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THE GREAT RECESSION AND THE RHETORICAL CANONS OF LAW AND ECONOMICS

Michael D. Murray*

Abstract

The Great Recession of 2008 and onward has drawn attention to the American economic and financial system, and has cast a critical spotlight on the theories, policies, and assumptions of the modern, neoclassical school of law and economics—often labeled the "Chicago School"—because this school of legal economic thought has had great influence on the American economy and financial system. The Chicago School's positions on deregulation and the limitation or elimination of oversight and government restraints on stock markets, derivative markets, and other financial practices are the result of decades of neoclassical economic assumptions regarding the efficiency of unregulated markets, the near-religious-like devotion to a hyper-simplified conception of rationality and self-interest with regard to the persons and institutions participating in the financial system, and a conception of laws and government policies as incentives and costs in a manner that excludes the actual conditions and complications of reality.

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This Article joins the critical conversation on the Great Recession and the role of law and economics in this crisis by examining neoclassical and contemporary law and economics from the perspective of legal rhetoric. The Great Recession already has caused several of the stars of the Chicago School to recant their hardest, most definite statements concerning market efficiency and the necessity of non-regulation and zero government oversight (or interference) in the financial system. The law and economics movement is likely to regroup or reform itself under a revised conception of market efficiency, as indicated by the chastened admissions of the leaders of the old school, or move in the direction of a revised conception of rational choice theory represented by the thriving school of behavioral law and economics. In order to better understand the law and economics movement now and in the future, this Article joins the discussion by pointing out the fundamental rhetorical canons of law and economics. These canons have made law and economics a persuasive form of discourse:

- *Mathematical and scientific methods of analysis and demonstration;*
- *The characterization of legal phenomena as incentives and costs;*
- *The rhetorical economic concept of efficiency; and*
- *Rational choice theory as corrected by modern behavioral social sciences, cognitive studies, and brain science.*

Law and economics has developed into a school of contemporary legal rhetoric with a particular, effective combination of topics of invention and arrangement and tropes of style that are relevant to legal rhetoric beyond the economic analysis of law. My Article is the first to examine the prescriptive implications of the rhetoric of law and economics for general legal discourse as opposed to examining the benefits and limitations of the economic analysis of law itself. This Article advances the conversation in two areas: first, as to the study and understanding of the persuasiveness of law and economics, particularly because that persuasiveness has played a role in influencing American economic and financial policy leading up to the Great Recession; and second, as to the study and understanding of the use of economic topics of invention and arrangement and tropes of style in general legal discourse when evaluated in comparison to the other schools of classical and contemporary legal rhetoric. My conclusion is that the rhetorical

canons of law and economics can be used to create meaning and inspire imagination in legal discourse beyond the economic analysis of law, but the canons are tools that only are as good as the user, and can be corrupted in ways that helped to bring about the current economic crisis.

INTRODUCTION

Why has law and economics been so persuasive
leading up to the Great Recession¹?

This article examines law and economics as a school of contemporary legal rhetoric with a particular combination of rhetorical modes of communication and persuasion—the rhetorical canons of law and economics—that have made it persuasive to many audiences within and without the legal community. My goal is to critique the rhetoric of the neoclassical and contemporary law and economics² analysis of law, not to examine the benefits or costs of the application of one form of economic analysis or

¹ I take the name, “Great Recession,” from none other than Nobel Laureate Professor Joseph Stiglitz, who recently discounted decades of neoclassical economic assumptions when he pointed out that “markets do not work well on their own” and that in the recent recession, the United States suffered because the economy lost its “balance between the role of markets and the role of government.” JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* xii (2010).

² I use the term “contemporary law and economics” to mean twenty-first century law and economics that incorporates behavioral and socio-economic approaches to the study and analysis of law. Contemporary law and economics has evolved from “new” or “neoclassical” law and economics that developed in the 1960s and which applied neoclassical economic principles and methodologies to the analysis of law. New or neoclassical law and economics is also referred to as “traditional” or “conventional” law and economics. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31 (7th ed. 2007) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*]; Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2088 (1996); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 77, 83, 138 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]; Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 73; Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J. L. & LIB. 470, 470–72 (2007).

another in shaping law and social policy.³ I seek to examine law and economics as a rhetorical perspective in law so as to reveal and demonstrate the combination of rhetorical canons that helped bring about the Great Recession.⁴

³ Not to mention the *Pareto* superiority or *Kaldor-Hicks* efficiency obtained through contemporary economic analysis of law. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 18 (5th ed. 2008).

⁴ Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 619 (2001) (“In its more extreme forms, law and economics solutions to problems of human behavior were paraded as “science” (not as social science but as “science”), the findings of which were unassailable. Those who questioned were made to appear ignorant or foolish.”); Timothy A. Canova, *The Failing Bubble Economy: American Exceptionalism and the Crisis in Legitimacy*, 102 AM. SOC’Y INT’L L. PROC. 237, 238 (2008) (“Lawyers and legal scholars have tended not to question the economic assumptions of orthodox economic models”); Timothy A. Canova, *Legacy of the Clinton Bubble*, DISSENT, Summer 2008, at 41; Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621, 622 (2011); Lawrence E. Mitchell, *The Morals of the Marketplace: A Cautionary Essay for Our Time*, 20 STAN. L. & POL’Y REV. 171, 173 (2009); Lawrence E. Mitchell, *The Board as a Path to Corporate Responsibility*, in Doreen McBarnet, *THE NEW CORPORATE ACCOUNTABILITY* (2007). Even the unofficial dean of the Chicago School, Judge Richard Posner, has admitted the connection between neoclassical law and economics and present economic crisis. See RICHARD POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION* xii, 270 (2009) (“We are learning from [the crisis] that we need a more active and intelligent government to keep our model of a capitalist economy from running off the rails. . . . [T]he market can be blamed for recessions, which without government intervention would often turn into depressions, as they often did before the government learned (we thought!) in the after-math of the Great Depression how to prevent that from happening.”). Alan Greenspan, previously a staunch advocate of non-regulation of the financial markets, has recently recanted his faith in the self-correcting power of free markets. Alan Greenspan, as quoted in EDMUND L. ANDREWS, *BUSTED: LIFE INSIDE THE GREAT MORTGAGE MELTDOWN* 65 (2009). See also Alan Greenspan, *The Crisis*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2010, at 3, http://www.brookings.edu/~media/Files/Programs/ES/BPEA/2010_spring_bpea_papers/2010a_bpea_greenspan.pdf). Critics have noted that the Chicago School has worked its effects not only on the United States economy, but globally. See Paul H. Brietzke, *Law and Economics Meets the Great Recession* (2012), copy on file with the author.

Rhetoric and law and economics do not often share the same paragraph in academic legal writing let alone the same article title,⁵ but a central focus of the discipline of law and economics is the study of human nature and human behavior⁶ in order to predict what incentives can be communicated to humans that will motivate them to act or react, and thus law and economics shares a common goal of rhetoric, the study of communication and persuasion. The advocates of the economic analysis of law must persuade their own cohorts of the truth of their discoveries, and use the rhetoric of their discipline to do so, and also seek to communicate the lessons of their economic analysis of law to the wider legal community, and again use the rhetoric of their discipline to persuade the wider audience. That law and economics is persuasive beyond the confirmed members of the discipline is supported by modern history: critics and supporters alike agree that law and economics has established itself as the dominant and most influential contemporary mode of analysis among American legal scholars.⁷

⁵ An exception being, Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752 (1988) [hereinafter McCloskey, *Rhetoric of Law and Economics*], a very useful discussion to which I will refer below.

⁶ Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) ("law and economics analysis may be improved by increased attention to insights about actual human behavior"); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000) [hereinafter Korobkin & Ulen, *Law and Behavioral Science*] ("Law and economics is, at root, a behavioral theory, and therein lies its true power.").

⁷ Law and economics' critics and proponents alike agree that the movement has become the most dominant method of legal analysis among legal scholars in at least the last fifty years. See, e.g., Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 142–43 (2003) [hereinafter Hanson & Yosifon, *The Situation*], which states:

The law and economics movement is quite strongly entrenched in the law schools, and is more powerful there than any of the other social sciences. . . . [T]he flourishing of law and economics [is] undeniable, . . . Economic analysis of law . . . has transformed American legal thought, . . . [and] enjoyed unparalleled success in the legal academy

The recognition that the rhetoric of law and economics is persuasive—and not just to legal economists—reveals the enormous potential of law and economics as a lens on legal discourse through which to examine the structure and design of the discourse and as a source of *topoi* (topics) of invention and arrangement and *tropes* of style in the content of the discourse. It also helps to explain why so many persons in the academy, the legal profession, the courts, and government could be persuaded to alter the economy and financial system of the United States in accordance with the prescriptions of law and economics in ways that helped to bring about the Great Recession.

