifteen years, but that it would pick up momentum in the future).

32 Herget & Wallace, *infra* note 82.

33 See, e.g., Aernout Nieuwenhuis, *Freedom of Speech: USA vs. Germany and Europe*, 18 NETH. Q. OF HUM. RTS. 195, 214 (2000) (arguing that the European laws criminalizing racist

This is because a European “formalist” will accept the undisputed prerogative of the legislature to legislate on any matter, as long as the law produced is harmonious with the body of law present.³⁴ As such, if there is sufficient political motivation to legislate in an area, the judiciary will neither block nor promote that political agenda;³⁵ it will simply endeavor to apply the law in a straightforward manner, while at the same time guarding against departures from the established jurisprudence.³⁶ This European empirical reality allows their political system to effectuate “true center” legal solutions to actual societal problems with minimal judicial interference; least of all if that judicial interference, as in the United States, is to be done in the name of misconstrued or misapplied efficiency considerations.³⁷

utterances would never have been allowed in the United States because Courts would have found them unconstitutional). *See also* *infra* note 35.

34 *See* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253 (1996) (arguing that the European perceived formalism in judicial analysis is a restrictive view of what is in fact just a deferential systemic approach to the will of the legislative body).

35 *See Judgment Days*, *THE ECONOMIST* (Mar. 26, 2009), <http://www.economist.com/node/13376204> (remarking on the significant power the German Constitutional Court has within its system, and the legislative deference with which that institution chooses to exercise that power).

36 Leiter, *supra* note 34.

37 The problem is one of institutional competence as well as democratic accountability. First, in passing a law Congress should not have to worry about a judge balancing the economic impact of that law against the perceived benefits. This should be fundamental since the judge will inevitably have a personal opinion on what constitutes a societal benefit or a cost. But, it is not the judge’s place to make that final determination; the elected representatives of the people hold that right. Second, if elected officials promote a bad, or even inefficient law, they are always accountable to their constituents, and subject to the judgment of the court of public opinion. Not so in the case of federal judges, even when they purport to interpret the law through the supposedly “value-neutral” lens of economic theory.

II. A BRIEF LEGAL HISTORY OF THE UNITED STATES FOCUSING ON LAW-AND-ECONOMICS

At its core, the United States legal tradition is conservative and formalist.³⁸ Formalism can be both a descriptive way of looking at adjudication and a normative way of prescribing what adjudication should do.³⁹ In both instances, however, the focus is always on the independence of the legal system from coordinated branches of government.⁴⁰ In a purely descriptive sense, formalists believe that judges should reach decisions exclusively by discerning the applicable principles of law and applying them to the facts before them.⁴¹ This restrictive view of the law

It is deeply ironic, and evoking of Orwellian doublespeak, when we find staunch conservatives, always sounding the alarm bell against activist judges, now praising law-and-economics, which legitimates precisely a judge's right to interfere with the democratic process in the name of efficiency considerations. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (discussing costs and incentives in insurance markets in arguing that the Affordable Care Act's Individual Mandate is not permissible under the Commerce Clause). It is beyond the scope of this Note to analyze the extent to which judges, as a group, even understand economics as applied to, for example, disfavored categories of citizenry. However, the rational actor model has been sufficiently critiqued for this Note to just simply remark that this model does not apply to all categories of persons, and that it has serious limitations when dealing with many particular cases. *See, e.g.*, RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (2015); *see also Transatlantic Divergence*, *supra* note 30.

38 ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed. 1997) (“[Even when a murderer has been caught red-handed] [w]e nonetheless insist that . . . the state . . . must conduct a full-dress criminal trial that results in a verdict of guilty. . . . It is what makes us a government of laws and not of men.”).

39 *See* Steven M. Quvedo, *Formalist and Instrumental Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119 (1985) (providing an overview of the legal realist instrumentalist “attack” on the formalist deontological values). *See also* Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM. U. J. OF LEGAL HIST. 221 (1980) (arguing that legal formalism was not simply a conservative tool but a way to perceive the law as self-sufficient).

40 *See, e.g.*, MASS. CONST. art. XXX (providing that the judiciary “shall never exercise the legislative and executive powers, or either of them; to the end [that Massachusetts’ government] may be a government of laws, and not of men.”).

41 Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 320, 2010). *See also* CESARE BONESANA DI BECCARIA, AN

that does not allow for extraneous factors to be a part of a proper law analysis is now supposedly extinct. However, a nuanced version of formalism is strongly present in the writings of many U.S. judges and scholars,⁴² a fact that explains the ease with which conservative jurists have accepted the supremacy of economic analysis in the law.⁴³ These jurists have just substituted one type of formalism — law as a self-sufficient social phenomenon — with another — law that is best explained and practiced exclusively through the lens of economics.⁴⁴

As such, part of this Note's argument is that economic analysis of the law has now reached a formalist prevalence, both in substance and in its dominance of the American judicial commentary and adjudication.⁴⁵

ESSAY ON CRIMES AND PUNISHMENTS (W.C. Little & Co. 1872) (1764) (attempting to reduce the analysis of criminal law to a mechanistic, formal and rational application of the legal rules); RONALD DWORKIN, *LAW'S EMPIRE* 217 (Harvard Univ. Press ed. 1986).

42 See DWORKIN, *supra* note 41, at 218-19 (1986). See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 56 (1989) (Scalia, J., concurring in part and dissenting in part) ("It is our task . . . not to enter the minds of the Members of Congress - who need have nothing in mind . . . - but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.").

43 See Kronman, *infra* note 57.

44 David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949 (1981) (arguing that formalists and instrumentalists share a common baseline of understanding of what law is, or should be; but, that the latter merely go one step further by looking outside the law for other sources of explanatory and decisional power while the former maintain the sufficiency of law, by itself, to explain all legal processes. This familial similarity explains why the law-and-economics method—a strand of the legal realist, instrumentalist movement—has easily derailed into a formalistic practice by applying a one-size-fits-all analysis grounded in efficiency considerations).

