

## LAW AND ECONOMICS IN JAPAN

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*Although law and economics scholarship has grown rapidly in recent years, Japanese scholars (with prominent exceptions, to be sure) have embraced the approach less enthusiastically than their U.S. peers. I explore some “explanations” for this reticence—particularly, the location of legal education in the undergraduate curriculum and the long-term Marxist domination of economics faculties. Ultimately, these “explanations” remain unsatisfactory. The undergraduate location of law does not explain the reception of law and economics across a broader sample of countries, or why universities keep law in these undergraduate departments in the first place. And Marxist dominance is not the cause of an intellectual outcome; instead, it is itself an intellectual outcome.*

*At root, the reason for the difficulty in explaining patterns of intellectual diffusion lies in the paucity of hard-edged incentives in higher education. Although universities compete, they do not compete with anything approaching the intensity of for-profit firms. As a result, the mechanisms behind the equilibrium outcomes we observe in economic markets simply do not apply in education. Lacking those mechanisms, universities might still converge on superior intellectual approaches. Or they might not.*

Sometimes, Japanese law professors approach a legal question through economics—but not as often as their colleagues might in the United States. Japan has half the population and roughly the same per capita gross domestic product (GDP). But the popularity of an approach that has transformed legal scholarship in the United States has grown more slowly in Japan. The pace of the diffusion is different—the question is why.

One should not overstate the contrast. Several Japanese universities do house a critical mass of world-class scholars in law and economics—most obviously, the University of Tokyo in its law faculty, economics faculty, and Institute for Social Sciences. Given the porous nature of

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disciplinary lines (when is game theory part of law and economics, and when is it not?), developing any list of scholars in the field is problematic. Just in these three units, though, those whose work touches on law and economics would include the following, and probably several others. In alphabetical order: Tomotaka Fujita (corporate law); Toshihiro Ihori (public economics); Hideki Kanda (corporate law); Michihiro Kandori (game theory); Yoshitsugu Kanemoto (economic geography); Shoji Kawakami (civil law); Yoshihiro Masui (tax law); Toshihiro Matsumura (industrial organization); Yoshiro Miwa (industrial organization); Osamu Morita (contract law); Minoru Nakazato (tax law); Shozo Ota (civil procedure); Wataru Tanaka (corporate law); and Noriyuki Yanagawa (finance theory).

Universities like this are the exception, and in this Article I ask why. Tentatively, I suggest that part of the reason may lie in the internal organization of the law faculties and the longtime Marxist domination of most economics faculties. Japanese universities locate legal education in the undergraduate curriculum. As a result, law students spend less time in economics courses in Japan. Since professors are former students, professors will have spent less time studying economics as well. That location further encourages scholars to think of law as a scholarly “discipline,” akin to sociology or economics, rather than a set of phenomena to study through a disciplinary perspective. And in part because of that understanding, law faculties avoid hiring professionally trained economists onto their staffs.

For much of the last half of the twentieth century, most Japanese economics faculties found themselves dominated by Marxists. For obvious reasons, these scholars had little use for the neoclassical and game-theoretic roots to law and economics. Although the Marxists are mostly gone now, they left only in the last several decades. Only since 1980 (and at some schools, only more recently still) have most professional economists had the analytical tools necessary for contributing to the law and economics enterprise.

These are not satisfactory explanations. They carry no universal pretensions: they do not apply either to all geographic markets, or to all firms (i.e., departments) within any given geographic market. The location of legal teaching in a university does not explain the diffusion of law and economics across the globe. The Marxist domination of economics departments is not a cause of an intellectual outcome; it *is* an intellectual outcome. And the “explanations” do not tell us either why universities placed legal teaching in the undergraduate curriculum or why Marxists came to dominate economics in the first place.

Contrast these phenomena with the for-profit sector. One would not explain equilibrium market outcomes through internal firm organizational structures. Firms with internal structures that prevent them from improving performance would lose the competitive tournament and dis-

appear; those with more adaptive structures would take their place. Neither would one explain an equilibrium market outcome by the “preferences” managers held for a given production technology. Firms that preferred an inefficient technology would disappear; those with preferences for more efficient technologies would replace them.

Sheltered in the more leisurely nonprofit world (and heavily subsidized by the government), universities face less competitive pressure. Even when a scholarly approach promises unambiguous intellectual progress, universities can ignore it for decades. In turn, this absence of rigorous competition explains why no one has identified a universal explanation for the reason scholars in some countries embrace law and economics while those elsewhere do not. In a for-profit sector, the most efficient technologies would survive while the rest disappeared. Firms would converge on a given technology simply because it was best.

I first explore the nonprofit character of the university and the relation between that nonprofit status and intellectual progress (Part I). I selectively review some of the explanations posed for the uneven diffusion of law and economics across countries (Part II). I then turn to two explanations consistent with the slower growth of the field in Japan: the location of legal education in the undergraduate curriculum (Part III.B.) and the Marxist domination of Japanese economics faculties (Part III.C.).

## I. UNIVERSITIES AND THE MARKET

### A. *Owners*

His was a short-lived presidency, and an ill-fated one to boot. When one of the school’s star physicists won the Nobel Prize, Dwight Eisenhower—then president of Columbia University—famously exclaimed how “very happy” he was “to see one of the employees of the University” win a prize. We “faculty are not the employees of the university,” the now-Nobel laureate replied. We “*are* the university!”<sup>1</sup>

In truth, of course, we may be senior professors, but we are still employees. We have our administrative superiors in the university hierarchy. They hire us. They pay us. They assign us offices. They order us to teach. They tell us by when to submit our grades.