The *topoi* and *tropes* of law and economics inspire inventive thinking about the law that constructs meaning for the author and the audience. For many members of the legal writing discourse community—judges, practitioners, government agencies, and academics—the modes of persuasion of law and economics can provide a critical perspective to construct meaning and improve the persuasiveness of legal discourse generally in content, arrangement, and style. As such, law and economics rhetoric should be recognized as a new school of contemporary rhetoric⁸

and in the judiciary . . . [making it] the most important development in legal scholarship of the twentieth century.

Id. (inner citations omitted). See also POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at xix (“[Law and economics is] the foremost interdisciplinary field of legal studies”); Kenji Yoshino, *The City and the Poet*, 114 *YALE L.J.* 1835, 1836 & n.6 (2005) (law and economics surpasses other movements in legal analysis, including law and literature).

⁸ Basic sources on contemporary rhetoric include: PATRICIA BIZZEL & BRUCE HERZBERG, *THE RHETORICAL TRADITION* (Patricia Bizzel & Bruce Herzberg eds., 1990); PETER GOODRICH, *LEGAL DISCOURSE* (1987); Carroll C. Arnold, *Rhetoric in America since 1900*, in *RE-ESTABLISHING THE SPEECH PROFESSION: THE FIRST FIFTY YEARS* (Robert T. Oliver & Marvin G. Bauer eds., 1959); John B. Bender & David E. Wellbery, *Rhetoricality: On the Modernist Return of Rhetoric*, in *THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE* (John B. Bender & David E. Wellbery eds., 1990); James L. Kinneavy, *Contemporary Rhetoric*, in *THE PRESENT STATE OF SCHOLARSHIP IN HISTORICAL AND CONTEMPORARY RHETORIC* (Winifred B. Horner ed., rev. ed. 1990);. See also sources cited in notes 7–9, *infra*.

that joins the existing schools—modern argument theory,⁹ writing as a process theory,¹⁰ and discourse community theory¹¹—as a lens

⁹ See, e.g., JEROME BRUNER & ANTHONY AMSTERDAM, *MINDING THE LAW*, chs. 2–3, 6–7 (2002); CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., 1969); STEPHEN TOULMIN ET AL., *AN INTRODUCTION TO REASONING* (2d ed. 1984) [hereinafter TOULMIN, *INTRODUCTION TO REASONING*]; FRANS H. VAN EEMEREN ET AL., *FUNDAMENTALS OF ARGUMENTATION THEORY: A HANDBOOK OF HISTORICAL BACKGROUNDS AND CONTEMPORARY DEVELOPMENTS* (1996); Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007) (the corporate metaphor in modern argument theory); Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004) (use of metaphor in modern argument theory and cognitive studies); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129, 139 (2006) [hereinafter Smith, *Rhetoric Theory*]; Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRECTORS 75, 80–81 (2009) [hereinafter Stanchi, *Persuasion*].

¹⁰ See Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING 57 (2000) [hereinafter Berger, *Reflective Rhetorical Model*]; Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Leigh Hunt Greenhaw, *“To Say What the Law Is”: Learning the Practice of Legal Rhetoric*, 29 VAL. U. L. REV. 861 (1995); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089 (1986); Smith, *Rhetoric Theory*, *supra* note 7, at 139.

¹¹ See Brook K. Baker, *Language Acculturation Process and the Resistance to In “doctrine” ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz’s Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131 (2000); Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489 (2002); Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887 (2002); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994); Smith, *Rhetoric Theory*, *supra* note 7, at 139; Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998); Joseph M. Williams, *On the*

through which to examine and improve the persuasiveness of legal discourse.

Law and economics is a discipline that brings a unique combination of modes of persuasion used both as rhetorical *topoi*¹² and *tropes*¹³ to construct meaning and to inform and persuade its audiences: the priority of mathematical and scientific methods of analysis and demonstration, the characterization of legal phenomena as incentives and costs, the rhetorical economic concept of efficiency, and the lessons of rational choice theory as

Maturing of Legal Writers: Two Models of Growth and Development, 1 LEGAL WRITING 1 (1991).

¹² In rhetoric, the *topoi* [Greek] or *loci* [Latin] (singular, *topos* or *locus* = “place”) are the “topics” or “subjects” of argument that can be made in various situations. *Topoi* are developed in the process of *inventio* [Latin] or *heuresis* [Greek], which may be translated as “invention” or “discovery” of the type of argument that will be most persuasive in the situation, and in the *dispositio* [Latin] or *taxis* [Greek] of the argument, which translates as the “arrangement” or “organization” or “disposition” of the contents of the argument. See EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 17, 20, 89–91 (4th ed. 1999); Gabriele Knappe, *Classical Rhetoric in Anglo-Saxon England*, 27 ANGLO-SAXON ENGLAND 5, 25 (Cambridge 1998).

¹³ Tropes are developed in the rhetorical process of style (Latin *elocutio*; Greek *lexis*), which pertains to the composition and wording of the discourse, including grammar, word choice, and figures of speech. See generally CORBETT AND CONNORS, *supra* note 10, at 20, 378; Knappe, *supra* note 10, at 25–26; Smith, *Rhetoric Theory*, *supra* note 7, at 129, 133–34 & n.2 (collecting sources on style in classical rhetoric). Figures of speech were divided into tropes (creative variations on the meanings of words) and schemes (artful deviations from the ordinary arrangements of words). Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 51 & n.179 (2010) [hereinafter Berger, *Law as Rhetoric*]. Professors Berger, Corbett, and Connors identify the classically identified tropes as metaphor, simile, synecdoche, and metonymy; puns; antanaclasis (or repetition of a word in two different senses); paronomasia (use of words that sound alike but have different meanings); periphrasis (substitution of a descriptive word for a proper name or of a proper name for a quality associated with the name); personification; hyperbole; litotes (deliberate use of understatement); rhetorical question; irony; onomatopoeia; oxymoron; and paradox. CORBETT AND CONNORS, *supra*, note 10, at 395–409; Berger, *Law as Rhetoric*, *supra*, at 51 & n.179. See also MICHAEL R. SMITH, ADVANCED LEGAL WRITING 199–248 (metaphors), 328–40 (other tropes) (2d ed. 2008) [hereinafter SMITH, ADVANCED LEGAL WRITING].

corrected by the empirical studies of behavioral social sciences, cognitive studies, and brain science. My examination of contemporary law and economics as a rhetorical perspective requires the discussion of the following theses:

- Law and economics is inherently rhetorical and uses its own rhetoric to persuade the members of the law and economics discourse community as well as the legal community as a whole.
- Law and economics uses a unique combination of modes of persuasion as rhetorical *topoi* and *tropes*—the rhetorical canons of law and economics—which are:
 - Mathematical and scientific methods of analysis and demonstration;
 - The characterization of legal phenomena as incentives and costs,
 - The rhetorical economic concept of efficiency; and
 - Rational choice theory as corrected by the modern behavioral social sciences, cognitive studies, and brain science.

The rhetorical canons of law and economics alone did not cause the Great Recession. Canons of rhetoric are tools for legal discourse, not universal goals and not perfect solutions. Law and economics provides a rhetorical lens through which a legal author might examine and improve the persuasiveness of her discourse regarding the economy, governmental regulation, or any other topic of the law. But a lens, like any other tool, is only as good as its user. My conclusion is that the rhetorical canons of law and economics can be used to create meaning and inspire imagination in legal discourse beyond the economic analysis of law, but the choice to employ the canons must be made with regard to the rhetorical concept of ethos and the needs, demands, and limitations of the rhetorical situation at hand.

I. THE RHETORICAL NATURE OF LAW AND ECONOMICS

A. *Law and Economics is Inherently Rhetorical*

Law and economics, like all disciplines of academic inquiry and study, uses rhetoric to explain and justify its assumptions, models, paradigms, assertions, and predictions.¹⁴ To understand the assertion represented by the sub-heading of this section—law and economics is inherently rhetorical—one must understand the nature of rhetoric: Rhetoric is the “discovery and transmission of insight and knowledge.”¹⁵ Rhetoric is the discipline that examines “ways of winning others over to our views, and of justifying those views to ourselves as well as others, when the question of how things in the world ought to work is contested or contestable.”¹⁶

¹⁴ See McCloskey, *Rhetoric of Law and Economics*, *supra* note 3, at 760. As one scholar states:

[W]e are now invited to think hard about the rhetoric of *everything*; “the rhetoric of philosophy,” “the rhetoric of sociology,” “the rhetoric of religion,” even “the rhetoric of science.” Though these rhetorics are not all of the same kind, we should realize that all of these fields depend on rhetoric in their arguments. Most of them are in fact grappling with rhetorical issues, as they debate their professional claims.

WAYNE C. BOOTH, *THE RHETORIC OF RHETORIC: THE QUEST FOR EFFECTIVE COMMUNICATION* xii (2004) [hereinafter BOOTH, *THE RHETORIC OF RHETORIC*] (emphasis in original).

¹⁵ Francis J. Mootz, III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and The Natural Law Tradition*, 11 YALE J.L. & HUMAN. 311, 317 (1999) (quoting Hans-Georg Gadamer, *The Expressive Power of Language*, 107 PUBLICATIONS MOD. LANGUAGE ASS'N AM. 348 (1992)). See also James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985) [hereinafter White, *Law as Rhetoric*]:

Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials.