45 See Kronman, *infra* note 57.

Advocates of this approach consistently deny any possible flaw in the application of economics to the law, maintaining that it should almost always be a fundamental part of a legal analysis and that to deny its primacy would be an irrational way to approach a legal problem.⁴⁶ The belief is that without an economic underpinning, *any* legal decision becomes unfounded at best, and most likely even harmful to the interests advanced.⁴⁷ This type of absolutist faith in one's method is curious considering the supposed, and often flaunted, "value-neutral" nature of the methodology.⁴⁸ It is also eerily similar to the formalist belief in the existence of a priori principles of the law that will inevitably dictate the outcome of all controversies, with the noted difference that law should apparently now bow to neo-classical price theory, or individual behavior driven by object scarcity, and other assumptions present in liberal economics.⁴⁹

To return to the historical evolution, the formalist theory of old was prevalent and universally accepted, at least at the level of theoretical explanations of adjudicating, until the "realist" challenge of the 1920s.⁵⁰

46 See Frank H. Easterbrook, *The Inevitability of Law and Economics*, 1 LEGAL EDUC. REV. 3, 3 (1989) ("If there is scarcity, law cannot be understood apart from economic thought. Neither teaching nor practice nor judging can disregard the subject.").

47 *Id.* at 4-5 ("Decisions based on falsehoods . . . will not achieve the purposes their authors had in mind . . . Without [law-and-economics], we shall be unable to achieve our objectives or understand the consequences of the rules other people propose. In this sense economic analysis is inevitable.") (emphasis added).

48 Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, (Apr. 14, 2004) (unpublished manuscript) (on file with Penn Law: Legal Scholarship Repository, Faculty Scholarship Paper 1131) ("Functional law and economics avoids paternalism and methodological imperialism by formulating value-neutral principles of collective choice.").

49 See generally POSNER, *supra* note 19. Judge Posner has sustained these restrictive views on the role of economics in the law in most all of his publications on the issue.

50 See Leiter, *supra* note 41, at 7.

The realists saw the judicial process as being highly influenced by other-than-legal considerations.⁵¹ In the works of Jerome Frank, Herman Oliphant, and Karl Llewellyn, to name a few, the adjudication process was viewed as indeterminate, especially in the cases that reached appellate review.⁵² This was so because these cases were usually not straightforward decisions that could be based exclusively on a clear reading of law.⁵³ The realists contended, thus, that judges cannot be truly impartial because they would habitually import their own normative considerations into the adjudication process.⁵⁴

For the purpose of this Note, it is sufficient to remark that “we are all realists now.”⁵⁵ The realists have dominated legal analysis in the United States for a considerable amount of time. Within this approach, the law-and-economics movement has evolved to a dominant position in both legal commentary and adjudication practice.⁵⁶ The dominance of the law-and-

51 *Id.* at 12.

52 *Id.* at 3. In these theorists’ views, the word “indeterminate” meant that most, if not all, cases that reach appellate review cannot be properly decided by a straightforward appeal to legal rules. As such, they contended, judges will import conscious or unconscious personal biases into adjudication. The Realists differed when discussing the extent of this phenomenon, but this Note will not delve into those differences.

53 *Id.* at 2.

54 *Id.* at 3.

55 Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

56 Bruce Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L. J. 929, 929-30 (1986) (arguing that there are two distinct law-and-economics schools: the Chicago School, which holds that “the only appropriate forms of legal argument are those that can be cast in a way that is acceptable to economists;” and the Yale Law School, which advocates the “integrat[ion] [of] distinctive grammar of law and economics into traditional forms of legal discourse, producing a richer

economics approach has been an accepted fact for more than thirty-five years, even by critics of the method.⁵⁷

As previously mentioned, this approach had its beginnings in the 1960s.⁵⁸ Later, the scholars from the Chicago School have altered the initial positions of Coase and Calabresi, who both advocated a mostly value-neutral methodological approach to law by using the tools of economics.⁵⁹ Thus, in a significant departure from the initial Coase model, modern-day economic analysis of the law, for example, assumes as a given empirical truth what Coase had postulated only as a theoretical model: the lack of transaction costs.⁶⁰ Coase himself has decried this narrow interpretation of his theory, stating that his theory was meant as a catalyst for further theoretical research into the use of economic principles in the analysis of the law, not as an axiom that advocates free market laissez-faire economics.⁶¹

conception of appropriate legal argument.”). The distinction between the two “schools of law and economics” has been since blurred, to the total domination of the “imperialistic” approach of the Chicago School. *See infra* note 57 and accompanying text.

57 Anthony T. Kronman, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 160 (1995) (“The law-and-economics movement was and continues to be an enormous enlivening force in American legal thought and, I would say, today continues and remains the single most influential jurisprudential school in this country.”).

58 *See* Coase, *supra* note 20; *See* Calabresi, *supra* note 20.

59 *See* Coase, *supra* note 20; *See* Calabresi, *supra* note 20.

60 Based on this warping of the Coase theorem, conservative judicial activists, led by the Chicago School, have led the laissez-faire, deregulation revolution, while arguably giving the world the 2008 recession in the process. There is significant research on the excesses of the unregulated market to warrant at the very least a skeptical attitude towards a purely economic approach to legal problems. *See* Douglas C. North, *The New Institutional Economics*, 142 J. OF INSTITUTIONAL & THEORETICAL ECON. 230 (1986) (arguing that a proper understanding of economic theory requires a significant investigation into the empirical situation of the actors involved, including the transaction costs associated with their interactions).

61 *See* Kaiser, *supra* note 9.

Supporters of the Chicago School approach will sometimes reply that applications of the economic analysis to the law that are blind to surrounding empirical realities are just poorly done, and do not represent the ideal way of using the method.⁶² However, it is the reality of more than thirty-five years of dominant application of this method which is relevant, not the supposedly benign intentions of the Chicago School scholars. The effect belies the intent. Empirically, in most cases, economic analysis of the law *is* being used as a powerful tool of polarization with a strong conservative bias.⁶³ True adherents to the law-and-economics method are supposed to be inveterate empiricists, and, as such, they should look at the actual cumulative effects of their method in action, not hide under the supposed purity and rationality of economic analysis of the law, as applied in a vacuum or behind university doors.

In its present militant and formalist form, economic analysis of the law has become the dominant conservative jurisprudential tool. It has the power to constantly influence judicial thought and lawyer behavior in all aspects of the law.⁶⁴ This influence helps to exacerbate the “right” shift

62 See Easterbrook, *supra* note 46, at 28 (“[E]conomics is not an addition to law, a strange outside force. Economics is an integral part of the study of legal rules and the rule-making process. *The only question is whether we do this well or poorly.*”) (emphasis added).

