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Law & Economics in Japan

by J. Mark Ramseyer*

Abstract: Although law & 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 "reasons" 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 law & economics' reception 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.

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Law & Economics in Japan

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

One should not overstate the contrast. Several Japanese universities do house a critical mass of world-class scholars in law & economics -- most obviously, the University of Tokyo in its law faculty, economics faculty, and Institute for Social Sciences. Given the porous nature of disciplinary lines (when is game theory part of law & economics, and when not?), any list of scholars in the field is problematic. Just in these three units, though, those whose work touches on law & 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); 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 long-time 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 20th century, most Japanese economics faculties found themselves dominated by Marxists. For obvious reasons, these scholars had little use for the neo-classical and game-theoretic roots to law & 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 & economics enterprise.

These are not satisfactory explanations. They carry no universal pretentions: 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 & 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 prevented them from improving performance would lose the competitive tournament and disappear; 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 non-profit 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 & 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 non-profit character of the university and the relation between that non-profit status and intellectual progress (Section I). I selectively review some of the explanations posed for the uneven diffusion of law & economics across countries (Section 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 (Section. III.B.), and the Marxist domination of Japanese economics faculties (Section 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."[1]

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.

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

[1] John S. Rigden, Rabi: Scientist & Citizen 238 (New York: Basic Books, 1987).

the president understands the pretext for what it is. He pretends to govern; they pretend to obey. The faculty tell 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 either. 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 transferrable 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 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 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.[2] Polaroid, Wang Computers, dBase III: misgauge the direction of technological change, and a chief technical officer will need a new job quickly. Scott Turow, John Grisham, Stephen King: miss-guess his audience, and a novelist will need to write a screen-play fast. Gauge right or guess wrong, we senior professors hold our posts.

To be sure, we do face some competition. Lose students, and those of us in the humanities can hire fewer colleagues. Lose grant competitions, and 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've never matched an outside offer," a Harvard dean once bragged to the New York Times.[3] But as usual, the lady doth protest too much.

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 & economics thrives in some countries but not others, Nuno Garoupa and Thomas Ulen rightly observe that:[4]

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[2] See, e.g., Henry Hansmann, Economic Theories of Nonprofit Organization, in Walter W. Powell, The Nonprofit Sector: A Research Handbook 27, 38 (New Haven: Yale University Press, 1987).

[3] Sylvia Nasar, New Breed of College All-Star; Columbia Pays Top Dollar for Economics Heavy Hitter, N.Y. Times, Ap. 8, 1998. When Isidore Rabi (the star physicist quoted at the outset) received an offer from Princeton's Institute of Advanced Study, Eisenhower claimed that Columbia "was in no position to match Princeton's offer financially," and that he could only stress to Rabi that "to the academic world, he symbolized pure science on Morningside Heights." Rigden, supra note, at 239. 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 (New Brunswick: Transaction Publishers, 2001).

[4] Nuno Garoupa & Thomas S. Ulen, The Market for Legal Innovation: Law and Economics in Europe and the United States, __ Ala. L. Rev. __, xx (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972360.

> 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.

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 non-profit 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 vary by discipline. When Garoupa & Ulen explore the differential pace of diffusion in law & economics across geographic lines, they nicely observe that the scope of academic variation varies across disciplinary lines too:[5]

> Nor is there an obvious difference between U.S. 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 European and U.S. academies, it appears to be particularly significant in the study of law.

The "reasons" for academic variation, in other words, seldom generalize. A given factor may explain why law departments in some countries adopt law & economics faster than others. It will not necessarily explain why some physics departments explore string theory while others take a different tack. 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 & 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 & Ulen identify nearly a dozen potential candidates. Consider the three most promising accounts.

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[5] Garoupa & Ulen, supra note, at xx.

B. Jurisprudential Traditions:

Predictably, some observers attribute the differing responses to law & economics in the U.S. and Europe (and, implicitly, Japan) to the common-law civil-law divide.[6] 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, 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."[7] Unfortunately, most of the stereotypes are also non-falsifiable. 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 Napoleonic code see the world formalistically? Other stereotypes explain even less. Law professors might indeed enjoy more prestige in continental Europe than in the U.S., 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 & economics. If we take the claim that they do avoid it as (for whatever reason) a given, then part of Japanese aversion to law & 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 American. One can over-state this. Increasingly, young Japanese law professors study in the U.S. rather than Europe. Increasingly, they learn English rather than German or French. Increasingly, they translate American books (like Cooter-Ulen on law & economics)[8] 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: the Hogaku kyokai zasshi [Journal of the Law Association].[9] 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 (5 percent), 14 translated into German (35 percent), and 24 translated into English (60 percent). A decade later, the French and German legacy remained. During 2008-2010 (volumes 125-