Id.

¹⁶ AMSTERDAM & BRUNER, *supra* note 7. See also White, *Law as Rhetoric*, *supra* note 13, at 684 (rhetoric establishes, maintains, and transforms the community and the culture); James Boyd White, *A Symposium: The Theology of*

“Rhetoric is primarily a verbal, situationally contingent, epistemic art that is both philosophical and practical and gives rise to potentially active texts.”¹⁷ Much of the scholarly attention within the discipline of rhetoric has been directed to effective communication with a particular focus on techniques for persuasive communication and argumentation; thus, many familiar definitions of rhetoric revolve around persuasion in discourse.¹⁸

In this Article, I am referring to the academic study of rhetoric, both in its classical¹⁹ and contemporary²⁰ forms. Rhetoric as the

the Practice of Law, February 14, 2002 *Roundtable Discussion*, 53 *MERCER L. REV.* 1087, 1090 (2002) (“[T]he minute we begin to think and talk about anything at all we live in the world of language, a world of contingent resources for thought and speech, and rhetoric is a perfectly good term for how we do that.”).

¹⁷ William A. Covino & David A. Joliffe, *What is Rhetoric?*, in *RHETORIC: CONCEPTS, DEFINITIONS, BOUNDARIES* 5 (1995).

¹⁸ See, e.g., ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* 1355B (George A. Kennedy trans., 1991); ARISTOTLE, *THE RHETORIC*, bk. 1, ch. 2 (W. Rhys Roberts trans. 1965), available at <http://www.public.iastate.edu/~honeyl/Rhetoric/> (last accessed Nov. 22, 2010) (Lee Honeycutt ed.) [hereinafter ARISTOTLE, *THE RHETORIC*] (“Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion.”); JOHN J. MAKAY, *SPEAKING WITH AN AUDIENCE: COMMUNICATING IDEAS AND ATTITUDES* 9 (3d ed. 1984) (“Rhetoric is defined ‘as the process of human communication in which a speaker sorts, selects, and sends symbols for the specific purpose of evoking a precise response’ from an audience.”); KRISTEN K. ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* 9 (2009) [hereinafter ROBBINS-TISCIONE, *RHETORIC FOR LEGAL WRITERS*] (“[R]hetoric here refers to the art of persuasion through eloquent, inventive, and strategically organized discourse, both oral and written.”); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 *VA. L. REV.* 1545, 1546 n.14 (1990) (“By ‘rhetoric,’ I mean the discipline . . . in which the objects of formal study are the conventions of discourse and argument.”).

¹⁹ “Classical rhetoric” was begun in the fifth century B.C.E. and continued on and perfected over the course of the next 1,000 years of Greco-Roman history by Aristotle, Cicero, and Quintilian. See CORBETT & CONNORS, *supra* note 10, at 15–16, 18–19. Even after this reign as the defining study of public discourse in classical times, the scholarship and teachings of classical rhetoric were followed as the dominant discipline for developing legal arguments until the first quarter of the nineteenth century. See *id.* at 2, 15. The origin of classical rhetoric as a discipline devoted to the study of legal discourse and argumentation

is traced to Corax of Syracuse. See, e.g., Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 615 (1999) [hereinafter Frost, *Lost Heritage*]. The early tenets of the discipline were critiqued by Socrates and by Socrates' student, Plato, see *infra* note 19, and subsequently they were refined by Plato's student, Aristotle. See JOHN H. MACKIN, CLASSICAL RHETORIC FOR MODERN DISCOURSE vii, 6–7, 17–18, 26 (1969). The most important writings of classical rhetoric are those of Aristotle, ARISTOTLE, THE RHETORIC, *supra* note 16, Cicero, MARCUS TULLIUS CICERO, DE INVENTIONE 93, 104 (H.M. Hubbell trans., 1949); MARCUS TULLIUS CICERO, DE ORATORE (E.W. Sutton trans., 1942), and Quintilian, 1 MARIUS FABIIUS QUINTILIAN, INSTITUTIO ORATORIA 273 (H.E. Butler trans., 1954), which together define the canons of the discipline that serve as a rhetorical lens on legal discourse.

²⁰ The contemporary period of rhetoric begins in the twentieth century. Major movements in thought have broadened the study of rhetoric to include all aspects of communication, ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS, *supra* note 16, at 61, including linguistics, ethics and persuasion, practical reasoning, human motivation, composition theories, cognitive studies, and socio-epistemic studies. *Id.* at 61–82. See, e.g., ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (Annette Lavers & Colin Smith trans., 1968) (language as symbols); KENNETH BURKE, A GRAMMAR OF MOTIVES (1969) [hereinafter BURKE, GRAMMAR OF MOTIVES] (impact of culture); KENNETH BURKE, A RHETORIC OF MOTIVES (1950) [hereinafter BURKE, RHETORIC OF MOTIVES] (impact of culture); UMBERTO ECO, A THEORY OF SEMIOTICS (1976) (language as symbols); MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1996) (modern media studies); C. K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING (1972) (language and meaning); I.A. RICHARDS, THE PHILOSOPHY OF RHETORIC (1936) (language and meaning); RICHARD M. WEAVER, THE ETHICS OF RHETORIC (1953) (ethics); Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 6–8, 389–92 (1968) [hereinafter Bitzer, *The Rhetorical Situation*] (the impact of situation). Over time, the cognitive rhetoric group divided into the process theory cognitivists, who believe that the study of rhetoric should focus on the process of writing, a recursive rather than linear creative process, that teaches the writer how to reason and persuade and improve their communication by examining each stage of the writing process, see ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS, *supra* note 16, at 79, and the discourse community cognitivists, who believe the study of rhetoric is a study of the writer's assimilation into and acceptance of the tenets, vocabulary, and expectations of a discourse community, such as the legal writing discourse community. See, e.g., *id.* The socio-epistemic group combines social theories of community with epistemological theories of learning to form a theory of communication that considers the interaction of speaker, subject matter, and audience. See *id.* at 81.

The common thread among these the schools of thought in the developing discipline of contemporary rhetoric was a shift in thinking on the nature of

study of persuasion and argument has a noble and classical tradition, but the discipline has had difficulty shaking off a common but enduring slur that is traced to ancient sources: Socrates and Plato described the early study and practice of rhetoric by the ancient Greek Sophists as the art of flattery and trickery,²¹ and throughout the ages the slur has stuck. I emphasize that this slur is not the subject of my study here. Rhetoric, the academic discipline, is not the study of hollow speech, not puffery designed to prop up specious assertions, not hyperbole employed to distract an audience from the truths or falsities of the speakers'

knowledge and truth. Kristen K. Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108, 123 (2006) [hereinafter ROBBINS, PHILOSOPHY V. RHETORIC]. Beginning in the 1950s, Stephen Toulmin and Chaim Perelman asserted that truth is relative. *Id.* See, e.g., STEPHEN E. TOULMIN, *USES OF ARGUMENT* (updated ed. 2003) [hereinafter TOULMIN, *USES OF ARGUMENT*]; CHAIM PERELMAN, *THE REALM OF RHETORIC* (William Kluback trans., 1982) [hereinafter PERELMAN, *REALM OF RHETORIC*]; PERELMAN & OBRECHTS-TYTECA, *supra* note 7. Toulmin argued that people in everyday life do not use Aristotelian logic to establish conclusive proof, but "informal logic" to reason and to acquire knowledge. TOULMIN, *INTRODUCTION TO REASONING*, *supra* note 7, at 94–134. The knowledge acquired and the arguments made are only probable, not absolute. *Id.* Like Toulmin, Perelman argued that appeals to reason lead only to probable truths: "the appeal to reason must be identified not as an appeal to a single truth but instead as an appeal for the adherence of an audience. . . ." CHAIM PERELMAN, *THE NEW RHETORIC: A THEORY OF PRACTICAL REASONING*, *GREAT IDEAS TODAY* 234–52 (1970) (as reprinted in JAMES L. GOLDEN ET AL., *THE RHETORIC OF WESTERN THOUGHT* 234–52 (6th ed. 1997)). From these beginnings, three contemporary theories of rhetoric arose to focus on the construction of meaning, the creation of arguments, and the processes that allow the creation of meaning and argumentation. See Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 118–21 (1993). These are: Modern Argument Theory, Writing as a Process Theory, and the Theory of Discourse Communities. See Michael Smith, *Rhetoric Theory*, *supra* note 7, at 139.

²¹ Socrates did not devote his time to the publication of works, so we rely on Plato whose writings purport to represent Socrates' criticisms of rhetoric in such famous dialogues as PLATO, PHAEDRUS, http://www.classicallibrary.org/plato/dialogues/7_phaedrus.htm (last accessed Dec. 27, 2010), PLATO, GORGIAS, http://www.classicallibrary.org/plato/dialogues/15_gorgias.htm (last accessed Dec. 27, 2010), and PLATO, PHAEDO, http://www.classicallibrary.org/plato/dialogues/14_phaedo.htm (last accessed Dec. 27, 2010).

position.²² In short, it is nothing like the meaning of the commonplace phrase, “mere rhetoric.”²³ I am not examining law and economics as a scheme of flattery and trickery but rather as a discipline with a well-developed system of argumentation and persuasion that has lessons for legal discourse beyond the realm of economic analysis of law.