63 See Mark Thoma, *There’s a Conservative Bias in Economics*, THE WEEK (June 25, 2016), <http://theweek.com/articles/631010/theres-conservative-bias-economics> (“The conservative bias in economics *begins with the baseline theoretical model*, what is often called ‘Economics 101.’ This model of perfect competition describes a world that agrees with Republican ideology. In this model, there is no role for government intervention in the economy beyond setting the institutional structure for free markets to operate. There is nothing government can do to improve the ability of market to provide the goods and services people desire at the lowest possible price, or to help markets respond to shocks.”) (emphasis added).

64 See, e.g., David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L. J. 1619, 1620 (1991) (analyzing a precise

from a “true center” to a “false center” that American society has been experiencing for the last forty years. Nevertheless, the issue is not necessarily this pendulum swing, but the fact that law-and-economics is legitimizing this new “false center” by defending the use of economics in the law as just a baseline, scientific tool, and maintaining that theorists who subscribe to the method are merely apostles of rationality.⁶⁵ The fact that modern law-and-economics scholars and judges do not explicitly state their conservative bias is perhaps their most egregious fault. This is so because by pretending, or even honestly believing in some cases, that they are just applying a “value-neutral” method of legal analysis, they deprive their natural opponents—scholars and judges who believe in procedural rights, for example—of the opportunity to engage them, and to eventually balance the jurisprudential field through communication between the opposing camps. This dialogue would have the beneficial effect of returning legal analysis, and with it in time the entire legal profession, closer to its natural habitat, the “true center” of society.⁶⁶

example of the law-and-economics approach’s overapplication, in the case of the corporate lawyers’ tactics in civil rights litigation after the 1980s.)

These corporate lawyers would habitually bring their efficiency-oriented modes of analysis from commercial disputes into cases involving civil rights violations. This led to a process of commodification of social justice. In turn, this affected the underlying social contract because large segments of society no longer felt like they had a stake in the “American Dream.” Thus, society became less cooperative at all levels of interaction. This effect is contrary to the fundamental societal purpose of promoting synergy; if we wanted a zero-sum game, pure anarchy would be more efficient. See also David Dayen, *Corporate-Funded Judicial Boot Camp Made Sitting Federal Judges More Conservative*, THE INTERCEPT (October 23, 2018) <https://theintercept.com/2018/10/23/federal-judiciary-henry-manne-law-economics/> (describing a law-and-economics training program for judges and remarking that “[b]y introducing to federal judges what appeared to be a neutral method to organize and understand the law, [the program’s organizer] was able to significantly shift the way law is now practiced.”).

65 Parisi & Klick, *supra* note 47; POSNER, *supra* note 19; Easterbrook, *supra* note 46.

66 It would probably even suffice if legal analysis and adjudication would simply refrain from *helping* the right swing of societal discourse. It is not necessary for the law to help “the other side,” and embrace, for example, the postulates of critical legal studies. It would suffice if legal analysis and

At its core, law-and-economics is sustained by an explicit assumption that all individuals are rational economic actors, who invariably will behave in a predictable manner because they will always seek to maximize personal utility.⁶⁷ Starting from this ideological presupposition, the economic analysis of the law proceeds to apply economic rules in a supposedly “value-neutral” way to the entirety of legal human interaction, from family to constitutional law.⁶⁸ Leaving aside the impossibility of any methodology to actually reach a “value-neutral” perspective,⁶⁹ the laws of economics being used are uniquely unsuited for this designation. The science of economics is laden with classical liberal thought and subscribes to a limiting view of property rights, anchored in exclusive individualism.

adjudication would resume its natural position of impartial arbiter and allow the American society to gradually balance out the right-wing position it finds itself in. The main point of this Note was not to advocate for a partisan swing, but to illuminate the deleterious effects a partisan approach to law will have, and is having, on the society in which it operates. See Brian Z. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 WM. & MARY L. REV. 2235 (2015) (arguing that the modern jurisprudential landscape should not be limited to a simple dichotomy between natural law and legal positivism; but that it should include a “third pillar,” social legal theory, which is a balanced approach between these two extremes, one that is sensitive to the surrounding historical context in which law operates but also mindful of maintaining the internal coherence and purpose of the law itself).

67 See generally POSNER, *supra* note 19.

68 Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 759 (1975) (“The hallmark of the ‘new’ law and economics is the application of the theories and empirical methods of economics to the central institutions of the legal system Whereas the ‘old’ law and economics confined its attention to laws governing explicit economic relationships, and indeed to a quite limited subset of such laws (the law of contracts, for example, was omitted). The ‘new’ law and economics recognizes no such limitation on the domain of economic analysis of the law.”) (emphasis added).

69 See generally EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (W.D. Halls, trans., Steven Lukes, ed., The Free Press 1982) (1895) (arguing that there is no possible impartial methodology, and that, at most, a researcher can minimize his input into the researched problem by maintaining a formalistic separation between his personality and his hypotheses).

In a nutshell, the economic paradigm that is being used by the law-and-economics scholars is far from “value-neutral,” and while it is treated as rationally axiomatic, it reflects a strong initial ideological choice.⁷⁰

Because of these underlying assumptions and presumed axioms, the application of economics to the law should always be tempered by a holistic view of the case in controversy using a broader array of methodological tools.⁷¹ This point has been convincingly and exhaustively argued by Professor Laurence Tribe.⁷² In his efforts to comprehensively reply to Professor Easterbrook, Professor Tribe correctly argues that the utilitarian approach of law-and-economics is constitutively incapable of providing proper guidance to legal decision making, especially at the Supreme Court level.⁷³ Ultimately, this is because utilitarian views cannot contain any discourse about values, they are by their very nature incapable

70 See Thoma, *supra* note 63. See also Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905-06 (1980) (identifying the “systematic bias of Chicago law-and-economics favoring the [economic] status quo.”). Professor Horwitz’ critique of the incipient Chicago School is valuable in its entirety, even if it prematurely prognosticated its demise: “I have the strong feeling that the economic analysis of law has ‘peaked out’ as the latest fad Future legal historians will need to exercise their imaginations to figure out why so many people could have taken most of this stuff so seriously.” *Id.* at 905.

71 This point has been conceded by one of the preeminent advocates of law-and-economics, Frank Easterbrook, in his polemic with Laurence Tribe. See Frank H. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 623 (1985) (agreeing with Professor Tribe that not all disputes should be governed by utilitarian principles; “[professor Tribe] believes . . . that many human concerns cannot be (or ought not to be) monetized . . . and that the Constitution often instructs judges to disregard utilitarian calculations in favor of recognizing personal rights and reshaping preferences. I am delighted to agree.”).