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[6] See, e.g., Ugo Mattei & Roberto Rardolesi, Law and Economics in Civil Law Countries: A Comparative Approach, 11 Int'l Rev. L. & Econ. 265, 266 (1991); Wolfgang Weigel, Prospects for Law and Economics in Civil Law countries: Austria, 11 Int'l Rev. L. & Econ. 325 (1991); Christian Kirchner, The Difficult Reception of Law and Economics in Germany, 11 Int'l Rev. L. & Econ. 277 (1991).

[7] Richard A. Posner, The Future of the Law and Economics Movement in Europe, 17 Int'l Rev. Law & Econ. 3, 6 (1997).

[8] Ho to keizaigaku [Law & Economics] (Tokyo: Shoji homu kenkyu kai, 1997) (Shozo Ota, tr.; new ed.).

[9] http://www.j.u-tokyo.ac.jp/en/hokyo/127.html

127), the journal published 5 articles with titles translated into French (24 percent), 6 into German (29 percent), and 10 into English (48 percent).

C. Promotions:

Oren Gazal-Ayal explains the success of law & economics in Israel (ten times the per capita law & economics production of the U.S., he finds) by internal university promotion rules.[10] 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 write about legal doctrine in the U.K. or U.S., they stand at a substantial competitive disadvantage. Hence the turn to law & economics. As explained by Gazal-Ayal, the appeal of law & 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 American 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 do already publish in English. The C.V.s of the faculty at the University of Tokyo's math[11] and physics departments[12] 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.[13]

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 second only to the Swiss Federal Institute of Technology in the U.S. News. The University of Kyoto ranks fourth in the non-English-speaking world.

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 among for-profit firms, the universities in some countries compete more fiercely than others. Even in the fundamentally non-competitive 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 & economics around the globe, Garoupa & Ulen focus on one

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[10] Economic Analysis of Law in North America, Europe and Israel, 3 Rev. Law & Econ. 485 (2007).

[11] http://www.ms.u-tokyo.ac.jp/teacher/all.html.

[12] http://www.phys.s.u-tokyo.ac.jp/staff-50on.php

[13] http://www.wiley.com/bw/journal.asp?ref=1352-4739

factor: the stiffer university competition in the U.S. More specifically, they attribute the more rapid diffusion of law & economics in the U.S. than in Europe to the different pace of competition in the two university markets.[14] Universities compete fiercely in the U.S.; they compete less in continental Europe. They quickly assimilate innovations like law & economics in the U.S.; 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.

Back in 1908, novelist Natsume Soseki described the travails of a young Sanshiro, a talented student from Kyushu admitted to the coveted University of Tokyo.[15] Travelling alone, Sanshiro 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 Soseki 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,[16] but the rankings themselves are nothing new. Universities have long been competitive, and long been open to all. As one-time-U.S.-ambassador Edwin Reischauer put it, "[t]he whole [pre-World War II education] system was rigorously egalitarian, at least for men." It opened "up the track to the top to any young man who could complete the necessary preliminary schooling and pass the necessary entrance examinations."[17]

The competition for those slots in pre-war Japan was, in the words of historian Donald Roden, "brutal." It was a "competition of unprecedented ruthlessness."[18] During the decades after the war, the competition continued. By the 1970s, Reischauer could describe an "examination hell" for the talented and ambitious:[19]

> 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

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[14] Garoupa & Ulen, supra note, at xx.

[15] See, e.g., Soseki Natsume, Sanshiro (xx).

[16] http://daigaku.jyuken-goukaku.com/nyuushi-hensati-ranking/siritu/hougaku.html (private university law departments); http://daigaku.jyuken-goukaku.com/nyuushi-hensati-ranking/kokkouritu/hougaku.html (public university law departments).

[17] Edwin O. Reischauer, The Japanese 168-69 (Cambridge: Harvard University Press,).

[18] Donald Roden, Schooldays in Imperial Japan: A Study in the Culture of a Student Elite 97 (Berkeley: University of California Press, 1980).

[19] Reischauer, supra note, at 172.

> 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."