B. Excerpts from the History of the Rhetoric of Law and Economics

The discipline of economics is rhetorical,²⁴ and the discipline of law and economics is rhetorical, too.²⁵ Adam Smith, the honorary father of economics, apparently understood the rhetorical imperatives of economics and the law when, in his *Lectures on Jurisprudence* concerning principle in the human mind and the division of labor, he commented on the topic of exchanges and self-interest:

The offering of a shilling, which to us appears to have so plain and simple a meaning, is in reality offering an

²² See, e.g., KARLYN KOHRS CAMPBELL, THE RHETORICAL ACT 3–4 (1982); Wayne C. Booth, *The Rhetorical Stance*, in *Toward a New Rhetoric*, 14 C. COMPOSITION & COMM. 139, 139 (1963) [hereinafter Booth, *The Rhetorical Stance*]; Wayne C. Booth, *The Idea of a University as Seen by a Rhetorician*, 1987 Ryerson Lecture, University of Chicago, available at <http://home.uchicago.edu/~ahkissel/booth/booth.htm> (last accessed Nov. 23, 2010) [hereinafter Booth, *Idea of a University*].

²³ See BOOTH, THE RHETORIC OF RHETORIC, *supra* note 12, at vii, x, 6–7; Booth, *The Rhetorical Stance*, *supra* note 20, at 139; Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC. L. REV. 813, 817, 829 (2003).

²⁴ See DEIRDRE N. MCCLOSKEY, THE RHETORIC OF ECONOMICS xix–xx, 5 (2d ed. 1998) [MCCLOSKEY, RHETORIC OF ECONOMICS] [Note that the author, Donald N. McCloskey, became Deirdre N. McCloskey; the two names refer to the same author, but in my citations I will use the name or names used at the time of publication of the works cited herein]; see generally Arjo Klammer & Donald N. McCloskey, *Economics in the Human Conversation*, in ARJO KLAMMER, DONALD N. MCCLOSKEY & ROBERT M. SOLOW, THE CONSEQUENCES OF ECONOMIC RHETORIC 3–4, 11 (1988); DONALD N. MCCLOSKEY & DEIRDRE N. MCCLOSKEY, KNOWLEDGE AND PERSUASION IN ECONOMICS 38–52 (1994).

²⁵ MCCLOSKEY, RHETORIC OF LAW AND ECONOMICS, *supra* note 3, at 760.

argument to persuade one to do so and so for it is in his interest. . . . Men always endeavour [sic] to persuade others to be of their opinion even when the matter is of no consequence to them. . . . And in this manner every one is practicing oratory on others thro [sic] the whole of his life.”²⁶

Robert L. Heilbroner interprets Smith to mean that “the basis for economic relationships lies not in a disinterested calculation of advantages, but in the ‘faculties of reason and speech’ that underlie the capacity for persuasion.”²⁷

Oliver Wendell Holmes, who is quoted in Cooter and Ulen’s seminal text on law and economics,²⁸ held that:

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and master of economics. . . . We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.²⁹

Judge Richard Posner summarizes the foundational rhetoric of law and economics as follows:

[T]he most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is . . . amenable to scientific study. Economics is the most advanced of the social sciences, and

²⁶ Adam Smith, *Lectures on Jurisprudence*, as quoted in Robert L. Heilbroner, *Rhetoric and Ideology*, in ARJO KLAMER, DONALD N. MCCLOSKEY & ROBERT M. SOLOW, *THE CONSEQUENCES OF ECONOMIC RHETORIC* at 38 (1988) [hereinafter Heilbroner, *Rhetoric and Ideology*].

²⁷ Heilbroner, *Rhetoric and Ideology*, *supra* note 24, at 38.

²⁸ COOTER & ULEN, *supra* note 2.

²⁹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469, 474 (1897), quoted in COOTER & ULEN, *supra* note 2, at 1.

the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.³⁰

[The economic] approach enables the law to be seen, grasped, and studied as a system—a system that economic analysis can illuminate, reveal as coherent, and in places improve. By the same token, the approach enables economics to be seen as a tool for understanding and reforming social practices, rather than merely as a formal system of daunting mathematical complexity.³¹

C. The Nature of the Rhetoric of Law and Economics

Law and economics is a discipline whose persuasion is built from the application of scientific analyses—especially mathematics and the quantitative analysis of empirical data—to social problems.³² Law is a discipline that attempts to deal with social problems, and legal issues and the social conditions created or imposed or perpetuated by the state of the law are problems or conditions that may be subjected to economic analyses “with

³⁰ Richard A. Posner, *Foreword*, to MICHAEL FAURE & ROGER VAN DEN BERGH, *ESSAYS IN LAW AND ECONOMICS* 5, 5 (1989) [hereinafter Posner, *Foreword*], quoted in COOTER & ULEN, *supra* note 2, at 1.

³¹ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 2, at xxi.

³² Heilbroner states:

Economics prides itself on its sciencelike character, and economists on their ability to speak like scientists, without color, passion, or values, preferably in the language of mathematics. . . . [M]ost [economics] articles are “written” in matrix algebra, complex econometrics, formal lemmas, and four-quadrant diagrammatics. They would be incomprehensible to anyone not trained in the vocabulary and techniques of advanced economics . . . [T]he language of formalism and mathematics is still a language, and therefore inescapably “rhetorical.”

Heilbroner, *Rhetoric and Ideology*, *supra* note 25, at 38–39. See also Herbert M. Kritzer, *The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom*, 72 *LAW & CONTEMP. PROBS.* 41, 42–43, 59 (2009).

coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses.”³³

Economics provides scientific theories to predict the effects of legal rules on behavior that surpasses mere intuition, logic, or common sense concerning human behavior.³⁴ The theories are behavioral theories that seek to predict how people will respond to laws when laws are viewed as a system of incentives.³⁵ Legal economists assert that economics is a persuasive rhetorical lens on the law because it has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) of analyzing the effects of legal rules and sanctions (viewed as incentives, prices, or costs) on (presumptively rational) human behavior to achieve desirable (efficient) results for individuals and for society.³⁶

II. THE RHETORICAL CANONS OF LAW AND ECONOMICS

A. *The Four Canons*

If law and economics is inherently rhetorical, then what is the rhetorical nature of this discipline when used as a rhetorical lens in the law? I start with my summary of the rhetoric of the discipline introduced earlier: Economics combines mathematically precise theories and empirically sound methods of analyzing the effects of incentives and costs on presumptively rational human behavior to achieve efficient results for individuals and for society.³⁷ From this, I derive the four canons of law and economics rhetoric:

³³ Posner, *Foreword*, *supra* note 28, at 5.

³⁴ See COOTER & ULEN, *supra* note 2, at 3, 4.

³⁵ See *id.* at 4.

³⁶ See *id.* at 3, 4, 5. See also JEFFREY L. HARRISON, *LAW AND ECONOMICS* 2 (4th ed. 2007) [hereinafter HARRISON, *LAW AND ECONOMICS*]; Kritzer, *supra* note 30, at 42–43, 59.

³⁷ See COOTER & ULEN, *supra* note 2, at 3, 4, 5. The rhetorician James Boyd White channeled the rhetoric of law and economics when he characterized the legal system in the following way: “The overriding metaphor is that of the machine; the overriding value is that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs.” James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in *THE RHETORIC*

Mathematics and Science

The primacy of mathematical and scientific methods of analysis and demonstration³⁸

Incentives and Costs

The characterization of law and the legal system in the language of incentives and costs³⁹

Efficiency

The rhetorical economic concept of efficiency⁴⁰

Contemporary Theory of Rational Choice

The contemporary rational choice theory as corrected by modern behavioral social sciences, cognitive studies, and brain science⁴¹

Each of four canons of law and economics are used both as topics of invention and arrangement and tropes of style in persuasive discourse. The canons represent the fundamental assumptions upon and from which propositions regarding law and economics will be measured as persuasive in both conception and design and according to which theses concerning law and economics will be accepted as reliable and authoritative by the members of the law and economics discipline⁴²—in other words,

OF THE HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS 298, 300 (John S. Nelson et al. eds., 1987) (quoted in Levine & Saunders, *Thinking Like a Rhetor*, *supra* note 18, at 114).

³⁸ Discussed in Part II.A.1, *infra*.

³⁹ Discussed in Part II.A.2, *infra*.

⁴⁰ Discussed in Part II.A.3, *infra*.

⁴¹ Discussed in Part II.A.4, *infra*.