72 See Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 595 (1985) [hereinafter *Constitutional Calculus*] (“Contrary to Professor Easterbrook’s assumption, the constitutional decisions of courts . . . serve not merely to implement ‘given’ systems of acknowledged values, but also to define and reshape the values - indeed, the very identity - of the nation.”).

73 *Id.* (“[The Supreme Court] not only chooses *how* to achieve preexisting ends, but also affects *what* those ends are to be and *who* we are to become.”).

of providing answers to any “oughts.”⁷⁴ Owing to its structural shortcomings, law-and-economics should not drive the discourse in legal analysis and adjudication; it is simply not the proper tool for the job.⁷⁵

III. A SCHEMATIC OUTLINE OF EUROPEAN LEGAL HISTORY AS A USEFUL COUNTERPOINT

Europe is the birthplace of both dominant forms of legal systems; the Roman Empire through the Justinian Code inspiring the civil system and the British Empire through the system of writs promoting the common law.⁷⁶ Europe has also long been a divided place, not only geographically by nations, but also in its nations’ legal traditions.⁷⁷ There are several

⁷⁴ *Id.* at 596 (“The appeal of utilitarian policy analysis, as well as its power, lies in its ability to reduce the various dimensions of a problem to a common denominator. The inevitable result is not only that ‘soft’ variables . . . tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character. . . . Being ‘assigned’ a right on efficiency grounds, after an appraisal of the relevant cost curves, hardly satisfies the particular human need that can be met only by a shared social and legal understanding that the right belongs to the individual because the capacity and opportunity it embodies are organically and historically a part of the person that she is, and *not for any purely contingent and essentially managerial reason*. As Justice Stewart concisely put the matter . . . ‘Personal liberties are not rooted in the law of averages.’”) (emphasis added) (footnotes omitted).

⁷⁵ *Id.*

⁷⁶ See generally BART WAUTERS & MARCO DE BENITO, THE HISTORY OF LAW IN EUROPE, AN INTRODUCTION (2017), <https://www.e-elgar.com/shop/eep/preview/book/isbn/9781786430762/>; see also Thomas Plucknett, *The Conquest and “Domesday Book” through Henry I’s Reforms*, in A CONCISE HISTORY OF THE COMMON LAW 11, 11-16 (2010), <http://oll.libertyfund.org/titles/plucknett-a-concise-history-of-the-common-law>.

⁷⁷ *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION, <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> (last visited Nov. 23, 2018).

distinct civil law traditions within Europe, most notably those of France, Germany, and Scandinavia. The civil law, in general, is derived from “*ius civile*, the law applicable to all Roman *cives* or citizens.”⁷⁸ In the Middle Ages, most of western Europe developed a common system of law founded on the Justinian Code that “was taught at most universities and formed the basis of a shared body of legal thought.”⁷⁹ This initial uniformity of law and custom provided a solid foundation for the current attempt at integration through the European Union. In the interim, however, the aspirations of the eighteenth-century Enlightenment produced different legal codes in the dominant European continental states of the time.⁸⁰ These codes are now the model for most of the world’s civil codes.

The legal scholars and judges of contemporary Europe generally adhere to a legal positivist approach to the law.⁸¹ But this has not always been the case, as evidenced by the existence of the “free law movement” in Germany,⁸² with a “central period” between 1899 and 1912.⁸³ Of

78 *Id.*

79 *Id.* (“The birth and evolution of the medieval civil law tradition based on Roman law was thus integral to European legal development. It offered a store of legal principles and rules invested with the authority of ancient Rome . . . [allowing] a comprehensive legal code [that provides] substantive and procedural law . . .”).

80 *Id.* (citing the 1786 Code of Joseph II and Complete Civil Code of 1811; the 1794 Complete Territorial Code in Prussia; and the 1804 Civil Code in France, which is also known as the Napoleonic Code).

81 *See Transatlantic Divergence*, *supra* note 30, at 303 (“[L]egal positivism, understood as strict adherence to positive law to the exclusion of any substantive justification of norms, caused legal scholarship to dissociate from other disciplines.”).

82 James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 421-28 (1987) (arguing that one of the sources for American legal realism was the free law movement from Germany and drawing attention to the crosspollination of academic ideas across the Atlantic between legal scholars in late nineteenth and early twentieth centuries).

83 *Id.* at 402.

course, all schools of jurisprudence were represented in European legal analysis in the late nineteenth century.⁸⁴ However, in the end, legal positivism won the debate, owing its victory to the strong social circumstances favoring a clear separation of powers—the spirit of the age, and perhaps of the land, required that law be law and nothing else. As such, in true positivist fashion, “law [was identified] in a manner that would clearly separate it from the morality with which it had been ‘confused.’”⁸⁵ This approach helped to define law “as those commands or norms that emanate[] from the state.”⁸⁶

This purely deferential view of the law in the face of legislative will is fundamental to the understanding of contemporary European jurisprudence. However, and more salient to this Note’s inquiry, the European jurisprudence is not entirely positivist; the strong and respected “historical school” has influenced and added nuance to the European legal scholarship.⁸⁷ Savigny, the originator of this school, and his ideas of the

84 Three main schools of jurisprudential thought existed at that time. First, there were followers of a “historical school” represented mainly by Savigny, and in the company of intellectual powerhouses like Hegel and Darwin. Second, the natural law school was also strongly represented, and advocates of that perspective, heavily influenced by Thomas Aquinas, were mostly centered around Catholic universities. Lastly, the analytical school, or the legal positivist school existed as well. This latter school of thought ended up dominating European jurisprudence. See *Transatlantic Divergence*, *supra* note 30, at 296.

85 Herget & Wallace, *supra* note 82, at 404.

86 *Id.* (“Thus, in the positivist view the paradigm of law was legislation.”).

87 *Id.* at 406-407 (“[T]he fusion that enactment of [the German law code] brought about between the competing schools of thought resulted in a relatively standardized and authoritative approach to the [origin of law] problem.”).

Volksgeist,⁸⁸ the spirit of the people from which law emanates, are strongly present both in the national legal systems with their internal laws⁸⁹ and in the structures of the European Union.⁹⁰

In any case, it can convincingly be said that the strong European tradition favoring a high level of formalism has never been dethroned, at least not in the manner that the American legal realists envisioned and realized in the United States. Interestingly, the United Kingdom also adheres to the European formalist tradition even though it shares the common law system with the United States.⁹¹ The majority of modern European legal scholars assume the field of law to be a distinct area of inquiry, with its own methodological tools,⁹² and they analyze judicial decisions and proposed new legislation by inquiring into their internal consistency with the entire body of law.⁹³ Even in the United Kingdom,

88 For an interesting comparison between Savigny's idea of possession with Holmes's and the law-and-economics approach, see Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000) (finding that both Savigny and Holmes were wrong, and that (surprise!) law-and-economics can always explain possession better).

