Polish Yearbook of Law & Economics

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Editors:
Jarosław Bełdowski
Katarzyna Metelska-Szaniawska
Louis Visscher

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From the Editors

Jarosław Bełdowski (Warsaw School of Economics)
Katarzyna Metelska-Szaniawska (University of Warsaw)
Louis Visscher (Erasmus University Rotterdam)

With pleasure we present the third volume of the Polish Yearbook of Law & Economics encompassing a collection of articles selected on the basis of an additional review process from papers presented at the 3rd Polish Law & Economics Conference. In 2010, with the organization of the 1st Polish Law & Economics Conference and the issuance of the first volume of the Polish Yearbook of Law & Economics, a new chapter was opened in the development of the cross-disciplinary scientific movement of Law and Economics in Poland. This third volume of the Yearbook confirms its academic value, potential and sustainability.

The 3rd Polish Law & Economics Conference was organized at the University of Warsaw on April 20–21, 2012 by the Polish Association of Law & Economics (PSEAP) in cooperation with the Centre for Economic Analyses of Public Sector (CEAPS) at the Faculty of Economic Sciences of the University of Warsaw and two students' associations: Students' Association of Institutional Economics at the University of Warsaw (KNEI) and Students' Association of Law and Economics at the Warsaw School of Economics (SKN EAP SGH). With its two days of presentations, covering a wide range of issues analyzed from a Law & Economics perspective, the conference brought together 120 scholars, students and practitioners interested in the Economic Analysis of Law and related disciplines, both from Poland and several other countries. The conference program consisted of the keynote lecture by Professor Thomas S. Ulen (University of Illinois at Urbana-Champaign), five sessions encompassing twelve presentations, as well as a student panel (three speakers). Detailed information about the Conference is available at the Polish Law & Economics Conference website (www.lawandeconomics.pl).

This third volume of the *Polish Yearbook of Law & Economics* contains eight papers presented during the 3rd Polish Law & Economics Conference (modified following an additional review process), as well as a Student Section consisting of the paper whose author was awarded the 1st prize in the Best Student Paper Prize contest accompanying the conference. Other scholars and students who gave their presentations during the conference included Giacomo Balbinotto Neto (Federal University of Rio Grande do Sul), Jarosław Kantorowicz (University of Hamburg), Rahul Suresh Sapkal (University of Hamburg), Penio Penev Gospodinov (Erasmus University Rotterdam), as well as Iwo Małobęcki (student at University of Warsaw) and Jakub Michalik (student at Jagiellonian University).

The first section of this volume (Featured Article) contains Thomas S. Ulen's paper entitled "The Lessons of 30 Years of Law and Economics – and the Prospects for its Future", based on his keynote lecture delivered at the conference. The author, being one of the founding fathers of modern Law and Economics, formulates three general observations about how the law and legal scholarship developed over the last 30 years by applying theories, explanations and empirical tools of Economics. He formulates those three "lessons" in the following way: (1) legal scholarship is moving toward a more scientific method of studying law; (2) behavioral (or psychological) theories of decision-making are becoming increasingly important in legal analysis; (3) empirical work is becoming increasingly important in legal analysis. He concludes with a reflection about the future of Law and Economics, expecting an even more intensified interaction with other academic disciplines within the legal academy, which should lead to a more complete theory and body of evidence about how the law can improve the working of today's societies.

The subsequent article by Michele Mosca and Salvatore Villani ("Reuse of Illegal Assets and the Competition Policy for Social Aims. A New Network Strategy to Defeat Organised Crime") presents in what way reasoning on the basis of economic arguments and tools of network analysis may be useful in studying the legal framework designed to counteract organized crime. They concentrate on a particular solution adopted within the Italian legal system, according to which assets confiscated from criminal organisations may be reutilized for social purposes. On the basis of an economic model of the relationship between social capital and criminal organisations which they develop, the authors propose a strategy to fight organised crime.

In his contribution to the volume entitled "The Incentives of National Judge's Incentives (not) to Seek a Preliminary Ruling from the Court of Justice of the EU in the Context of the National and EU Constitutional Framework" Przemysław Mikłaszewicz undertakes one of the topics that has been of high interest for Law and Economics scholars for many decades already – the motivation and determinants of the behavior of judges. In his study he concentrates on the national judges' choice whether or not to seek a ruling from the European Court of Justice. He discusses the crucial aspects of the constitutional framework within which national judges operate which, in his opinion, influence the judges' decisions in this respect.

