In Honour of Prof. Thomas S. Ulen's legacy in the evolution of Law and Economics: Reflections on the Rise, Reception, and Future of Law and Economics

- *Thomas S. Ulen*[1]

https://doi.org/10.69893/gjle.2026.000084

Abstract

This piece was originally written by Prof. (Dr.) Thomas S. Ulen as the foreword to the edited book "Economic Analysis of Law and Governance," and is reproduced here as a dedication to Prof. (Dr.) Thomas S. Ulen. This foreword reflects on the reception of law and economics in the Indian legal academy and bar, situating this reception within the discipline's own history in the United States. Drawing on Thomas Kuhn's account of paradigm shifts, Prof. Ulen draws an analogy between the rise of law and economics with the displacement of the geocentric model by the helio-centric one, while cautioning that unlike astronomy, law and economics need not displace doctrinal scholarship but can coexist alongside it. He surveys the discipline's global spread, and the persistence of confirmation bias among scholars and practitioners alike. Finally, he closes with predictions for the future of law and economics in public health law, legal history, comparative law, and above all the growing importance of empirical data in legal scholarship.

We are reproducing this Foreword here in honour of Prof. Ulen's legacy and his invaluable contributions to the genesis and evolution of Law and Economics at GNLU and other universities in India. We are publishing this foreword along with the lectures delivered by Prof. Ulen during the 03rd GNLU Workshop on Law and Economics: Theories and Applications, organised by the GNLU Centre for Law and Economics in the fall of 2022.

Keywords: *Law and Economics; Legal Education in India; Legal Scholarship Methodology; Doctrinal and Interdisciplinary Legal Analysis; Empirical Legal Studies; Comparative Law*

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[1] Swanlund Professor Emeritus, University of Illinois at Urbana-Champaign, and Professor Emeritus, University of Illinois College of Law.

This piece was originally written by Prof. (Dr.) Thomas S. Ulen as the Foreword to the edited book *Economic Analysis of Law and Governance*, edited by Ranita Nagar and Hiteshkumar Thakkar (2022) and published by the GNLU Centre for Law and Economics and Eastern Book Company (EBC).

1. Introduction

I am honored to have been asked and extremely pleased to write this introduction. Many of the readers of this book know law and economics and have contributed to the growth of that discipline in India and elsewhere. They will understand what I am about to tell you about why it gives me such pleasure to write this Foreword to the edited book *Economic Analysis of Law and Governance* by Nagar and Thakkar (2022).

First, my many interactions with the Indian legal academy have invariably been enjoyable and constructive. Clearly, Indian professors have not only discovered law and economics but have found it to be an attractive and useful way to address legal issues. Their enthusiasm for the subject is infectious.

Additionally, I have been heartened by the apparent interest of the practicing Indian bar in law and economics. Members of that distinguished group have attended some of the talks I have given and have asked penetrating questions about the subject matters of my lectures. I hope very much that the bar truly finds the academic work in our field useful.

That last comment recalls the growing pains that law and economics suffered in the United States. I want to comment on those pains involved in getting the legal academy to accept law and economics and then the different pains involved in getting the practicing bar to recognize that there is much in the law-and-economics literature that they might find to be useful to them. I hope that you are spared both of those pains, but if you are not, I assure that there is "light at the end of the tunnel." Your persistence will pay off.

When law and economics first appeared as an innovation that attracted economic and legal attention – roughly around 1980, there was a great deal of skepticism in the U.S. legal academy about whether this scholarly innovation would contribute anything useful. I would call some of that skepticism "prudent" in the sense that it raised questions that any academic discipline should raise if a scholarly innovation questions the central paradigm prevailing in that discipline and that the innovators should be prepared to answer. Most academic disciplines have a tested and long-standing set of assumptions and a core methodology that have served the discipline and its practitioners well. They do not abandon those things lightly.

