

THE LIFE OF TRANSPLANTS: WHY LAW AND
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THE LIFE OF TRANSPLANTS: WHY LAW AND ECONOMICS HAS “SUCCEEDED” WHERE LEGAL ANTHROPOLOGY HAS NOT

Riaz Tejan*

This essay asks why Law and Economics succeeded at influencing doctrinal legal thought in an era when Legal Anthropology has largely failed in this regard. It compares select “conceptual transplants” from each subfield in search of key differences that might shed light on their divergent histories. Contrary to other writings that explain this difference in terms of a putative “natural” discord between legal and anthropological forms of argument, it finds that key concepts from the respective subfields emerge from self-consciously different rhetorical positionings that, ultimately, help determine their levels of acceptance in the legal academy. Understanding these differences can help remedy the marginalization of one subfield in favor of another and call into question longstanding beliefs that one is immanently normative while the other merely descriptive.

INTRODUCTION

Law and Economics has influenced the broader study of doctrinal law in academic settings far more than Legal Anthropology. That influence, I will assume in this piece, can be assessed by the degree of uptake and circulation of conceptual transplants—measured crudely by publications referencing them in publicly available forms. *Conceptual transplants* are ideas lifted from one scholarly community and transposed into another, albeit with reinterpretation, modification, and creative application—or what some have called “transfiguration.”¹ This idea purposely alludes to “legal transplants,” the idea that doctrines and institutions of law have been borrowed, imported, and transposed from one legal system into others since at least the Classical period.² But whereas legal transplants denotes concepts moved across cultural, communal, national, or systemic borders, *conceptual transplants* transcend academic disciplines. By reviewing several conceptual transplants absorbed into law from Legal Anthropology and Law and Economics respectively, this essay asks *why* Law and Economics has been so successful where Legal Anthropology has not. Guiding this exploration will be an argument that Law and Economics succeeds by emphasizing that its key concepts are part of a continuity rather than discontinuity with contemporary Western legal culture. In writings aimed at a legal academic audience, Law and Economics tells scholars that legal actors always already behave with economic priorities as the key motivation. In its

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1. See Dilip Parameshwar Gaonkar & Elizabeth A. Povinelli, *Technologies of Public Forms: Circulation, Transfiguration, Recognition*, 15 PUB. CULTURE 385, 394–95 (2003).

2. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–22 (1974).

writings embraced by legal academics, Legal Anthropology tends to argue that its concepts are indicative (and useful because) of a discontinuity with contemporary Western legal culture. The former speaks descriptively while the latter speaks normatively.

This assertion paradoxically inverts a widespread view that anthropology is a descriptive endeavor, whereas economics leads to normative claims about what law “should be.” It does not contend with those views at that level of analysis, but zooms closer in on the claim-making approach of each field and what they require us to believe about the respective disciplines and their conceptual outputs. Interdisciplinary conversations in each field have played out differently: lawyer-economists have worked hard to assert to academics, practitioners, and judges that their economic view of legal behavior describes how people already do law-in-action, whereas legal anthropologists have tended to argue to academics that their sociocultural views of legal action are informed by other spaces or other times—ones that should be adopted as a model for reform. The lesson seems to be: when it comes to convincing non-PhD academic lawyers to *use* one discipline’s conceptual tools, it may be easier and more persuasive to say one’s own field captures the world “as it really is” rather than “as it should be.” This rhetorical difference, I claim, may lie at the heart of why one has succeeded where the other has not.³

I. LEGAL ANTHROPOLOGY

Legal Anthropology, or Law and Anthropology, is a long-established subfield of cultural anthropology. Indeed, early cultural anthropology, with its emphasis on norms, kinship structures and taboos, and disputes, evolved with law-like native practices among its core subject matter.⁴ It approached the study of law-like behavior initially using the techniques of “armchair” study, but considerably advanced through the development of fieldwork ethnography—or long-term participant observation. Today, legal anthropologists utilize fieldwork and interviews to capture what law means—something too often

3. This essay extends from my larger empirical project on the moral anthropology of Law and Economics. It draws on substantial interviews with lawyer-economists, and extant scholarship, in both fields. It interprets the messaging of the two subdisciplines to discern whether differences in that messaging may play a role in their respective receptions in the legal academy. This essay, therefore, deliberately omits the majority of scholarly writings in each field to focus primarily on those that have been embraced by mainstream doctrinal legal scholarship. For purposes of scope, this analysis focuses solely on influences found within English common law. It details some of the lessons of Legal Anthropology and Law and Economics to discern differences that may account for their respective receptions. In raising the possibility that one difference may be instrumental, however, it does not advance or *test* the hypothesis that this difference is the sole cause of success or failure.

4. Riaz Tejani, *Anthropology*, in RESEARCH HANDBOOK FOR NEW LEGAL REALISM (Shahin Taleh, Heinz Klug & Elizabeth Mertz eds., 2021).

ignored by neighboring disciplines—to the people who make, enforce, apply, and live by it.⁵

A. *Maine: Status to Contract*

The reception of anthropological thought in law was in some senses “primed” by the longstanding tradition of comparative law. Dating back to Classical Antiquity, jurists among the Greek city-states compared legal institutions and procedures across their borders.⁶ In the Roman period, comparative law helped allow legal pluralism to flourish and helped refine institutions in one corner of the Empire with innovations from another.⁷ Not unlike comparative law, early anthropology, or ethnology, emerged as an “armchair” discipline in which scholars utilized accounts from remote sources far and wide but did not conduct fieldwork of their own.⁸ Among the largest influences of legal anthropology on law, the earliest emerges from this armchair approach, whereas the latter ones draw from field research.

