COLUMBIA LAW REVIEW

VOL. 124 JUNE 2024 NO. 5

LECTURE

THE PROMISE AND PERIL OF "LAW AND . . ."

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The Columbia Law Review *launched its Karl Llewellyn Lecture series on March 19, 2024, celebrating pioneers in the law who have innovated and challenged legal theory. The inaugural Lecture was delivered by Judge Guido Calabresi who spoke on the promise and peril of "Law and . . ." disciplines, such as Law and Economics, Law and Philosophy, and Law and History. A transcript of Judge Calabresi's Lecture is published in this Issue.*

INTRODUCTION

For over a hundred years, American law has been characterized by an explicit reliance on fields of learning outside of law to examine and criticize governing legal rules, and thereby bring about reform in those rules. Rejecting the notion that law is an independent, self-contained system, this external examination of law—leveraging a perspective from outside law to offer a critique of legal rules—has and continues to bring about salutary changes in law. Such an approach to law is neither only American nor particularly new.[1] Nevertheless, its explicit recognition and use since around 1900 in the United States,[2] and its gradual acceptance in

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1. English philosopher and jurist Jeremy Bentham, for example, was doing this long before in England. See, e.g., Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789) (outlining Bentham's moral theory of utility as a possible basis for the English penal system). For contemporaneous criticism of Bentham's approach, see John Stuart Mill, Bentham, *in* Mill on Bentham and Coleridge 39, 39–98 (F.R. Leavis ed., 1980).

2. Professor Herbert Hovenkamp, for instance, suggests legal academics first began to incorporate economic concepts into their thinking about the law during the 1880s in the Progressive Era. See Herbert Hovenkamp, The First Great Law & Economics Movement, 42 Stan. L. Rev. 993, 993 (1990).

other countries that for a time and for important reasons adhered to a view of law as a self-contained and unchanging system,[3] has been the dominant form of legal scholarship in the last century.[4]

Not surprisingly, the criticisms of existing law and the proposals for reform derived from the use of outside fields have had their effect on lawmakers. Whether from the perspective of legislatures enacting statutes, administrative agencies drafting regulations, or, perhaps most dramatically, the courts, what outside fields have suggested the law should be has had and continues to have significant effect. And, by and large, outside fields are a good influence on law, as worn-out rules, based on past power relations and even plain incorrect judgments, have been overcome. Indeed, I have been a strong proponent and employer of one outside field, economics, as a basis for advocating for legal reform.[5]

That said, looking at law from the standpoint of any given outside field—what I call a "Law and . . ." approach—is not without its perils. And it is on two of these that I would like to focus. The first derives from a confusion between the role of the legal scholars who develop these outside fields and the role of lawmakers. The second, which will be the principal topic of this Lecture, is the possibility that, attracted to outside fields as a cure for law's ills, law forgets to question the validity of theories developed by outside fields. And, in doing so, law overlooks that much as it can use outside fields to question existing paradigms in law, law can and should also force outside fields to question their own underlying assumptions.

Let me address briefly the first of these perils. When scholars, of whatever field, write articles that seem to demonstrate that existing law is incorrect or even immoral, the answer of the lawmaker should often be: "Perhaps, but let's move slowly." You have heard it said that lawmakers should "let justice be done though the heavens fall." But that is nonsense. A lawmaker, whether a judge, or legislator or an administrator, who caused the heavens to fall would be kicked out, and extremely quickly. Scholars, the developers of the "Law and . . ." theories I will be discussing, instead

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3. For example, for a discussion of the historical reluctance of Italian legal scholarship to adopt this view, see Guido Calabresi, Two Functions of Formalism: In Memory of Guido Tedeschi, 67 U. Chi. L. Rev. 479, 481–82 (2000) (discussing especially how this reluctance was used to counter Fascist-sponsored changes in the law).

4. For an overview of the origins of "Law and . . ." and its relationship with other approaches to legal thought, including doctrinalism, legal process, and law and status, see generally Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 Stan. L. Rev. 2113 (2003) [hereinafter Calabresi, Legal Thought].

5. See, e.g., Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis 15 (1970) [hereinafter Calabresi, The Cost of Accidents] (determining the goals of the system of accident law by discussing "what systems are best suited for dealing with combinations of goals, and what systems are most suitable in areas where one goal predominates" through a Law and Economics lens); Guido Calabresi, The Future of Law & Economics: Essays in Reform and Recollection 17 (2016) [hereinafter Calabresi, Future of Law and Economics].

have the job of writing, the duty to say, what they believe to be true and to do so, "though the heavens fall." They can and must do so, precisely because lawmakers may and usually read such scholarship with skepticism and caution. The heavens don't fall, and the scholar can write what might cause the heavens to fall, because the lawmaker in the first instance says "it sounds good, but he never ran anything, or she never met a payroll."

Law (and hence lawmakers) is and should in this sense be conservative—not in an ideological sense of the word—but in the sense of moving slowly.[6] The fact that major changes in law—even if correct, and so demonstrated to be by scholars of fields outside law—are deeply disruptive of people's lives is a very good reason for law to react to what such scholars have written with caution. When lawmakers act too rapidly they may do egregious harm, even if in the long run radical change is warranted.

Scholars often don't like the fact that wise lawmakers treat their work skeptically. They don't realize that their freedom to write and propose radical change exists exactly because they are often, in the first instance, ignored. My own reaction—when some of my early writings in Law and Economics and Torts were accepted, and quickly, by courts—was the opposite. I thought then, and think now, that what I wrote was correct. But I worried that too early and quick adoption of what I proposed might do more harm than good.

This, then, is the first peril of the "Law and . . ." approach. Lawmakers, even if convinced that the outside field has correctly demonstrated errors in the law, must move to update the law slowly so that the heavens do not fall. Too often, lawmakers move too fast. Law *must* adapt and *change* in response to proper criticism, but it must do so always keeping in mind the disruptions that change—even in some sense ultimately just change—brings about.

My main focus in this Lecture, however, is on the second peril of law's reliance on fields outside of law. That is, that law and lawmakers must always question the validity of the outside field's theory. The fact that the law does not conform to the outside theory may be because the law is wrong. But it may also be because the outside theory is incomplete, limited, or insufficiently nuanced.[7]

"Law and . . ." should operate as a two-way street, leaving no paradigm, whether in law or an outside field, unquestioned. This peril is

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6. Much in the same way as some argued that formalism or doctrinalism was "conservative," not in an ideological sense, but in its reticence to embrace change. See Calabresi, Legal Thought, supra note 4, at 2116. And, indeed, "Law and . . ." arose, in part, as a response to the perceived inertia of formalism. Id. at 2119.

7. Unquestioning application of an outside field's theory or methods, in other words, should not itself become another instance of "mechanical jurisprudence." Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 606–07 (1908) (describing the need for scholars continually to question the "unsound conclusions" of "departed masters," even when their methods appear sound).

the same, I think, regardless of whether the outside field is economics, philosophy, or history—to choose three particularly dominant "Law and . . ." approaches.[8] The manifestation and effect of this peril on legal rules—its "legal process" operation—differs according to the particular outside field employed.[9] The recognition of the peril, however, has not been as explicit as to all of these "Law and . . ." approaches.

In this Lecture, I will begin by discussing this second peril as it has manifested itself in Law and Economics. I do this as it is here that the peril has been most clearly criticized.[10] I then move on to examine what I believe to be the same, but perhaps less recognized, peril in Law and Philosophy, and Law and History.

I. THE PERIL OF LAW AND ECONOMICS

When a structure, whether a set of legal rules or a market arrangement, does not comply with what economic theory would prescribe, economists—and by extension, economic analysts of law—may call the rules or the arrangement inefficient, or even—using a very strong word—irrational.[11] This, for example, may properly describe what the early work of the greatest of contemporary economic analysts of law,

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8. My treatment of these three disciplines as separate iterations of "Law and . . ." reflects the specialization and disaggregation of "Law and . . ." into specific fields, like Law and Economics or Law and Philosophy. By contrast, in the early twentieth century, advocates of "Law and . . ." invoked a variety of different disciplines (albeit primarily in the social sciences) indifferently to make claims about the law. In fact, one of the claimed strengths of "Law and . . ." was its potential for bringing generalized interdisciplinarity into law. See Calabresi, Legal Thought, supra note 4, at 2120.