Harvard operates in a famously (infamously, in some faculty club conversations) top-down style. A self-perpetuating club of five old men and two old women pick and fire the president. That president then picks and fires the deans. Usually, the president indulges the pretext of consulting us on the faculty. But even we know a pretext when we see it. “They pretend to pay us; we pretend to work,” ran a Soviet joke. At Harvard, they pretend to consult us; we pretend to advise.

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1. JOHN S. RIGDEN, RABI: SCIENTIST AND CITIZEN 238 (1987).

Most research universities are less top-down. At most, the senior professors actually run the school. They retain the pretext that the president appoints the deans. But the president understands the pretext for what it is. He pretends to govern; they pretend to obey. The faculty tells the president which deans to appoint, and he duly appoints them. They teach what they want, when they want. They work in their offices. Or not. They grade their exams promptly. Or not.

And yet, if we senior professors are not quite employees, neither are we quite owners. We do not take a residual interest in the university's revenues: for the most part, we do not bring home more money if the school does well and less if it does poorly. We do not hold a transferable interest: we cannot sell our stake in the school. We do not even hold a capital asset: upon our death or retirement, our heirs cannot submit our stake for redemption at cash value.

If we are not owners, neither is anyone else. Our university may attract students, climb the *U.S. News* ranks, and hire Nobel laureates. No one will collect dividends, no one will sell his or her interest at a capital gain, and no one will have a stake for the university to redeem. Our university may lose students, fall in the ranks, and lose faculty. No one will wake up and find himself or herself the poorer for it.

### B. *Competitive Pressure*

With no equity claimant to our firm's cash flow, we senior professors face much less competitive pressure than our for-profit peers.<sup>2</sup> If Polaroid, Wang Computers, or dBase III misgauge the direction of technological change, a chief technical officer will need a new job quickly. If Scott Turow, John Grisham, or Stephen King misjudges his audience, a novelist will need to write a screenplay quickly. Gauge right or guess wrong, we senior professors hold our posts.

To be sure, we do face some competition. If we lose students, those of us in the humanities can hire fewer colleagues. If we lose grant competitions, those of us in the sciences can lose our labs. All of us like to publish in prestigious journals, and all of us like lateral offers. University administrators may deny it to the end: "I have never matched an outside offer," a Harvard dean once bragged to the *New York Times*.<sup>3</sup> But as usual, the lady doth protest too much.

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2. See, e.g., Henry Hansmann, *Economic Theories of Nonprofit Organization*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 27, 38 (Walter W. Powell ed., 1987). The point that nonprofit firms face less competitive pressure is basic and something noted by Henry G. Manne. See Henry G. Manne, *Comment on Peter Byrne's "Academic Freedom and Political Neutrality,"* 43 *J. LEGAL EDUC.* 340 (1993); see also Larry E. Ribstein, *Henry Manne: Intellectual Entrepreneur*, in *PIONEERS OF LAW AND ECONOMICS* 125, 125 (Lloyd R. Cohen & Joshua D. Wright eds., 2009).

3. Sylvia Nasar, *New Breed of College All-Star: Columbia Pays Top Dollar for Economics Heavy Hitter*, *N.Y. TIMES*, Apr. 8, 1998, at D1. When Isidore Rabi (the star physicist quoted at the outset) received an offer from Princeton's Institute for Advanced Study, Eisenhower claimed that Columbia was "in no position to match Princeton's offer financially" and that he could only stress to Rabi

Still, universities face more attenuated market constraints than for-profit firms, and as a result, less incentive to “get it right.” In economic markets, firms that “get it right” make money and grow. Those that “get it wrong” retrench and vanish. In their own survey of explanations why law and economics thrives in some countries but not others, Nuno Garoupa and Thomas Ulen rightly observe: “Much of higher education is organized on a non-profit basis, so it is not obvious that the academy has an analogous process for sorting out which innovations should survive and which ought to fade away.”<sup>4</sup>

A firm in the for-profit sector that bets on a product no one wants can fail within months. A university department that invests in a theory students despise will face Darwin too, but at a much more languid pace. Unable to attract students, it may not be able to replace retirements. But professors do not retire in a hurry, and the government subsidies continue. The Darwinian process selects for fitness at universities too. But it does not select any time soon.

### C. Implications

Because they face but gentle competitive pressure, universities do not immediately abandon bad theory. Compare again the for-profit sector: firms that produce good products cheaply survive while others disappear. In markets like this, the process of identifying and explaining most equilibria is simple. The firms that survive do so because they compete most efficiently. The technology that survives does so because it out-performs the others.

By contrast, in nonprofit sectors, markets converge on superior firms and technologies much more slowly. Equilibria are harder to identify, and variations across geographical markets and product or service sectors are harder to explain. The rate by which academic technology spreads will vary by geography and by discipline. When Garoupa and Ulen explore the differential pace of diffusion in law and economics across geographic lines, they nicely observe that the scope of academic variation varies across disciplinary lines too:

Nor is there an obvious difference between Untied States and Europe with respect to innovations in other social sciences, such as anthropology, economics, physics, psychology, political science, public administration and public policy, sociology, and the like. If there is a difference in receptivity to innovation between the Euro-

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that, “to the academic world, he symbolized pure science on Morningside Heights.” RIGDEN, *supra* note 1, at 238–39. In fact, Eisenhower also told his provost “to take care of Rabi,” and the provost “more than matched the offer.” TRAVIS BEAL JACOBS, *EISENHOWER AT COLUMBIA* 243 (2001).

4. Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1561 (2008).

pean and U.S. academies, it appears to be particularly significant in the study of law.<sup>5</sup>

The “explanations” for academic variation, in other words, seldom generalize. A given factor may explain why law departments in some countries adopt law and economics more quickly than others. The given factor, however, will not necessarily explain why some physics departments explore string theory while others take a different track. It will not necessarily explain why some linguistics departments focus on transformational grammar while others do not. And it will not necessarily explain why so many literature departments embrace Derrida while others find him ridiculous in the extreme.

## II. LITERATURE REVIEW

### A. Introduction

Scholars have embraced law and economics at very different speeds around the globe, and others have advanced a range of reasons for the variation. In their survey of the literature, Garoupa and Ulen identify nearly a dozen potential candidates.<sup>6</sup> I will now consider the three most promising accounts.

### B. Jurisprudential Traditions

Predictably, some observers attribute the differing responses to law and economics in the United States and Europe (and, implicitly, Japan) to the common law/civil law divide.<sup>7</sup> Most of them bring to the attribution a set of stereotypes about the two systems. They suggest, for example, that courts in the different regimes pay more or less attention to formal doctrine, attribute more or less weight to logical syllogisms, and grant more or less respect to law professors.

To many of us in comparative law, these stereotypes are mostly imaginary. Indeed, Richard Posner once dismissed them as either “marginal” or “misunderstood.”<sup>8</sup> Unfortunately, most of the stereotypes are also nonfalsifiable. This is hardly the place to relitigate the stereotypes yet again, but note that they explain something only if one takes them as exogenous. A professor inclined to see the law formalistically might indeed avoid economic (or sociological, or psychological) analysis. But why would professors teaching in countries that adopted a Prussian or

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5. *Id.* at 1578.

6. *See id.* at 1578–1619.

7. *See, e.g.*, Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277 (1991); Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265 (1991); Wolfgang Weigel, *Prospects for Law and Economics in Civil Law Countries: Austria*, 11 INT'L REV. L. & ECON. 325 (1991).

8. Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT'L REV. L. & ECON. 3, 6 (1997).

Napoleonic code see the world formalistically? Other stereotypes explain even less. Law professors might indeed enjoy more prestige in continental Europe than in the United States, but so what? Is economics a refuge for the prestige deprived?

That said, table for the moment the question of why continental Europeans might avoid law and economics. If we take the claim that they do avoid it as a given (for whatever reason), then part of the Japanese aversion to law and economics is easy to explain. For historical reasons (going to the adoption of the Prussian Civil Code in 1896), Japanese law professors identified more closely with their continental European peers than their U.S. peers. One can overstate this. Increasingly, young Japanese law professors study in the United States rather than Europe. Increasingly, they learn English rather than German or French. Increasingly, they translate U.S. books (like Cooter and Ulen on law and economics)<sup>9</sup> rather than European treatises. Things are not what they were in 1970.

And yet, despite the recent changes, many Japanese legal scholars still focus on Europe. Consider the official law review of the University of Tokyo: *Hogaku Kyokai Zassi [Journal of the Law Association]*.<sup>10</sup> On its back cover, the journal translates the title of its articles into the western language of the author's choice. Although by the end of the last century more authors chose to translate their titles into English than anything else, a substantial minority still chose French or German. During 1998–2000 (volumes 115–117), the journal published two articles with titles translated into French (five percent), fourteen translated into German (thirty-five percent), and twenty-four translated into English (sixty percent). A decade later, the French and German legacy remained. During 2008–2010 (volumes 125–127), the journal published five articles with titles translated into French (twenty-four percent), six into German (twenty-nine percent), and ten into English (forty-eight percent).

### C. Promotions

Oren Gazal-Ayal explains the success of law and economics in Israel (ten times the per capita law and economics production of the United States) by internal university promotion rules.<sup>11</sup> Unlike those in continental Europe, promotion review committees in Israeli universities demand that legal scholars publish in English. Unfortunately for the scholars, U.K. and U.S. journals will not likely publish many traditional doctrinal studies of Israeli law. And should Israeli scholars instead try to

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9. ROBERT D. COOTER & THOMAS S. ULEN, *LAW AND ECONOMICS* (Shozo Ota trans., Shoji homukenkyu kai new ed. 1997) (1988).

10. *Hogaku Kyokai Zassi [Journal of the Jurisprudence Association]*, U. TOKYO FACULTY L., <http://www.j.u-tokyo.ac.jp/en/hokyo/127.html> (last visited June 26, 2011).

11. Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 *REV. L. & ECON.* 485, 487–94 (2007).

write about legal doctrine in the United Kingdom or United States, they stand at a substantial competitive disadvantage. Hence the turn to law and economics. As explained by Gazal-Ayal, the appeal of law and economics to Israeli scholars lies in its universality. Because it focuses on no particular country, Israeli scholars can contribute to its theoretical advance without mastering U.K. or U.S. law.

Like their continental European competitors, Japanese law faculties do not demand that their scholars publish in English. After all, a Japanese scholar might reasonably reply, they are faculties of *Japanese* law, not U.S. law. Why *should* they publish in English? For better or for worse, however, the language of international scholarly communication seems to have become English—to the obvious accidental advantage of universities that happen to sit in English-speaking countries.