The subsequent three papers focus on topics which may be considered laying at the intersection of Law and Economics and Political Economy. In his study entitled "Regulatory Causes of Corruption" Łukasz Goczek is interested in explaining the determinants of corruption, with particular emphasis on the regulatory activity of the state. He argues that a regulatory, bureaucratic environment with numerous procedures and delays coupled with lack of democracy and low level of development are the major causes of corruption. His conclusions are supported by results of an empirical study conducted using econometric techniques to find marginal effects of the number and duration of different bureaucratic procedures.

Alexander Marek Waksman and Valerio Cosimo Romano undertake the analysis of a problem which is closely related to corruption. In their paper "Corruption and Effort Among Political Agents: Analysing Incentives and Evidence from the UK and Italy" they study the effects of immunity laws on the behavior of politicians. They apply a theoretical framework based on the principal-agent model to provide conclusions about the British and Italian solutions in this respect.

The subsequent paper also touches upon a Political Economy topic, dealing in particular with political accountability in a novel context – rural development policy. In his contribution entitled "Rural Policy and Political Accountability: Looking at the Pilot Programme LEADER+ in Poland" Jan Fałkowski analyzes the effects of the LEADER programme, implemented in the European Union, aimed at encouraging (network-like) cooperation between representatives of the civil society, public administration and the private sector. His empirical study reveals a correlation between LEADER-type partnerships and electoral rules allowing for a higher degree of political accountability at the local level.

Patryk Gałuszka and Victor Bystrov present the Law and Economics approach to the recent crowdfunding phenomenon, contributing thereby to a very timely debate about the benefits and potential risks of this new way of financing various projects, including cultural goods. In their paper "Development of Crowdfunding in Poland from the Perspectives of Law and Economics" they undertake a theoretical analysis illustrated with data from the oldest Polish crowdfunding service. Additionally, the paper focuses on Polish legislation which at the moment causes obstacles for further development of crowdfunding platforms in Poland.

European law in the field of product regulation is the topic of Mireia Artigot i Golobardes' paper entitled "A Close Look to European Product Regulation: An Analysis of the Interaction Between European Product Safety Regulation and Product Liability". The author's analysis of the interaction between European product safety regulation and product liability reveals lack of coordination mechanisms between them and suggests a need for joint consideration of both systems in order to enhance product regulation in Europe.

Finally, the Student Section of this volume presents the paper by Kamil Joński – winner of the 1st prize in the Best Student Paper Prize contest accompanying the 3rd Polish Law & Economics Conference. This contribution

presents an econometric analysis of the deterrent effect of an accelerated procedure introduced within the Polish Code of Criminal Procedure in 2007 ("Does Quicker Mean Better? Measuring the Deterrent Effect of the 24-Hour Courts"). The 2nd prize in the Best Student Paper Prize contest was shared by Iwo Małobęcki and Jakub Michalik, while Ruifeng Song received a distinction awarded by the Scientific Committee of the conference.

Having briefly presented the contents of the volume we leave the Reader to explore the subsequent chapters in more detail.

Section I

FEATURED ARTICLE

Chapter 1

The Lessons of 30 Years of Law and Economics – and the Prospects for its Future[1,2]

Thomas S. Ulen (University of Illinois at Urbana-Champaign)

1.1. INTRODUCTION

In many areas of scholarly life, one's most productive years are one's younger years. Mathematicians, for example, are said to have produced their best work before they are 35. By contrast, a recent study has suggested that geologists do their best work later in their academic lives – sometime in their 50s. The most common explanation for these differences is that brilliance in young-blooming fields like mathematics arises from flashes of pure ratiocinative insight, to which, it is alleged, the young are more prone. By contrast, brilliance in later-blooming academic subjects like geology arises from making connections

[1] I want to thank Katarzyna Metelska-Szaniawska and Jaroslaw Beldowski in Warsaw and Anna Guzik in Krakow for their hospitality and for organizing my wife's and my marvelous trip to Poland. I want to congratulate Katarzyna and Jarek on the remarkable work they have done to further Law and Economics in Poland and in Europe. Bob Cooter and I also owe them a very, very deep thank you for their translation of our text into Polish.