89 As an example, the French will always see their 1789 Declaration of Human and Civic Rights as foundational to the whole of modern western civilization. Similarly, the Germans see their tradition within the law as ancient and venerable, as well as the only tradition that kept intact the spirit of Roman law, through the age of the Germanic Holy Roman Empire.

90 *The Institution: General Presentation*, CT. OF JUST. OF THE EUR. UNION, https://curia.europa.eu/jcms/jcms/T5_5119/en/ (noting that the Court of Justice of the European Union ensures uniform interpretation of the laws of the European Union throughout the member states).

91 See *Transatlantic Divergence*, *supra* note 30, at 303 ("Admittedly, law and economics have made some inroads in the U.K., notably in corporate law, but as a whole, scholarly work based upon black-letter law continues to predominate as it does on the European continent. External or critical perspectives seem to remain marginal as they do in continental Europe."); see also Neil Duxbury, *When Trying is Failing: Holmes's "Englishness,"* 63 BROOK. L. J. 145, 146 (1997).

92 In other words, they are legal positivists.

93 See *Transatlantic Divergence*, *supra* note 30, at 295-96 ("[In Europe] [l]aw is typically viewed 'from the inside,' that is as an autonomous discipline independent from the other social sciences. Most legal scholarship is doctrinal, meaning that legal scholars employ interpretative methods in order to systematically expose the law and to find out what the law is, frequently even

most legal commentators will look at the common law with a much stricter deference, allowing for limited flexibility in the system, in contrast to the comparatively pragmatic American approach.⁹⁴ As such, the existence of a common law system, as opposed to a civil one, seems not to be the distinguishing principle that allowed for the realist approach to flourish.⁹⁵ Thus, a different limiting principle must be found.

A strong candidate explaining the existence of this divergence in approaches between the United States and Europe is the former's legal scholars' predisposition toward utilitarian and pragmatic modes of analysis.⁹⁶ While utilitarian approaches need not entail a total lack of

before it is tackled by a court. U.S.-style legal scholarship is often considered very alien, and law and economics in particular often meets outright rejection.”).

94 Even though the United States and the United Kingdom share a common system of laws, the British evolution of the common law has ossified their precedents to a larger degree than in the relatively young American jurisprudence. This fact, coupled with probable differences in national character, have led to a significant variance in the way judicial commentators treat precedent. While in the United Kingdom, most legal scholars will look at precedent as having almost the force of written law (similar to a civil system), in the United States, while *stare decisis* is still given significant weight, the flexibility and innate pragmatism of the American judicial mindset seems to favor a faster change in the rules. A deeper analysis of these differences is, however, not within the scope of this Note. For a fascinating and insightful dialogue on the topic between Justice Ginsburg and Lord Hale, see *British and U.S. Legal Systems*, C-SPAN (Jan. 24, 2008), <https://www.c-span.org/video/?202885-1/british-us-legal-systems>.

95 See generally H.L.A. HART, *THE CONCEPT OF LAW* 138-44 (Oxford Univ. Press 1961).

96 See, e.g., *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 860 (7th Cir. 2002) (Posner, J). (“One must know something about the practical as well as the purely verbal context of the language to be interpreted. This doesn't mean that judges should have an M.B.A . . . but merely that *they be alert citizens of a market-oriented society* so that they can recognize absurdity”) (emphasis added).

sensibility to issues of distributive justice,⁹⁷ the modern law-and-economics approach in practice *does* tend to ignore these issues.⁹⁸ As such, while in Europe legal scholars would try to determine what is “right,” in the United States often the question would be recast into what is “expedient” or, more recently, as this Note remarks, what is most “efficient.”⁹⁹

In conclusion, because efficiency was not (and is still not) considered a highly relevant consideration in a proper legal analysis, let alone *the only* consideration as in the law-and-economics method, European jurisprudence and adjudication has remained largely unaffected by the law-and-economics revolution.¹⁰⁰ Because of this factual state of affairs,

97 See, e.g., PAUL J. KELLY, UTILITARIANISM AND DISTRIBUTIVE JUSTICE – JEREMY BENTHAM AND THE CIVIL LAW (1990) (attempting to remove Bentham’s philosophy from the vulgar oversimplification of utility maximization that many purported followers erroneously insist he was advocating).

98 See *Constitutional Calculus*, *supra* note 72, at 594-95 (“Professor Easterbrook tells us that what we need to ask is what effect the alternative rules will have on the future behavior of individuals; but he does not bother to inquire how those same alternatives *will affect the future distribution of power and wealth among those individuals*, nor does he care to know how the parties actually before the court initially arrived at their unequal positions. This disregard of the *distributional* dimension of any given problem is characteristic of the entire law-and-economics school of thought, which assumes a world in which no one is economically coerced and in which individuals who do not ‘buy’ things are said to be ‘unwilling,’ rather than unable, to do so.”) (emphasis added).

99 This tendency can best be explained by the philosophical differences in approaches to moral theory. While European scholars (especially on the continent) mostly subscribe to the Kantian/deontological view of morality and law, the United States has a significant bend toward utilitarian approaches. This difference in views goes a long way in explaining the ease with which law-and-economics has conquered the American legal landscape, becoming the new formalism; and conversely, it also explains to a significant extent why it probably will never have the same impact in Europe. See *Transatlantic Divergence*, *supra* note 30.

100 See Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT’L L. 602, 620 (2006); Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States* (Mar. 22, 2007) (Ill. Law & Econ. Working Papers Series, Research Paper No. LE07-009), <https://ssrn.com/abstract=972360>; but cf. Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J.

the legal landscape in Europe is mostly conservative from the perspective of methodology (positivist) but also purely deferential to the legislature and thus progressive in effect.¹⁰¹ As such, European formalism is in fact achieving far more of the substantial aims of proponents of American legal realism,¹⁰² in contrast to their purported direct descendants, adherents to the law-and-economics movement, which are locking the American jurisprudence in a new dogmatic, formalist, and conservative approach.¹⁰³

IV. THE ISSUE

The center of American civil society and political discourse has experienced a significant shift beginning with the neoliberal counter-revolution of the late 1970s. Social mores and attitudes are, to be sure,

COMP. L. 469 (2004) (remarking that the Scandinavian legal tradition has a flourishing legal realist school, as does the United States).