⁴² The sources I have consulted to derive these four canons are many and varied, but for general reference, see COOTER & ULEN, *supra* note 2, at 2, 3, 4, 5, 41–43; POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 3–4, 9, 13, 21, 24–25, 495–96; Grant M. Hayden & Stephen E. Ellis, *Law and Economics after*

by the members of the law and economics discourse community.⁴³ Therefore, these canons are described as *rhetorical* canons of law and economics.

B. The Interaction of the Rhetorical Canons of Law and Economics

Canons of rhetoric are customarily expressed or depicted in a manner that reflects the interaction of the canons in a persuasive exercise; all of the canons work together and simultaneously to affect the persuasiveness of the discourse of the discipline or activity. Each canon also simultaneously affects the operation of the other canons, making them more or less persuasive. In classical rhetoric, the three canons of invention (aspects of persuasion that must be devised or “invented” by the author or speaker) known as *logos*, *ethos*, and *pathos*,⁴⁴ are often depicted as a rhetorical triangle to suggest the interaction of the factors one to another and the combined impact on the recipient of the discourse:

Behavioral Economics, 55 U. KAN. L. REV. 629 (2007); and the sources cited in subsections 1–4 of this section.

⁴³ “Discourse community” is a term that grounds this discussion as to the rhetoric of law and economics. See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 419–38 (1995) (economic representing a change in discourse); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 611 & n.53 (1989) (describing the discourse of law and economics).

⁴⁴ See CORBETT & CONNORS, *supra* note 10, at 71–84; KENNEDY, *CLASSICAL RHETORIC*, *supra* note 52, at 68, 75, 82, 89; Covino & Joliffe, *supra* note 15, at 17, 52; Frost, *Lost Heritage*, *supra* note 17, at 617–18; Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN’S L. REV. 107, 127 (1992) [hereinafter Frost, *Greco-Roman Legal Analysis*]; Robin Smith, *Aristotle’s Logic*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2004 ed.), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/sum2002/entries/aristotle-logic/> (last accessed Jan. 2, 2011) (last substantive edit Oct. 5, 2000).

With regard to the classical modes of invention, Jakob Wisse presents the concept as a linear flow-chart:⁴⁵

James Kinneavy identifies these terms as Encoder – Signal – Decoder, linking the author, the language or message, and the reader or audience to reality.⁴⁶ The author projects his ethos along with or, in optimal circumstance, as part of the logos of the message so as to influence the pathos of the audience.⁴⁷

The rhetorical pathways are fundamentally pragmatic.⁴⁸ Aristotle sought to remind advocates that an argument is not one-dimensional. The most logically constructed argument still will

⁴⁵ WISSE, *supra* note 44, at 8.

⁴⁶ See JAMES L. KINNEAVY, A THEORY OF DISCOURSE: THE AIMS OF DISCOURSE 19 (1971) [hereinafter KINNEAVY, THEORY OF DISCOURSE]; Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 57, 67 (2000); Phelps, *supra* note 8, at 1091.

⁴⁷ WISSE, *supra* note 44, at 7–8.

⁴⁸ See Frost, *Lost Heritage*, *supra* note 17, at 614, 624, 625, 627; Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1728–29 (1995).

not persuade an audience if the audience questions the knowledge, skill, or credibility of the author. Similarly, the most respected author whose reputation is beyond question still will not win the day if her argument is riddled with logical fallacies and comes apart at the seams with a single, gentle tug at one of its logical flaws. An ironclad argument may be delivered in such a way as to antagonize the audience, or the effect of the argument may be squandered if the audience begins to question the integrity and credibility of the author.⁴⁹

The four canons of law and economics rhetoric interact together at the same time and toward the same audience. Proper economic discourse incorporates each canon for the persuasion of the audience. There is a connection and interaction in the discourse of each canon to the others that influences the persuasion of the audience—one cannot alter or abandon the canons of efficiency, mathematical and scientific certainty, response to incentives, and even rational choice without affecting the persuasiveness and effectiveness of the economic discourse. An incorrect, overstated, or deceptive message regarding one canon puts the others at risk of suspicion or rejection by the audience. As with classical rhetorical modes of invention, the interaction of the canons of law and economics may be depicted visually, although with four canons it shall be a rhetorical diamond, not a triangle:

⁴⁹ See generally CORBETT & CONNORS, *supra* note 10, at 72–73; Frost, *Ethos, Pathos & Legal Audience*, *supra* note 45.

DISCOURSE DIAMOND of the RHETORICAL CANONS of LAW AND ECONOMICS

In modern argument theory, the author of the discourse (Speaker) codes the discourse (Message) for a particular receiver (Audience) according to the conditions, requirements, and limitations of the context of the discourse (Situation). In law and economics rhetorical discourse, the Speaker's purpose is most closely aligned with the canon of Efficiency, the Message to achieve an efficient purpose is coded in the language of Incentives and Costs and is framed for the needs of the Audience according to the Rational Choice Theory, and the means used are chosen in reference to the rhetorical Situation with a distinct preference for the methods of Mathematics and Science. Therefore, the rhetorical diamond of the canons of law and economics is aligned to depict the flow of the discourse wherein each canon feeds into and simultaneously draws from the other canons in alignment with the components of modern argument theory.

1. The Primacy of Mathematical and Scientific Methods of Analysis and Demonstration

The practitioners of law and economics—those who follow the conventional and the contemporary approaches—rely on the inherent persuasiveness of mathematics and the methodologies of scientific proof both as a method of analysis and as a form for the demonstration⁵⁰ of the analysis.⁵¹ Members of the economic disciplines hold themselves out as scientists, applying logical, scientific deduction and induction to *prove* propositions.⁵² The syllogism and enthymeme (deductive forms) and the induction and example (inductive forms) are topoi of invention and arrangement

⁵⁰ Demonstration and dialectic are the two principle forms of reasoning recognized by Aristotle. See ARISTOTLE, *THE RHETORIC*, *supra* note 16, at Book I, ch. 1 at 1354a; GEORGE A. KENNEDY, *CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 80 (1999) [hereinafter KENNEDY, *CLASSICAL RHETORIC*]. See also P. CHRISTOPHER SMITH, *THE HERMENEUTICS OF ORIGINAL ARGUMENT: DEMONSTRATION, DIALECTIC, RHETORIC* (1998). Rhetoric is the form of demonstration used in argumentative persuasion or “continuous discourse,” whereas dialectic is more appropriate to debate. KENNEDY, *CLASSICAL RHETORIC*, *supra* at 66. Demonstration provides the rhetorical process of arrangement with two paradigms of deductive reasoning, *sullogismos* (syllogisms) and *enthymema* (enthymemes), CORBETT & CONNORS, *supra* note 10, at 38–60; KENNEDY, *CLASSICAL RHETORIC*, *supra*, at 83–84; Christof Rapp, *Aristotle's Rhetoric*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Summer 2002 ed.), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/sum2002/entries/aristotle-rhetoric/> (accessed Feb. 7, 2008) (last substantive edit May 2, 2002), and two paradigms of inductive reasoning, the induction and the example. See ARISTOTLE, *THE RHETORIC*, *supra* note 16, at Book I, ch. 2 at 1356b; Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 752 & n.58 (2004); Robert H. Schmidt, *The Influence of the Legal Paradigm on the Development of Logic*, 40 S. TEX. L. REV. 367, 372–73 (1999).

⁵¹ See COOTER & ULEN, *supra* note 2, at 3, 4; Robert L. Heilbroner, *Rhetoric and Ideology*, *supra* note 24, at 38–39; Kritzer, *supra* note 30, at 42–43, 59.

⁵² GEORGE PÓLYA, *INDUCTION AND ANALOGY IN MATHEMATICS: VOLUME I OF MATHEMATICS AND PLAUSIBLE REASONING* v–vi (1954); McCloskey, *Rhetoric of Law and Economics*, *supra* note 3, at 752, 760. The pros and cons of this rhetorical imperative are a lively topic of debate, and one that is growing in the wake of the economic meltdown of 2009–10. E.g., Samuel Gregg, *Smith versus Keynes: Economics and Political Economy in the Post-Crisis Era*, 33 HARV. J.L. & PUB. POL'Y 443, 445, 451–52, 455–56 (2010).

in science, mathematics, and rhetorical demonstration.⁵³ Contemporary law and economics assumes and advocates the rhetorical primacy of scientific and mathematical methods of analysis in forming hypotheses, designing the methods for testing the hypotheses, and analyzing the data, statistics, and information collected to test the hypotheses.⁵⁴ Law and economics also assumes the rhetorical primacy of scientific and mathematical forms in discourse to demonstrate the analyses and communicate its theses about human behavior.⁵⁵

In contemporary law and economics, predictions and prescriptions are informed by scientific testing and mathematical analysis of data not just by logic, intuition, common sense, ideology, or philosophy.⁵⁶ The methods of examination and the assumptions made that are supported by the rhetoric of

⁵³ The structural form of pure logic and scientific or mathematical proof is the syllogism, while the structural form of rhetorical demonstration and legal argument is the enthymeme. *See* ARISTOTLE, *THE RHETORIC*, *supra* note 16, at Bk. I, ch. 1, at 1355a. The deductive structure of the syllogism and enthymeme provides the framework for each of the organizational paradigms of legal discourse, including IRAC, IREAC, and TREAT. LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, chs. 10, 11, 19, 20 (5th ed. 2010) (discussing IREAC and variations for objective and persuasive discourse); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL WRITING AND ANALYSIS*, chs. 2, 6, 7 (2009) (discussing IRAC and TREAT); James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 719–23 (2006) (discussing IRAC and IREAC); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 484–87, 492 (2003) [hereinafter Robbins, *Paradigm Lost*] (discussing IRAC and IREAC).