2. Prof. Kuhn's Reading of Legal Innovation

Thomas Kuhn's study of how a scholarly innovation succeeds in displacing the prevailing paradigm and thereby affecting what he called a "scientific revolution" is fascinating and applicable to law and economics (Kuhn, 1996). He says that the innovators point out some previously unremarked phenomena that cannot be easily explained by the prevailing paradigm. For example, in the "geocentric model" of our planetary system (the model that Copernicus, Kepler, Brahe, and others overthrew), all the planets and the sun were said to revolve around the Earth. Some observers found "anomalies" (the word is from Kuhn) in the movement of some planets: They appeared to stop their steady passage across the sky and to reverse the direction in which they were traveling and then, after a while, to reverse their direction again to resume the original path. These loops in planetary orbits were odd and not easily explained within the prevailing geocentric model. An alternative theory – the "heliocentric model," which put the Sun at the center of our Solar System – offered a simple but, for some, troubling explanation for the anomaly of planetary loops: They are the result of the Sun's being at the center of system and of all the planets, including the Earth, revolving around the Sun. The implication of those championing the new model was that if one could observe the movement of the planets from the Sun, at the center of our solar system, the anomalous movements – the loops in the orbits of the planets – would disappear.

The proponents of the geocentric model attempted to explain the eccentric movement of the planets (and thereby to preserve their model against the innovators), but those attempts made the geocentric model exceedingly complex and inflexible. In contrast, the heliocentric model not only easily accommodated the anomalies but also led to additional discoveries that probably would not have been made under the old paradigm.

The triumph of the heliocentric model was not quick or easy. The geocentric model was entangled with theological conceptions that placed humans (and their planet) at the center of the divinely created heavens, as if God arranged the solar system to highlight Humans as his crowning achievement. So, rejecting the geocentric model was much more than a mere scientific dispute. It threatened the deepest theological conceptions of the time. Remember that in 1633 the Catholic Church tried Galileo Galilei (who had just published his Dialogue Concerning the Two Chief World Systems) for heresy and forced him to abjure his contention that the Earth revolved around the Sun.[2]

I do not think that it is too arrogant of those who profess law and economics to suggest that their scholarly innovation has been to traditional doctrinal legal scholarship what the

[2] There is a famous account, perhaps apocryphal, that Galileo muttered to his Inquisitors after his abjuration, "And yet it moves," referring to the Earth. See https://blogs.scientificamerican.com/observations/did-galileo-truly-say-and-yet-it-moves-a-modern-detective-story/.

heliocentric model of the Solar System was to the geocentric model.[3] But there are limits to this analogy. In the battle between the heliocentric and geocentric models, one or the other had to triumph. They could not co-exist. That is not so as between law and economics, any of the other "law ands," and traditional doctrine analysis. There is room for all of those perspectives to coexist and supplement one another in legal analysis.

3. Why Innovations Succeed: Evidence, Utility, and the Limits of Confirmation Bias

We know that in most (but not all) instances of scholarly innovation, there is a pitched academic battle between the proponents of the old paradigm and those of the new paradigm. These battles are often generational, with the older, established professors arguing in favor of the old paradigm and younger, up-and-coming professors arguing in favor of the innovative paradigm. This general perception prompted the great physicist Max Planck to quip that science advances funeral by funeral.[4]

I do not want to leave this matter with that cynical thought. My experience has been that in any scholarly discipline, an innovation must prove its worth before being accepted. This is typically not a political battle or one in which money and special interests play a significant role. Rather, scholarly disciplines accept a new way of viewing their subject matter only after its proponents have shown by more than a preponderance of the evidence (and, perhaps, almost "beyond a reasonable doubt") that their innovation is useful. That utility can have multiple dimensions – including helping to explain better the anomalies that the current paradigm has trouble explaining; helping to make the disparate parts of a discipline cohere better; translating academic concerns into useful practices in medicine, business, education, legal practice, economic policy, and so on; and answering old conundrums in the field.

I want to make one final observation on this matter. In most people's lives, they do not change their minds in response to persuasive argumentation, including the presentation of compelling evidence. Rather, their practice is to seek out (or give greater weight to) evidence that confirms their prior beliefs (a practice psychologists call the "confirmation bias"). Consider, for example, the reasoning of those reluctant to be vaccinated against Covid-19.