9. By "legal process" operation, I refer to the choice of which institutional actor should react to an outside field's suggestions that existing legal norms be amended. See id. at 2123.

10. Perhaps because of the close relationship between the two fields, or perhaps because of the writings of as great a scholar as Economist and Professor Ronald Coase, economics has also been more conscious about the implications of Law and Economics for economics as a discipline. See, e.g., Ronald Coase, Economics and Contiguous Disciplines, 7 J. Legal Stud. 201, 210 (1978).

11. This is consistent with the view that the task of economics "explores and tests the implications of the assumption that man is a rational maximizer of his ends in life," that economic analysis assumes that the common law tends toward efficient outcomes, and that inefficient norms are likely to be questioned and overturned over time. See Richard Posner, Economic Analysis of Law 3 (1973); see also Gary S. Becker, The Economic Approach to Human Behavior 14 (1976) ("[H]uman behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets."); A. Mitchell Polinsky, An Introduction to Law and Economics 7 (5th ed. 2019) ("The attractiveness of efficiency as a goal is that, under some circumstances . . . everyone can be made better off if society is organized in an efficient manner."). For an example highlighting the "irrationality" of legal actors, see W. Kip Viscusi, Jurors, Judges, and the Mistreatment of Risk by the Courts, 30 J. Legal Stud. 107, 109 (2001) (examining the irrationality of juror and judge behavior).

Richard Posner, was taken by his followers to do.[12] And on that basis any number of legal rules and market arrangements have been radically changed.[13]

When that criticism was addressed to courts, rather complex legal process moves had to be made to permit courts to make law adhere to what economic analysts contended economic theory said was most efficient or rational. Perhaps the most successful of these moves was in the reform of how courts applied statutory antitrust law to do what economic theory allegedly demanded. And the legal process analysis employed was Professor Robert Bork's brilliant, if misguided, position that for courts to read the relevant statutes in any way other than to further economic efficiency was to give courts jobs they were incapable of doing.[14]

Still, for several reasons, the peril in the use of economic theory to "rationalize" law has been widely recognized. The argument that law must be changed to adhere to the dominant economic theory continues to be made, but it is frequently met by powerful counterarguments.[15] Its perils

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12. Posner's studies of specific substantive fields, for example, set out to "question to what extent [a given area of law] can be explained as a means for promoting efficient allocation of resources." See William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 325 (1989).

13. With, as I further note below, significant effects especially on antitrust law. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977) (overturning a rule mandating that certain vertical restrictions were per se violations of the Sherman Act, and returning to a more flexible standard); United States v. General Dynamics Corp., 415 U.S. 486, 501, 503–04 (1974) (affirming that courts, when assessing violations of § 7 of the Clayton Act, may consider a variety of factors pertinent to the economic dynamics of a given industry); E. Thomas Sullivan, Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years, 58 Notre Dame L. Rev. 1, 1 (1982) (noting the Burger Court's reliance on efficiency-based rationales in its antitrust jurisprudence). Even at the time, however, some questioned whether changing political trends, or other factors besides the application of economic theory, were responsible for doctrinal shifts in antitrust. See Louis Kaplow, Antitrust, Law & Economics, and the Courts, 50 Law & Contemp. Probs. 181, 182–83 (1987) ("Although law and economics has been applied to virtually all areas of law, and although some parallel developments do reflect more of an economic approach, it would be extremely difficult to make the case that the broad changes in Supreme Court doctrine are primarily or even substantially explained by these phenomena." (footnotes omitted) (citing R. Posner, Economic Analysis of Law (3d ed. 1986); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976))).

14. See Robert Bork, The Antitrust Paradox 6–7 (1978) [hereinafter Bork, The Antitrust Paradox] (discussing how the Supreme Court's contemporary approach to antitrust law fails to take adequately into account economic theory—the concept of business efficiency in particular—and as a result has "skewed legal doctrine disastrously"); Robert H. Bork, Antitrust and Monopoly: The Goals of Antitrust Policy, 57 Am. Econ. Rev. 242, 243–44 (1967) (discussing that lawyers "are properly concerned . . . with models of how they ought to behave" and that the consumer welfare model "is the only legitimate goal of antitrust").

15. See Calabresi, Future of Law and Economics, supra note 5, at 1–21 (contrasting the "Economic Analysis of Law," which utilizes "economic theory to criticize and correct law," with "Law and Economics," which both employs economics to critique law and "use[s] law to suggest changes and alterations in economic theory"). These long-standing criticisms

now laid bare, Law and Economics may prove today less dangerous than in earlier times.

The first reason for the prevalence of this significant skepticism lies in the fact that the broad use of economics to critique law was relatively new. As a general "Law and . . ." approach it is usually linked to Ronald Coase's and my writings in the 1960s.[16] Criticizing law on the basis of economic theory, especially when employed in areas often far removed from predominantly financial arrangements, was sufficiently novel that despite its force it immediately aroused criticism and doubt.[17] This doubt was made easier because both Coase (dramatically and early on) and I worked from the assumption that when law did not "fit" economic theory, it was more than possible that it was the economic *theory* rather than the law that was inadequate and had to be reformed. Coase's Theory of the Firm in the 1930s demonstrated that unequivocally.[18]

More recently, I have written explicitly making the same point: If a "legal reality discloses rules and practices that economic theory cannot explain," then Law and Economics should ask whether the prevailing economic theory has missed something.[19] And a whole field of economic theory, Law and Behavioral Economics, has been developed to explain, analyze, and occasionally justify conduct or legal norms that at one time had been described and criticized as irrational.[20]

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might include empirical observations, countering economic analysis of law's assumption that economic actors uniformly behaved as rational actors, see, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1476–80 (1998), or more philosophical critiques, regarding the normative value of "efficiency" or "wealth maximization," see, e.g., Ronald M. Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191, 194 (1980). For a collection of early criticisms, see Jules L. Coleman, Markets, Morals, and the Law (1998).

16. E.g., Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961); R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). For a historical overview, see George Priest, The Rise of Law and Economics: A Memoir of the Early Years, *in* The Origins of Law and Economics: Essays by the Founding Fathers 350, 350–82 (Francesco Parisi & Charles Rowley eds., 2005).

17. See, e.g., C. Edwin Baker, The Ideology of the Economic Analysis of Law, 5 Phil. & Pub. Affs. 3, 47 (1975) (providing three reasons why "economic efficiency is not an adequate basis from which to assess and make suggestions concerning the law"); Jules L. Coleman, Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law, 94 Ethics 649, 661–79 (1984) ("[E]conomic efficiency is normatively prejudiced in a particularly insidious way: namely, it turns out that what is efficient depends on what people are willing to pay, and what people are willing to pay in turn depends on what they are capable of paying."); Mark G. Kelman, Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics", 33 J. Legal Educ. 274, 277–84 (1983).

18. R. H. Coase, The Nature of the Firm, 4 Economica 386 (1937).

19. Calabresi, Future of Law and Economics, supra note 5, at 3–4.

20. See id. at 90–116 (discussing, for example, altruistic behavior and asking "[i]f self-interest is more effective at producing the goods we want, why do we, in fact, have so much altruism, so much beneficence, and so many not-for-profit structures in the world" (emphasis omitted)); Jolls et al., supra note 15, at 1473 (developing "a systematic framework for a behavioral approach to economic analysis of law").

Despite this, the peril remains. And even here the desire to analyze law on this basis of a given outside economic theory, rather than recognizing that all "Law and . . ." must be a two-way street, remains prevalent. The move away from Economic Analysis of Law to Law and Economics is, however, growing. And it is now well recognized that when economics fails to explain law it indeed may be law that is outdated or failing, but it may instead be that economic theory that is wanting. If that is so, the use of economics as a way of examining law may come to fulfill its promise while avoiding its peril.