One cannot open a common law contracts casebook today without encountering some reference to the following narrative. The evolution of Western societies has been one in which social bonds—and therefore credit—were once characterized primarily by kinship, reputation, and hierarchy; today these societies are “freed” from those bonds and instead tied together by webs of formal contracts recognized by law. The evolution of Western legal culture has accordingly been “from status to contract.”⁹

This thesis comes from Sir Henry Maine. A British jurist who had been stationed in India during the British Raj, Maine used the opportunity to compare English common law legal history with that of the Indian subcontinent—characterized by the presence of religious and tribal legal orders alongside imperial Western legal norms imposed by Britain. His theory comported well with other evolutionist ideas about human culture and law propounded by theorists such as Marx, and later Frazer and Durkheim.¹⁰ It explained in part how modern Western economies were able to grow so expansively, and able to include ever more abstract legal technologies such as commercial paper and negotiable instruments.¹¹ And it offered explanation for how multiculturalism could begin to flourish in the West, where immigrants

5. *Id.*

6. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 11 (2d ed. 1999).

7. See *id.* at 51; see also G.C.J.J. van den Bergh, *Legal Pluralism in Roman Law*, 4 *IRISH JURIST* 338, 338 (1969).

8. See Riaz Tejani, *Distance in Law and Globalization: Armchair Anthropology Revisited*, in *COMPARATIVE LAW AND ANTHROPOLOGY* 491, 494 (James Nafziger ed., 2017).

9. R.H. Graveson, *The Movement from Status to Contract*, 4 *MOD. L. REV.* 261, 261 (1941).

10. See *supra* text and accompanying note 3; see also THOMAS HYLLAND ERIKSEN & FINN SIVERT NIELSEN, *A HISTORY OF ANTHROPOLOGY* 29 (Vered Amit & Jon P. Mitchell eds., 2013).

11. See HENRY SUMNER MAINE, *ANCIENT LAW* 45–46 (1861).

had to establish credit without any of the reputational security afforded by life after centuries in the same town or village.¹²

B. *Llewellyn and the UCC*

It is broadly acknowledged today that Columbia Law Dean Karl Llewellyn drafted Article 2 of the Uniform Commercial Code (UCC) in the early twentieth century.¹³ Born and educated in the U.S., Llewellyn had transnational horizons that brought him to France and then Germany during World War I.¹⁴ While there, he absorbed lessons from French and German legal cultures. But it was as a faculty member at Columbia that Llewellyn partnered with E. Adamson Hoebel, a graduate student of anthropologist Franz Boas, to design a fieldwork project surveying dispute resolution among the Cheyenne Indians, by that time forcibly relocated to modern-day Oklahoma.¹⁵ Already familiar with the work of Malinowski—the founder of modern ethnographic fieldwork—Llewellyn embraced this project as an extension of his comparative realist interests in “law in action.” With Hoebel, he conducted several weeks of fieldwork in 1935 and was evidently well-liked by the Cheyenne he met.¹⁶ After gathering numerous oral histories from the informants about how disputes over property and intentional harms were resolved, the team returned to New York. At this point, Llewellyn began his work on the UCC, and did so heavily influenced by what he had learned in Oklahoma. The law scholar David Papke has suggested that the Cheyenne, and not simply “Legal Realism,” should be considered a major influence on Article 2 thanks to Llewellyn’s work.¹⁷ Regardless of how this is phrased, contemporary scholars frequently cite this anthropological fieldwork as a direct and practical force in the shaping of the all-important institution of American contract law.

C. *Legal Translation: The Gluckman-Bohannon Debate*

Though comparative law long predates the advent of legal anthropology, it came under the latter’s influence relatively quickly. The legal pluralism of Europe mentioned above had raised the issue of translation between legal cultures and languages, but jurists in England and on the Continent both traced the origins of their institutions to Roman Law. Once Europeans and North

12. See *id.* at 13.

13. See Ajay K. Mehrotra, *Law and the “Other”: Karl N. Llewellyn, Cultural Anthropology, and the Legacy of the Cheyenne Way*, 26 *LAW & SOC. INQUIRY* 741, 747 (2001).

14. See Michael Ansaldi, *The German Llewellyn*, 58 *BROOK. L. REV.* 705, 708, 709 n.11 (1992).

15. See David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 *BUFF. L. REV.* 1457, 1460–61 (1999).

16. See *id.* at 1461.

17. See *id.* at 1459.

Americans began to seriously study non-European social ordering as forms of “law,” the problem of translation—of rendering other people’s legal concepts understandable in one’s own language—became more acute. Legal anthropologists were the first to apply an ethnographic or fieldwork approach to this type of research, and they initially explained “folk” legal institutions by translating them into Western terminology. For example, tribal councils were labeled as “courts” and elders helping to resolve disputes were labeled as “judges.”¹⁸ On one hand, this served an antiracist function by giving tribal societies, generally in developing regions nearer to the equator, an air of rationality and order once thought missing by European colonizers. It harmonized with other efforts in cultural anthropology led by Boas in North America and Levi-Strauss in France.¹⁹ The anthropologist most associated with the translation of folk legal concepts into Western ones was Max Gluckman. In his study of the Lozi of modern-day Zambia, Gluckman argued that “[o]n the whole, it is true to say that the Lozi judicial process corresponds with, more than it differs from, the judicial process in Western society.”²⁰ Following publication of his first major work on the topic, Gluckman was challenged by Paul Bohannan, who argued that the Tiv of modern-day Nigeria used their dispute resolution mechanisms to improvise living solutions to conflict, rather than to develop, any formal corpus juris—body of “law.”²¹ Bohannan felt that the very application of Western concepts like “law” to the Tiv and other tribal societies reduced the ingenuity and richness of their social problem-solving.²²

This repartee became known as the “Gluckman-Bohannan debate.” And as anthropology moved away from scientific classification and description toward experience and self-reflection, the discipline ultimately moved away from its importance and real efforts to resolve it.²³ But, the same was not true in comparative law. There, the Gluckman-Bohannan debate continues albeit in slightly different form. In 1974, the Scottish jurist A. Alan Watson proposed the theory of “legal transplants”—an idea that legal concepts and institutions over time have been copied and transposed into foreign systems throughout the course of human migration and conquest.²⁴ This compelling idea paralleled the shift that had already happened in anthropology from an *evolutionist* theory

18. MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 15, 21 (2d ed. 1967).

19. See, e.g., Michelle Brattain, *Race, Racism, and Antiracism: UNESCO and the Politics of Presenting Science to the Postwar Public*, 112 *AM. HIST. REV.* 1386, 1391 (2007); Kamala Visweswaran, *The Interventions of Culture: Claude Lévi-Strauss and the Internationalization of the Modern Concept of Race*, in *UN/COMMON CULTURES: RACISM AND THE REARTICULATION OF CULTURAL DIFFERENCE* 76 (2010).