101 *See infra* Part IV.

102 *See* ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921); *see also* KARL LLEWELLYN, *THE BRAMBLE BUSH* 109-21 (1930).

103 Ironically, the law-and-economics movement traces its lineage primarily to Jeremy Bentham. Bentham was an initial proponent of using law as a tool of achieving the greater good for the greatest number of people in society, a true legal realist agenda. While the idea of economic efficiency being a fundamental concern for adjudication so that it may enhance the aggregate wealth of society is easy to defend, the fact that the wealth of society, its overall capital, is conflated with the greater good is not. Bentham himself was far more nuanced on the topic, his famous formulation of the greater good being the greatest happiness of the greatest number of people. He advocated criminal reform, for example, while the law-and-economics scholars will do away with the protections of the 5th Amendment on grounds of inefficiency. It is perhaps time for law-and-economics to at least choose another patron saint if they wish to proceed as they have. *See* Frederick N. Judson, *A Modern View of the Law Reforms of Jeremy Bentham*, 10 COLUM. L. REV. 41 (1910); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470-71 (1897) (arguing that the purpose of the law is the deterrence of undesirable social consequences).

always in flux, and there is no need for alarm if the variance is within accepted parameters. But the erosion of public trust and polarization of political beliefs currently experienced in the United States is a strong indicator that we are most likely outside the “temperate zone.” This radical “right” shift can be traced to multiple factors that mostly have their roots in the strong counter-reaction of 1970s and 1980s conservatives to what they perceived as social challenges, by the previous generation, against the status quo of power and privilege.¹⁰⁴ Among their tools, and often playing the role of main instigators, the Chicago School scholars, using their influence on legal commentary, substantially contributed to the deregulatory reform, by skewing to the “right” the jurisprudential approach in almost all areas of the law, and providing the ammunition for the free market, anti-big-government activists.

The Chicago School of legal interpretation subscribes to a limiting interpretation of all human interaction using only the polarizing lens of efficiency. One of the most common protestations of law-and-economics scholars is, however, that critics fail to distinguish between positive law-and-economics, which only describes a legal controversy using economics, and normative law-and-economics, which advocates for change in the law by using the tools of economics.¹⁰⁵ Essentially, the argument goes, we should not conflate the person who employs economics as an explanatory tool with someone who uses it for social engineering. I

104 See Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 Md. L. Rev. 253, 254 (1986) (“Government power, not private power, is the concern of these new reformers. ‘Freedom,’ ‘accountability,’ ‘efficiency,’ and ‘economic growth’ are the dominant themes. The regulatory agencies that were once the temples of the earlier social reform movements have become the targets of the modern ‘regulatory reform’ movement.”) McGarity astutely remarks that this new movement developed as a “response to perceived weaknesses in the regulatory process as it had evolved through the years.” *Id.* In short, the conservatives were hitting back at what they perceived as a governmental overextension into areas that in their view should be left solely to the play of the markets—perhaps areas like civil rights or environmental regulation.

105 See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 284-85 (1979).

fail to see any practical distinction for this sophistry to be relevant; when writing a judicial commentary or arriving at a decision as a judge, if a person employs economics as its main tool, the results that person will obtain will inevitably be circumscribed by the tool being used. As such, even if that person does not set out to “change the world” and merely wants to describe it, by using economics exclusively and forgetting to balance it out with true legal analysis grounded in values, the empirical effect will be indistinguishable: the social engineering will take place by force of repetition. Hiding behind benign intentions does not change the empirical results.

Moreover, efficiency, as a concept, is always going to favor distributive paradigms that help the financially affluent and reinforce existing power structures. This is just in the nature of the concept itself and it has no possibility of self-balancing; that is why, before law-and-economics dominated legal discourse, arguments presented in briefs that extolled the *ex ante* efficiency benefits of an advocated course of action attempted to balance that efficiency angle with other strong policy, rights, and value-related arguments. The mechanical, ruthless way in which economic laws function is precisely why their application to legal issues will always be insufficient. This is why economics is economics—and it functions splendidly when faced with commercial problems and maximization of capital returns. Conversely, law is law, and it has its basis in human and ethical values, as reflected in the Bill of Rights and the Constitution, that should not be nicked-and-dimed out of our jurisprudence. Human controversies require a humanistic perspective in

their resolution to avoid promoting a society made of people/objects¹⁰⁶ who just transact things/objects.¹⁰⁷

Because of this efficiency-only approach, modern day law-and-economics is helping to swing the pendulum toward the “right” of the political spectrum, transforming the law itself from the anchor of our social system into a political tool that legitimizes a new “false center.”¹⁰⁸ Consequently, by failing in its role as a neutral force impartial and immune to political bias, the law as advocated by the contemporary law-and-economics approach helps the neoliberal counter-revolution commodify most aspects of our lives and foster a generation of corporate consumers bereft of traditional notions of liberty and autonomy.¹⁰⁹

By contrast, in Europe the process of integration has helped to propel the values of the Enlightenment to the forefront of political discourse.¹¹⁰ At the same time, the impact legal scholars and legal decisions have on

106 As economics would describe us, “human capital.”

107 See MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stanford Univ. Press 2002) (1987). See also, Alex Ross, *The Naysayers*, THE NEW YORKER (Sept. 15, 2014) <https://www.newyorker.com/magazine/2014/09/15/naysayers>; Marcel Stoetzler, *‘It Only Needs All’: Re-reading Dialectic of Enlightenment at 70*, OPEN DEMOCRACY (June 24, 2017), <https://www.opendemocracy.net/can-europe-make-it/marcel-stoetzler/it-only-needs-all-re-reading-dialectic-of-enlightenment-at-70>.

108 For an example of the pervasiveness of the method, see Oren Gazal-Ayal, *Economic Analysis of “Law & Economics,”* 35 CAP. U. L. REV. 787, 801 (2007).

109 See Noam Chomsky & David Barsamian, *Noam Chomsky Diagnoses the Trump Era*, THE NATION (Oct. 3, 2017) <https://www.thenation.com/article/noam-chomsky-diagnoses-the-trump-era/>. See also Rosamund Hutt, *What Do Young People Value?*, THE WORLD ECON. F. (Jan. 20, 2016) <https://www.weforum.org/agenda/2016/01/what-do-young-people-value/> (finding that “[o]ver 90% believe that business is the way to solve problems like unemployment”).