II. THE PERIL OF LAW AND PHILOSOPHY

I do not believe the peril has been sufficiently recognized when philosophy is used as the outside field to criticize and correct law. I would like to speculate as to why this is so while making some quite general references to the use of philosophy in tort law.[21]

Unlike economics, philosophy has long been used, allegedly, to explain existing legal rules and institutional arrangements.[22] In practice, however, like other "Law and . . ." approaches, Law and Philosophy has also been deployed to reform law. These philosophical critiques often begin by identifying a point of "incoherence" in a particular area of substantive law. The step from there to a finding that the supposed "outlier" rules are themselves normatively unjustified is a small one. And the further step, to use normative concepts like desert, wrongdoing, just burdens, or corrective justice explicitly as ways of "fixing" these outlier rules is, again, very short.[23]

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21. The most recent prominent example can be found in the works of John Goldberg and Bejamin Zipursky. See John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020) [hereinafter Goldberg & Zipursky, Recognizing Wrongs].

22. "Explaining" the "nature of law," of course, is the primary purpose of general or "analytical" jurisprudence, a field of as long a vintage as law itself. See David Plunkett & Scott Shapiro, Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry, 128 Ethics 37, 39 (2017) (arguing that the goal of analytical jurisprudence is to "explain how legal thought and talk . . . fit into reality overall"). See generally Andrei Marmor & Alexander Sarch, The Nature of Law, Stanford Encyc. of Phil. (May 27, 2001), https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/ [https://perma.cc/A94F-ZU5G](last updated Aug. 22, 2019). To be clear, here, I do not seek to examine the merits of analytical jurisprudence as a discipline of philosophy, but rather, the use of philosophy to critique legal norms and practice—what is sometimes referred to as "normative" jurisprudence. See Plunkett and Shapiro, supra, at 45. These normative critiques could well come from developments in analytical jurisprudence, but are equally if not more likely to come from other subfields within philosophy, most obviously moral and political philosophy but also cognate areas like epistemology and philosophy of language. See, e.g., Hrafn Asgeirsson, On the Instrumental Value of Vagueness in Law, 125 Ethics 425, 426 (2015) (applying philosophy of language to distinguish between vagueness and "incommensurate multidimensionality," and arguing that the latter, more so than the former, is valuable to law).

23. This is one way of characterizing Professor Ronald Dworkin's approach to legal philosophy, which self-consciously blended analytical and normative jurisprudence

Still, I believe the explicit use of a philosophical theory to demand that specific legal rules or arrangements be changed has not been met with the same skepticism that the Posnerian use of economics has encountered. Because philosophy was viewed traditionally almost as part of law, the significance and effect of a "Law and . . ." approach here was not as clear as it was for Law and Economics.

All this was made stronger—and more dangerous—by the claims that while other outside fields like economics spoke to the public side of law, private law is necessarily about regulating interpersonal behavior and, for this reason, must reflect norms of interpersonal morality.[24] As a result, deviations from what these philosophical theories deemed correct from the perspective of interpersonal morality could easily be termed as destructive of "private law" itself.[25]

This, I would suggest, is nonsense. All law is public, and all law is private.[26] Torts is about the relationships between an injurer and a victim,

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together. See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–37 (1996); Ronald Dworkin, Law's Empire 1–44 (1986). For examples in the domain of tort law, see generally Arthur Ripstein, Private Wrongs (2016); George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); John Gardner, What is Tort Law For? Part 1. The Place of Corrective Justice, 30 Law & Phil. 1 (2011); Stephen R. Perry, The Moral Foundations of Tort Law, 77 Iowa L. Rev. 449 (1992); Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37 (1983).

24. See Ernest J. Weinrib, The Idea of Private Law 2, 56 (1995) ("Aristotle's account of corrective justice is the earliest—and in many respects, still the definitive—description of the form of the private law relationship." (footnote omitted)).

25. See id.

26. See Daniel A. Farber & Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 Mich. L. Rev. 875, 887 (1991) ("If the private law/public law distinction retains any vitality after the realist critique, the line between the two is at best elusive."); Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1426–28 (1982) (describing the contemporary erosion of the public/private distinction in many areas of legal doctrine); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1357 (1982) ("Following out these lines of similarity and difference, one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."); Douglas A Kysar, The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism, 9 Eur. J. Risk Regul. 48, 50–51 (2018) (arguing that the tort law system's capability to "hold[] open a forum for the self-presentation of grievances and the declaration of norms of right and responsibility which rest on reason, principle, precedent, and evidence" may prove beneficial in regulating the risk of broader complex issues such as climate change); Michael P. Vandenbergh, The Private Life of Public Law, 105 Colum. L Rev. 2029, 2030 (2005) (arguing that the regulatory administrative state is influenced by "agreements entered into between regulated firms and other private actors in the shadow of public regulations"). Some, like Goldberg and Zipursky, have arguably described a "new private law" in terms that suggest that private law and public power may be deeply interconnected. E.g., John C.P. Goldberg, Introduction: Pragmatism and Private Law, 125 Harv. L. Rev. 1640 (2012); Benjamin C. Zipursky, *Palsgraf*, Punitive Damages, and Preemption, 125 Harv. L. Rev. 1757 (2012). For a specific critique of Goldberg and Zipursky's characterization of the relationship between private and public law, see Guido Calabresi & Spencer Smith, On Tort Law's Dualisms, 135 Harv. L. Rev. Forum 184 (2022),

but it is also about the numbers and bearers of accidental harms a society ordains, and thus it is about both deterrence and compensation.[27] The definition of what is wrong and merits discouragement or punishment, or reversal or correction, is neither public nor private; it is both. And the merits of a philosophical theory that commands one approach over the other must be analyzed with the same respect and skepticism that attends an economic theory.

Here too, on occasion, the primacy of what a philosophical theory must require courts to do has been linked to a misguided legal process notion. Thus, philosophers of law, like John Goldberg and Benjamin Zipursky, have argued that courts should not attend to issues like the quantity of accident costs brought about by tort rules.[28] This, they contend, is beyond the scope of what courts may properly do.[29] Such a move is curiously the reverse analogue of that made by Bork in antitrust law.[30] And it is just as wrong. Common law courts have always looked to such "public" effects in making law, even in so-called "private law" areas. And in New York, for example, the duty of courts to do just that has been explicitly ordained by its highest court.[31] But my object today is not to take issue with

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https://harvardlawreview.org/wp-content/uploads/2022/02/135-Harv.-L.-Rev.-F.-184.pdf%20 [https://perma.cc/3UPK-TDNR].

27. Calabresi, The Cost of Accidents, supra note 5, at 26 (stating that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents" and that this is accomplished, in part, by a "reduction in the number and severity of accidents"); Guido Calabresi, Civil Recourse Theory's Reductionism, 88 Ind. L.J. 449, 451 (2013) ("I further think, however, that, in any given case, torts is also about giving someone compensation from somewhere, somehow, because that someone 'deserves' compensation, that is, has a corrective justice right to it."); Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 73–91 (1975) (explaining the relationship between causation and the four goals of tort law: two "compensation goals" (spreading and distributional equity) and two "deterrence goals" (specific or collective deterrence and general or market deterrence)); Guido Calabresi, Torts—The Law of the Mixed Society, 56 Tex. L. Rev. 519, 521–26 (1978) (describing the nature of tort law as one that is the product of a mixed society, employing mixed collective and atomistic approaches).

28. Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 246–47.

29. See John C.P. Goldberg & Benjamin C. Zipursky, Thoroughly Modern Tort Theory, 134 Harv. L. Rev. Forum 184, 191 n.45 (2021), https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-F.-184.pdf%20 [https://perma.cc/RE3K-JJ8R] ("[A]ny invitation for judges to deploy cheapest cost avoider analysis — given the indeterminacy of that concept, the structure of tort litigation, rules limiting the admissibility of evidence, judicial competence to engage in policy analysis, and various other factors — is an invitation for them to make stuff up.").