20. GLUCKMAN, *supra* note 18, at 357.

21. PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 57–58 (1957).

22. See *id.* at 57–59.

23. See Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999*, 7 *J. ROYAL ANTHROPOLOGICAL INST.* 95, 99–101 (2001).

24. See WATSON, *supra* note 2, at 21.

of cultural change to a *diffusionist* one that said societies develop new cultural adaptations not because of their place on a developmental continuum, but by virtue of their contact, borrowing, and sharing with other cultures.²⁵ The diffusionist school of culture theory lent itself more readily to the antiracist view in anthropology. But in legal history, where colonialism and conquest had been so obviously instrumental, it may have had the opposite implication: that dark-skinned legal subjects in the colonies owed their politico-legal progress to their colonizers, especially England, France, and Spain. But “legal transplants” also explained the movement of doctrines and institutions between and among Western legal systems as well.

Nevertheless, it has been vigorously criticized by the Canadian jurist Pierre LeGrand for reasons that resemble Bohannan’s challenge: can foreign legal concepts ever truly be replicated outside their culture of origin?²⁶ LeGrand’s “impossibility thesis” of legal transplantation has become a mainstay of contemporary legal pluralism scholarship.²⁷ It is viewed as an extension of the Gluckman-Bohannan debate, and it can be found in well-trafficked comparative law casebooks in English today.²⁸

Gluckman’s last book was published in 1972, three years before the author’s death.²⁹ A year later, in 1973, Clifford Geertz’s *The Interpretation of Cultures* appeared, giving the world his now-famous essay *Thick Description: Toward an Interpretive Theory of Culture*.³⁰ In 1981, Geertz gave the series of lectures later compiled as *Local Knowledge: Fact and Law in Comparative Perspective*.³¹ Whereas this essay is now read as a classic in legal anthropology, it cannot be called a “hit” for the subfield within academic law. On the contrary, after these lectures, the discipline began to wane in relevance among law schools, and lawyers would turn to more positivist social science for empirical support.

25. See, e.g., Leslie A. White, *Evolution and Diffusion*, 31 *ANTIQUITY* 214, 214–18 (2015).

26. See, e.g., UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER’S COMPARATIVE LAW* (7th ed. 2009).

27. See, e.g., PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 513 (3d ed. 2006).

28. See, e.g., MATTEI, *supra* note 26.

29. Elizabeth Colson, *Obituary: Max Gluckman*, 9 *RAIN* 8 (1975).

30. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 310 (1983). Interpretive social sciences went back at least to Max Weber and saw application in the work of Evans-Pritchard, but *Thick Description* is considered the moment in which interpretive anthropology—the idea that culture and its study are acts of interpretation, meaning-making, and their disentanglements—went mainstream. See Thomas Burger, *Max Weber, Interpretive Sociology, and the Sense of Historical Science: a Positivist Conception of Verstehen*, 18 *SOCIO. Q.* 165 (1977); E.E. Evans-Pritchard, *Social Anthropology: Past and Present*, 50 *MAN* 118 (1950). Paul Shankman, *The Thick and the Thin: On the Interpretive Theoretical Program of Clifford Geertz*, 25 *CURRENT ANTHROPOLOGY* 261, 261 (1984). This greatly influenced the developing field of cultural studies and moved anthropology further from positivist social science toward the humanities. Increasingly influenced by this, later ethnographic fieldwork on law and legal behavior never influenced academic lawyers to the degree their predecessors had.

31. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983).

II. LAW AND ECONOMICS

In approximately this same period, the influence of economic studies of law was rapidly increasing. But whereas Legal Anthropology started off with a natural affinity for academic law due to its ethnographic interest in law-in-action, economics had to be coaxed into the legal academy through the work of several key institutional agents in the mid-twentieth century.³² At the University of Chicago, this agent was Aaron Director—a professor in the law school who directly helped build the “Chicago School” of economics. Director convinced the University Press to publish *The Road to Serfdom* by his friend and later Nobel laureate Friederich Hayek.³³ His sister, Rose, would marry the economist and later Nobel laureate Milton Friedman.³⁴ Director taught the main Antitrust Law course at Chicago—the area that became an early laboratory for ideas in Law and Economics. And though his own writings were sparse, he would found and edit the *Journal of Law and Economics*, the first of its kind.³⁵ Director closely influenced students Robert Bork and Frank Easterbrook—both of whom went on to become high-profile federal judges appointed by Ronald Reagan.³⁶

Though nearly synonymous with Chicago, early Law and Economics had another agent in the form of Henry Manne. Manne earned his law degree from Chicago while Director was still on faculty there.³⁷ Manne began teaching at the University of Rochester, then moved to the University of Miami, Emory, and finally George Mason.³⁸ From Miami onward, he brought with him the Center for Law and Economics—a research and teaching institute that began offering summer training to judges and law graduates in economic analyses with hopes of influencing the bench and legal academic community directly.³⁹ Further, Manne recruited economics Ph.D.s to teach in law school and offered J.D.

32. This essay emphasizes the role of institutional agents, but the rise of Law and Economics is similarly—if more ephemerally—attributable to the work and intersubjective social impact of key scholars such as Richard Posner (cited at length below) and Guido Calabresi. Although vastly different in ideological postures, both academic-turned-judges are frequently cited for their immense personal investments in the development of Law and Economics, or alternatively Economic Analysis of Law. See Wendy J. Gordon et al., *The Future of Law and Economics and the Legacy of Guido Calabresi*, 48 EUR. J.L. & ECON. 1, 1 (2019). These investments are seen most in the generous mentoring of junior scholars both Posner and Calabresi (especially) are widely known for. In other words, whereas this section emphasizes formal and financial institution building, one must not discount the role of parallel informal, intersubjective, and charismatic institution-building practices.

33. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 93 (Ira Katznelson et al. eds., 2008).

34. See Bruce Weber, *Rose Friedman, Economist and Collaborator, Dies at 98*, N.Y. TIMES (Aug. 18, 2009), <https://www.nytimes.com/2009/08/19/business/19friedman.html>.

35. TELES, *supra* note 33, at 95.

36. See Paul Baumgardner, *The Law: “Something He and His People Naturally Would Be Drawn To”: The Reagan Administration and the Law-and-Economics Movement*, 49 PRESIDENTIAL STUDS. Q. 959 (2019).

37. TELES, *supra* note 33, at 95.

38. *Id.* at 90.

39. See *id.* at 109.

admissions to produce a crop of Law and Economics J.D./Ph.D.s.⁴⁰ According to Teles, the institution-building roles served by Aaron Director and Henry Manne are almost wholly responsible for the success of the discipline in U.S. academic and policy circles.⁴¹ With this being said, concepts travel farther than—and outlive—human voices; what, then, were the main legal doctrines shaped by Law and Economics thinking, and how have these fared over time?

A. Risk-Utility Balancing

The foremost influential theory of Law and Economics, *risk-utility balancing*, is a direct offshoot of utilitarian ethics. Utilitarianism, as conceived by Bentham and Mill, says that an action is morally justifiable if the aggregate utility or pleasure derived from it is greater than the aggregate cost.⁴² Mill believed this type of balancing was complicated because various beings and human individuals might not experience all pleasures identically.⁴³ Bentham’s approach was more simple and quantifiable: if everyone’s preferences and distastes were translated into a numerical expression, we could simply compare hypothetical outcomes to judge whether any action was “right.”⁴⁴ For being outcome-centered, this approach is known as consequentialist.

Bentham’s approach lent itself well to new applications in law once further simplified. Rather than speaking of “pleasure or pain,” we should consider “utility” to be about wealth and aggregate utility to mean the total wealth in the social system. In a famous 1979 article, Richard Posner wrote that Law and Economics’ adaptation of Bentham should be about “wealth maximization.”⁴⁵ But development of this simpler approach to adjudicating “right” was in a sense more complex. The prospective, consequentialist approach to choosing between actions could not ignore the probabilities of any comparative outcomes. In concrete terms, the choice not to employ a weather radio on board a ferryboat that later sinks would only be “wrong” if the *likelihood* of the sinking with the radio aboard *multiplied* by the cost of the sinking was comparatively less than the *likelihood* of the sinking without it *multiplied* by the added cost of buying it. Taking into account this question of likelihood, utilitarian cost–benefit balancing became “risk-utility” balancing. But, before he was appointed to the bench by Ronald Reagan, Posner had argued that this balancing test was *already* a mainstay of the common law of negligence.⁴⁶ As an

40. *Id.* at 109–10.

41. *See id.* at 133.

42. *See* David Meeler, *Utilitarianism*, in BUSINESS IN ETHICAL FOCUS 35–42 (Fritz Allhoff et al., eds. 2016).

43. *See id.* at 36.

44. *See id.* at 35–36.

45. Richard A. Posner, *Utilitarianism, Economics, and Social Theory*, 8 J. LEGAL STUD. 103, 103 (1979).

46. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 179–83 (5th ed. 1998).

example, he analyzed the New York case of *United States v. Carroll Towing*, in which a barge owner left its vessel roped but unattended in New York Harbor only to see the barge swept away, cause damage, and sink.⁴⁷ The opinion was written by Justice Learned Hand of the Second Circuit, but for purposes of this essay, it is significant to note that Jerome Frank, a classic American Legal Realist who had argued that judges in fact “make” law, was also a member of the court and joined Hand in signing the opinion.⁴⁸ It reasoned in large part that the actions of the barge owner were negligent if the cost of manning the vessel around the clock was less than the likelihood times the magnitude of harm from not doing so.⁴⁹

Whereas he used this to suggest that judges have utilized cost–benefit and thus economic thinking in law, Posner went further to suggest the entire common law theory of negligence, wherein an accident-causing harm is culpable if and only if the core action was “unreasonable,” was based upon cost–benefit thinking.⁵⁰ Society, it has been since paraphrased, does not like to encourage unnecessary “waste” of its resources. Failure to take a reasonable precaution to avoid harm is precisely such waste. Reason and economism are, by this token, in fact one.

B. *Irrelevance and “Social Cost”*

Before the accepted translation of “utility” became “wealth,” a different theory was already making progress in the scholarship of property law. In 1960, Ronald Coase, then at the University of Virginia, wrote that parties to a dispute over nuisance or land use were not simply individuals with disparate interests but rather parts of a social system in which the rights to use property had to be allocated.⁵¹ In keeping with the utilitarian views about cost-benefit and waste, the allocation of these rights should be made in the manner that benefits the entire system most on the whole.⁵² Most importantly, for legal academics, came the argument that discounting for “transaction costs,” it did not matter at all where courts placed the priority of land-usage rights because the parties would be free and incentivized to find the most efficient allocation among themselves.⁵³ They would, in other words, “bargain” so that the side that placed the greatest value on their own rights would buy out the others.

47. *United States v. Carroll Towing Co.*, 159 F.2d 169, 170–71 (2d Cir. 1947).

48. Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 751 (2001).

49. *Carroll Towing*, 159 F.2d at 173.

50. POSNER, *supra* note 46, at 182.

51. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960).

52. *Id.*

53. *Id.* at 15.

