CHICAGO AND LAW AND ECONOMICS: A HISTORY

By Robin I. Mordfin and Marsha Ferziger Nagorsky
While numerous publications by the University of Chicago place the birth of law and economics in 1933—the year both Aaron Director and Henry Simons offered courses in economics at the Law School—its conception can be traced all the way back to the beginning of the school itself. President William Rainey Harper was working to borrow Joseph Henry Beale from Harvard as a dean to get the Law School up and running, but differences in philosophy had already arisen. Beale wrote to Harper on April 2, 1902, to complain about the views of Professor Ernst Freund, who had insisted that the Law School emphasize the interdependence between law and the social sciences:

He [Freund] wishes to put into the three-year course certain subjects which are not law in any sense, and to that extent to diminish the time and thought devoted to the study of law. This is a very serious matter, and one which I regard as of radical importance.

Beale then went on to outline what he expected from the Law School should he consent to be its founding dean:

- That no subjects shall be taught in the School or counted toward the degree but strictly legal subjects.
- That the policy of the school shall be formulated in the first instance by a faculty consisting only of lawyers.

Fortunately, this difference of opinion was worked out, and Beale came to Chicago and helped to create a first-class law school. But as soon as he completed his two-year tenure as dean and returned to Harvard, the faculty of the Law School, led by Freund, began to insert the study of the social sciences into the Law School curriculum. James Parker Hall called for such education in a paper he presented to the American Bar Association in 1905, and discussion among the faculty continued as they attempted to bring study of the social sciences into the Law School over the next two decades.

By the 1920s, so-called seminar courses were offered to small numbers of students who met informally at their instructors’ convenience. While some of these courses took up the careful scrutiny of specific legal problems, others were taught in conjunction with a member of the Department of Philosophy or the Department of Economics and took up problems that were basically legal but which could profit from examination from a nonlegal point of view.

Such study was largely the result of the rise of legal realism—a movement that got its footing in the 1920s with the view that legal scholars had a calling to investigate the operation of law in relation to social reality. As Edmund
Kitch, ’64, mentioned in “The Fire of Truth,” a 1983 article in the Journal of Law and Economics, legal thinking of the time had been criticized harshly as conceptual, doctrinaire, and confined to what judges thought the law was:

It is clear that legal realism made people in the law schools open to social sciences, indeed to any and all social sciences: psychology, economics, sociology, political science, anthropology. No one was sure which, if any of the social sciences might be helpful, but there was a willingness to try any of them. In the years that followed, American law schools were to try them all. That environment was receptive to the introduction of economics into the law school.

By the early 1930s, the contribution of the social sciences, and specifically economics, was becoming inextricably intertwined with the Law School curriculum. During the 1933–1934 school year Professor Henry C. Simons from the Department of Economics offered an informal seminar on economic theory. At the same time, the Law School began developing the four-year curriculum, which allowed students who arrived without an undergraduate degree to receive a law degree that included classes in the social sciences. Dean Wilbur Katz, who was instrumental in the creation of the program, strongly believed that a lawyer’s thorough knowledge of another subject would affect the way law developed over time. The program was adopted in 1937, and by 1939 Simons was hired full-time by the Law School as the need to teach law students economics was viewed as critical. (The Law School returned to a three-year curriculum in 1949).

Despite the fact that Aaron Director and Milton Friedman regarded Simons as an enormous influence on their work, neither took a class from him. Simply having an economist of Simons’s stature at the Law School changed the way law was thought about and the analytical approaches that were taken, and his antitrust and monetarist models helped to form the basis of the Chicago School of Economics. The turmoil that World War II brought to the Law School (there was even discussion of closing the Law School and opening a Department of Jurisprudence in the Division of Social Sciences because so many of the law students had gone to war) interrupted the exploration of the role of the social sciences in legal study. But in 1946 that process kicked into high gear when Walter Blum, Aaron Director, and Milton Friedman began teaching at the Law School. Henry Simons had been instrumental in their hiring and had also wanted to hire George Stigler. It was not until 1958 that Stigler left Columbia University to join the Chicago faculty.