30. Bork, The Antitrust Paradox, supra note 14, 408–18.

31. The New York Court of Appeals has expressly stated that:

> To discern whether a duty exists, the court must not engage in a simple weighing of equities, for a legal duty does not arise "when [ever] symmetry and sympathy would so seem to be best served" . . . Rather, the court must settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the

this legal process move, misguided though it is. My point is rather to indicate that having made such move, philosophers of law will often say that cases, decisions, and approaches to torts that do not comport with what their normative theory requires are either wrong or not torts.[32]

And here two things need to be said. The first is that just as economic theory—even at its best—may not be adequate to explain or justify entire areas of law, neither will philosophical theories at their best do so. There are ways of describing and analyzing that stretch any given "and" too far. Of course, economics can be stretched through the broadest of utilitarian reasonings so it could, in theory, cope with any individual victim/injurer relationship. And so, more easily perhaps, could philosophical theories entertain all that, say, economic theory or any other outside field focuses on. But to do that requires using language in uncomfortable ways and makes the relevant outside field of knowledge and its practitioners deal with topics in ways that are inconsistent or in tension with the core focus of that given field.[33]

Often, as when Coase made economics take the costs of markets into account, what law showed to be true could be readily incorporated into the outside field that was being used to analyze law.[34] But at times, the

> parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty.

In re N.Y.C. Asbestos Litig., 59 N.E.3d 458, 469 (N.Y. 2016) (citations omitted) (quoting De Angelis v. Lutheran Med. Ctr., 449 N.E.2d 406, 407–08 (N.Y. 1983)). See also Lauer v. City of New York, 733 N.E.2d 184, 188 (N.Y. 2000) (holding that the court must balance both general duties to society and the specific duty to the plaintiff).

32. See, e.g., Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 209–31 (critiquing various approaches identifying why certain ways of treating others count as torts and why others do not).

33. Which is not to say that, for example, legal scholarship anchored in economic analysis cannot successfully consider more philosophical questions of fairness or distributional justice. See, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961, 970–71 (2001) ("We next identify which legal rules are best according to welfare economics and which are best according to the principles of fairness that seem naturally relevant . . . ."). Or that legal scholars may not seek to incorporate insights from both economic analysis and legal philosophy to formulate hybrid or "mixed theories" of, for example, tort law. See, e.g., Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801, 1802 (1997) (discussing how a view of deterrence as compassionate and meant to prevent injustice can justify an approach that is a mix of economic and justice approaches).

34. The evident effectiveness of Coase's writings, for example, pushed economists to revisit the role of institutions and legal norms in defining market behavior and was, in part, responsible for the rise of the New Institutional Economics. See Ronald H. Coase, The New Institutional Economics, 140 J. Institutional & Theoretical Econ. 229, 230–32 (1984) (arguing that institutional economic theory should concern itself "within the constraints imposed by real institutions" and not "what would happen in an ideal state"); Douglass C. North, The New Institutional Economics, 142 J. Institutional & Theoretical Econ. 230, 230 (1986) (arguing that modern institutional economics "should be capable of integrating neo-classical theory with an analysis of the way institutions modify the choice set available to human beings" and that it should "build upon the basic determinants of institutions" to

discontinuity between law and any given outside field is not adequately cured by changing the outside field somewhat. Rather, at such times the discontinuity is best explained and analyzed by recognizing that another or various other fields of knowledge, outside of law, are best suited to shed light on what law is doing.

The second thing worth saying is that even within one "Law and . . ." approach, many variants may coexist.[35] A traditional—let's call it Chicago—economic theory may fail to explain or justify a set of legal rules while another economic theory—whatever its overall merits—may do so very well. Accordingly, the fact that tort law does not adhere to all that, say, Goldberg and Zipursky's "civil recourse" philosophy would dictate does not mean that a different, perhaps more sophisticated or perhaps wrongheaded, philosophical approach can explain and justify quite clearly what the law is doing.[36] For example, returning people to their previous status quo—the essence of many philosophical approaches to tort law—is not without its powerful, philosophical critics.[37]

Let me be clear. I am not for a moment suggesting that looking at legal rules in the way Goldberg and Zipursky do, or in the way that philosophers of law more generally do (whether Aristotelian or Dworkinian), is wrongheaded. Far from it. Asking what complex notions of merit, of right and wrong behavior, justify is surely worth doing.[38] What I am suggesting is that here too, if the law does not do what those notions would indicate should be done, one should not assume that the law is wrong and must be changed. It may be that the law is wrong. But it may also be that the philosophical theory has not been applied in a fully sophisticated fashion, that another, perhaps as yet undefined,

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analyze the way in which institutions change); Oliver E. Williamson, The Institutions of Governance, 88 Am. Econ. Rev. 75, 75 (1998) (describing much of the contemporary work of the new institutional economics as finding its origins in Coase's work). For an examination of the relationship of Ronald Coase's thought to neoclassicism and institutionalism, see generally Herbert Hovenkamp, Coase, Institutionalism, and the Origins of Law and Economics, 86 Ind. L.J. 499 (2011).

35. For a sampling of different contemporary philosophical views, see generally Philosophical Foundations of the Law of Torts (John Oberdiek ed., 2014).

36. See supra note 27 and accompanying text.

37. Some critics point out, for example, that restoring an injured party to the status quo reproduces and perhaps intensifies preexisting social inequalities. See, e.g., Richard L. Abel, A Critique of Torts, 37 UCLA L. Rev. 785, 798–806 (1990) (finding that tort damages that focus only on injury not only fail to provide adequate compensation but also reinforce and obscure real inequalities); Leslie Bender, Overview of Feminist Torts Scholarship, 78 Cornell L. Rev. 575, 577–79 (1993) ("Even though the 'emotional' harms resulted in interferences with physical integrity, like miscarriage or premature birth, they were shunted off into a separate injury classification. Tort law thus marginalized women's injuries by taking them out of the realm of compensable physical harms." (footnote omitted) (citing Martha Chamallas & Linda Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 833–34 (1990))).

38. Indeed, I have stressed the value of such work. Calabresi, Future of Law and Economics, supra note 5, at 24–89 (discussing "merit goods").

philosophical theory has been what has influenced the law. Or perhaps it is that what the law is doing in that area responds best to what is optimally analyzed in terms of a totally different "Law and . . ." approach, a totally different outside field of knowledge.

The discontinuity asks for an explanation. But the explanation need not be that law is wrong. As with Law and Economics, as with seemingly "inefficient" legal rules, I believe proper Law and Philosophy should be a two-way street. And so, it may be that law pushes us to reconsider what truly constitutes or how we should identify the good or the just.[39]

III. THE PERIL OF LAW AND HISTORY

Perhaps the contemporaneously most interesting and most perilous use of "Law and . . ." to analyze and criticize existing legal rules has been the invocation of history. To begin, we must distinguish different ways in which law and history can interact. First, historians of law have sought to trace the development of certain legal doctrines or practices over time. Their goal is to offer what one may describe as a genealogy of law.[40] Second, legal historians may turn to law, including court cases, but also other materials like legal treatises, as a window into the social or political history of a given moment in time. Law, from this perspective, offers an archive for understanding the broader history of a period.[41] Neither of these first two frameworks makes explicit normative claims as to what law should be, although, implicitly, historians writing from within these frameworks may suggest that a particular legal doctrine or practice emerged out of a time with regrettable social or political dynamics which our contemporary society may not wish to emulate.[42]

My interest, however, is in two other practices that explicitly claim to make normative arguments about what law should look like based on

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39. At a conference at Harvard Law School, honoring Professor Emeritus Frank Michelman on his retirement, distinguished philosophers presented papers. Several of them, while praising Michelman's contributions, seemed puzzled that on more than one occasion where the philosophical theory Michelman was applying did not fully support a legal doctrine, Michelman, nonetheless, adhered to pre-existing legal rules. What they did not realize was that Michelman, a truly great legal scholar, was treating Law and Philosophy as a two-way street and was questioning philosophical theory on the basis of what law suggested. Robert Post, correctly, referred to Michelman's writing as "so wise and perfectly tactful." See Lewis Rice, A Career of "Reflective Equilibrium": Celebrating Frank Michelman, Harv. L. Bull. (July 1, 2012), https://hls.harvard.edu/today/a-career-of-reflective-equilibrium-celebrating-frank-michelman/ [https://perma.cc/2LBQ-LUFG] (internal quotation marks omitted).