⁵⁴ *See* POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 15–16; Posner, *Foreword*, *supra* note 28, at 5; Richard A. Posner, *Volume One of The Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437, 437 (1972) [hereinafter Posner, *Afterword*]. *See also* Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 66 TENN. L. REV. 137, 190 n.493 (1998); Gary Minda, *supra* note 51, at 611–12.

⁵⁵ *See* Bryant G. Garth, *Strategic Research in Law and Society*, 18 FLA. ST. U. L. REV. 57, 59 (1990)); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 912 (1980).

⁵⁶ *E.g.*, COOTER & ULEN, *supra* note 2, at 3, 4, 5.

contemporary law and economics and law and behavioral science are those that are susceptible to scientific proof through the application of mathematical and scientific methods of analysis of empirical data to confirm or rebut hypotheses and assumptions about human behavior in the context of the law.⁵⁷ But the propositions chosen to be proved, and especially the design of the experiments or studies that will be adequate and reliable to *prove* the propositions, rely on rhetoric—the rhetoric being that which is held within the disciplines to be reasonable, reliable, and provable using a scientific, mathematical, or quantitative methodology.⁵⁸

Mathematics is a language, and like any other language, is rhetorical.⁵⁹ Mathematics is a wonderful tool of analysis, but the elevation of mathematical forms and models as the primary method of demonstration in economic rhetoric comes with a warning for the application of this trope in general legal discourse: it is not realistic to assume that every legal issue and social

⁵⁷ See, e.g., HOWELL E. JACKSON, LOUIS KAPLOW ET AL., *ANALYTICAL METHODS FOR LAWYERS* 372, 375–77 (2003).

⁵⁸ Compare Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439 (1992); and Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 678–79, 682 (1999), and John M. Rogers & Robert E. Molzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992 (1992), with David R. Dow, *Godel and Langdell - A Reply to Brown and Greenberg's Use of Mathematics in Legal Theory*, 44 HASTINGS L.J. 707 (1993), and Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 OKLA. L. REV. 219 (1993); and Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 WASH. L. REV. 51, 54, 61–63, 121–124 (1996) [hereinafter Townsend, *Implications of Foundational Crises*].

⁵⁹ See David N. Haynes, *The Language and Logic of Law: A Case Study*, 35 U. MIAMI L. REV. 183, 186–87, 220 (1981); Donald N. McCloskey, *The Lawyerly Rhetoric of Coase's The Nature Of The Firm*, 18 J. CORP. L. 425, 425–26, 428–31 (1993); Townsend, *Implications of Foundational Crises*, *supra* note 60, at 62–63, 141; Mike Townsend & Thomas Richardson, *Probability and Statistics in the Legal Curriculum: A Case Study in Disciplinary Aspects of Interdisciplinarity*, 40 DUQ. L. REV. 447, 483–84 (2002); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 439 (1987).

condition can be subjected to mathematical analysis.⁶⁰ Albert Einstein once said, “As far as the laws of mathematics refer to reality, they are not certain; and as far as they are certain, they do not refer to reality.”⁶¹

The very word, *proof*, as in what the economist or behavioral scientist has *proved*, is inherently rhetorical in nature,⁶² and it is a powerfully persuasive word. An assertion that something is *proved* or even *can be proved* is a rhetorical assertion because, even in mathematics, there are some assertions and propositions that cannot be proved within a known mathematical system.⁶³ The differences in opinions as to what are reasonable, reliable, and provable assumptions and predictions in economics using a scientific, mathematical, or quantitative methodology have led to internal divisions within the law and economics community, and led directly to the creation of the law and behavioral science discipline, as discussed in Part II.A.4 below.

The rhetorical use of mathematical forms in law and economics—the use of mathematics as a trope of arrangement and style in the demonstration—is to this author the most intriguing aspect of this canon, and the most delicate topic from which to draw prescriptions for legal discourse. The appearance of mathematical certainty in law and economics rhetoric is an

⁶⁰ See generally Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1383–84 (2010); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 881, 889–90 (1989); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1331–32 (1971).

⁶¹ Albert Einstein, quoted in F. CAPRA, *THE TAO OF PHYSICS* 27 (1975).

⁶² McCloskey, *Rhetoric of Law and Economics*, *supra* note 3, at 752, 760.

⁶³ See Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 597 (1989); Steven P. Goldberg, *On Legal and Mathematical Reasoning*, 22 JURIMETRICS 83, 87 n.26 (1981); Susan K. Houser, *Metaethics and the Overlapping Consensus*, 54 OHIO ST. L.J. 1139, 1152 (1993); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 136 n.3 (1992); Rudolph J. Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence*, 80 NW. U. L. REV. 956, 999 n.214 (1986); Roy Stone, *Affinities and Antinomies in Jurisprudence*, 1964 CAMBRIDGE L.J. 266, 281.

attractive tool, but is it too seductive? Critics have challenged legal economists for adopting complex mathematical formulae to demonstrate findings the relevance of which to actual legal problems and social conditions is said to be specious.⁶⁴ Nevertheless, the a priori, ex ante, positivist application of mathematical formulas to legal topics and problems has led the practitioners of neoclassical law and economics to claim their greatest successes.⁶⁵ Unfortunately, this has come at a cost, namely a string of mathematically verifiable prescriptions that brought about policies that contributed to the severity of the Great Recession.

I explained above that my purpose here is not to critique the benefits or costs of the use of the canons of law and economics in the economic analysis of law. My purpose is to explore the application of these rhetorical canons in legal discourse generally. On the one hand, mathematics is a language, and thus rhetorical, and its particular form of persuasion is an appeal to certainty by the open demonstration of the truth and logic of its workings.⁶⁶ On the other hand, mathematical forms of demonstration may be employed to attempt to overcome “the difference between truth in mathematics and truth in law—between logical truths and

⁶⁴ E.g., MCCLOSKEY, *THE RHETORIC OF ECONOMICS*, *supra* note 22, at 44–45; Heilbroner, *Rhetoric and Ideology*, *supra* note 24, at 38; Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 485–90 (1987).

⁶⁵ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at xix (championing the unity, simplicity, and power, but also the subtlety, of economic principles); James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 L. & HIST. REV. 275, 287–88 (1997); Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 5 (1994) (“Assumptions about preference have enabled neoclassical economics and public choice theory to describe both private and public markets by means of mathematical models that have great elegance and rhetorical power.”); Richard Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUR. J.L. & ECON. 265, 274 (1995).

⁶⁶ See MCCLOSKEY, *THE RHETORIC OF LAW AND ECONOMICS*, *supra* note 3, at 761, 763; Kronman, *supra* note 60, at 679; Schmidt, *supra* note 52, at 395–96.

rhetorical or dialectical or polemical truths”⁶⁷—by cloaking the legal discourse in the rhetorical garb of mathematics⁶⁸ and science,⁶⁹ making the findings appear to be more certain and

⁶⁷ See Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983) (citing two of the most influential modern rhetoricians, Kenneth Burke, *Politics as Rhetoric*, 93 ETHICS 45, 46–47 (1982); and CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 120–74 (1980); CHAIM PERELMAN, THE NEW RHETORIC AND THE HUMANITIES 1–61, 117–33 (1979)). The difference between formal logic and the absolute proof of the syllogism, and informal logic used in everyday discourse to assert the most probable arguments in everyday situations, is one of the primary impetuses that motivated the move to contemporary schools of rhetoric building on the work of Burke and Perelman. See also BURKE, A GRAMMAR OF MOTIVES, *supra* note 18; BURKE, A RHETORIC OF MOTIVES, *supra* note 18; PERELMAN, REALM OF RHETORIC, *supra* note 18; PERELMAN & OBRECHTS-TYTECA, THE NEW RHETORIC, *supra* note 18. Pigou, one of the forefathers of neoclassical law and economics, pointed out the distinction between formal logic and pure mathematics on the one side and the “realistic sciences” on the other, as to which economics was to be a realistic science. A. C. PIGOU, THE ECONOMICS OF WELFARE 5 (4th ed. 1962) (“On the one side are the sciences of formal logic and pure mathematics, whose function it is to discover implications. On the other side are the realistic sciences, such as physics, chemistry and biology, which are concerned with actualities.”).