In 1946, Director began teaching classes at the Law School on price theory—now microeconomics—and antitrust with Edward Levi. His students included such future law and economics scholars as Robert Bork, Henry Manne (founder of the Law and Economics Center at George Mason University), Kenneth Dam, Ward Bowman, and Wesley J. Liebeler (a longtime professor at George Mason). Levi would teach for four days, and then Director would teach for one. As Liebeler explained in “The Fire of Truth”:

For four days each week Ed Levi would develop the law and would use the traditional techniques of legal reasoning to relate the cases to each other and create a synthesis . . . and for one day each week Aaron Director would tell us that everything Levi had told us the previous four days was nonsense. He used economic analysis to show us that the legal analysis would not stand up.

Most of the early work in law and economics centered around antitrust and taxation, but as the 1950s progressed, the interaction of law and economics moved beyond this confine. It would seem that the correct social science with which to make the analysis of law more realistic had been found, just as Kitch had hoped.
We strongly objected to this heresy. Milton Friedman did most of the talking, as usual. He also did much of the thinking, as usual. In the course of two hours of argument the vote went from twenty against and one for Coase to twenty-one for Coase. What an exhilarating event! I lamented afterward that we had not had the clairvoyance to tape it.

According to his memoirs, it was Stigler himself who dubbed the thinking within the paper the Coase Theorem, which has become the cornerstone of the study of law and economics and has made “The Problem of Social Cost” the most-referenced article in both legal and economics scholarship. The Coase Theorem states that under conditions of perfect competition private and social costs are the same. As Douglas Baird, Harry Bigelow Distinguished Service Professor of Law, explains:

If you were a microeconomist in the 1950s, you believed that there were problems of externalities and you could use the tools of microeconomics to solve them. So Ronald’s was very bad news, because it basically says that under perfect competition, those problems don’t exist and that everything they were working on was meaningless. The theorem is just accepted now, it’s part of the canon. But at the time, it was revolutionary.

In 1964, Coase came to teach at the Law School. As he explains:

I came to the University to develop a research program, which would later become known as Law and Economics. But it was the opportunity to work on the *Journal of Law and Economics*. Without that, I probably would not have come to Chicago.

Coase took over *JLE* from Aaron Director in 1964 and continued to edit it until his retirement from the Law School. Its editors have included, among others, longtime professors and jurists William Landes, Frank Easterbrook, Richard Epstein, and Richard Posner as well as younger academic stars such as Eric Posner, Omri Ben-Shahar, and Tom Miles.

But still more important developments in law and economics were to come. Gary Becker, who had received his doctorate at the University of Chicago, had been teaching at Columbia University for 11 years when he received appointments from the Law School and the Graduate School of Business in 1968. That same year he had published his landmark paper “Crime and Punishment:
An Economic Approach,” which was instrumental in changing the sociological and criminological consequences on deterrence. Becker’s work, which applied the insights of economics to fields different from the usual ones involving business regulation and private law, influenced the work of law and economics scholars throughout the world, including Chicago faculty such as Richard Posner, Frank Easterbrook, and William Landes.

In 1969, Richard Posner came to the Law School after teaching for a year at Stanford. Within four years he had published the magisterial *Economic Analysis of Law*, a book that is now in its eighth edition and is widely regarded as the publication that brought economic analysis of legal issues to the attention of the academy.

“These days, the book is really considered a text,” notes Richard Epstein, James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer of Law. “But when Posner originally wrote it, it was a manifesto. It brought economic analysis to nearly every area of law.”

While not everyone in the Law School supported Posner in his work, most of the faculty did. “There were several law professors who had close relationships with members of the economics faculty,” Posner says. “I never felt like I was working alone.”

Around the country, law and economics was becoming a more important area of scholarly investigation. Guido Calabresi of Yale University had published “The Cost of Accidents: A Legal and Economic Analysis” in 1970, which provided an economic efficiency analysis of the rules of tort law. At the same time Henry Manne, ’52, began teaching economics to law students at Rochester, before founding the Law and Economics Center at George Mason University.