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[3] I once gave a talk to a professional society of faculty from many different disciplines in which I talked about the revolution in the legal academy that law and economics was creating. In the question-and-comment session after the talk, I was astonished (and heartened) to learn from professors in physics, geology, engineering, biology, and economics (among other scholarly areas) that their disciplines had all gone through a significant paradigm change during their careers.

[4] More precisely, Planck said, "A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it." (2017).

Their reasons range from the absurd ("I've heard that the vaccine contains a microchip that when inserted into your bloodstream, causes you to vote for Biden") to the misguided ("The authorities have not required the manufacturers to go through the usual tests for new vaccines"). I think that the most compelling evidence is that showing that more than 90 percent of those who have died of Covid-19 since the availability of vaccines in January, 2021, were unvaccinated. And yet I do not think that that evidence has changed many people's minds.

While some in academia suffer from confirmation bias, one of the defining glories of great universities is that they are places whose people – faculty, students, alumni, and staff – seem to me to be less likely to suffer from the confirmation bias. Indeed, I would go so far as to say that one of the most important things that we teach at great universities is not so much the details of our various disciplines but the methods of critical inquiry by which we live and that we practice daily in our professional scholarship. So, although I think that Planck's wonderful quip has a kernel of truth, it misses something essential about academic inquiry. After all, there are very few academic innovations that survive if they are wrong (consider alchemy) and very few innovations that should have triumphed but ultimately did not transform their discipline.

The early years of law and economics in the United States and Western Europe (the areas I am most familiar with) were characterized by strife between the innovators and the traditionalists.[5] I am happy to report that by the early 1990s most of the reluctance to admit law and economics to a place in the U.S. and Western European legal academies had ended. I would like to think that this happened because those professing law and economics persuaded their colleagues that their innovation was worthwhile. From that point on, law and economics has become part of the standard curriculum of most North American law schools – either as a stand-alone course or as a discipline whose findings are routinely covered in more traditional law school courses – and a tool that al-most every law professor in North America has in her toolkit.

[5] I should qualify this assertion by noting that in the early 1980s the faculty members of the University of Illinois College of Law – all of them distinguished traditional, doctrinal legal scholars – welcomed me, a traditional economist, onto their faculty with open arms and warmth. They exhibited nothing more than a healthy skepticism that I could dispel by demonstrating in my teaching, scholarship, and collegial activities that I was as productively concerned with explaining and analyzing the law as they were. In my wildest dreams I could not have imagined a more fulfilling place to have worked.

4. From Academic Curiosity to Practical Tool

Above I noted that for a scholarly legal innovation to be truly effective, it must move beyond being something that only professors in a discipline discuss and care about. It must become some-thing that practitioners use.[6] For too long, law and economics was, alas, something that only academics recognized as exciting. It did not immediately make its way into legal practice in obvious or dramatic ways. There are, of course, examples of law and economics having had an influence on some practice areas, such as criminal law, litigation, environmental regulation, corporate law, bankruptcy law, and more. But there is also a famous literature criticizing the academy's infatuation with law and economics to the exclusion of developing useful tools for practitioners, especially judges.[7] I think that this criticism is overdrawn, but I also think that there are things that law and economics could have done to minimize these complaints. For example, we could have been less messianic in our urging traditionalists to abandon their doctrinal studies in favor of learning economics, then psychology, and now empirical techniques. We might have found ourselves more congenially welcomed if we presented our tools as supplements, not replacements, for their traditional interpretive tools[8] (Garoupa & Ulen, 2021).

I am extremely heartened to see that law and economics is also becoming popular and of use to an ever-increasing number of countries and regions around the world. The indications of this growth are several: the increasing number of national and regional professional associations devoted to law and economics; the increasing number of languages into which the text by Bob Cooter and me has been translated; the percentage of our text's sales coming

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[6] The same movement from academy to practice is true of medicine, journalism, education, business, and the other disciplines within the modern university that have a strong connection to a distinct profession.