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. Before World War II, note Richard Herrnstein and Charles Murray, 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."[20]

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. "If they did, they probably went to the nearest state university or to a private college affiliated with their church."[21]

Only in the 1950s did this begin to change in the U.S. 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."[22] But it had still only begun the process. The average verbal SAT score at Harvard remained at 678, and the average math only 695.[23]

Not until the 1990s would competition push educational stratification to its current levels. By then, the top 50 schools would enroll 5 percent of the freshmen in four-year programs, but 60 percent of those scoring at least 700 on the verbal SAT. The top ten schools would enroll only 1.5 percent of the freshman but 31 percent of those 700+ scorers. And Harvard and Yale would by themselves enroll a full 10 percent of the 700 club.[24].

3. Competition for faculty. -- Nor are matters less competitive in Japan for the faculty. As in the U.S., universities in Japan fill some senior posts by promoting from their internal ranks, but also hire laterally. Almost exclusively, they hire by publication record. Notwithstanding the stereotypes about life-time 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 81 of its 84 full-time faculty.[25] Of those 81, fewer than half (39 professors) began their teaching careers there. The rest moved from posts at 24

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[20] Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life 38 (New York: Free Press, 1994).

[21] Herrnstein & Murray, supra note, at 38.

[22] Herrnstein & Murray, supra note, at 30.

[23] Id.

[24] Herrnstein & Murray, supra note, at 43.

[25] http://www.j.u-tokyo.ac.jp/about/professors/index.html.

other universities or other UT units. Of the 42 lateral recruits, fourteen had taught in at least two other institutions before joining the UT law faculty. Seven had taught at Kobe University (ranked 6th among the public schools), and five each at the Tokyo Metropolitan University (ranked 14th), Tohoku University (ranked 8th), and Gakushuin University (ranked 25th among the private schools).

The Faculty of Economics lists 55 full-time faculty.[26] Unlike the legal scholars, a large majority (41 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 (33 professors, or 60 percent) earned their last degree (generally a Ph.D.) elsewhere. The most common outside Ph.D. was from Stanford (4 professors). Next came Harvard (3 professors), MIT (3 professors), and Yale (3 professors).

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 Ph.D. elsewhere. Neither phenomenon is consistent with a department oblivious to the competition. Instead, both are consistent with a department self-fiercely competing in a larger marketplace.

III. Law & Economics in Japan

A. Introduction:

Because universities (even in the more-competitive-than-Europe U.S. 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 cheap, it goes out of business. A rival with a more effective internal structure takes its place.

But universities do not face a profit-constraint. They compete in the non-profit 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 the law & 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.[27]

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.

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[26] http://www.e.u-tokyo.ac.jp/fservice/faculty/view.e.html

[27] Obviously, I table the question of how the market clears. What scholars look to in evaluating the work of other scholars is indirectly (but only indirectly) related 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 popularlity.

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

B. Law as Undergraduate Education:

1. Introduction. -- Law is an undergraduate subject in Japan. A high-school student eying a career in the field would apply to the law department (or division) of a university. He would take the entrance examination to the department. If admitted, he would then spend some of his first two years in a general education program. He would take the rest 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.[28] To graduate, a Waseda student needs 124 units. Of those, the law faculty requires that he take 60 in law and 20 in foreign languages. Should he wish, he can study other subjects for the remaining 44. They will constitute roughly one third of his college education.

This curriculum obviously lets law students learn some economics, but just as obviously prevents them from learning it as well as they would if they could major in it. On the one hand, Goeran Skogh notes that Swedish students begin their legal education with no training in economics.[29] Shozo Ota observes he and his Japanese colleagues "cannot expect their students to have basic knowledge" in economics.[30]

On the other hand, Garoupa & 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 law & economics because their students cannot grasp it either? And anyway, observe Garoupa & Ulen, law & economics does

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[28] http://www.waseda.jp/hougakubu/main/about/curriculum.html

[29] Goeran Skogh, Law and Economics in Sweden, 11 Int'l Rev. L. & Econ. 319, 319, 321 (1991).

[30] Shozo Ota, Law and Economics in Japan: Hatching Stage, 11 Int'l Rev. L. & Econ. 301, 307 (1991).

thrive in two countries with undergraduate law faculties: the Netherlands and (as discussed above) Israel.[31]

Consider, however, three other implications that the institutional location of legal education poses for the development of law & economics: its impact (a) on the sophistication that faculty members bring to the subject, (b) on how those scholars understand the nature of the legal field itself, and (c) 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, this 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, in Japan and some of Europe, as "research associates"), 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 significantly spent 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," empirical "phenomena" with intellectual "discipline." When students learn law in college, 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 only study legal phenomena through a separate -- 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. In the decades since Gary Becker, economists have learned to study phenomena far removed from any that more classical scholars examined. Many economists do 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.