[2] These remarks were originally presented as a speech at the 3rd Polish Law & Economics Conference at the University of Warsaw on April 20, 2012. I am grateful to the attendees for their very insightful questions, which helped significantly in clarifying some of the points I was trying to make in the original speech. I want also to thank the Poland Ministry of Justice and the Minister of Justice. The Minister gave me a warm welcome and sponsored an educational workshop on Law and Economics that was a marvelous educational experience for me and, I hope, for the law professors. I would also like to thank the United States Department of State, the U.S. Embassy in Warsaw, and the U.S. Consulate in Krakow for their financial and scheduling support for our trip.

among large stores of information, which stores are said to be generated by experience and decades of study[3].

Law professors may be more like geologists than mathematicians in that they require great stores of experience and study before producing their best work.

I bring up these points to try to suggest to you that like geologists and law professors, my age may allow me to talk meaningfully about the long-run achievements of Law and Economics: I have been at this for 35 years. I began my scholarly career in 1977 at about the same time as Law and Economics appeared. And I am one of several people – Bob Cooter, Charlie Goetz, Vic Goldberg, Dave Haddock, Steve Shavell, Mitch Polinsky, and others also fall into this category – who, although trained professionally as economists, have spent most of their scholarly lives in law schools.

As a result of my age and experience, I would like to take this occasion to talk about what I think the major lessons of Law and Economics have been since 1980. I will identify three major lessons that I discern as emerging from Law and Economics over the last 30 years. I will offer some brief commentary on each point and then conclude with speculation about where Law and Economics might go to in the next 30 years.

1.2. THREE LESSONS FROM THIRTY YEARS OF LAW AND ECONOMICS

The lessons upon which I want to focus here are not particular conclusions in particular substantive areas of the law. They are, rather, broad scholarly developments about the study of law. My contention is that these developments or lessons are the result of the importation of economic concepts and methodology into the study and practice of law. But, further, these developments or lessons for the study of law have been so extensive that I perceive that we are moving beyond the era of Law and Economics to one of law and behavioral and social sciences.

1.2.1. Lesson 1: Law as a Science

The first lesson that I draw from my observation of the first 30 years of Law and Economics is this:

Legal scholarship is moving toward a more scientific method of studying law.

A related and important sub-lesson is that the movement toward a more scientific method of studying law has occurred because of Law and Economics.

[3] There are, of course, other factors that might explain these differences in the average age of highest productivity in different academic fields. For example, in a field that is undergoing a revolution, one might expect, all other things equal, younger scholars to do relatively more productive work.

By the *scientific method* I mean simply an organized method for acquiring reliable and accurate information about a subject by a two-step process. The first step is the articulation of consistent, coherent, and testable hypotheses and theories about the phenomenon under study. To use an example from Law and Economics, one might hypothesize that society's valuable resources will be most efficiently used if decisions about how to assign and protect property entitlements are done according to economic principles – for example, by choosing according to the rule of maximizing the net difference between benefits and costs. The theory would have to establish what efficiency means here and give examples of what assignments and protections would conduce to the better discovery and use of resources, and so on. The theory might also demonstrate how it applies among different kinds of property – real property, chattels, and intellectual property.

The second step in the scientific method is the confrontation of each hypothesis with data and analysis of those data that are well-designed to test the credibility of the hypothesis[4]. This is a potentially complicated process that requires careful attention to procedures, details, and some prevailing norms of scholarly investigation. I shall have much more to say on this matter below.

For a field that is moving from non-scientific to scientific methods of investigation, there are frequently significant impediments to the move that occur within this second step. For example, if the scientific method is new to this field, then there may well be no data with which to engage in hypothesis-testing. So, in addition to the burden of equipping oneself with the skills to do that testing, a scholar may also bear the additional burden of developing data. This burden can range from the relatively light – as would be the case, for instance, if there are publicly available archives or data sets – to the relatively heavy (including costly) – as would be the case if one had to gather the data over a number of years or across wide geographically dispersed jurisdictions or develop and administer laboratory, field, or on-line experiments. And once the data have been collected, they must be organized, checked for accuracy, analyzed so as to bring out aspects of central tendency and variability, and then further analyzed to find patterns, correlations, and (one hopes) causal explanations among the variables[5].