In math and science, the best Japanese universities employ scholars who already publish in English. The curricula vitae of the faculty at the University of Tokyo's math<sup>12</sup> and physics<sup>13</sup> departments report long lists of articles in English. In economics, too, professors publish in English. And in 1995, the Japanese Economic Association simply stopped publishing its flagship journal in Japanese altogether; it moved it to Wiley-Blackwell and began publishing only in English.<sup>14</sup>

Perhaps in part as a result of this English language publication strategy in the sciences, the Universities of Tokyo and Kyoto perform relatively well in international competitions. Outside of the English-speaking world, the University of Tokyo ranks third only to the Swiss Federal Institute of Technology and the University of Hong Kong in the *U.S. News* rankings.<sup>15</sup> The University of Kyoto ranks fourth in the non-English-speaking world.<sup>16</sup>

#### D. Relative Competition

##### 1. The Hypothesis

Because universities face only attenuated market constraints, wrong approaches can survive longer than they would in the for-profit sector. Yet although competition everywhere is less than that among for-profit firms, the universities in some countries compete more fiercely than

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12. *Kyōin ichiran (50 onjun) [Faculty at a Glance (in Syllabry Order)]*, U. TOKYO GRADUATE SCH. MATHEMATICAL SCIS., <http://www.ms.u-tokyo.ac.jp/teacher/all.html> (last visited June 26, 2011).

13. *Butsurigaku senmon kyōin ichiran (goju onjun) [Physics Department Faculty at a Glance (in Syllabry Order)]*, DEP'T PHYSICS, U. TOKYO GRADUATE SCH. SCI., <http://www.phys.s.u-tokyo.ac.jp/staff-50on.php> (last visited June 26, 2011).

14. *The Japanese Economic Review*, WILEY-BLACKWELL, <http://www.wiley.com/bw/journal.asp?ref=1352-4739> (last visited June 26, 2011).

15. See *World's Best Universities: Top 400*, U.S. NEWS & WORLD REP. (Sept. 21, 2010), <http://www.usnews.com/education/worlds-best-universities/articles/2010/09/21/words-best-universities-top-400->

16. See *id.*

others. Even in the fundamentally noncompetitive university sector, some national markets foster more competition than others.

After carefully reviewing a wide variety of explanations for the differences in the pace of diffusion of law and economics around the globe, Garoupa and Ulen focus on one factor: the stiffer university competition in the United States. More specifically, they attribute the more rapid diffusion of law and economics in the United States than in Europe to the different pace of competition in the two university markets.<sup>17</sup> Universities compete fiercely in the United States; they compete less in continental Europe. They quickly assimilate innovations like law and economics in the United States; they assimilate them more slowly in Europe.

Yet if a more competitive market distinguishes U.S. universities from those in Europe, it does not distinguish them from those in Japan. Students in Japan compete fiercely for seats in the best law departments. Scholars compete for posts at ever-more-prestigious faculties.

## 2. *Competition for Students*

Aside from departments like physical education and the fine arts, admission to the best schools in Japan has long turned exclusively on a blindly graded examination. Until recently, the U.S. university market was regional. By contrast, Japanese universities recruited across the entire country.

In 1908, novelist Natsume Sōseki described the travails of young Sanshirō, a talented student from Kyushu admitted to the coveted University of Tokyo.<sup>18</sup> Travelling alone, Sanshirō meets a young widow who tries to seduce him in a hot tub; she leaves him flummoxed instead. He arrives at the university and falls rapturously in love with a maiden he spots across the university pond; his feet stay glued to the spot. He watches Hamlet; it leaves him puzzled. He probably learns something in class, but Sōseki left it out of the novel. Relevant here, the brilliant and ambitious young man had travelled half the country to attend the prestigious University of Tokyo.

In Japan, the competitive national market for university slots is longstanding. Google may now make Japanese school rankings immediately accessible,<sup>19</sup> but the rankings themselves are nothing new. Universities have long been competitive and open to all. As onetime U.S.

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17. Garoupa & Ulen, *supra* note 4, at 1597–1603.

18. NATSUME SŌSEKI, *SANSHIRŌ* (Jay Rubin trans., Penguin Books 2009) (1908).

19. *Shiritsu daigaku hōgakubu hensachi ranking* [*Private University Law Department Relative Rankings*], DAIGAKU JYUKEN GOKAKU.COM [PASS U. EXAMINATION.COM], <http://daigaku.jyukengokaku.com/nyuushi-hensati-ranking/siritu/hougaku.html> (last visited June 26, 2011) (private university law departments); *Kokkōritsu daigaku hōgakubu hensachi ranking* [*National Public University Law Department Relative Rankings*], DAIGAKU JYUKEN GOKAKU.COM [PASS U. EXAMINATION.COM], <http://daigaku.jyukengokaku.com/nyuushi-hensati-ranking/kokkouritu/hougaku.html> (last visited June 26, 2011) (public university law departments).

ambassador Edwin Reischauer put it, “The whole [pre-World War II education] system was rigorously egalitarian, at least for men, opening up the track to the top to any young man who could complete the necessary preliminary schooling and pass the necessary entrance examinations.”<sup>20</sup>

The competition for those slots in prewar Japan was, in the words of historian Donald Roden, “brutal.” It was a “competition of unprecedented ruthlessness.”<sup>21</sup> During the decades after the war, the competition continued. By the 1970s, Reischauer could describe an “examination hell” for the talented and ambitious:

The importance of preparing for entrance examinations helps account for the seriousness with which education is taken in Japan and for its high levels of excellence . . . . As the child approaches his crucial entrance examinations, the whole life of the family centers around facilitating his studies . . . . The pressures on the examination taker are tremendous, and the whole process is commonly referred to as the “examination hell.”<sup>22</sup>