110 Micheline Ishay, *European Integration: The Enlightenment Legacy*, 19 HIST. OF EUR. IDEAS, 207-213 (1994). But cf., Nikita Dhawan, *Rescuing the Enlightenment from the Europeans*, THE EUR. MAG. (Apr. 27, 2015), <https://www.theeuropean-magazine.com/nikita-dhawan/10063-the-migrant-crisis-and-enlightenment-values>.

society continues to be limited by the nature of the civil system.¹¹¹ As a result, the cross-national legislation aimed at promoting arguably “progressive” ideals does not have to run the gauntlet of an adversely predisposed, conservatively bent judiciary.¹¹² The supranational treaties that have the force of law for individual nations within the EU are also shaping a coherent European approach to civil society.¹¹³ This is true because the treaties themselves are based on “progressive” social values, like equality, a value that promotes the main goal of the European Union: to prosper together and avoid conflicts between the forming nations. Cooperation between member states and eventual economic integration is fundamental.¹¹⁴ Most of the values espoused in the Enlightenment are thus embodied within the very structures of the European Union.

111 Because in continental Europe any legal decision has limited precedential value, the impact of judicial determinations is necessarily more restricted than in the United States. This distinction is fundamental and has been exhaustively analyzed in other circumstances. For the purposes of this Note, it is sufficient to remark that the nature of the civil system itself, for better or worse, limits the impact on civil society of both the actual judicial decisions and of legal commentary on those decisions. See Linda Ravo, *The Role of the Principle of Effective Judicial Protection in the EU and Its Impact on National Jurisdictions*, in SOURCES OF LAW AND LEGAL PROTECTION 101, 101-25 (2012).

112 As long as the law being proposed does not violate a Treaty, The European Court of Justice will not inquire into any other faults. See Ravo, *supra* note 111. This can be contrasted to the extensive power of review the judiciary has in the United States, established by the Marshall court in *Marbury v. Madison*, 5 U.S. 137 (1803).

113 See MARINUS OSSEWAARDE, *MEDCRAVE GRP. LLC , THE SOCIOLOGISTS’ STRUGGLE FOR A EUROPEAN IDENTITY* (2017), https://ris.utwente.nl/ws/portalfiles/portal/17963158/Ossewaarde_The_Sociologists_Struggle_for_a_European_Identity.pdf.

114 Treaty Establishing the European Economic Community, art. 2, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *Treaty of Rome*] (“It shall be the aim of the Community, by . . . progressively approximating the economic policies of Member States, to promote [the] harmonious development of

The European Union's transnational structure has not led to an easy and seamless shift to a post-tribal, globalized Europe, but it has significantly pushed the center of the political arena to the "left" of the political spectrum, at least as perceived from an American viewpoint. Of course, there is a colorable argument that from the point of view of the Europeans themselves they are merely living up to their founding values, and the "left" tinge of their policies is nothing but a purely centrist approach.¹¹⁵ Nations within the European Union feel constant pressures to conform with directives from Brussels, allowing for yet another avenue of progressive change in their national laws. These pressures are also felt by the natives of the constituent countries, which by and large, have more liberal views of the world when compared to their transatlantic cousins.¹¹⁶ The drive from Brussels to accept multiculturalism and universal tolerance at a local level is a modern European development with no true federal counterpart in United States state politics.¹¹⁷

economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.”).

¹¹⁵ This may be true also because the political systems of continental Europe are overwhelmingly multi-party systems. These types of political systems will tend to be less polarized, more balanced and coalition-based. This reality in turn will force parties to avoid extreme positions and, as such, both the left and the right will actively fight for the centrist vote, reinforcing in the process more moderate standpoints. However, a full analysis of the differences between dual-party political systems and “polyarchies” is outside the scope of this Note. *See generally* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (50th Anniversary ed. 2006) (comparing Madisonian, populist, and polyarchal forms of democracy).

¹¹⁶ *See, e.g.,* Mila Versteeg, *What Europe Can Teach America About Free Speech*, THE ATLANTIC (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-europe-can-teach-america-about-free-speech/537186/> (arguing for a balanced, and non-unidimensional approach to the right of free speech, modeled after the European laws). Versteeg sees the evolution of human rights in Europe after the second World War as the “strongest” in the world. *Id.* This trend was reinforced, she argues, by the framework of the Union itself. She proceeds: “European free-speech doctrine is based on the idea that free speech is important but not absolute, and must be balanced against other important values, such as human dignity.” *Id.*

¹¹⁷ These pressures have had deleterious effects as well. As such, a portion of the population of Europe has shifted to extremes; see, for example, the contested general election of 2016 in France.

V. PROPOSED SOLUTIONS

Chicago School's law-and-economics approach needs to be constantly challenged in areas of the law where the methodology it espouses creates more problems than it resolves.¹¹⁸ I will concede the enhanced applicability of an efficiency-only mode of legal analysis in the context of the conflicts that arise between private commercial parties.¹¹⁹ However,

Some have even decided to reject the European project altogether, like the British did the same year when they voted to exit the European Union. However, this effect seems to be contained at the moment with German voters in 2017 supporting Angela Merkel's policy of refugee acceptance and largely rejecting the far-right German party AfD (Alternative für Deutschland). Similarly, there has been a significant centrist resurgence in Eastern Europe, with polls now projecting some of the lowest shares of those countries Parliaments to be captured by far-right parties.

118 Strauss, *supra* note 64.

119 When the interests involved *are* economic in nature, almost to the exclusion of all other considerations, it makes sense to predominantly use the tools of economics in the legal analysis. However, this presupposes an equality of bargaining power between the commercial parties, both in their initial contractual negotiation and/or during the situation that has evolved from their conflict. This assumption is almost always empirically wrong and requires judges to adjust their analysis to realities present in the case before them. This is one of the reasons why no single methodology or approach can be exclusively used in the law.