⁶⁸ E.g., JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2007); McCloskey, *Rhetoric of Law and Economics*, *supra* note 3, at 753–54; Joseph Vining, *The Gift of Language*, 73 NOTRE DAME L. REV. 1581, 1583–84 (1998). See also Dan Ariely, George Loewenstein & Drazen Prelec, *Coherent Arbitrariness: Stable Demand Curves Without Stable Preferences*, 118 Q. J. ECON. 73–106 (2003) (demonstrating how the illusion of stable, ordered preferences can be created with arbitrary anchors); Gary Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1, 4 (1962).

⁶⁹ MCCLOSKEY, THE RHETORIC OF ECONOMICS, *supra* note 22, at 147; Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 912 (1980); Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 478–81 (1974). The excessively persuasive effect of scientific demonstration is a problem in non-economic legal settings, too, such as evidence law. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 7.8, at 992 (1995) (“Scientific proof may suggest unwarranted certainty to lay factfinders, especially if it comes dressed up in technical jargon, complicated mathematical or statistical analysis, or involves a magic machine (‘black box’) that may seem to promise more than it delivers”); John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function*,

absolute than they really are. It seems highly likely that government policy was shifted because of the seeming certainty of the formulas that supported law and economics' prescriptions regarding unregulated markets and government non-interference in financial systems. This possibility sends a significant message of caution for the ethos-minded use of mathematical and scientific forms in general legal discourse.

2. The Characterization of Law and the Legal System in the Language of Incentives and Costs

The rhetoric of traditional and contemporary law and economics begins with a seminal insight of economics: that people respond to incentives⁷⁰ and that the law (legal rules and the legal system) can create incentives that can influence human behavior in one direction and can create disincentives that can influence human behavior in the other direction.⁷¹ Legal rules and the legal system can “encourage socially desirable conduct and discourage undesirable conduct” by rewarding or subsidizing certain behavior and punishing or taxing other behavior.⁷² Legal rules and the legal

Reliability, and Form, 71 OR. L. REV. 349, 367 n.81 (1992) (“There is virtual unanimity among courts and commentators that evidence perceived by jurors to be ‘scientific’ in nature will have particularly persuasive effect.”). *See also* United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (scientific evidence “assume[s] a posture of mythic infallibility in the eyes of a jury of laymen”); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (describing scientific testimony’s “aura of special reliability and trustworthiness”). *But see* Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror “Incompetence” and Scientific “Objectivity,”* 25 CONN. L. REV. 1083 (1993) (jurors are able to evaluate competing scientific and technical testimony).

⁷⁰ Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054; Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 987 (2009).

⁷¹ *See* Paul J. Heald & James E. Heald, *Mindlessness and Law*, 77 VA. L. REV. 1127, 1132 (1991); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 412–14 (2005); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1043.

⁷² Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054. *See* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 164–65 (1996); Lior

system can increase the costs of certain behavior or lessen the costs of other behavior.⁷³

The premise that people respond to incentives is rhetorical;⁷⁴ it is both an assumption and a presumption that shapes the predictions that analysts using the methodology of law and economics can make about the effects of law and the recommendations that these analysts are willing to make about changes to the law.⁷⁵ Law and economics imported this assumption from economics, along with the assumption that people react rationally to incentives.⁷⁶

Economists' examination of human behavior within various legal and social environments of the world involves the characterization of many phenomena as either incentives or costs.⁷⁷

Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1711 (2008); Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 343–47 (1989).

⁷³ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 84; Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 284–86 (1998); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054; Peter Reuter, *A Just Use of Economics or Just Use Economics*, 70 CAL. L. REV. 850, 853–54 (1982).

⁷⁴ See generally Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009) (discussing the rhetoric of incentives in copyright law); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (same).

⁷⁵ See Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054; Gregory Mitchell, *Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics*, 56 VAND. L. REV. 1781, 1795–96 & nn.42–44 (2003) (discussing “overadvocacy” of legal incentives).

⁷⁶ Russell Korobkin, *Possibility and Plausibility in Law and Economics*, 32 FLA. ST. U. L. REV. 781, 781, 795 (2005); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054; George Stigler, *Economists and Public Policy*, 1982 REGULATION 13–16 (May–June 1982).

⁷⁷ See Balganesh, *supra* note 77, at 1591–92; Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1589–92 (2008); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1141–42, 1198–99 (2001); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1058.

The canon of incentives and costs states that humans and human institutions facing a choice in conditions of scarce resources (thus requiring a choice) will act in ways that achieve or realize (maximize) the incentives and avoid (minimize) the costs.⁷⁸ When the actor under examination is government, the rhetoric of the discipline defines the benefits and rewards offered or imposed by government as incentives and the costs imposed or perpetuated by government as taxes or externalities.⁷⁹ When the actors under examination are private parties, the rhetoric of the discipline defines incentives and costs in economic terms such as offers, inducements, price, or rent.⁸⁰ The presumption is that humans are motivated to alter their behavior in response to incentives and costs.⁸¹

The language of economics—cost, benefit, incentives, disincentives, externalities, and economics—already is widely embraced in the law. Courts and scholars alike have widely embraced the language of incentives and costs in their discussions of law and legal analysis as part of the general acceptance of

⁷⁸ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 4; Philip B. Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797, 829–30, 848–49 (1973); Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79 CHI.-KENT L. REV. 431, 448–49 (2004).

⁷⁹ See generally W. KELLER, *TAX INCIDENCE: A GENERAL EQUILIBRIUM APPROACH* (1980); POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 22; Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1740 (1982); Jeffrey Evans Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447, 1463–64 (1991).

⁸⁰ Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 STAN. L. REV. 1161, 1167–68 (1993); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 492–94 (1988); Richard S. Markovits, *Second-Best Theory and the Standard Analysis of Monopoly Rent Seeking: A Generalizable Critique, a “Sociological” Account, and Some Illustrative Stories*, 78 IOWA L. REV. 327, 329–30 & n.3 (1993); Roger G. Noll, *“Buyer Power” and Economic Policy*, 72 ANTITRUST L.J. 589, 600–01 (2005).

⁸¹ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 4; Korobkin, *supra* note 79, at 781, 795; George Stigler, *supra* note 79, at 13–16.

economic considerations in legal analysis, as suggested by the following chart:

Database ⁸²	Cases or Articles using the term “cost” with “benefit” ⁸³	Cases or Articles using the term “incentive” with “law” or “government” ⁸⁴	Cases or Articles using the term “disincentive” with “law” or “legal” or “government” ⁸⁵	Cases or Articles using the term “externality(ies)” ⁸⁶	Cases or Articles using the term “economic(s)” with “law” or “analysis” ⁸⁷
ALLFEDS	5225	2093	186	170	4303
ALLSTATES	3423	924	88	86	1935
JLR	10,000+ ⁸⁸	10,000+	1447	10,000+	10,000+
BRIEFS	1465	536	58	43	1014

This chart (a taxonomy, an economic-friendly demonstration of data—a topos of arrangement or trope of style) indicates that the language (i.e., the rhetoric) of costs and incentives is fairly common in legal analysis among courts and in legal scholarship. Legal authors—judges, scholars, and practitioners—already are employing incentives and costs language in substantive legal discourse with significant frequency. Every time an author writes about a cost-benefit analysis, every time a change in the law is said to “incentivize” certain conduct, every time a license or permit application process is said to provide a disincentive to an activity,

⁸² Westlaw database for all federal cases since 1945, all state cases since 1945, all journals and law review articles, and appellate briefs filed in ten state courts of appeals (Arizona, California, Connecticut, Illinois, Indiana, Maryland, Ohio, North Carolina, Washington, and Wisconsin) with coverage of appellate briefs ranging by state; the earliest coverage is 1991–present (Washington) and the latest is 2006–present (Arizona).

⁸³ Westlaw search terms used: cost /2 benefit.

⁸⁴ Westlaw search terms used: incentive /5 law legal government.

⁸⁵ Westlaw search terms used: disincentive /5 law legal government.

⁸⁶ Westlaw search terms used: externalit!

⁸⁷ Westlaw search terms used: economic /2 law analysis

⁸⁸ Entries marked 10,000+ indicate search results exceeding 10,000 documents (articles).

every time a change in procedural rules is said to impose an “externality” on the cost of litigation, the author uses a rhetorical trope of style (a figure of speech) to discuss laws and legal conditions as incentives or costs in contexts that are not necessarily business or contract settings or do not involve the calculation of pecuniary sums or damages.⁸⁹

The basic statement that humans respond favorably to incentives and not favorably to costs disguises the rhetorical complexity of this presumption when it comes to making predictions about human behavior in legal situations and in response to legal conditions. First, incentives or costs must be designed, communicated, and recognized by the human actor or institution; government must correctly design and communicate its actions so as to offer the benefit or impose the tax that government intends to offer to or impose on its audience of citizens, and private actors must correctly design and communicate their actions so as to offer the correct intended inducement or impose the intended price or rent.⁹⁰ Second, and equally important to the rhetoric of the discipline, is the fact that the action must be perceived and understood by the human audience, the object or recipient of government’s or a private actor’s action, and what should be perceived and understood as an incentive as opposed to a cost is not always a simple process for humans.⁹¹

The rhetorical canon of incentives and cost is closely associated with the canon of rational choice: the design, communication, perception, and motivation concerning incentives and costs require analysis and an understanding of the rhetorical audience and the rhetorical situation.⁹² Scientific empirical analysis

⁸⁹ See, e.g., THOMAS CONLEY, *RHETORIC IN THE EUROPEAN TRADITION* 15 (1990); Levine & Saunders, *supra* note 18, at 118–21; Fred A. Simpson & Deborah J. Selden, *When to Welcome Greeks Bearing Gifts—Aristotle and the Rules of Evidence*, 34 TEX. TECH L. REV. 1009, 1011 (2003).