Students compete for slots at top U.S. universities too, but only recently have they competed with anything approaching Japanese intensity. Take Harvard. It may be nearly four centuries old, but for three of those centuries it educated only the children of the northeastern social elite. Some were smart, some were not. As noted by Richard Herrnstein and Charles Murray, before World War II, schools like Harvard “all had a thin layer of the very brightest among their students but also many students who were merely bright and a fair number of students who were mediocre.”<sup>23</sup>

The market for U.S. schools was local, both geographically and socially. Some smart students outside the social elite applied—and Harvard responded with its Jewish quota. Others just stayed home. “The valedictorian in Kalamazoo and the Kansas farm girl with an IQ of 140 might not even be going to college at all,” wrote Herrnstein and Murray.<sup>24</sup> “If they did, they probably went to the nearest state university or to a private college affiliated with their church.”<sup>25</sup>

Only in the 1950s did this begin to change in the United States. By 1960, Harvard had started to become what Herrnstein and Murray would call “a school populated by the brightest of the bright, drawn from all over the country.”<sup>26</sup> But it had still only begun the process. The average

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20. EDWIN O. REISCHAUER, *THE JAPANESE* 168–69 (1977).

21. DONALD RODEN, *SCHOOLDAYS IN IMPERIAL JAPAN: A STUDY IN THE CULTURE OF A STUDENT ELITE* 97 (1980).

22. REISCHAUER, *supra* note 20, at 172.

23. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 38 (1994).

24. *Id.*

25. *Id.*

26. *Id.* at 30.

verbal SAT score at Harvard remained at 678 (out of 800), and the average math only 695.<sup>27</sup>

Not until the 1990s would competition push educational stratification to its current levels. By then, the top fifty schools would enroll 5% of the freshmen in four-year programs, and 60% of the students who scored at least 700 on the verbal SAT.<sup>28</sup> The top ten schools would enroll only 1.5% of the freshman but 31% of those 700+ scorers.<sup>29</sup> And Harvard and Yale would, by themselves, enroll a full 10% of the 700 club.<sup>30</sup>

### 3. *Competition for Faculty*

Nor are matters less competitive in Japan for the faculty. As in the United States, universities in Japan fill some senior posts by promoting from their internal ranks, but they also hire laterally. Almost exclusively, they hire by publication record. Notwithstanding the stereotypes about lifetime employment, many of the most productive academics climb the university hierarchy by switching jobs.

Take the first-ranked University of Tokyo. On its home page, the law faculty gives the employment history for eighty-one of its eighty-four full-time faculty.<sup>31</sup> Of those eighty-one, fewer than half (thirty-nine professors) began their teaching careers there. The rest moved from posts at twenty-four other universities or other University of Tokyo units. Of the forty-two lateral recruits, fourteen had taught in at least two other institutions before joining the University of Tokyo law faculty. Seven had taught at Kobe University (ranked sixth among the public schools), and five each had taught at the Tokyo Metropolitan University (ranked fourteenth among the public schools), Tohoku University (ranked eighth among the public schools), and Gakushuin University (ranked twenty-fifth among the private schools).

The Faculty of Economics lists fifty-eight full-time faculty.<sup>32</sup> Unlike the legal scholars, a large majority (forty-one professors) of the economists began their teaching careers with their home department at the University of Tokyo. Where the law department primarily hired University of Tokyo graduates, however, most of the economists (thirty-three professors, or sixty percent) earned their last degree (generally a PhD) elsewhere. The most common outside PhD was from Stanford (four professors). Next came Harvard (three professors), MIT (three professors), and Yale (three professors).

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27. *Id.*

28. *Id.* at 43.

29. *Id.*

30. *Id.*

31. *Kyōju, junkyōju [Professors & Associate Professors]*, TŌKYŌ DAIGAKU HŌGAKUBU, DAIGAKUIN HŌGAKU SEIJIGAKU KENKYŌKA [TOKYO U. L. DEP'T, GRADUATE L. POL. & SECTION], <http://www.j.u-tokyo.ac.jp/about/professors/index.html> (last visited June 26, 2011).

32. *Faculty Profiles—Alphabetical Order*, U. TOKYO GRADUATE SCH. ECON. (Apr. 26, 2011), <http://www.e.u-tokyo.ac.jp/fservice/faculty/view.e.html>.

The University of Tokyo law department tends to hire its own graduates, in other words, but only after they have taught elsewhere and assembled a lengthy publication record. The economics department promotes internally, but primarily those who have earned their PhD elsewhere. Neither phenomenon is consistent with a department oblivious to the competition. Instead, both are consistent with a department fiercely competing in a larger marketplace.

### III. LAW AND ECONOMICS IN JAPAN

#### A. *Introduction*

Because universities (even in the more-competitive-than-Europe United States and Japan) face less-stringent competition than for-profit firms, their internal structure and dynamics can affect market outcomes. Were they subject to stronger market constraints, we would not look to internal structure and dynamics to explain the pace of academic progress. After all, those structures and dynamics do not shape the market itself. They merely shape the particular firms that compete in that market. If a firm's internal structure hampers its ability to make good products cheaply, it goes out of business. A rival with a more effective internal structure takes its place.

But universities face a much weaker profit constraint. They compete in the nonprofit sector, and there Darwin operates only at a more languid pace. And so it has come to pass that peculiarities of the internal structure and dynamics of the Japanese university have slowed the diffusion of law and economics. Effectively, they have dampened the diffusion of the one intellectual approach that—over the course of the past half century—has most radically transformed the U.S. legal academy.<sup>33</sup>

Below, I focus on two factors. One could posit others too, of course. One could note the historical “accident” of Richard Posner's decision to enter law teaching and of Ronald Reagan's decision to appoint him to the Seventh Circuit. One could correctly note that no such “accident” happened in Japan.