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[31] Garoupa & Ulen, supra note, at 35-37. Canada also has a thriving interest in law & economics, but Toronto and Osgoode Hall do require students to bring three years of undergraduate education with them before starting their legal training. Osgoode Hall: http://www.osgoode.yorku.ca/jd/applying_getting_ready.html; University of Toronto: http://www.law.utoronto.ca/prosp_stdn_content.asp?itemPath=3/21/0/0/0&contentId=1319.

So too 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 American 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. He studies the disciplines during his four undergraduate years. Instead, law is a phenomenon. As a student at a graduate-level trade school, he then learns to sort the phenomena he encounters and to examine them through the disciplinary tools he learned in college. In management school, he uses economics and psychology to study business. In law school, he studies law -- but studies it through something else. He may use economics to examine legal phenomena, or he may use sociology or history. Unless he styles himself a walking Black's dictionary, however, he will not study law with law.

When a student studies law as an undergraduate, the curricular structure instead implies that law is an autonomous discipline.[32] The 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 (i) what they learned in their few general education courses and (ii) what they might have learned in other departments (except that they did not -- because their law department's distributional requirements did not let them take those other courses). Theoretically, law professors could do this. For the most part, in Japan 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 and formalistic, 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.

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[32] 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 American-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 70s transforming the interpretive structure within legal scholarship. Before Kaneko, legal scholars had few acceptable ways to introduce economic analysis. After his work, colleagues finally had a way within legal theory for introducing economic analysis. J. Mark Ramseyer & Minoru Nakazato, Tax Law, Hiroshi Kaneko, and the Transformation of Japanese Jurisprudence, 58 Am. J. Comp. L. 721 (2010).

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. American 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 American law schools acquired their disciplinary expertise by hiring economists (or historians, sociologists, 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 that 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.

Although Japanese universities do have economists in the economics departments, location matters. Scholars write for their colleagues. If in an economics department, a law & economics scholar will tend to write for other economists. If in a law school, he 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 & 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 & 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 & economics; yet (again, except for a few select departments) Japanese economists have not published extensively in law & economics either. The "reason" is simple: economics as we know it is a relatively new field in Japan.

Ugo Mattei and Roberto Rardolesi claim that:[33]

> [E]conomics 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 world-wide expansion of this scholarship.

Not so. For much of the post-war period, most Japanese economists did not speak the same language. Instead, most (not all) worked in departments dominated by Marxists,

[33] Ugo Mattei & Roberto Rardolesi, Law and Economics in Civil Law Countries: A Comparative Approach, 11 Int'l Rev. L. & Econ. 265, 266 (1991).

and these Marxists did not speak the language of their putative American peers. Indeed, they did not even speak the language of their neo-classical 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, they 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 American or Japanese economist. It was not neo-Keynesian economics, or fringe-left Paul-Krugman or even U-Mass-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:[34]

* Lenin's Critique of Rosa Luxembourg'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

In time, this changed. The top-ranked University of Tokyo, Hitotsubashi University, and Osaka University were among the first economics departments to leave the Marxist orbit. 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:[35]

* 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

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 Ph.D.s from U.S. universities (28 of the 55 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.[36] 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

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[34] Yoshiro Miwa & J. Mark Ramseyer, The Fable of the Keiretsu: Urban Legends of the Japanese Economy 53-54 (Chicago: University of Chicago Press, 2006).

[35] Keizai ronso, v. 154 (1994).

[36] 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.

entry-level Marxist candidate. But they had not just turned down the one candidate. Through the discussion, they had made it clear that they would never -- ever -- hire another Marxist.

The long-time Marxist domination of the Japanese economics departments contributed to the slow diffusion of law & economics for an obvious reason: scholars who specialize in Part 1 Section 7 of Das Kapital are not men 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 & 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 department with scholars devoted to Lenin's critique of Rosa Luxembourg.

III. Conclusion

In the U.S. 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 & 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 & economics has thrived. And why did legal training end up in the undergraduate curriculum anyway? Marxists may have slowed the development of law & 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 U.S.). Universities do compete, whether in the U.S. 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.