[7] See, for example, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561 (1994); Ronald K.L. Collins & Harry T. Edwards, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. L. EDUC. 637 (2016). Judge Edwards was a distinguished professor at the University of Michigan Law School before joining the federal judiciary. For a persuasive contrary view, see – among many other writings – RICHARD A POSNER, HOW JUDGES THINK (2008); Richard A. Posner, *What Is Wrong With the Federal Judiciary, Part I*, 19 GREEN BAG 2D 187 (2016); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable, Part II*, 19 GREENBAG 2D 257 (2016); RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016), and RICHARD A. POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES (2017).

[8] Put in the terms of Kuhn's famous model, those of us who were drawn to law and economics did not need to characterize their innovation as the heliocentric model to the traditional geocentric model. That is, the battle was not a clash of paradigms in which only one could succeed and the other would be banished. It was, rather, about whether economic tools could and should be part of a lawyer's standard tool kit, alongside the doctrinal tools that had and still serve legal analysis so well.

from foreign users; the in-creasing number of Zoom talks and classes that we give to foreign audiences; and more.

5. Looking Ahead: Future Directions for the Discipline

Nonetheless, there is still much work to be done using the tools of law and economics. I cannot presume to imagine all the ways that scholars of the future will find to use law and economics. We will be surprised, I am sure, by the inventiveness and creativity with which they do their scholar-ship. But I can guess about some general topics and directions that are likely to attract the attention of future law-and-economics scholars.

One prediction that I am confident in making is that matters of public health will be of interest. What legal policies can we adopt that either minimize the likelihood of pandemic disease arising or equip us to better serve the public if another virus arrives to ravage humanity? What role can law play to help spur the further development of novel vaccines? And what role can legal tools like nudges and mandates play in helping to increase the rate of vaccination against novel diseases?

There is still much work to be done in specifying the role that law plays in economic development – not just in increasing the rates of GDP growth and GDP per capita growth but also in making societies happier (Kenny, 2011).

As a general matter, I am confident that data analysis will continue to grow as an important part of legal scholarship. Legal scholarship has recently embraced empirical analysis as an exciting and informative addition to doctrinal and economic analysis. But there is so much more to do. In many cases, we simply do not have the data that we must have to measure the effectiveness of legal policies. To further that analysis every society needs to develop a plan for gathering data on legal matters. There is almost no limit to the methods that might be used to gather those data – surveys, interviews, archival research, recordation of all information about legal disputes and how they are disposed of, and more. There are so many gaps in our data about legal matters that we either ignore the empirical side of our legal analysis or resort to experiments that, while informative, could be usefully supplemented by comprehensive cross-sectional, panel, and longitudinal real-world data.

I am also confident that as law and economics spreads around the world's legal academies and practitioners that the historical, cultural, governance, and resource differences among the almost 200 countries in the world will generate fascinating studies of why some areas of law are similar across national and regional borders while other areas are different and distinctive. I am aware that comparative law has studied these matters for decades. But that field has not yet brought the full force of the tools of law and economics to bear on its subject (Garoupa & Ulen, 2021).

Similarly, legal historians have contributed fascinating studies of the development of legal systems. With only a few exceptions,[9] however, they have not brought the full force of law and eco-nomics to the study of legal history. That sort of cross-disciplinary history has been extremely fruitful in other instances, such as economic history; so, I see no reason why it cannot be similarly productive in economic legal history.

6. Lectures on Law and Economics by Prof. (Dr.) Thomas Ulen (Delivered at 03rd GNLU Workshop on Law and Economics 2022)

GNLU Centre for Law and Economics organised the 3rd GNLU Workshop on Law and Economics – Theories and Applications from 12th September to 18th September 2022. The Workshop was graced by the presence of participants from across India and abroad, including research scholars from Rotterdam University, students and professors from National Law Universities, among others. During the workshops across seven days lectures were delivered by many eminent scholars such as, Prof Ram Singh, Prof. Regis Lanneau, and including Prof. (Dr.) Thomas Ulen.