40. For classic examples of this practice, see Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992); Morton Horwitz, The Transformation of American Law, 1780–1860 (1977).

41. See Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870 (1983).

42. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (upholding racial segregation).

history. On the one hand, some argue that history can, like any other social science, provide data points for understanding where law should go next. History might, for instance, help elucidate how law has, over time, failed to resolve the social mischief it was designed to redress.[43] On the other hand, the more recent trend, espoused primarily by those who use the label "originalism," seeks to use history to define what law should be.[44] Adherents to "originalism" seek to determine the meaning of the law by turning to "original intent," "original public meaning," "original expectations," or even "history and tradition."[45] And if the legal rule under scrutiny fails to fit, it is assailed and quite often set aside. It is, in effect, deemed the equivalent of irrational and, hence, requiring change. This form of legal antiquarianism, thus, sees law as an entity whose meaning was forged in the past.

Let me, again, be clear. I am not in this Lecture criticizing originalism—whatever its problems or limits may be,[46] and I am certainly

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43. This approach has been taken, for example, by historians who have submitted amicus briefs making historical claims without making the argument that only historical sources can elucidate the proper meaning of a given constitutional or statutory provision. See, e.g., Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 91–93 (2023) ("Our brief . . . show[s] that abortion bans are rooted in a history of state-sponsored reproductive control that has targeted individuals and communities based on characteristics now considered constitutionally suspect.").

44. For overviews of originalism, see generally Originalism: A Quarter-Century Debate (Steven G. Calabresi ed., 2007); Ilan Wurman, A Debt Against the Living: An Introduction to Originalism (2017).

45. See, e.g., Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 9 (2d. ed. 1997) (stating that the inquiry into "original intention" must involve asking "what did the framers mean to accomplish, what did the words they used mean to them" and not "what we should like the words to mean in the light of current exigencies or changed ideals"); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143 (1990) ("In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."). For other methods of originalist determinations of the meaning of a law, see generally, Randy E. Barnett, Restoring the Lost Constitution (2003) (arguing that original meaning originalism "avoids the prominent objections leveled at originalism"); John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013) (advocating that under both original intent and original public meaning, the Constitution's meaning should be interpreted based on the applicable interpretive rules of the time); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997) (advocating for constitutional interpretation which is concerned with the original meaning of the text, not what the original draftsmen may have intended); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999) (advocating for an originalist interpretation that adheres to the discoverable intentions of the Founders); William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349 (2015) (describing the methods that an original meaning originalist must employ).

46. For critiques of originalism, see, e.g., Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism 207 (2022) ("[Originalism] is a rhetorical shield that conservatives use to pretend they are not making value judgments, when that is exactly what they are doing."); Eric J. Segall, Originalism as Faith 193 (2018) ("What most originalists do

not criticizing the use of history as an outside field to be used in analyzing, understanding, and correcting current law. I could hardly be a former clerk, and mentee, of Hugo Black and do that.[47] And history has done at least as good a job as economics and philosophy in telling us where law has gone astray or become outdated. Indeed, as to the former, history may tell us more than any other outside field.

What I mean to do in this Lecture is to suggest that the peril of using an outside discipline's seeming requirements to judge current legal rules, followed by a willingness to consider existing legal rules as necessarily wrong if they don't adhere to what the outside discipline dictates, is today especially strong in this "Law and . . ." approach.

One sees this tendency—relying on historical claims to call for the displacement of current legal norms—both in statutory and constitutional analysis. First, existing law as it has "come to be" is examined. Second, the meaning of what the writers of the given statute or constitutional provision intended to do is asserted through claims predicated on some historical sources. Third, a lack of fit is found, and then the law is changed even in the face, indeed precisely, in the face, of long-standing precedent, of long-standing legal development.

Again, changing existing legal norms in light of history may well be correct. Justice Black frequently made an argument of that sort. He did it, for example, with respect to double jeopardy.[48] He began with the language the Framers used; he adverted to its meaning and historical context, including its particular meaning when trials in different

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have in common is the faith that some combination of text, originalist-era evidence, and history can constrain Supreme Court decision making. But the words of the Constitution are too unclear, and their history too contested, for that to work."); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 231 (1980) (arguing that "strict intentionalism produces a highly unstable constitutional order" and that moderate originalism's "constraints are illusory and counterproductive"); Jamal Greene, Originalism's Race Problem, 88 Denv. U. L. Rev. 517, 522 (2011) ("A racially-sensitive constitutionalism must always, therefore, hold out the possibility of legitimate dissent from history. Originalism denies that possibility . . . ."); Robert Post & Reva Siegel, Originalism as Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 572 (2006) ("The originalist vision of the Constitution is thin enough to conjoin many distinct conservative perspectives that share only a common repudiation of the menacing encroachments of modernity.").

47. For discussions of Justice Black's reliance on history, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution 34 (1982) ("Of course, Justice Black did not rely on textual arguments to the exclusion of all others; his *Adamson* dissent, in which he argues that the Fourteenth Amendment extends the Bill of Rights to the states, is well known." (footnote omitted)); Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1737, 1799 (2007) (characterizing Justice Black as "the original originalist on the modern Supreme Court"); Jack M. Balkin, Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time, 98 Tex. L. Rev. 215, 251 n.132 (2019) (describing Justice Black as "the most famous liberal originalist, exemplif[ying] liberals' turn to history both before and during the Warren Court era").

48. Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (Black, J., dissenting).

jurisdictions were involved.[49] He then pointed out how far from those meanings contemporary law was. In other words, how Law and History pointed out a lack of fit.[50]

But interestingly, he would do two other things as well. First, he would be skeptical of any claims that "history" was clear and certain. Thus, he made me examine in excruciating detail the historical record. He even made me go back and read the original of a statute from Tudor times to see why one seeming exception to his historical conclusion really supported his view as to what history dictated as to double jeopardy.[51] In other words—unlike many "Law and . . ." scholars, whether economists, philosophers, or historians, he did not stop questioning the conclusions of the outside discipline simply because the lack of fit supported a reform to his preferred outcome.

But beyond this, he would also examine how law had come to deviate from what he concluded was what history dictated. He would ask whether the historical requirement was itself wrong because of what other outside fields or even, in an odd sense, law itself had come to tell us was correct. He would, in other words, while being very much sympathetic to an argument from Law and History, both question whether his history was correct and whether there were reasons to look beyond history—say, to philosophy or economics or even law itself to explain, and perhaps justify, the deviation.[52]

It is this kind of important, but also skeptical, use of history as an outside field for advancing changes in legal norms that I would like to further in this Lecture. It is this approach that I think is often missing today in Law and History. And it is this gap that is making the use of Law and History particularly perilous today.

Let me suggest three reasons why this peril is so great in this area. The first is the particular legal process grounds that are being used to make Law and History dominant. The second is that, because history as a field is far more complex and uncertain than economics, or even philosophy, what history actually dictates is anything but easily discerned. The third is the wish, common to every "Law and . . ." approach, to justify what is really primarily one's own desired legal outcome and reform by citing the purported conclusions of an outside field.

Let me turn first to the legal process move made, especially by judges, to justify the new-found dominance of historical arguments. It is as elegant, and as wrong, as Bork's move to make economic theory primary in

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49. Id. at 152.

50. Id. at 159–61.

51. For a more detailed account of this moment and the impact it had on my perspective on the judicial role, see Norman I. Silber, Outside In: An Oral History of Guido Calabresi 273–75 (2023).

52. *Bartkus*, 359 U.S. at 158–62 (Black, J., dissenting).

antitrust, and Goldberg and Zipursky's to do the same for philosophy in tort law.

Here one should distinguish between history, or "original meaning," as applied to statutes and as applied to constitutional provisions. Let me start with statutes. The argument is often made that any deviation from the intent (and by some, the language) of a statute is undemocratic,[53] and hence prohibited to courts.[54] Note the similarity with Bork's and Goldberg and Zipursky's arguments as to what courts can properly do.[55]

It is surely true that at least in one sense "interpretation" of a statute must be backward looking. After all, the word interpretation suggests as much. One must ask, historically, what a statute and its enactors meant. And whether one should, in doing this, look primarily to the language of the statute, to its context, to the mischief the statute was designed to correct, to legislative statements during its passage, or to any other indications of historical meaning, is something as to which I—like most scholars—have strong views.[56] But these are not germane to this Lecture. Rather, the question, which goes to the propriety of looking beyond historical meaning, is whether it is undemocratic, and "therefore" always wrong, for courts to look beyond that historical meaning, whatever it was. Can courts, when reading statutes, properly consider factors beyond the time of passage and not be fully retrospective?