The example of a factory town allows writers to put this into concrete terms. Assume there is a town adjacent to an industrial factory releasing noxious fumes into the air and assume that the town and the factory are separate—in other words, without one's fate able to influence the other apart from the fumes released and the willingness to tolerate those. The townspeople could bring a nuisance claim to a local judge who must decide between who gets to continue their expected use, and who must pay for the others' surrender. The "Coase Theorem" says it doesn't matter how the judge decides this: she could give priority to the townspeople forcing the factory to stop producing or give it to the factory forcing the townspeople to move. If the town values its homeownership on location more than the factory values its operation on location, it will be willing to buy out the factory. If the factory values its operation more, it should be willing to buy out the townspeople.

The point in all of this is that the townspeople and the factory are not really "external" to one another. They are part of the same social system. Moreover, the "costs" imposed by this competition of uses are actually costs shared by "society." For this reason, the freedom to bargain away rights—however allocated or recognized—is a way to ensure that this society can reach the most efficient allocation of rights, where efficiency means resources are going to the parties that value them the most or can do the most with them. This form, Pareto Efficiency, says that no additional change to the distribution of resources can bring more efficiency to the system.⁵⁴ Free bargaining of rights is a way that societies achieve Pareto Efficiency "naturally." The argument resembles the more general argument in favor of free-market activity and has resonances with Darwinian natural selection as well as the Rawlsian "difference principle"—both of which find inequalities tolerable in a healthy system.⁵⁵

At this stage, it is imperative to point out that although these concepts may represent the most widely recognized transplants from economics into law, they are far from the most credible at the present time. Just as Legal Anthropology may have suffered for its turn to interpretivism after the 1970s, Law and Economics lost some credibility in the broader academic community for its adherence to "wealth maximization" as the primary goal for utilitarian cost-benefit analysis. As my ethnographic interviews on this subject have revealed, contemporary lawyer-economists now tend to disavow this definition of utility in favor of more expansive ones, including "use-value" or "enjoyment." From extensive interviews with informants representing all three "waves" of the movement, I have substantial data to suggest the wealth-maximization concept

54. JOHN BLACK, NIGAR HASHIMZADE & GARETH MYLES, *A DICTIONARY OF ECONOMICS* 459 (5th ed. 2017).

55. Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 *IND. L.J.* 119, 133 (1994); William L. McBride, *Social Theory Sub Specie Aeternitatis: A New Perspective*, 81 *YALE L.J.* 980, 998 (1972).

described above is widely under question. As one prominent leading scholar told me:

Yeah. I mean, the notion that the only thing that matters is wealth maximization without taking into account who gets the wealth has to be wrong because we care about who gets the wealth, and to the extent that we care that is a cost if it goes against it, and there's no more reason why that cost shouldn't be taken into account than if I hit you on the nose. Actually it was no one other than Robert Bork strangely that in one thing said, if I do something that offends you morally, that is just as much a cost as if I blow smoke in your face. But he was thinking of religious morality or things of that sort. I'm talking about distribution of morality, I'm talking about any number of other things because of which we will not let the simplistic Posnerian wealth maximization win because in economic terms, it isn't a radial superior, it isn't because there are costs that people bear, and so it just doesn't work.⁵⁶

Another criticism about the concept was that it too strongly favored commercial activity—in particular by public corporations, which can appear to maximize wealth for a wide circle of stakeholders, especially stock owners.⁵⁷ Still another criticism has been about the ethnocentrism of this definition. When comparing the “values” placed on land by a mineral exploration company on one hand and a Native American tribe on the other, the former (particularly in the era before Indian gaming and increased economic prosperity for some tribes) would always prevail. Greater sensitivity to multiculturalism and legal pluralism over the past two decades have caused many in the Law and Economics world to question the definition of utility that had made their theories appear simple and transportable for much of the last century.⁵⁸ The greatest revelation in my ethnographic research thus far has been finding that lawyer-economists care to this degree about wealth distribution now that the field has had time to absorb and reflect internal and external critique.

III. THE LIFE OF TRANSPLANTS

Nevertheless, the shadow cast by the early concepts is long indeed. First-wave Law and Economics ideas remain among the most prominent in the law school curriculum, and they thus have greater potential influence on new lawyers than virtually any other interdisciplinary law and social science knowledge.⁵⁹ To make this point more clear, some objective numbers might be helpful. Using HeinOnline Law Journal Library database as a proxy for published legal academic knowledge, the following results were obtained.⁶⁰ A

56. Interview with author (Feb. 26, 2021) (on file with author).

57. See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 6 (2004).

58. See Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1653 (2018).

59. RIAZ TEJANI, LAW AND SOCIETY TODAY 4 (2019).

60. All performed 12/27/2020.

search for “Clifford Geertz” leads to 2,562 citations. “From status to contract” yields 2,140 publications. “Llewellyn AND Cheyenne” produces 1,553 results. And “Gluckman AND Bohannan” (admittedly overinclusive) yields 104 publications. By contrast, a search for “risk AND utility AND balancing”⁶¹ results in 47,709 publications. “Social cost” produces 18,905 results, while “Coase Theorem” produces 4,546. When comparing these numbers, some historical perspective is also important; Maine’s Ancient Law (arguably the starting point of Legal Anthropology) dates to 1861, whereas *Carroll Towing*, the Coase Theorem, and Posner’s *Economic Analysis of Law* (various inaugural moments in Law and Economics) date to 1947, 1960, and 1973 respectively.⁶² To be abundantly clear, the opportunity to accrue citations has been wider for concepts in Legal Anthropology, but actual accumulation has been modest by comparison.

Today, four of the top ten most-cited law scholars of all time are lawyer-economists; another three are constitutional law experts, and two defy categorization.⁶³ One, the only woman and person of color, is a prominent Critical Race Theorist.⁶⁴ None are legal anthropologists by any stretch.⁶⁵ With these crude numbers, the relative success of one field over the other is at least provisionally apparent.

61. Authors write this as “risk/utility” and “risk-utility,” in addition to using more general phrasings like “cost-benefit.”

62. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); Coase, *supra* note 51; POSNER, *supra* note 46.