6.1. Lecture 1: Introduction to Law and Economics (GNLU Centre for Law and Economics, 2022a)

This lecture on "Introduction to Law & Economics" delivered by Prof. (Dr.) Thomas Ulen gives a brief introduction to basic concepts and principles of Law and Economics. Particularly, he introduces the microeconomic approach in analysing law's impact on human behaviour. He differentiates positive analysis, which considers how people are likely to behave, from normative analysis which focuses on how laws should be designed and enforced. Law creates incentives through consequences, or "prices," for people to behave in certain way with an assumption that people will respond to those incentives. He also highlights the importance of *ex ante* and *ex post* analyses, thus stressing the need to analyse how legal rules affect behaviour even before a dispute arises.

Discussion is based on transaction costs and Ronald Coase's idea that low transaction costs would allow bargaining to produce efficient allocation, while high transaction costs may

[9] For an exception, see the scholarship of Dan Klerman – for example, Klerman, "Economic Analysis of Legal History," in ULEN, ED., THE METHODOLOGIES OF LAW AND ECONOMICS (2017).

require the intervention of law (Coase, 1960). He then applies this reasoning to fields such as torts, property and liability, and contractual remedies. Further, he discusses the relationship between law and social norms with the use of the ideas developed by Robert Ellickson, to prove that individuals do not behave solely based on the law, but sometimes due to social norms as well (Ellickson, 1998).

In the end, he gives his insights on limitations of markets and the prospect of monetary motivation leading to unintended outcomes, as demonstrated in Daycare-Fine Experiment (Gnezzy & Rustichini, 2000). Prof. Ulen hence argues that while tackling social issues, one has to consider markets, law, and social norms together. He also speaks about social costs, which are cases where an individual action causes costs to others, and that those individuals should account for such externalities.

Overall, the session emphasized that Law and Economics is a way of analysing the interplay of legal rules, incentives, markets, transaction costs, and social norms.

6.2. Lecture 2: Coase Theorem *(GNLU Centre for Law and Economics, 2022b)*

Prof. Thomas Ulen's lecture explains how economics approaches property rights differently from traditional property law by focusing on the efficient use of scarce resources and the role of property rights in achieving that efficiency. The central idea is the Coase Theorem, based on Ronald Coase's *The Problem of Social Cost*, which states that when transaction costs are zero or very low, parties can bargain and reach an efficient allocation of resources regardless of how the law initially assigns the right (Coase, 1960). Prof. Ulen identifies three main transaction costs namely; search, negotiation and enforcement costs and explains through the farmer and rancher example that where these costs are low, private bargaining can lead to the most efficient outcome. However, when transaction costs are high and bargaining is not possible, law becomes important, and the court may have to undertake a "hypothetical market transaction" to determine to whom the legal right is more valuable.

The lecture then turns to the law and economics of intellectual property, which is particularly important because innovation is one of the major drivers of economic growth (Solow, 1956) Prof. Ulen explains that information is different from real property because it is non-material and non-rivalrous in consumption, meaning that one person can use an idea without preventing another from using it. Since information is also difficult to appropriate once disclosed, there may be too little incentive to produce it therefore, society can respond by subsidising its production, producing it publicly or giving the creator an enforceable property interest. However, certain works such as recipes, magic tricks and comedy routines, may instead be protected through strong social norms.

Unlike real property, intellectual property is generally limited in duration. Prof. Ulen uses patents to ask why protection is fixed and why it is not adjusted according to the social value of an invention. The reasons he notes is that a patent may create a monopoly right and therefore a social cost, but patent duration is an ex-ante rule meaning, when protection is granted, we do not yet know how valuable the invention will become or how easily it can be substituted. Copyright raises a similar balance, because later creators often build on earlier works. His example of *Pyramus and Thisbe*, *Romeo and Juliet* and *West Side Story* shows why protection cannot continue forever, while the falling cost of copying explains the need to preserve incentives for creators (Landes & Posner, 2003). Trademarks differ because they may last indefinitely in competitive markets, although marks such as Aspirin or Xerox may become generic.