The answer is, of course, courts do and have always, on occasion, done just that. It is manifest that courts do look beyond that past meaning

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53. In this context, for some, "intent" refers to legislative intent—that is, the purpose of legislators in enacting a statute, as discerned through legislative history; for others, "intent" is the expected application of a particular statute, as discerned by the public meaning of particular terms used by the legislature at the time of the statute's enactment. Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1776–77 (2020) (Alito, J., dissenting) ("Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of 'congressional intent,' including legislative history."), with id. at 1739 (majority opinion) ("The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions 'because of' sex. . . . So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.").

54. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4 (1980) (noting that a "comparative attraction of an interpretivist approach . . . derives from the obvious difficulties its opposite number encounters in trying to reconcile itself with the underlying democratic theory of our government"); Scalia, supra note 45, at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

55. See Bork, The Antitrust Paradox, supra note 14, at 5; Goldberg & Zipursky, Recognizing Wrongs, supra note 21, at 9.

56. See, e.g., United States v. Nelson, 277 F.3d 164, 186–91 (2d Cir. 2002) (Calabresi, J.); Guido Calabresi, Common Law for the Age of Statutes 31–43 (1982) [hereinafter Calabresi, Common Law].

frequently.[57] Some have still called it interpretation (and have used maxims of interpretation to justify it).[58] Some—I for one—call it construction and have used rules—like avoidance of constitutional issues—to explain what the courts were doing.[59] Some have simply done it.[60] But the fact of the matter is that courts have, in fact, on occasion when it seemed correct to do so, looked beyond the past, beyond historical meaning when dealing with statutes.

My point today, though, is not to rework those arguments but simply to suggest that at the statutory level, it is no more "undemocratic" for courts to do this, than it is for courts to violate Bork's legal process maxim or Goldberg and Zipursky's contrary one. Democracy does not demand that past statutory writings govern judicial behavior. The question of whether only a legislature may update past enactments, or whether and when courts or administrative agencies should do so, is an immensely complex one.[61] But as long as democratically elected legislatures can overturn court or administrative decisions such rulings do not raise serious issues of democratic governance. In other words, there is nothing in democratic theory that requires us to keep courts from looking beyond and override history in doing their job when dealing with statutes.

A second legal process argument for relying on history and what a statute *meant* when originally written is that such a view limits lawmakers, and especially courts, and keeps them from simply doing what they want. This might be a strong argument if it were valid. But it seems to me obvious—empirically obvious—that those who adhere to the view that statutes mean only what the enacting legislators meant have been as free to impose their meaning on what was meant as those who believe that statutes grow. Judges, properly criticized, as result oriented, or activist, are as frequent among those who claim to follow original meaning as among those who admit reasons for statutory construction. This process argument, even if believed in by its proponents, is nonsense. It doesn't do what it is supposed to do.

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57. See, e.g., *Bostock*, 140 S. Ct. at 1748–53.

58. Id. at 1753.

59. See Calabresi, Common Law, supra note 56, at 120–62 (describing the factors affecting how a rule fits within the legal landscape and the choice of judicial techniques courts may employ when they have decided that an old rule is out of phase); see also Henderson v. Immigr. & Naturalization Serv., 157 F.3d 106, 118–19 (2d Cir. 1998) (Calabresi, J.) (applying principles of construction to analyze the impact of the 1996 amendments to the Immigration and Nationality Act).

60. Calabresi, Common Law, supra note 56, at 33–34 (noting examples where courts have updated statutes "[o]nly by ignoring legislative language and intent, and its own prior interpretations").

61. For a discussion of the relative merits of administrative, legislative, or structural responses to anachronistic statutes, see Calabresi, Common Law, supra note 56, at 44–80; see also William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 29–74 (2010).

Again, let me be clear. I am not here arguing that history is not important and should not often, or usually, inform an outcome. I am simply saying that as with economics or philosophy the fact that our law—even court-made law—on more than one occasion deviated from what a historical meaning would seem to suggest does not necessarily make that deviation improper, let alone undemocratic. The move to an absolute legal process mandate to the particular "Law and . . ." theory applied, is just as misguided here as it is in Bork's, and Goldberg and Zipursky's use of it. In all three it is simply an ipse dixit.

The issue becomes more complicated when the question is not the interpretation of a statutory mandate but the meaning of a constitutional provision. For here it can be said that any deviation from what was originally required breaches a fundamental governmental structure and cannot (in some sense) constitutionally be done. Once more, my goal today is not to take sides in this argument. There surely has been plenty of writing (not to mention judicial opinions by judicial giants) countering the argument that only what the Framers intended must govern.[62] And it is certainly the case that constitutional law has, in fact, deviated dramatically in area after area from what the Framers intended and continues to do so.[63] Moreover, the often-made argument that only a reliance on original intent can limit judges and keep them from imposing their policy views is just as manifestly wrong here, as it is with statutory analysis. The indefiniteness of history, of original intent, is—as will shortly be discussed—so great (as has been seen, both recently and in the past), that originalism as a way of restraining judges is sheer nonsense.[64] Only honesty and good faith can do that.

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62. A notable example is *Brown*'s rejection of the relevance of history and original intent. See Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."). Originalists, thereafter, have spilled much ink seeking to reconcile *Brown* with originalism. See, e.g., Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1140 (1995) (asserting that "school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment").

63. It is, of course, more than dubious that the Framers embraced originalism. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 948 (1985) (arguing that the historical evidence indicates that the Framers would not have interpreted the constitution in an originalist way).

64. For commentary questioning whether originalism is, in fact, a form of judicial restraint, see, e.g., Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 223–24 (2023) (discussing the selectiveness of the Court's reliance on originalist analysis and maintaining that "[i]n large swathes of cases," "the Justices make little or no effort to justify their rulings by reference to original constitutional meanings" and instead rely principally on their own precedents as grounds for decision); Reva B. Siegel, Memory Games: *Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance, 101 Tex. L. Rev. 1127, 1131 (2023) (probing claims that originalist methods promote values of judicial constraint); David A. Strauss, Originalism, Conservatism, and Judicial Restraint, 34 Harv. J.L. & Pub. Pol'y 137, 139–45 (2011)

But certainly, the legal process claim, that courts should look to history when engaging in interpretation, has more weight when it is made with respect to constitutional questions than when made as to statutory analysis. And with this in mind, I will turn to the second, and more fundamental, problem with simply "following" what Law and History dictates—the indefiniteness, the uncertainty of even the best historical analysis. I will begin by pointing out the special problem that occurs, when judges, not historians, rely on that analysis. This too is not new, but it must be emphasized now, for it is only recently that so dramatic a use of Law and History has been made to nullify what the law had come to mandate.[65] And I will do this by starting with a silly story.

When I was clerking, I proposed, as a joke, to Justice Frankfurter (who had come to like me even though I was Justice Black's clerk), an "interpretation" of a constitutional provision that seemed to apply to him and to me. It was the constitutional requirement that only a natural-born citizen of the United States could serve as President. My absurd, but perhaps slightly linguistically possible, proposed reading of the clause was that if one were Naturally Born (that is, illegitimate), to become President, one had to be a citizen of the United States at birth. This of course would be impossible as to the Framers since the United States did not exist when they were born. But its effect (if read that way) would be to bar only one Framer, for only one was illegitimate, Alexander Hamilton. And on that basis—fear of a Hamiltonian presidency—I added a "policy" reason to explain my (ridiculous) historical reading of the clause.