Moreover, the controversy has already proven itself beyond the solving power of the business people involved, with their pragmatic and efficiency-oriented world views. As such, if *they* could not reach an economically efficient solution to their conflict, as evidenced by their presence before a judge in what is usually an expensive litigation process, how is a judge employing only economics in a better position? The adjudication process is resorted to by commercial parties only when business negotiations break down, and those negotiations break down most often *because* the parties involved could not find a sufficient economic incentive to settle their dispute. See John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 *FORDHAM L. REV.* 1129 (2009) (remarking on similarities between justice-oriented approaches to settlement and utility maximization approaches to that same topic); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 968 n.5 (2001) (“[O]ur critique is limited to notions of fairness that give weight to factors unrelated to individuals’ well-being . . .”).

even in this limited milieu, the law retains multiple facets, and a myriad of other apt methodologies and approaches may be employed.¹²⁰ Ultimately, the main point is that efficiency should not always be dispositive, especially if there is a clearly expressed legislative proscription or constitutionally enshrined individual right at stake.¹²¹

Outside of commercial law, however, I see no value in a pure utilitarian and consequentialist analysis. While those considerations are always going to exist within a well-balanced legal analysis, they should be just that: one factor among the many. This is because they do not provide enough by themselves to be decisive, and when they are pushed to the forefront of legal analysis the result is invariably a lopsided decision or commentary.¹²² Even if we do not ascribe to the law-and-economics scholars the specific intent to influence society toward a purely commodified vision of the individual, this is in fact the effect of the oversimplification they are advocating. As such, instead of progressing towards solutions to

120 See Bronsteen, *supra* note 119.

121 As a case in point, American antitrust law, under the influence of law-and-economics, has become overwhelmingly pro-business. There are significant hurdles any prospective plaintiff under the Sherman Act must currently overcome to even *bring* an action of monopolization into court. Basing most of their judgments on issues of efficiency, and fears of “ruinous” litigation, the judiciary has all but excluded several causes of action, and severely limited others by imposing onerous prima facie burdens on would-be plaintiffs and on the regulatory agencies. These developments are a direct example of how a focus on economics for a sustained amount of time in a field of law will eventually, *de facto*, overwrite a Congressional statute. Analyzing antitrust with economics makes sense initially, but after a while, judges become enamored with the tool they are using and instead of economics being just one of the required pieces of evidence in a well-balanced antitrust case, it becomes *the only* evidence required. These modern decisions, thus, are no longer enforcing the Sherman Act, a congressional statute that has never been overturned. See generally Fox, *Law and Economics*, *supra* note 28. See also Horwitz, *Law and Economics*, *supra* note 70; Elliot Ash, Daniel L. Chen, & Suresh Naidu, *The Impact of Legal Schools of Thought* (Jan. 25, 2017) (unpublished manuscript), http://www.law.northwestern.edu/research-faculty/colloquium/law-economics/documents/2017_Spring_Ash_Legal.pdf (finding empirical support that “judges who use law-and-economics language or attend law-and-economics training are more likely to issue and support conservative rulings.”).

122 See *Constitutional Calculus*, *supra* note 72.

contemporary problems that enhance justice,¹²³ law-and-economics enslaves the discipline and practice of law and has it pulling at the wagon of privilege.

To combat this effect, it might arguably be useful to once again look across the Atlantic,¹²⁴ even though the civil systems of law are seen by some as incapable of providing useful insights to a modern American lawyer.¹²⁵ The empirical realities of modern European jurisprudential commentary and adjudication¹²⁶ are evidence of a legal profession that is devoted to fulfilling the impartial arbiter role I have argued to be

123 See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987) (“Economic analysis, growing out of the liberal tradition, tends to view all inalienabilities in the way traditional liberalism views inalienable property rights. When it does this, economic analysis holds fast to one strand of traditional liberalism, but it implicitly rejects – or at least challenges – another: the traditional distinction between inalienable and alienable kinds of rights. In conceiving of all rights as property rights that can (at least theoretically) be alienated in markets, *economic analysis* has (at least in principle) *invited markets to fill the social universe*. It has invited us to view all inalienabilities as problematic.”) (emphasis added).

124 There is ample precedent for crosspollination of legal ideas from both sides of the Atlantic. See, e.g., Richard H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1653 (1992) (applying an empirical analysis to several early decisions in the United States and concluding that “[t]he survey demonstrated that more than a few American lawyers knew and made use of the civil law in arguments offered in courts, and also that American judges cited [European decisions during that time].”).

125 *Id.* at 1650, n.4 (citing KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 10 (2d ed. 2008)). (“The civil law tradition contributed only modestly to the origins of American law.”). The applicability of foreign materials to United States law is, however, a hotly disputed issue in itself. See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. OF CONST. L. 519 (2005).

126 I am referring here to the general political agnosticism of European judges and jurists that hopefully has been established by the preceding sections of this Note.

fundamental to a healthy law system if we aim for it to help achieve a well-functioning civil society. It is, of course, by no means necessary to adopt the *form* of the continental system for its contemporary positive effects to manifest in the United States.¹²⁷ But it is nevertheless useful to notice how a related Western system of law has chosen to deal with the important question of the proper place for the practice and commentary of law in society. The neutrality of the civil system in Europe is helping those countries achieve an accurate reflection of their citizenry's aspirations in the form and substance of their laws, mainly by not interfering on the basis of extraneous factors like efficiency.

Ultimately, the issue boils down to awareness of the existence of a problem, the definition of that problem, and potential solutions. Law-and-economics does not see a problem, because it supposes itself "value-neutral" and even benign in its application.¹²⁸ However, most scholars and judges using law-and-economics behave with the force of a tyrant—only efficiency can best explain and dispense law — and they need to be constantly opposed in these bold-faced assertions, until the balance within the practice and commentary of law in the United States is restored. The practice of law needs to be brought back to the aspirational place the Founders had envisioned for it; it needs to be, once again, the balanced

127 Arguably, the common law system is *better* suited for the impartial arbiter role I am advocating the legal profession should embrace. It is not the intention of this Note to extol the virtues of the civil law system and propose a fundamental change in the American common law. On the contrary, when the common law is not dominated by dogmatic approaches like law-and-economics, the system will inherently favor balanced and reasonable adjudication, perhaps to a higher degree than the civil system. This Note's scope is limiting, however, any further inquiry into this topic. For an interesting perspective on the topic see William Ewald, *What's So Special About American Law*, 26 OKLA. CITY. UNIV. L. R. 1083, 1087 (2001) (arguing that "the mere presence or absence of a civil code is hardly the most striking difference between law in America and [other parts of the world]."). See also R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions*, 1990 Duke L. J. 1207 (1990) (comparing the common law to the civil system with a focus on British common law versus the continental civil system in the context of European integration).

128 See Posner *supra* note 68; see Easterbrook *supra* note 46.

arbiter that operates in, and grounds the, “true center” of American society.

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