Similarly, one could note the suspicion with which legal and economic scholars see each other's work in Japan. Yet people in different departments everywhere often view each other's work skeptically. People everywhere usually prefer the methodologies of their own disciplines. Scholars in field *A* chose that field for a reason. If they had preferred the methods in field *B*, they would have entered *B* instead—but they did not. They entered *A*. What is more, some departments every-

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33. Obviously, I table the question of how the market clears. What scholars look to in evaluating the work of other scholars is indirectly (and only indirectly) related to what students look to in picking their classes. Departmental budgets tend to turn on popularity among students. Departmental rankings turn on (depending on the source) a mix of peer evaluation and student popularity.

where are harder to enter than others. As a result, some departments will have brighter students. They will look skeptically at the disciplinary methods used in departments with lower admissions standards. Some departments bring more historical prestige than others. They will look skeptically at their rivals.

These (and many other) interdisciplinary tensions in the Japanese university are decidedly real. Similar tensions also exist in the United States. Knowledgeable observers assure me that the interdisciplinary tensions are more intense in Japan than in the United States. If they are right (and they are in a position to know), that fact should slow the rate of diffusion of interdisciplinary approaches like law and economics within Japan. Given the difficulty of measuring the tension, however, I note those very real tensions here, and I turn below to two other differences in educational structure between Japan and the United States.

### *B. Law As Undergraduate Education*

#### *1. Introduction*

Law is an undergraduate subject in Japan. A high school student eyeing a career in the field would apply to the law department (or division) of a university. He would take the entrance examination for the department. If admitted, he would then spend some of his first two years in a general education program. The rest he would spend in law, and by his last two years would take almost nothing but law.

One of the best of the private law faculties, Waseda University, illustrates the implications that follow.<sup>34</sup> To graduate, a Waseda student needs 124 units. Of those, the law faculty requires that he or she take sixty in law and twenty in foreign languages. Should the student wish, he or she can study other subjects for the remaining forty-four. They will constitute roughly one-third of the student's college education.

This curriculum obviously lets law students learn some economics, but just as obviously prevents them from learning it as well as they could if they could major in it. On the one hand, Göran Skogh notes that Swedish students begin their legal education with no training in economics.<sup>35</sup> Shozo Ota observes that he and his Japanese colleagues "cannot expect their students to have basic knowledge" in economics.<sup>36</sup>

On the other hand, Garoupa and Ulen rightly ask how much any of this should matter. Physicists do not shun string theory because their undergraduates cannot understand it. Why should law professors avoid

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34. *Kyōiku [Education]*, WASEDA U. SCH. L., <http://www.waseda.jp/hougakubu/main/about/curriculum.html> (last visited June 26, 2011).

35. See Göran Skogh, *Law and Economics in Sweden*, 11 INT'L REV. L. & ECON. 319, 319–21 (1991).

36. Shozo Ota, *Law and Economics in Japan: Hatching Stage*, 11 INT'L REV. L. & ECON. 301, 307 (1991).

law and economics because their students cannot grasp it? And anyway, observe Garoupa and Ulen, law and economics thrives in two countries with undergraduate law faculties: the Netherlands and, as discussed above, Israel.<sup>37</sup>

Consider, however, three other implications that the institutional location of legal education poses for the development of law and economics: its impact (1) on the sophistication that faculty members bring to the subject, (2) on how those scholars understand the nature of the legal field itself, and (3) on how urgently they see a need to hire scholars from other disciplines.

## 2. *Faculty Background*

If universities teach law in the undergraduate curriculum, law students will learn less economics. For a simple reason, the background that students bring matters crucially: professors were students once. Student backgrounds do not matter in themselves. Faculty do not limit their research to subjects their undergraduates understand. But where universities teach law to undergraduates, virtually all law professors will have graduated from undergraduate law departments. As graduate students (or as “research associates” in Japan and some of Europe), they will then have studied yet more law.

Where universities teach law to undergraduates, law professors will bring to their careers a profoundly sophisticated understanding of the law. Necessarily, however, many (certainly not all) faculty will have spent significantly less time in other fields—after all, one only spends a finite number of years as a student. The training students acquire does not matter because faculty tie their research to what their students can understand; it matters because it determines the expertise that faculty members themselves bring to their research.

## 3. *Law As Discipline*

Second, scholars who teach law to undergraduates potentially confuse scholarly “subject” with scholarly “approach” and empirical “phenomena” with intellectual “discipline.” When students learn law as undergraduates, they learn it in tandem with economics, sociology, or psychology. Yet law differs fundamentally from these other fields. “Law” is an empirical phenomenon. One cannot study it “as law” or through a “legal discipline” because there is no discipline there. One can

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37. Garoupa & Ulen, *supra* note 4, at 1591–92. Canada also has a thriving interest in law and economics, but Toronto and Osgoode Hall do require students to bring three years of undergraduate education with them before starting their legal training. See *Academic Requirement*, OSGOODE HALL L. SCH.: YORK U., [http://www.osgoode.yorku.ca/jd/applying\\_getting\\_ready.html](http://www.osgoode.yorku.ca/jd/applying_getting_ready.html) (last visited June 26, 2011); *Prospective Students*, U. TORONTO FACULTY L., [http://www.law.utoronto.ca/prosp\\_stdn\\_content.asp?itemPath=3/21/0/0/0&contentId=1319](http://www.law.utoronto.ca/prosp_stdn_content.asp?itemPath=3/21/0/0/0&contentId=1319) (last visited June 26, 2011).

only study legal phenomena through a separate and different scholarly discipline.