The broader point is that different kinds of property require different forms of protection, and the law must structure these rights in a way that encourages creation and efficient use without creating unnecessary social costs.

6.3. Lecture 3: Tort liability and Insurance *(GNLU Centre for Law and Economics, 2022c)*

The economic analysis of tort law originated in the 1960s after Guido Calabresi applied Ronald Coase's insights from "The Problem of Social Cost" to accident law (Coase, 1960; Calabresi, 1970). The lecture develops this to discuss that the economic objective of tort law is to minimise the total social costs of accidents. Prof. Ulen discusses that these social costs consist of three distinct elements: precaution costs (expenses incurred to prevent accidents), accident losses and administrative costs.

When bargaining between two strangers who have been involved in an accident is prevented by high transaction costs, tort law steps in to internalise the social costs that their activities impose on others. Now, in a tort law regime, the parties are under a veil of ignorance, as they don't know ex ante whether they will be the victim or the injurer (Rawls, 1971). Therefore, rational actors here will take a cost-justified precaution up to the point where its marginal cost equals its expected marginal benefit.

The discussion distinguishes between negligence, which incentivises care in bilateral situations where both parties can prevent harm, and strict liability, which is more efficient for unilateral risks. A negligence standard exonerates an injurer from liability if their level of care meets or exceeds the social-cost-minimising legal duty. Here, because the potential victims assume that the level of care will be met, they also take the necessary precautions, leading to bilateral precaution. Under strict liability, an injurer is liable for harm caused regardless of their level of care, though rational injurers still take cost-justified precautions to minimise their expected liability. Because victims are relieved of any legal duty to take care, strict liability is most efficient in unilateral precaution contexts where only the injurer can minimise risk.

He then discusses the real-world application of this theory when actors are not usually rational. In this case, while insurance can introduce moral hazard and adverse selection, insurers mitigate these issues through deductibles, coinsurance, and experience rating, thereby maintaining care incentives.

Towards the end, Prof. Ulen explains how ex ante safety regulations and ex post tort liability complement each other by reducing accident costs while addressing the limitations of relying solely on either mechanism.

***6.4. Lecture 4: Economics of Crime & Punishment** (GNLU Centre for Law and Economics, 2022d)*

The economics of contracts, torts, and other private issues helps private entities deal with issues that arise amongst them, or rather avoid them altogether. The area of crime differs completely as it does not deal with just a private entity; a crime is committed against the state, all of us. The lecture traces the economic analysis of crime and punishment from its foundational theory to its most consequential empirical tests. The central theme is Gary Becker's rational-choice model of criminal behaviour, which holds that individuals weigh the expected benefits of a crime against its expected costs, the probability of detection, arrest, and conviction, multiplied by the severity of the resulting sanction, and offend only when benefits exceed costs (Becker, 1968).

Unlike property, contract, and tort law, criminal law is uniquely amenable to empirical testing, and the lecture traces how Becker's theory shaped real-world policy, including the U.S. Sentencing Commission's push toward determinate sentencing and the fourfold rise in American incarceration between 1980 and 2012. A theory being coherent, however, does not make it correct, it must survive contact with data. Isaac Ehrlich's early work found a strong deterrent effect from capital punishment, but this was later undermined by Donohue and Wolfers's comparative analysis of U.S. and Canadian homicide trends, which showed the two countries' rates moving in lockstep despite sharply diverging death-penalty policies, suggesting execution was not the operative variable (Donohue & Wolfers, 2005).

Particular attention is devoted to Donohue and Levitt's controversial finding that the legalization of abortion after Roe v. Wade (1973) accounts for roughly half of the 1990s crime decline, through both a "cohort size" effect (fewer young men in the highest-crime-prone age group) and a more contested "cohort quality" effect (children born under more favourable circumstances) (Donohue & Levitt, 2001). These findings are weighed against rival explanations, policing levels, the receding crack epidemic, and pandemic-era disruption, while returning throughout to the broader methodological point: a theory's internal coherence, however elegant, is never sufficient; it must be tested against evidence, and efficiency, however analytically powerful, is not the same thing as justice.