When Law and Economics began around 1980, its most significant scholarly innovation was the application of rational choice theory – the default theory of economic decision-making – to decision-making in the legal context. Legal decision-makers (in an analogy to economic decision-makers) had stable, well-ordered preferences and allocated their resources (time, mental effort, and income and wealth) so as to maximize their utility.

[4] For an introduction, see Lawless, Robbennolt and Ulen (2011). See also Eisenberg (2011).

[5] I am a fan of quantitative data and their analysis. But I also recognize that qualitative empirical work can also be extremely informative. I do not mean to denigrate it by focusing on quantitative empirical analysis. Indeed, when quantitative data are not available – as often happens in the early stages of the scientification of an academic discipline, qualitative studies may be the only form of empirical work.

Law's role was to identify situations in which individual utility maximization and social well-being were at odds and to construct law so as to harmonize individual decision-making and social desires. Early Law and Economics showed how the famous description of microeconomics – 'People respond to incentives' – applied to a wide variety of legal matters.

Consider a familiar example: In taking precautionary decisions, individuals have a keen regard for their own well-being. Presumably, they will take precaution that confers a benefit on them that is greater than the cost of the precaution. This is true, according to both common sense and to rational choice theory, regardless of the law's various obligations. But in most cases rational decision makers may consider *only* their own well-being in taking care. That is, they might not take into account the effects that their precautionary decisions may have on other parties, such as strangers.

There is no way in which potential injurers and their victims can identify one another *ex ante* an accident and bargain about their respective responsibilities. As a result, no one has much of an incentive to take precaution whose effect is to confer a benefit on someone else.

This state of affairs is likely to be socially inefficient because it may not minimize the social costs of accidents. If people took into account not only their own well-being but also that of those whom they might injure by failing to take reasonable care, then there would be an 'efficient' number and severity of accidents. That is, all accidents that could be avoided by taking cost-justified precaution would not take place[6]. But if there are no incentives to take care that confers a benefit on others, then there may be too many accidents; they may be too severe; and people may avoid risky activities.

Early Law and Economics – in what is still one of its most powerful reshapings of a traditional area of law – showed that tort law was a solution to this mismatch between individual and social desires. Simply put, Law and Economics showed that by making injurers liable for victims' accident losses, tort law created an incentive for individuals to alter their precautionary decisions so as to take account of other people's well-being, not just their own.

These tools from microeconomic theory were used to erect a complete account of all areas of law – property, contract, torts, litigation and settlement, and the many areas of public law, such as criminal law, legal procedure, corporations, antitrust, environmental law, administrative law, and more.

But those were the early days of Law and Economics. More recently, one of the most discernible trends in law-and-economics scholarship has been a move *away* from the application of microeconomic theory to legal analysis – even though the scientific method still holds. I do not mean to suggest that there has been a retreat away from Law and Economics and back toward a more doctrine-based, less scientific view of law.

To attempt to be clear, let me start with a bit of history. Having been present from the early days of Law and Economics, I am acutely aware of the

[6] 'Cost-justified precaution' is precaution that, in dollar terms, costs less than the expected benefit (the probability of an accident's occurring times the accident losses avoided).

fact that Law and Economics has not been received with open arms in the legal academy. Indeed, at many law schools there is still (as at my old employer, the University of Illinois College of Law) strong hostility to hiring any faculty in the area of Law and Economics.

What accounts for this hostility? Is it simply the well-known resistance to something new? It was this resistance, even in academia, that prompted the great German physicist Max Planck to note that "[s]cience advances funeral by funeral." Or is it a belief that Law and Economics is tied to a political philosophy that appeals only to some people and not to others? Or are there yet other factors that explain the hostility toward Law and Economics?

For what it is worth, I believe that the slow progress of Law and Economics within the legal academy is due to a combination of two factors – the general resistance to new paradigms and the perception (ludicrously mistaken, I believe) that the methodology of economics is by necessity conservative or what you in Europe might call "neoliberal."