Economics, sociology, and psychology are disciplines—intellectual approaches through which to study empirical phenomena. They are not themselves empirical phenomena. Take economics, for example. In the decades since Gary Becker, economists have learned to study phenomena far removed from any that more classical scholars examined. Many economists still study industrial organization and money supply. But others investigate the change in human bone size through the centuries, while some study crime patterns, returns to education, or divorce rates. Fundamentally, the money supply is a phenomenon. Crime is a phenomenon, and so are education and divorce. Economics is not. It is a discipline through which to understand these various phenomena. So too is psychology. Psychologists do not study “psychology” itself. Rather, they use psychological methods and principles to study phenomena like crime, education, and divorce. Sociologists do not study sociology. They use sociological methods and principles to study a similar set of phenomena.

For the most part, the more selective U.S. universities organize undergraduate training around disciplines. With prominent exceptions to be sure, the better universities do not teach undergraduates about business, education, crime, or divorce. Instead, they teach the various disciplinary approaches through which their students can explore these various phenomena.

This curricular organization shapes the intuition that students implicitly acquire. To a student at a U.S. university, law is not a discipline. The student studies the disciplines during his or her four undergraduate years. Instead, law is a phenomenon. As a student at a graduate-level trade school, one then learns to sort the phenomena he or she encounters and to examine them through the disciplinary tools learned in college. In management school, one uses economics and psychology to study business. In law school, the student studies law—but studies it through something else. One may use economics to examine legal phenomena, or one may use sociology or history. Unless one styles oneself a walking Black’s Law Dictionary, however, studying law with law is not possible.

When a student studies law as an undergraduate, the curricular structure instead implies that law is an autonomous discipline.<sup>38</sup> The

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38. More than anyone else, Japanese law professors owe their ability to explore economics to the work of University of Tokyo tax law professor Hiroshi Kaneko. Kaneko had the job of making sense of the tax structure introduced by the U.S.-dominated occupation. The occupation officials had designed the structure according to principles of public finance. Rather than law, they had relied on economics. The legal academy within which Kaneko worked did not welcome finance. Law was law, and economics was economics. To Kaneko’s colleagues, law was not just a phenomena to study but the intellectual means by which to study it as well. To introduce finance theory, Kaneko spent the 1960s and 1970s transforming the interpretive structure within legal scholarship. Before Kaneko, legal scholars had few acceptable ways to introduce economic analysis. After his work, colleagues finally

structure need not necessarily do so, of course. Legal scholars could expressly tell their students that they cannot understand legal phenomena except through other disciplines. In effect, however, they would be telling students that they cannot understand the phenomena in their major (law) except through (1) what they learned in their few general education courses, and (2) what they might have learned in other departments (except that they did not because their law department's distributional requirements did not allow them to take those other courses). Theoretically, law professors could do this. In Japan, for the most part, they do not.

Note that this curricular organization also explains a phenomenon typically described as intrinsic to the "civil law system": the sense that law is a technical, formalistic, and autonomous field. From time to time, scholars have described this formalism and autonomy as somehow (and for unspecified reasons) intrinsic to the civil law. It straightforwardly follows, however, from the curricular decision to teach law to undergraduates and tell them (explicitly or implicitly) that law is itself an intellectual discipline.

#### 4. *Faculty Hiring*

Last, if legal scholars think of law as its own autonomous discipline, they will see less reason to hire scholars from other disciplines. U.S. law school professors realize that we teach a phenomenon rather than a discipline. We realize that we cannot understand that phenomenon without a disciplinary framework. And because we realize that we need that framework, we hire scholars from other fields.

Before rookie candidates began to sport dual degrees, the top U.S. law schools acquired their disciplinary expertise by hiring economists (or historians, sociologists, or psychologists) directly. Illinois appointed Thomas Ulen in 1983. Chicago appointed Ronald Coase in 1964, and William Landes in 1974. Michigan appointed Daniel Rubinfeld in 1977. Stanford hired Mitchell Polinsky in 1979. In 1980, Berkeley appointed Robert Cooter, and Harvard appointed Steven Shavell. In 1983, Northwestern named Victor Goldberg, and in 1984 Pennsylvania hired Michael Wachter.

Legal scholars who see the law as its own autonomous discipline will not do this. If law is itself a discipline, then law professors do not need colleagues from "other" disciplines who lack legal training. They do not need economists. And in Japan, they have not hired them. Few Japanese law faculties have professional economists, whether with law degrees or without.

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had a way for introducing economic analysis within legal theory. See Minoru Nakazato & J. Mark Ramseyer, *Tax Law, Hiroshi Kaneko, and the Transformation of Japanese Jurisprudence*, 58 AM. J. COMP. L. 721 (2010).

Although Japanese universities do have economists in the economics departments, location matters. Scholars write for their colleagues. If in an economics department, a law and economics scholar will tend to write for other economists. If in a law school, he or she will tend to write for lawyers. Ever so slightly, the resulting output will differ. Neither is better than the other, but they do differ. When in economics departments, law and economics scholars will tend to focus on the subtleties of the model and the sophistication of the econometrics. When in law schools, they will tend to focus on the institutional structure of the law and legal system and the way that the system works in practice.

### C. *Marxist Economics*

The reasons behind the diffusion rate of law and economics in Japan goes further, however. For the most part (except at a few select departments), Japanese law professors have not published extensively in law and economics; yet (again, except for a few select departments) Japanese economists have not published extensively in law and economics either. The “explanation” is simple: economics as we know it is a relatively new field in Japan.