63. *ScholarRank’s Top 250 Authors in HeinOnline*, HEINONLINE, <https://home.heinonline.org/tools/author-profile-pages/scholarrank/> (last visited Mar. 25, 2022) (listing Cass R. Sunstein, Richard A. Posner, William L. Prosser, Mark A. Lemley, Henry J. Friendly, Frank H. Easterbrook, Kimberle Williams Crenshaw, Orin S. Kerr, Robert W. Calvert, and Richard H. Fallon, Jr. as the top ten most-cited authors on HeinOnline); *Cass R. Sunstein*, HARV. L. SCH. FACULTY PROFILES, <https://hls.harvard.edu/faculty/directory/10871/Sunstein> (establishing Sunstein as a lawyer-economist); *Richard A. Posner*, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/faculty/posner-r> (establishing Posner as a lawyer-economist); *Mark A. Lemley*, STAN. L. SCH. DIRECTORY, <https://law.stanford.edu/directory/mark-a-lemley/> (establishing Lemley as a lawyer-economist); *Frank H. Easterbrook*, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/faculty/easterbrook> (establishing Easterbrook as a lawyer-economist); *Orin Kerr*, BERKELEY L. FACULTY PROFILES, https://www.law.berkeley.edu/our-faculty/faculty-profiles/orin-kerr/#tab_profile (establishing Kerr as a constitutional law expert); *Calvert, Robert W.*, HEINONLINE AUTHOR PROFILE, https://heinonline.org/HOL/AuthorProfile?search_name=Calvert%2C+Robert+W.&collection=journals&base=js (establishing Calvert as a constitutional law expert); *Richard H. Fallon, Jr.*, HARV. L. SCH. FACULTY PROFILES, <https://hls.harvard.edu/faculty/directory/10247/Fallon> (establishing Fallon as a constitutional law expert); *Prosser, William L.*, HEINONLINE AUTHOR PROFILE, https://heinonline.org/HOL/AuthorProfile?search_name=Prosser%2C+William+L.&collection=journals&base=js (establishing Prosser as “defying categorization”); *Friendly, Henry J.*, HEINONLINE AUTHOR PROFILE, https://heinonline.org/HOL/AuthorProfile?search_name=Friendly%2C+Henry+J.&collection=journals&base=js# (establishing Friendly as “defying categorization”).

64. *Kimberle W. Crenshaw*, COLUM. L. SCH., <https://www.law.columbia.edu/faculty/kimberle-w-crenshaw> (last visited Mar. 25, 2022) (establishing Crenshaw as a woman, a person of color, and a Critical Race Theorist).

65. *See supra* notes 63–64 (establishing that all top-ten most-cited authors on HeinOnline are lawyer-economists, constitutional law experts, critical race theorists, or are uncategorizable).

A. The Culture of Neoliberalism

But more importantly, what are some possible reasons for this and what are their implications? There have been several significant theoretical advances that shed light on the first part of the question. One was Carol Greenhouse's cogent "[p]aradox of [r]elevance" thesis: that politics—in this case, law—ceased to view society as "social" and therefore ceased to accommodate anthropological insights premised upon society being inherently social.⁶⁶ Rather than social, what society was becoming by the late twentieth century was, in fact, transactional.⁶⁷ A confluence of political ideology, economic theory, and applied policies brought into existence the conditions in which ideas like "public" or "collective" were not based upon shared experience, joy, suffering, or empathy but on mutual economic necessity and benefit.⁶⁸ This meant that we are all individuals, and those who offer less benefit also enjoy less power and receive less care. But this compelling thesis views economics as the prime mover; it acted on collective society in a way that left its laws open to co-optation. The "rights revolution" of the 1960s and 70s could be undone because the new economics simply convinced policy mavens in a way that social science—especially interpretive forms—could not.

The history of Law and Economics suggests otherwise. That history, as told by Steve Teles,⁶⁹ Paul Baumgardner,⁷⁰ and others,⁷¹ suggests the clear agency with which several key scholar-activists like Director and Manne drew economics into the legal academy and pushed for its legitimacy. Over the decades that they did this, they also enjoyed unprecedented private financial support that grew even more instrumental as the universities received less and less public support and financing.⁷² The influx of Law and Economics, these stories suggest, was as much a question of *agency* as it was one of *structure*. An explanation for the differential success of this subfield reliant upon the structural conditioning of culture may not account for the very specific role of key agents in institutionalizing Law and Economics to the near-deliberate vexation of Legal Anthropology.

66. See Riaz Tejani, *Little Black Boxes: Legal Anthropology and the Politics of Autonomy in Tort Law*, 11 U.N.H. L. REV. 129, 140 (2013).

67. *Id.* at 140 n.56.

68. See WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015).

69. TELES, *supra* note 33, at 94-95.

70. Baumgardner, *supra* note 36, at 963-66 (2019).

71. ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 53 (2008).

72. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 4 (Steven Teles ed., 2015).

B. The Seduction of Quanta

Another interpretation has been less developed but no less significant. It pertains to the growth in the last several decades of data sciences. In her 2016 book, Sally Merry wrote that:

[I]t is the capacity of numbers to provide knowledge of a complex and murky world that renders quantification so seductive. Numerical assessments such as indicators appeal to the desire for simple, accessible knowledge and to a basic human tendency to see the world in terms of hierarchies of reputation and status. Yet the process of translating the buzzing confusion of social life into neat categories that can be tabulated risks distorting the complexity of social phenomena. Counting things requires making them comparable, which means that they are inevitably stripped of their context, history, and meaning.⁷³

Merry's observations about the dangers of quantification in the new data-driven world are, of course, compelling. They lend themselves to assertions elsewhere that even the "social" sciences as construed by professional disciplines like law were becoming narrowed to quantitative methods.⁷⁴ Most noteworthy, for example, was the National Science Foundation's renaming of its program in "Law and Social Sciences" as simply "Law and Science."⁷⁵ With the rise of a new "Empirical Legal Studies" movement rooted in positivist quantitative sociology, criminology, and policy studies, the view that law was being "seduced" by quanta pervaded some circles of the Law and Society and Law and Humanities communities.⁷⁶ And yet, the same period saw the rise of "behavioral" Law and Economics—this sub-subfield influenced by psychological studies challenged the classic "rational-actor" view of individual economic behavior. Seemingly a fad and initially unwelcome in mainstream Law and Economics, this school eventually grew strong and was elevated during the Obama Administration to influence national policy in the areas of health and transportation, among others.⁷⁷ One of its key writers became the "top" scholar on the aforementioned list of "most-cited" law scholars, and another—albeit

73. SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* 1 (2016).

74. See Michael McCann, *Preface to The New Legal Realism Volumes I and II*, in 1 *THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE*, at xiv (Elizabeth Mertz, Stewart Macaulay & Thomas Mitchell eds., 2016).