These are powerful forces, even if they are mistaken, but I do not think that they are a cause for despair about the ultimate success of Law and Economics (and other scholarly innovations). First, I have a very strong faith – one supported, I believe, by facts – that the modern higher-education academy ultimately makes the right decisions about scholarly innovations. It is difficult to think of areas of scholarship that have been discredited – say, alchemy and astrology – that still have a position in the modern university. Eventually, scholarly innovations that work are kept and built upon, and those that do not work or are not helpful are discarded.

Second, there is only a limited amount that one can do to persuade people to pay attention to an innovation. Academics, like most people, have a disposition to cling to the views that they learned early in their education or from their parents and mentors. They tend to give greater weight to evidence that confirms their dispositions and prior beliefs and to discount evidence that disputes or calls into question their prior beliefs[7]. One might think that these tendencies would be less among academics, who are, after all, surrounded by bright people who are making interesting and belief-shaking discoveries all the time and who are presumably driven by reason. Alas, I have found that my fellow academics are just as reluctant to give up their prior beliefs as are non-academics.

I have worried about these issues for a long time and, in an effort to correct them, have tried my best to find a means of overcoming the objections that many of my colleagues and extramural audiences have had to Law and

[7] I have had occasion, since August, 2011, to try to talk to good friends who are not economists about the U.S. national debt and the federal budget deficit. The almost-universal view is that the debt is dangerously high, a "significant burden on our children and grandchildren," a "threat to the financial well-being of the nation," and the like. My belief is that most professional economists do not believe those things to be true. I have done my part to try to change views by sharing this economic analysis, but so far I have not succeeded in having one of my interlocutors say, "Wow! That's interesting. I see what you're saying. I'll change my views and quit worrying so much about the national debt and the budget deficit."

Economics. I offered to send, at my expense, any faculty member to the annual meetings of the American Law and Economics Association (which, incidentally, had its inaugural meeting at the University of Illinois College of Law). I had no acceptances. I have organized reading groups with my law faculty colleagues of important new articles in Law and Economics or important new books. I have organized semester-long workshops in which eight to ten of the most prominent scholars in Law and Economics come to Illinois to present work-in-progress. Those have been a mixed success. Most faculty are very busy with their own research and teaching: Trying to find some extra time to read articles or books or to attend a workshop is not easy, even if my faculty colleagues were eager to learn Law and Economics.

One area of combatting the hostility to Law and Economics in which I believe that I have seen some success has to do with teaching Law and Economics to extramural audiences. These are typically practitioners, government officials, judges, and others who have time for only a relatively short introduction to the topic – usually an hour or, at the most, a morning or an afternoon set of lectures. (By contrast, law students take a semester-long course lasting 14 or more weeks and have 40–45 hours of class during which to come to terms with Law and Economics.) With those external groups, I have tried to find a better way of conveying the gist of Law and Economics. In the past, I believe that I made the mistake of telling them – perhaps implicitly – that to understand Law and Economics fully they would have to devote a lot of time and effort to the study, that they would have to forget or displace from their working memory the doctrinal knowledge of law with which they were comfortable, and that Law and Economics would involve a new way of thinking. In looking back on that method of teaching, I am afraid that I sounded like a religious fanatic trying to convert a skeptical audience to a new form of worship. "Repent of your academic sins, and cleanse yourself in the healing waters of Law and Economics!"

This message, although I did not mean to sound apocalyptic, did not strike the right tone. Recently, I believe that I have discovered a better way to teach Law and Economics to these external audiences. A few years ago I was asked to give several hours of lectures on Law and Economics to appellate court justices in Illinois. I knew many of these justices from committees on which we had served together. And I knew from talking to them about Law and Economics that they had gone to judicial conferences to learn some Law and Economics and had been off-put by the religious fervor of their instructors at those conferences.

So, when I taught the appellate court justices in Illinois, I tried something very different. I avoided talking about Law and Economics as being closely tied to the field of economics. Nor did I seek to persuade them that Law and Economics is a complete philosophy to which they should subscribe. Rather, I told them something far less imposing and intimidating: *Law and Economics is a set of useful tools for analyzing the law.* For example, I told them that they should learn three tools: transaction costs, cost-benefit analysis, and the