Ugo Mattei and Roberto Pardolesi claim that:

[E]conomists speak the same language all over the world, while lawyers, divided by political barriers, find themselves most of the time in a state of cultural parochialism. Since the economic side of [the economic analysis of law] is the same all over the world, it is on the law side that we may trace reasons for resistance to the worldwide expansion of this scholarship.<sup>39</sup>

This is not so. For much of the postwar period, most Japanese economists did not speak the same language. Instead, most (not all) worked in departments dominated by Marxists, and these Marxists did not speak the language of their putative U.S. peers. Indeed, they did not even speak the language of their neoclassical peers within Japan.

As Japan emerged from the war in 1945, Marxist scholars took influential university positions. The military had commandeered the government in the 1930s and led the country into a disastrous war. Those who had collaborated with it stood in disgrace. Many Marxists, however, had held the line against the militarists. Some had collaborated, to be sure. But others had gone to prison. In 1945, Marxists emerged to enormous social acclaim. Within a few years they had taken over nearly all university social science departments. Although they made more modest inroads in the law departments, in economics they acquired near-total control.

Theirs was not a Marxism likely to make much sense to any modern U.S. or Japanese economist. It was not neo-Keynesian economics, or

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39. See Mattei & Pardolesi, *supra* note 7, at 266.

fringe-left Paul Krugman, or even University of Massachusetts Amherst economics. It was a genuinely different—and today incomprehensibly alien—way of organizing the world. During the first half of 1967, the standard index to journal articles in economics listed titles like:

- *Lenin's Critique of Rosa Luxembour's "Theory of Capital Accumulation"*
- *The Method of Monopoly Capitalism*
- *A Study of "The Capital Accumulation Process" in Part I Section 7 of Das Kapital*
- *New Currents in the World of Soviet Economics*<sup>40</sup>

In time, this changed. The top-ranked University of Tokyo, Hitotsubashi University, and Osaka University were among the first economics departments to focus on modern economics. When the Soviet empire collapsed, others followed. But the second-ranked University of Kyoto stayed Marxist much longer. As recently as the mid-1990s, its house economics journal published articles like:

- *Marx's Concept of "Society" and the Theory of Monopoly Capitalism*
- *Marx's Theory of Human Society*
- *Lenin's Unequal Development Theory and Econometric Models*<sup>41</sup>

Having never experienced the total Marxist domination of many (or most) of its competitors, by the 1980s the University of Tokyo Economics Department was rapidly jettisoning its Marxist wing. That its younger faculty earn their PhDs from U.S. universities (twenty-eight of the fifty-five faculty) reflects that choice, of course. One does not go to Stanford or MIT to study Marxist economics. The few University of Tokyo economists who still follow the Marxist agenda are now approaching retirement.

Over lunch, a friend once explained how this transformation had occurred. Apparently, the Marxists and the scholars in (what in Japan goes by the name of) "modern economics" had cut a deal: alternate appointments. Both sides kept the deal until the modern economists acquired a majority.<sup>42</sup> Promptly, they reneged on the deal and started blocking Marxist candidates. One day, about a decade ago, my friend confided that the department had turned a corner. The faculty had just voted down an entry-level Marxist candidate. They had not, however,

40. YOSHIRO MIWA & J. MARK RAMSEYER, *THE FABLE OF THE KEIRETSU: URBAN LEGENDS OF THE JAPANESE ECONOMY* 53–54 (2006).

41. KEIZAI RONSO [ECON. REV.] v. 154 (1994).

42. I never quite understood the arithmetic: how one side could obtain a majority if the two sides alternated appointments? But then I am a lawyer rather than an economist, so I never asked.

just turned down the one candidate. Through the discussion, they had made it clear that they would never—ever—hire another Marxist.

The longtime Marxist domination of the Japanese economics departments contributed to the slow diffusion of law and economics for an obvious reason: scholars who specialize in Part 1 Section 7 of *Das Kapital* are not those given to the implications of the Coase theorem, capital asset pricing models, or Nash equilibria in uncooperative games. In turn, the attenuated profit constraint in the modern university contributes to the slow diffusion of law and economics by enabling the Marxists to survive for as long as they did. After all, universities subject to competitive constraints would not, for four decades, staff their economics departments with scholars devoted to Lenin's critique of Rosa Luxembour.

#### IV. CONCLUSION

In the United States and Israel, many law professors take an economic approach to their work. Elsewhere, fewer do. Others have offered a variety of reasons why scholars in the different countries have responded so differently. In this Article, I attribute part of the reason for the reluctance of some Japanese scholars to pursue law and economics to two factors: the location of law in the undergraduate curriculum and the long domination of economics departments by Marxists.

By the standards of economics, these are not satisfactory explanations. The undergraduate location of legal training may have slowed the diffusion of economics in Japan, but it does not slow it everywhere. In some countries with undergraduate law departments, law and economics has thrived. And why did legal training end up in the undergraduate curriculum anyway? Marxists may have slowed the development of law and economics within the economics departments, but why did the departments keep Marxists on staff in the first place?

The reason for the explanatory difficulty lies in the absence of a profits constraint at the modern university. For-profit firms adopt efficient technologies or die. By contrast, university departments with preposterous theories can survive for decades (witness literature departments in the United States). Universities do compete, whether in the United States or Japan. But they do not compete with anything approaching the intensity of ordinary economic markets. Spared that intensity, they need not converge on superior scholarly technology. In some departments in some universities in some countries, scholars will adopt the better technology. Elsewhere, they will thrive for decades without it.