75. The "Law and Social Sciences" program was last referred to as such in a program solicitation document, NAT'L SCI. FOUND., NSF 19-519, PROGRAM SOLICITATION REVISION (Nov. 5, 2018), and referred to as the "Law and Science" program in the following program solicitation document, NAT'L SCI. FOUND., NSF 19-612, PROGRAM SOLICITATION REVISION (Sept. 24, 2019).

76. See generally Robert Cooter, *Maturing Into Normal Science: The Effect of Empirical Legal Studies on Law and Economics*, 2011 U. ILL. L. REV. 1475.

77. See Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES MAGAZINE, May 13, 2010.

outside of law—won the Nobel Prize in Economics in 2017.⁷⁸ Behavioral economics, it must be emphasized, is experimental and clinical, rather than quantitative in the senses of both sampling and analysis.

So, if the *culture of neoliberalism* and the *seduction of quanta* don't fully explain the rise of Law and Economics in an era when legal interdisciplinarity turned away from anthropology, what alternatives are there?

Taking just the conceptual transplants from Maine, Llewellyn, and Gluckman-Bohannon outlined above and comparing these with the ones from Posner and Coase, a difference emerges in the rhetorical posture of the two groups. Maine's thesis was a speculative, historical one generalizing contemporary legal culture against legal cultures of the past. Like other evolutionist theories in anthropology, it paints with a broad brush and is incomplete in its assessments of the present. Above all else, it asserts a *discontinuity*. Similarly, Llewellyn's use of Cheyenne law-ways in drafting his portion of the Uniform Commercial Code brings the dispute resolution approaches of the indigenous Americans to bear upon the trans-Atlantic approaches extant in the common law of contracts at the time. Speculative in its foundation upon wide generalizations based on limited fieldwork and case studies, it similarly rests upon a form of discontinuity between the legal culture of the Native Americans and that of the urban Northeastern white Americans. And finally, the debate between Gluckman and Bohannon as to the possibility of translation across legal cultures is even more overtly about discontinuity: can their institutions and doctrines ever be understood in our terminology? And vice versa. In this case, it was Bohannon who answered "yes" before Gluckman answered "no." However, the lasting impression this left—especially in comparative law, legal anthropology's closest doctrinal cognate—was that direct translation should always be suspect.

Whereas all three marquee examples above signal discontinuity, the rhetorical posture of the examples from Law and Economics runs the opposite direction. In his famous article about *Carroll Towing*, where Posner highlights the ingenuity of the Hand Calculus for negligence, he goes further to say that this is, in fact, the way common law judges have "always" assessed "unreasonable" behavior.⁷⁹ He continues that this is how "average reasonable persons" themselves conduct daily life, and that communities (read: juries) in general frown upon "wasteful" conduct when judging their members.⁸⁰ The posture is one of *continuity*: reasonable judges and everyday people behave always-already economically. Embracing this approach now in adjudication and policy merely recognizes what we have already been doing. Similarly, in Coase, we see an equally placid rhetoric. Allocate property rights to party A or party B; it

78. Binyamin Appelbaum, *Nobel in Economics Is Awarded to Richard Thaler*, N.Y. TIMES (Oct. 9, 2017) <https://www.nytimes.com/2017/10/09/business/nobel-economics-richard-thaler.html?>

79. POSNER, *supra* note 46.

80. *Id.* at 125.

matters not. A working “market” should allow for the efficient decision to reveal itself anyway after the fact. Indeed, with this in mind, law should be more interested in facilitating markets than in allocating rights. The continuity here is between what people want and what they get—where “people” can be understood as the aggregate “society” to whom there are no true externalities.

One final note on continuity and discontinuity is in order. By *discontinuity*, I am not suggesting, as others have done, any natural rhetorical misfit or “incommensurability” between law and anthropological argument.⁸¹ If anything, the opposite: any irreconcilability between the fields has been *read into* the relationship for rhetorical purposes. As I suggested above, anthropologists are often the ones to do this. By contrast, the most often cited lawyer-economists have done the opposite, asserting—perhaps questionably—a strong, hidden, and durable reconcilability between their own field and mainstream legal scholarship. What this essay has argued is that these different active rhetorical postures have been very consequential to the success of each subfield *in effect*.

IV. BROADER IMPLICATIONS

The wider importance of all of this has been increased by a recent flurry of attention to the role of economics in everyday social life. As many have now said, capitalist societies evolved over the past century toward conceiving of *social* life in economic terms. Although long-established in Western theory by writers like Bentham⁸² and Smith,⁸³ ideas like “utility,” “cost-benefit,” and “supply and demand” are now part of everyday speech. But whereas this can be true at the street level of everyday consumption, what is more important has been the restructuring this has caused at the high levels of politics, democratic participation, and policy debates. Nancy Fraser has written that historical swings between “free markets” and “social protection” have now stabilized in favor of markets because these managed to absorb the liberation movements of the 1960s and 1970s.⁸⁴ Wendy Brown has said that democratic participation has been transmuted into market participation and neutered the power of real political action and expression.⁸⁵ And Michael Sandel has described the expansive marketization of everything by taking up examples from military

81. Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 601 (“I conclude that this movement between normative and reflexive genres, as incommensurable modes of thinking about law, is a highly salient aspect of contemporary legal thought.”).

82. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 59 (J.H. Burns & H.L.A. Hart eds., 1982).

83. J.S. MILL, UTILITARIANISM 54–72 (Roger Crisp ed., 1998) (1863).

84. Nancy Fraser, *A Triple Movement? Parsing the Politics of Crisis After Polanyi*, in *BEYOND NEOLIBERALISM: SOCIAL ANALYSIS AFTER 1989*, at 29, 39 (Marion Buchardt & Gal Kirn eds., 2017).

85. BROWN, *supra* note 68.

scription to organ donation.⁸⁶ Elsewhere, I have described the significant effects this has had in the marketing⁸⁷ and delivery⁸⁸ of legal education to a generation of new aspiring lawyers in the U.S.; but in this essay, I have grappled with the scholarly context in which the marketization of legal education has occurred.

From political theory to sociology, a small number of sociolegal scholars have engaged critically with the tensions between Law and Economics and Law and Society—the latter in which Legal Anthropology plays a notable role. In her 2004 Presidential Address to the Law and Society Association, Laurie Edelman called for “A Law and Society Approach to Economic Rationality.”⁸⁹ She argued that sociolegal scholars can contribute to the economic understanding of law by offering nuances about the roles culture and society play in individual economic decision-making.⁹⁰ Elsewhere, I echoed this sentiment in calling for a revisitation of classic American legal realists to support an interpretive approach to behavioral Law and Economics.⁹¹

More recent attention since the 2008 financial crisis has brought legal scholars to explore the underpinnings of the financial system that has caused growing inequality and widespread loss and misery. Annelise Riles studied corporate law in the aftermath of the Great Recession, noting that lawyers provided the underlying architecture of the global transactional system that permits abstract buying and selling of debt at the root of the financial bubble.⁹² Katharina Pistor describes the extensive history of legal innovations surrounding property and contracts that established this system in the first place.⁹³

Historians of Law and Economics specifically have detailed the subfield’s rise in ways that denaturalize its “fit” with doctrinal law. Steven Teles documents the role of specific institutional actors responsible for its development and rooting in academic institutions.⁹⁴ Paul Baumgardner shows how the Reagan Administration installed Law and Economics scholars in the federal judiciary at precisely the moment when the values of Chicago economics

86. Michael J. Sandel, *What Isn't For Sale?*, THE ATLANTIC, April 2012.

87. Riaz Tejani, *Market Creep: “Product” Talk in Legal Education*, in POWER, LEGAL EDUCATION, AND LAW SCHOOL CULTURES, 154, 154 (Meera E. Deo, Mindie Lazarus-Black & Elizabeth Mertz eds., 2019).

88. *Id.* at 157.

89. Lauren B. Edelman, 2004 Presidential Address to the Law and Society Association (June 2004).

90. Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC’Y REV., 181, 181–98 (2004).

91. Riaz Tejani, *Efficiency Unbound: Processual Deterrence For A New Legal Realism*, 6 U.C. IRVINE L. REV. 207 (2016).

92. ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 240 (John M. Conley & Lynn Mather eds., 2011).

93. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 1–22 (Joe Jackson & Jackie Delaney eds., 2019).

94. TELES, *supra* note 33, at 101–08.

became foundational to both groups.⁹⁵ And Ann Southworth explains that this was part of a larger move by conservative groups to counter what many perceived as the left-leaning bent of public interest law organizations in the 1980s and 1990s.⁹⁶ Together, these histories remind us not to view Law and Economics as naturally in harmony with American legal academics, but rather as the result of hard-fought battles both inside and outside academic institutions.

That such battles might leave Legal Anthropologists sidelined as a group by the 1990s is therefore not surprising. Carol Greenhouse described this sidelining brilliantly:

The fact that *relevance* was presented as a *mediating path* in relation to anthropology's internal debates implied that anthropologists had only themselves to blame if the public overwhelmingly communicated through other channels. In retrospect, this accusation misses the mark. It was politics that abandoned *society* as social—the basis of social security—and failed the people with whom anthropologists most readily identified, that is, minority communities at the social margins.⁹⁷

While this speaks of politics more generally, I maintain that shifts in the production of legal knowledge in the same period follow this same pattern and remind us that law is in many ways “politics by other means.”⁹⁸ How then, does law abandon society as social? It does so, in large part, by embracing society as economic, and it does *this* by adopting Law and Economics as its preeminent interdisciplinary subfield while turning away from Legal Anthropology—likely for the reasons described above.

CONCLUSION

On just its assumptions about society and culture, Law and Economics raises numerous worthy questions for Legal Anthropologists. What is its concept of “society”? Can cultural differences be reduced to “transaction costs”? And in a world of differences, what is “social cost” really? Although common questions when discussing these two subfields, they were set aside here in this essay to ask about the relative success of one field over the other.

Explanations for this so far have not fully captured some subtle differences between the fields. The *rhetorical* difference highlighted here, between Legal Anthropology's implied discontinuities and Law and Economics' suggestive continuities, should be the locus of renewed efforts to understand their differential disciplinary histories—as well as future possibilities for bridge-

95. Baumgardner, *supra* note 36.

96. SOUTHWORTH, *supra* note 71, at 14–18.

97. CAROL J. GREENHOUSE, *THE PARADOX OF RELEVANCE* 34 (2011).

98. *See* RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID 1980–1994* (John Brigham & Christine B. Harrington eds., 1995).

building. Rhetoric, particularly where legal argumentation and scholarship are concerned, can be more powerful than any evidence. Indeed, this insight was presciently flagged by a *New Yorker* piece in 2001 profiling Posner,

[c]ritics find [him] exasperating, because often he simply doesn't take the trouble to answer their careful refutations. It is not that he is incapable of doing so—it is, rather, that he is *more attracted to rhetoric than to proof*, and believes it is more powerful. He is not, in the end, very interested in the sort of prudent rigor that produces watertight logic.⁹⁹

As explanatory theories go, this one—extrapolated to the broader movement—is as good as any.

99. Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001 (emphasis added).