In the 1970s, few law schools had even a single economist on their faculty, but Chicago had Coase and Becker and in 1973 hired William Landes, an economist who had trained at Chicago and had worked at the National Bureau for Economics Research. Landes immediately began to work with Richard Posner to produce the richest trove of literature in the law and economics canon. As he wrote in “The Art of Law and Economics: An Autobiographical Essay”:

I collaborated with Posner and I immersed myself in the study of law. Not that I wanted to be a lawyer, but I wanted to know enough about different areas of law to see where economics would be most useful. Unlike most other economists, I actually enjoyed reading law cases. I read them with an economist’s eye, however. I looked for and often found an implicit economic logic in the outcome of a case. And, if I didn’t quite get the law right, or misinterpreted what the judge said, neither of which was unusual, I always had
"Even in law school at Stanford in the 1970s everyone understood that law and economics was really important," says Baird. "Everyone knew that it was all happening at Chicago and I just desperately wanted to come here because I wanted to come to Chicago before all the problems were figured out. You really had a sense that Chicago was the place to be and if you didn't get there soon enough, all the problems would be solved."

By the time Baird arrived at the Law School in 1980, things were beginning to change. Baird goes on to explain:

The great revolution in the early 1980s is that you have these giants like Posner who not only created a set of tools that could be applied to contracts, but that could apply to a lot of other things. The big shift took place when he applied it to torts and contracts and things of that sort and suddenly people realized there are these fields out there which no one has ever tried applying economics to.

As a consequence, productivity at the Law School skyrocketed. Frank Easterbrook and Dan Fischel investigated corporate law, while Baird looked into bankruptcy and reorganization. Richard Epstein published *Takings: Private Property and Eminent Domain* while writing dozens of articles on torts as Gary Becker undertook research on altruism and rational addiction. The low-hanging fruit in nearly every corner of law was analyzed, written about, and published as law and economics took hold around the country. Lucien Bebchuk of Harvard University notes:

Although I have spent most of my career at Harvard, my development and work in law and economics has been profoundly shaped by the Chicago School. During my first year at Harvard [1977–1978], I was greatly influenced by Judge Posner's *Economic Analysis of Law*, which made me realize how broadly and
As law and economics grew into a major academic school of thought, it was sometimes accompanied by controversy. For example, in its early years, law and economics was sometimes seen as a conservative doctrine propounded by scholars and judges who viewed an unfettered free-market economy as a creed. But as the tools of economics became a core part of legal studies and research turned to market failures and empirical analyses of major social issues, this image of the field dissipated. Economics became an essential component of nearly every law school in the nation and a tool employed by scholars of the left as well as the right. Its effect on the judiciary and on the methods and approaches taken by attorneys has revolutionized legal practice. As Baird sees it:

It would be completely irresponsible to allow law students to go through their educations without a firm grounding in law and economics. Judges today are so much more sophisticated than they used to be—many of them went to school in the 1980s—they understand securities prices and the effect of tax laws.

Even within the field of law and economics, there is robust self-criticism. For example, in recent years, as more and more faculty with economics doctorates join law school faculties, the field has become more technical and mathematical. Many researchers in the field now employ

fruitfully economics can be used. Three years later, when I was already committed to the field of law and economics, the writings of two other Chicago law and economics leaders—Frank Easterbrook and Daniel Fischel—played a significant role in my decision to focus on corporate law: engaging with the Easterbrook-Fischel writings has enabled me to develop my own, different views on the subject. The experience of doing work that was deeply shaped and informed by work done at Chicago is one that I know to be shared by many in law and economics.

This wide-ranging intellectual study led to stimulating debates nearly every day between Epstein and Posner on “the meaning of everything, and that was just lunch,” Baird remarks. Meanwhile, as the 1980s came to an end, more members of the Law School faculty joined in studying law and economics. The studies in the area became more complex and sometimes more formal. Alan Sykes, who served on the faculty of the Law School from 1986 to 2006, notes:

The field certainly became more diversified, and there was a significant rise in empiricism. In the last decade or so, law and economics had been brought to the analysis of international law, from law of war to customary international law, to Eric Posner who was using economic tools to analyze law of the sea.