The point of the story, however, is not my joke, but Frankfurter's reaction. He wrote me back: "*I'll* buy that" (remember, like me, he was born a non-citizen and hence was precluded by that clause, as ordinarily read, from the Presidency). "And anyway, *it's as good as most of what goes for history on this Court*!"[66]

In other words, that great scholar and traditionalist judge, some sixty-five years ago was saying one should not trust historical "findings" by Supreme Court Justices. He was seeing both the temptation, and the lack of capacity to do the job, that attends Law and History, in the hands of the category of people who became justices (and, I would add, judges generally). And he was pointing that danger out, as to a court that was relying on history far less than occurs today. Moreover, he was doing this

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(discussing the difficulties of ascertaining the "original understandings" and arguing that even with good faith approaches to original materials, "many different originalist conclusions will all seem plausible" with no criteria "that dictate a choice among them" and therefore will tempt judges to read in their own views). For the claim that originalism is an exercise in judicial restraint, see, e.g., William Baude, Originalism as a Constraint on Judges, 84 U. Chi. L. Rev. 2213, 2213 (2018) ("[O]riginalism was centrally a way, the best way, to constrain judicial decisionmaking . . . .").

65. Recent examples include Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and District of Columbia v. Heller, 554 U.S. 570 (2008).

66. Personal recollections of the author.

with respect to a Court whose membership, for various reasons, was much more broadly based (and, as a result, perhaps somewhat more capable of doing historical analysis) than today's.[67].

The point is a broader one than when history is the outside field employed in "Law and . . ." analysis. Judges, and justices, are not historians, economists, or philosophers. As a result, a simplistic reliance on what the outside field "requires," (in addition to all the limits of that discipline, as discussed above), is misguided due to the undisputed fact that judges and justices will frequently get wrong what the outside discipline in fact says.[68] And this, by itself, should make judges hesitant to follow the dictates of the outside field, rather than what the law has come to mean and require. After all, it is as to the latter's task—pure legal analysis—that one has the right to expect significant knowledge and ability from those named to high courts.

But, putting aside this fundamental problem, and assuming for the moment that judges and justices can become adequate historians (or economists or philosophers) when aided by scholarly briefs and articles by the best practitioners of a given outside field, the peril of simple reliance on history to justify change in existing law remains enormous. What was meant, what was intended, what was understood, when our Constitutional provisions were written is all too often deeply uncertain. This is so because, as historians themselves are the first to tell us, historical truth is—to put it mildly—very hard to come by.[69] What any given economic or philosophical theory—whatever the merits and limits of that theory—stands for is on the whole definite. What actually was the historically correct basis of a constitutional requirement is far less certain.

Just consider for a moment a few that have been at the heart of recent cases: dual sovereignty and double jeopardy, habeas relief for the incarcerated but innocent, the Second Amendment's statement as to the right to bear arms, the meaning of race discrimination in the Fourteenth Amendment, the grant of power to state legislatures in federal elections.

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67. Contrast today's Court, which is composed almost entirely of former federal appellate judges, with the Warren Court, which included, at one point, Justices who had previously served as a state governor (Warren), a Senator (Black), an academic (Frankfurter), the head of an administrative agency (Douglas), a former state supreme court justice (Brennan), a lawyer in the Justice Department (Clark), and only three judges who had served, briefly, as federal appellate judges (Whittaker, Harlan, and Stewart) after longer careers as corporate lawyers or trial judges.

68. I am just speculating, but in this respect, the temptation for judges to believe that they know and can speak to what an outside field requires seems to be greater with respect to history, and perhaps philosophy, than economics.

69. This, of course, does not mean that there can be no "objective" search for historical facts, but that process entails more than developing a broad theory on the basis of some words in a dusty tome. See, e.g., Mark Bevir, Objectivity in History, 33 Hist. & Theory 328, 329 (1994) ("I will offer an account of historical objectivity which relies on criteria of comparison, not on our having access to a given past. . . . [T]o deny that we have access to a given past is not to show the impossibility of historical objectivity.").

In each of these, serious scholars have made powerful arguments that are based on totally different historical "facts."[70] For this, if for no other reasons, one would think that courts would be reluctant to rely on any given "historical" requirement before overturning what the law, in its complex way, has come to require.

The indefiniteness of history, moreover, carries with it a particular danger. Finding a plausible historical meaning that is coherent with one's desired "policy" result is all too easy. And the fact of the matter is that far from limiting judges and justices, the use of history, even "good history," has given them an amazing degree of freedom to further their own policy goals—however good these may be.[71] Justice Scalia correctly criticized the simplistic use of the legislative record in statutory interpretation because one could too readily find a legislator who described the given statute as doing just what the "interpreting" jurist wanted it to do.[72] But, I suggest, that danger is just as great as to the existence of a historical fact and meaning.

The problem exists to some degree, with all "Law and . . ." approaches. Each, because it enables jurists to question what the law should be, gives courts power. The way in which this power may be used to

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70. A prominent example is, of course, the long-standing debate over the original meaning of the Second Amendment, and whether it was designed to protect individual or collective rights. See generally Don B. Kates, A Modern Historiography of the Second Amendment, 56 UCLA L. Rev. 1211 (2009) (describing the changing trends in historical and legal scholarship on the Second Amendment).

71. Indeed, among conservatives, and even originalists, there has emerged a growing concern over the indefiniteness of "history and tradition." In the aftermath of *Dobbs*, for example, some conservatives, and one concurrence, expressed frustration with the majority's willingness to preserve substantive due process, with protected rights defined by "history and tradition," instead of turning to the "original public meaning" of the Privileges and Immunities Clause. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring). Some conservatives have viewed the turn to "tradition" as raising the same challenges around indefiniteness and judicial activism that originalists chastise from "living constitutionalism." See Randy E. Barnett & Lawrence B. Solum, Originalism After *Dobbs*, *Bruen*, and *Kennedy*: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 478 (2023) (labeling "conservative variations on Constitutional Pluralism" as "nonoriginalist" because the approach "permits them to support outcomes that are inconsistent with the constitutional text"); Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1481 (2023) ("Originalists might . . . try to marry the living part of living traditionalism with the commitment to fixity that makes them originalists. The fruit of that union would be a chimera—the fixation of constitutional norms not at ratification, but at some arbitrary later point: the dead hand of the middle-past."); Adam Liptak, A Conservative Judge's Critique of the Supreme Court's Reliance on Tradition, N.Y. Times (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/supreme-court-originalism-tradition-conservative.html (on file with the *Columbia Law Review*) (quoting a range of judges, including Eleventh Circuit Judge Kevin Newsom and Justice Amy Coney Barrett, and scholars, including Sherif Girgis, describing traditionalism as vague and open to manipulation).

72. See Scalia, supra note 45, 29–37 (discussing his belief that legislative history "should not be used as an authoritative indication of a statute's meaning" because "it is much more likely to produce a false or contrived legislative intent than a genuine one").

further one's own policies differs somewhat with respect to the specific "Law and . . ." approach used. In economics and philosophy, it goes most often to the *theory* employed to analyze. With respect to history, it tends instead to focus on what the history allegedly shows. But what is the same is that using a particular outside field, the Court can say: what law has come to be is wrong, and what law *is* (or should be) is what *we* want it to be, which also happens to be what the economic or philosophical theory, or a historical fact, we use, commands.

Again, let me be clear. Law has often come to be quite wrong. And *all* "Law and . . ." approaches are as important as they are because they are appropriate bases for correcting past errors. The inherent conservatism of law as a self-contained independent subject that cannot be changed *is* unacceptable. It leads either to stagnation and continuation of past wrongs,[73] or to revolutionary change,[74] or to total simplistic majoritarian dominance.[75] The fact that law—as a self-contained subject made *reform*, even radical reform, based on serious analysis and criticism almost impossible was the reason for the development and current dominance of "Law and . . ." approaches, whether Benthamite or modern. But the current use of "Law and . . ."—whether by Economic Analysts of Law, Philosophers of Law, or Historicizers of Law—has also demonstrated manifest dangers.

IV. OVERCOMING THE PERIL OF "LAW AND . . ."

What then should one do? I firmly believe that scholars and lawmakers should not hesitate to use "Law and . . ." analysis to examine and criticize any and all legal rules. Asking how coherent those rules are

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73. Legal rules developed at times when caste or class relations, totally unacceptable today, gave rise to values that are reflected in those legal rules. These rules, accordingly, continue to further such relations long after they have been deemed misguided by a polity. Laws that appear to be neutral today may have been tainted originally by a discriminatory intent. And other laws that appear to be facially neutral may well have been enacted by legislatures which meant to disenfranchise or otherwise exclude particular groups.