*6.5. Lecture 5: **Behavioural Law and Economics** (GNLU Centre for Law and Economics, 2020e)*

In this lecture, Prof. Thomas Ulen discusses behavioural law and economics, examining how human behaviour departs from standard rational choice theory because individual and group decision-makers are imperfectly rational. The decision-making of a human can be clouded by status quo bias, confirmation bias, overoptimism or the endowment effect. This can be further explained in the light of assignment of legal rights under the Coase theorem where transaction costs can exist in form of certain biases. To address these cognitive flaws, he explores public policy mechanisms for example shifting from a rule of presumed denial to the rule of presumed consent. Furthermore, he delves into the dual system of thinking contrasting fast, intuitive "system 1" with slow, deliberative, logical "system 2" thinking as measured by the cognitive reflection test, and illustrates how cognitive disfluency and rules of criminal legal procedure forces decision-makers to use system 2 reflection. Further, he demonstrates application of this understanding in contract framing and contract remedies.

He concludes by giving a snapshot of application of behavioural law and economics in other areas of law like bankruptcy. Additionally, he states his criticism of behavioural economics and that regulating for rationality should be more evidence-based than regulating for traditional market imperfections.

***6.6. Lecture 6: [The Why, the How, and the Pitfalls of Empirical Legal Studies]** (GNLU Centre for Law and Economics, 2021)*

Prof. Thomas Ulen explains the place of empirical legal studies (ELS) within legal education and research. Traditionally, legal education has focused mainly on the practical aspects of lawyering and judging, along with doctrinal and jurisprudential analysis. The law-and-economics movement, particularly from the late 1970s and 1980s onwards, introduced economic methods into areas such as property, business associations and criminal law. This encouraged scholars to move beyond theoretical arguments and examine legal rules through empirical evidence. Instead of only asking whether a legal rule was theoretically efficient, researchers could formulate hypotheses and test them against actual behaviour and available data.

Prof. Ulen refers to the minimum-wage debate as an example of the importance of empirical research. The traditional economic argument suggests that an increase in the minimum wage would increase the cost of employing low-skilled workers and therefore lead to unemployment. However, the research of David Card and Alan Krueger (2015) challenged this assumption., they examined employment data and found no evidence that increases in the minimum wage necessarily resulted in employment losses for low-skilled workers. The example demonstrated how empirical evidence can be used to test established economic predictions about the effects of legal and policy changes.

Prof. Ulen further discusses some of the difficulties involved in conducting empirical legal research. One difficulty is that many concepts relevant to law and economics are difficult to measure directly. Researchers may not have sufficient information about how often commercial contracts are performed, renegotiated or disputed. In such situations, he suggested that researchers can examine observable changes in behaviour following a change in the law and use such changes as evidence of the law's effects.

Towards the end of the lecture, Prof. Ulen emphasised that empirical legal studies should not be understood as being limited to quantitative methods. Qualitative evidence, historical evidence and other forms of evidence can also contribute to understanding how legal rules operate in practice. The broader purpose of ELS, therefore, is to examine the relationship between law and actual behaviour using evidence, while remaining conscious of the limitations of the available data.

7. Concluding Remarks

Finally, I want to stress that the business and pleasure of being involved with a worldwide community of scholars is learning from them and enjoying their scholarly contributions, like those collected in this volume. Our profession is collaborative, cumulative, and collegial. Borrowing from Sir Isaac Newton's famous and memorable description of the sciences,[10] we might say, "If we can see further, it is because we are standing together on the shoulders of those who went before us, side-by-side with legal scholars from all over the world."

[10] In a letter to Robert Hooke, dated February 5, 1675, Newton wrote, "If I have seen further, it is by standing on the shoulders of giants."

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