Epstein, Baird, and Easterbrook take a break from serious law and economics study to compete on the faculty trivia team in 1987.
mathematical modeling and other techniques to make their arguments. Posner explains:

Economics has become more mathematical, so that would make our work more mathematical. But now law professors are more academic — more and more of them are getting PhDs. And of course, as the field becomes more diverse, and matures, much of the study will become more formal. This is to be expected.

Some practitioners of law and economics view this development with dismay. George Priest, 73, explains:

I agree with Ronald Coase about Formalism, I don’t think it advances thinking in law and economics. Formalism has made it acceptable to just use math, because it is easy to make a model, but it doesn’t advance the field.

On the other hand, Sykes thinks that Formalism is necessary for the more specific studies that are being undertaken now:

The rise of game theory has taken off in law and economics and that is a sea change from the theoretical approach that originated in the field. The methods have changed, the most basic regression techniques have been replaced with more new methods including panel dates and matching methods. The sophistication keeps going up and what was standard gets replaced when it is seen as less reliable.

It would be a mistake to view the golden age of law and economics and Chicago’s preeminence as having ended. To the contrary, the Law School has more law and economics scholars than any other school in the nation. (Profiles of each of the Law School’s law and economics faculty members can be found on page 36.) Pound for pound, no other law faculty in the nation has the breadth and depth of Chicago’s faculty, nor can any match its level of productivity. The scholars who came to the Law School at the end of the 20th century have taken up the mantle and taken law and economics in new directions undreamed of at its founding.

1998 was a banner year for law and economics faculty hiring at the Law School, as it saw the addition of Saul Levmore, Eric Posner, and David Weisbach to an already stellar group. Eric Posner, a professor who would be on anyone’s short list of the top American legal scholars, has spent much of his career applying tools such as cost-benefit analysis and game theory to an extraordinary range of subjects, including bankruptcy law, contract law, international courts, foreign relations law, employment law, constitutional law, administrative law, and immigration law. His books on social norms and international law have been critical to the development of those fields. He has also become, like many law and economics scholars before him, a prolific coauthor, working with scholars not only within the Law School, but also from the economics department and the Booth School of Business.
A regular coauthor of Eric Posner’s, Weisbach has done groundbreaking work in two very different areas: taxation and climate change. Weisbach brings his substantial practice experience in the Department of the Treasury’s Office of the Tax Legislative Counsel to his important scholarly pieces on consumption taxes, tax shelters, and tax-and-spend programs. In the last five years, Weisbach has also become a major figure in the law and economics of climate change. Weisbach has spent the last several years applying complex economic modeling to issues of climate change policy, leading to his and Posner’s provocative 2010 book, *Climate Change Justice*, in which they show that politicians and statesmen have been drastically misunderstanding the role of economic fairness between developed and developing nations in making climate change policy.

Saul Levmore was already one of the nation’s leading law and economics experts when he joined the faculty, and remarkably his level of scholarly production hardly flagged when he took on the deanship of the Law School in 2001. His work has been fundamental across the spectrum of private law topics, from torts and contracts to property and restitution, and with important installments also in insurance law, tax, and securities law. Levmore has most recently been working on the problem of anonymity on the Internet, as well as legislative areas such as double jeopardy, ambiguity in statutes, and the influence of interest groups.

During Levmore’s deanship a number of extraordinary law and economics experts were added to the faculty. Omri Ben-Shahar was one of those extraordinary lateral hires, joining the Law School from the University of Michigan Law School. Ben-Shahar’s works in fundamental, core areas of law such as contracts and criminal law, but has broken new ground in using economic analysis to understand key issues in those fields in new ways. In contracts, he has brought new insights to problems such as disclosure, willful breach, uneven bargaining power, and default rules. In studying the economics of criminal law, he has delved into the precautionary incentives of crime victims, plea bargains, and criminal attempt.