74. If too many legal rules that support relations that a polity deems misguided come to be viewed as governing a polity, and if the law cannot be criticized or updated, the call for revolution and a total change in the law is not infrequently a reaction. *Écrasez l'infâme*—destroy the unjust past as reflected in law—becomes the cry. And—after a revolution—a new set of legal rules comes to be established, with its own set of unchanging and perhaps unjust values and relationships.

75. If law cannot be criticized and updated by scholarly work, a polity may nonetheless avoid stagnation or revolution by giving its legislators or its elected officials the power to change the law. New laws take the place of the old in response to political reactions to perceived injustices. This is both common and appropriate. But it should also be obvious that laws new and old that are enacted in answer to particular (often dramatic) events may themselves be inefficient or unjust. What the majority desires and enacts at any given moment through certainly significant, is not the same as what is true and just. It too must be subject to criticism; the inertia, which characterizes our Constitutional structure—the impediments to what one of our founders, James Wilson, called (pejoratively) "Legisferation"—reflect precisely this concern. See Silber, supra note 51, at 391.

with important, and importantly relevant, other fields of learning, is essential if law is to do its job of ordering current society justly. Law often has come to be—and at times was even when initially developed—unjust in any of many proper ways of defining "unjustness." The absolute conservatism inherent in treating law as a self-defining field, separate from what other fields of knowledge would suggest are correct relationships cannot stand.

But when analysis of existing legal rules—whether common law, statutory, or constitutional ones—shows a problem (that is, a lack of fit with the outside discipline that has been used to examine the legal rule), one should realize that that is only the beginning of the task.

One should then, first, ask whether one has described correctly the governing legal rule that did not fit. Was it as it was commonly described or is the practical effect of the legal rule more complex? And, if more complex, does *that* "legal rule" in fact fit, with the requirements of the outside discipline used to analyze the law? The seeming, but in fact nonexistent, lack of fit at the core of the so-called fourth rule discussed in my Cathedral article is an easy example of a false lack of coherence.[76]

If after such an examination a serious lack of fit endures, one must refrain from immediately concluding that the law, as it has come to be, should be changed. Is there a gap, or something missing that can be made part of, and improve, the outside field employed? And when that gap is filled, is what current law does readily explained? Coase's foundational article, *The Nature of the Firm*, illustrates how examining the nature of law can lead to improvements in theories from other fields.[77]

This same approach essentially asks whether the outside field, when that field is fully understood and improved as a result of its encounter with law, really suggests lack of fit. This method operates in a slightly different, but at heart not that dissimilar, way when the outside field employed is history rather than economics or philosophy. If the law as it has come to be does not fit with what is suggested are the historical facts, one must begin by questioning the accuracy of those asserted historical facts. The willingness to question the completeness or sophistication of an economic or philosophical theory that would deem a legal rule "irrational" is the analogue of the willingness to ask whether the description of history as inconsistent with a legal rule is *in fact* the correct view of history. And just as even longstanding economic or philosophical theories must be questioned and reworked to see if then they in fact fit with the law, so must

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76. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1116–17 (1972). For a discussion of the significance of "Rule 4" and its possible rarity, see Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 1007–20 (2004).

77. R. H. Coase, The Nature of the Firm, 4 Economica 386 (1937). For a discussion of Coase's goals in writing the article, see R. H. Coase, The Nature of the Firm: Meaning, 4 J.L. Econ. & Org. 19, 19–20 (1988).

even broadly accepted historical facts be reexamined to see if other views of what was historically true explain what the law is or has come to be.

If that is done and the law still does not fit, a serious case for reform, for changing or abandoning existing legal rules has been made. The use of a "Law and . . ." approach will have done its job and have shown that Law must be updated. Whether that updating is best done by the courts, legislators or agency administrators is beyond the scope of this piece. And how quickly that updating can occur remains a crucial question for wise lawmakers. My point here is simply that when the outside field employed seems to offer solidly based insights, and the underlying problem with how the law has come to be is then properly seen, reform—even radical reform—may *in due course* be justified. And that is as true when history is the outside field invoked as when economics or philosophy is used.

But often, when one examines how a legal rule came to be, and the reasons given for it today in the face of a tension between law and an outside field, one finds a far more complex story. It is often a story that asks us to question the appropriateness of the outside field employed to analyze the legal rule. That is, even "at its best" and as "best improved" by its encounter with law, when economic theory reveals a lack of fit with a dominant legal rule, an examination of the source and force of the legal rule may tell us to look, at least in part, to *another* outside discipline to explain and perhaps justify the law.

And this is as true when the outside discipline employed is history as when it is economic or philosophical analysis. A statute meant something when it was enacted. But over the years it has been read to do something quite different. Why? What does philosophy or economics tell us about the change? And what does that say about the proper endurance of the current law, regardless of its historical lack of fit?

What I am saying is that legal rules come to be what they are in response to a wide variety of reasons. And these reasons are often best reflected in the analysis made by widely different fields outside of law. Before one deems what the law ordains to be inefficient, irrational, or unmoored, on account of its lack of fit either with its historical sources or with any given outside discipline (whether economics, philosophy, or any number of other outside fields not discussed in this Lecture), one must look to other possible sources of justification for the governing rule. And one must be aware that sometimes the justification or explanation may lie in a mixture of outside fields that our definition of "Law and . . ." approaches does not recognize as such. Law—in its development—draws from where it wishes and may rely on a combination of approaches that even the most sophisticated interdisciplinary doctoral programs fail to imagine.

If, of course, one is committed to a single given outside discipline as holder of the truth; or if one is committed to historical context as dominating over any other reason in determining what law should be, one

will fail to undertake this last type of analysis. But one would be wrong. Our legal rules—in practice—demonstrably are not so simplistic. And legal process attempts to make them so are misguided. And equally misguided is the desire, by relying on one given outside field, even historical context, to limit the power of lawmakers (and of judges in particular). As one of the earliest (and perhaps greatest) proponents of "Law and . . ." analysis, Arthur Corbin, said in his farewell address to the Yale Law School faculty, the truth does not lie in any given field defined by humans.[78] And *that* is what makes law and legal analysis so challenging and interesting.

CONCLUSION

"Law and . . ." gives those who would alter the law great power. This power, in our legal system, is often judicial power. And, as Alex Bickel toward the end of his life clearly saw, such power cannot be contained or controlled by theoretical limitations. Once a devotee of Frankfurtian nominal restraint and a fierce critic of Blackian linguistic and historical constraints, he came to realize that neither approach worked in practice.[79]

The moment one gives—as one must—lawmakers, including courts, the power to update legal rules on the basis of what an outside field tells us, the power to read that field to further one's own policy interests is there. But failure to give that power is also unacceptable. That means we must rely, as best we can, on demanding honesty and transparency on the part of lawmakers in their use of outside fields. And, most important, it means that as scholars, *we* must make use of "Law and . . ." analyses to point out, fiercely, when legal actors—and perhaps especially judges—have made wrong use of an outside field. This, moreover, is so whether they have done so out of lack of proper analysis or, and especially, out of a desire to achieve their own preferred results. If we, as scholars, do this well, and we, as lawmakers, aware that this will be done, apply the insights of an outside field properly; the promise of "Law and . . ." will be fulfilled. And its greatest peril avoided!

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78. Arthur Corbin, Farewell Letter to Yale Law School Faculty, *in* Calabresi, Future of Law and Economics, supra note 15, at 173, 173–76.

79. For Bickel's early calls for nominal restraints, see Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–98 (1962); Alexander Bickel, The Supreme Court 1960 Term–Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 55–56 (1961). By contrast, for Bickel's later critique, calling for more strict limitations on judicial review, see Alexander M. Bickel, The Supreme Court and the Idea of Progress 175 (1970). For an overview (and critique) of shifts in Bickel's thought, see J. Skelly Wright, Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 772 (1971).