Since 2000, one of the most exciting changes at the Law School has been the hiring of lawyers who are also formally trained as economists. For example, Thomas Miles, with a University of Chicago economics PhD, joined the faculty after completing an Olin Fellowship at the Law School. From the beginning of his time at Chicago, he focused his work on applying the tools of empirical law and economics, but he has radically transformed the field by taking it into previously unexplored substantive areas. Miles has done empirical analysis of such topics as the FBI Most Wanted List, racial bias of NBA referees, and, most famously, judicial decision making. He also regularly collaborates with famed University of Chicago economist Steven Levitt to bring powerful empirical analysis to questions of criminal law, including criminal procedure, punishment, and deterrence.

The work of Anup Malani, ’00, is among the most boundary pushing on the faculty. Malani, who received both his law degree and his economics PhD from the University of Chicago, holds a joint appointment in the University of Chicago Pritzker School of Medicine. Malani primarily studies health law, often utilizing empirical datasets, and has examined a wide range of topics, including the control of infectious disease, the conduct of clinical trials, medical malpractice, and drug products liability. He has not only published dozens of articles in legal journals, but also coauthored important articles in scientific and medical journals on such topics as antibiotic overuse, clinical and economic outcomes of hospital-acquired infections, and physiological placebo effects.
It might be tempting to think that the founding fathers of law and economics would be shocked if they could see the type of work the scholars of today were engaged in. But in many ways we have come full circle. Ronald Coase, certainly one of the most important pioneers of the movement, was at base as much an empiricist as a theorist. His goal was to understand the structure and behavior of the firm by studying firms in the real world. Today’s faculty is continuing to push the envelope just as Coase, Posner, and Becker did a generation ago by producing knowledge and scholarship on the very most important topics facing our nation and the world.

As we think about our past and our present, it only seems fitting that members of the leading law and economics faculty in the nation should be asked about the future of field. On pages 18-31 of this volume of the Record, ten scholars provide their views on how law and economics is likely to develop in the future. Professor Todd Henderson, ’98, offers this summary view:

The only thing I’m certain about for the future of law and economics is that it won’t be going away. Unlike other movements in the legal academy, like critical legal studies, law and economics is here to stay. It is absorbing its critics, like insights from psychology, brain research, and decision-making theory, and refining its methods to address the issues they raise. Consistent with its assumptions about the world, law and economics as a discipline is growing in importance and influence over time by adapting and evolving. I’m not sure what the future will look like or what issues we will face, but I’m fairly certain the most powerful framework for addressing them will be law and economics.

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The Olin Foundation and Support for Law and Economics Research

The John M. Olin Foundation was founded in 1953 by John M. Olin, president of Olin Industries’ chemical and munitions manufacturing businesses. A grant-making foundation, its funds remained dormant until 1968 when Mr. Olin, at age 80, determined that he had to pour his resources into preserving the free-market system. As a result, the most notable of its grants went to supporting and creating law and economics programs and professorships at law schools around the country.

The mission statement of the Foundation says, “The general purpose of the John M. Olin Foundation is to provide support for projects that reflect or are intended to strengthen the economic, political and cultural institutions upon which the American heritage of constitutional government and private enterprise is based. The Foundation also seeks to promote a general understanding of these institutions by encouraging the thoughtful study of the connections between economics and political freedoms, and the cultural heritage that sustains them.”

Unlike most other grant-making foundations, the Olin Foundation was charged to disburse all of its funds within one generation of Olin’s death and did so by making its final grant in 2005, after bestowing more than $370 million.

In addition to funding the John M. Olin Program in Law and Economics here at the University, the Foundation also provided support to, among others, Harvard, Yale, Washington University in St. Louis, the University of Rochester, George Mason University, New York University, Princeton, Cornell, and Columbia. The Foundation also supported such prominent research institutions as the Heritage Foundation, the Manhattan Institute, the Hoover Institution, the Hudson Institute, and the Brookings Institution.