⁹⁰ See *infra* Part II.A.4.

⁹¹ See *infra* Part II.A.4.

⁹² When is a situation “rhetorical”?—When the audience of the message in the situation has the opportunity to alter reality. When the audience has no choice, the situation is not rhetorical. A situation is made up of: subject—place—

of human behavior indicates that there are limitations on humans' abilities to understand and appreciate benefits and costs.⁹³ These limitations are assumed and represented in the rhetorical statement that humans are creatures of "bounded" abilities—bounded rationality, bounded ability to gather information, bounded perception, and bounded cognition. These bounds limit humans' abilities to perceive and understand the incentives and costs set before them, which in turn complicates the predictions and prescriptions of economists regarding the motivational effect of incentives and costs. This is the rhetorical "audience" consideration with incentives and costs.

Separately, there is the mounting scientific empirical evidence of the social, cognitive, and brain sciences that indicates that humans are situational decision-makers.⁹⁴ A consideration of the rhetorical problems of audience and situation are commonplace in rhetoric, and contemporary rhetoric in particular has covered this ground well.⁹⁵

time—audience—speaker. See Bitzer, *The Rhetorical Situation*, *supra* note 18, at 6–8, 389–92; Greenhaw, *supra* note 8, at 875–80.

⁹³ E.g., John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669 (1996); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640 (1999); Jolls, Sunstein & Thaler, *supra* note 4, at 1471; *Symposium: The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1495 (1998); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1502 (1998) [hereinafter Langevoort, *Behavioral Theories*]; Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955).

⁹⁴ See generally Hanson & Kysar, *supra* note 96, at 640; Hanson & Yosifon, *The Situation*, *supra* note 5; Hanson & Yosifon, *The Situational Character*, *supra* note 1.

⁹⁵ E.g., White, *Law as Rhetoric*, *supra* note 13, at 695:

Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials.

3. The Rhetorical Economic Concept of Efficiency

There are two kinds of efficiency in the rhetoric of law and economics: (1) formal efficiency as a preference for simple, elegant formulae and solutions, and (2) the substantive economic concepts of efficiency as a standard and goal of law and policy. Both modes employ a highly rhetorical turn. The adoption and application of the rhetorical primacy of science and mathematics carries other implications for the discipline, including, for example, that a more efficient (elegant) solution to a problem is preferred under the rhetoric of mathematics and science and subsequently under the rhetoric of economics and the rhetoric of law and economics.⁹⁶ The formal desire for efficiency in structure and form leads to a high priority for elegance and simplicity in the equations and formulae of the discipline.⁹⁷ Naturally, elegant and effective formulae that are substantively correct make an important impact regarding the understanding of economists, but I describe this mode as offering a different layer of persuasion for non-economists because non-economists can appreciate the persuasiveness of an elegant formula and simple solution because this mode of presentation promotes clarity and openness, revealing the workings and falsifiability of the reasoning.

Id.; Bitzer, *The Rhetorical Situation*, *supra* note 18, at 6–8, 389–92; Greenhaw, *supra* note 8, at 875–80.

The contemporary analysis of communication produces a formula for the speaker's invention of discourse crafted for a given situation: Exigence (a/k/a the rhetorical problem, the reason for speaking, and the urgency thereof) + Audience (mediators of change—those who may be moved from one point to another in the situation) + Constraints (the physical or psychological limitations or opportunities of the situation) = Fitting response (the speaker's purpose and objectives). See Bitzer, *The Rhetorical Situation*, *supra* note 18, at 6–8, 390–92; Greenhaw, *supra* note 8, at 875–80. This model easily can be applied to economic analysis—if the object of the incentive has no choice, then there is no opportunity for theorizing rational choice of incentives in that situation.

⁹⁶ “Mathematical elegance often becomes the primary goal, with usefulness in the realm of law, that combines logic with human experience, a mere afterthought.” Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054.

⁹⁷ See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 16; Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 *Nw. U. L. Rev.* 4, 5 (1994).

In substantive terms, law and economics assumes and advocates efficiency over more abstract concepts of fairness, morality, and justice.⁹⁸ This is not to say that fairness, morality, and justice are never incorporated into an economic analysis, but that economists find it preferable to assume such concepts into the rhetorical economic concepts of efficiency—in other words, assuming for purposes of a model or prescription that a fair, moral, and just solution will be more efficient according to one of the economic conceptions of efficiency.⁹⁹ Efficiency (or parsimony) in the rhetoric of law and economics is not just a formal imperative for methods and procedures of modeling paradigms and the formulation of hypotheses and theses, but it also has been advanced as a substantive and instrumental imperative in positive examination of conditions, normative analysis of possible conditions, and prescriptions for future conditions.¹⁰⁰ Efficiency,

⁹⁸ E.g., Russell B. Korobkin & Thomas S. Ulen, *Efficiency and Equity: What Can Be Gained by Combining Coase and Rawls?*, 73 WASH. L. REV. 329, 329–30 (1998).

⁹⁹ See, e.g., Henrik Lando, *An Attempt to Incorporate Fairness into an Economic Model of Tort Law*, 17 INT'L REV. L. & ECON. 575 (1997); Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT'L & COMP. L. REV. 157 (1994); Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 284–86, 316–17 (1998). See generally KEN BINMORE, *PLAYING FAIR: GAME THEORY AND THE SOCIAL CONTRACT* (1994); KEN BINMORE, *JUST PLAYING: GAME THEORY AND THE SOCIAL CONTRACT* (1998); DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* (1996); HERVÉ MOULIN, *COOPERATIVE MICROECONOMICS: A GAME-THEORETIC INTRODUCTION* 3, 8 (1995); H. PEYTON YOUNG, *EQUITY: IN THEORY AND PRACTICE* 8 (1994).

¹⁰⁰ See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 13–16; MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 3–6 (1993); Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260, 1263 (1982) (“A process is efficient when it yields the maximum output from given input, or equivalently, when it yields a given output with the minimum input.”); Frank I. Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307, 309 (1979) [hereinafter Michelman, *Comment*]; Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1032–35 (1978) [hereinafter Michelman, *Norms*]; Thomas S. Ulen, *The Efficiency of Specific Performance*:

therefore, has become a rhetorical imperative in and of itself in law and economics.¹⁰¹

The elevation of efficiency over other concepts associated with the law, such as fairness, morality, and justice, makes the work of law and economics simpler and easier in many ways,¹⁰² but more difficult in other ways.¹⁰³ The substantive meaning of efficiency in the rhetoric of law and economics is a clever twist on a common word to add a very specific, and nonintuitive meaning for efficiency in law and economics—and not just one meaning. In the rhetoric of economics, substantive and instrumental “efficiency” is defined in three, carefully crafted ways: *productive efficiency* (sometime referred to by the undistinguishing term of *economic efficiency*), in which a process or action produces the intended result with maximum utility and minimum costs;¹⁰⁴

Toward a Unified Theory of Contract Remedies, 83 MICH. L. REV. 341, 345–46 (1984).

¹⁰¹ “Although efficiency need not be the sole or primary goal of legal policy, economic analysis of law teaches that policymakers ignore the efficiency implications of their actions at society’s peril. Legal rights that are unobjectionable in the abstract are not free but rather must be measured against their opportunity costs.” Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1054 (inner citations omitted).

¹⁰² A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 3–4, 9–10 (2d ed. 1989) [POLINSKY, LAW AND ECONOMICS]; Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 301 (1979); Cass R. Sunstein, *On Philosophy and Economics*, 19 QUINNIPIAC L. REV. 333, 335–36, 348 (2000).

¹⁰³ *E.g.*, Jolls, Sunstein & Thaler, *supra* note 4, at 1508–09: laws may be efficient solutions to the problems of organizing society . . . [but] [t]he notion that laws emerge from considerations of efficiency and conventional rent seeking would probably strike most citizens as odd. . . . many laws on the books appear to be difficult to justify on efficiency grounds (for example, those that prohibit mutually beneficial exchanges without obvious externalities) and seem to benefit groups that do not have much lobbying power (such as the poor or middle class).

Id.

¹⁰⁴ Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1025, 1028–29 (1987); R. Quentin Grafton, Dale Squires & Kevin J. Fox, *Private Property and Economic Efficiency: A Study of a Common-Pool Resource*, 43 J. L. & ECON.

*Pareto efficiency*¹⁰⁵ (allocative efficiency), in which the situation cannot be altered to benefit one of the parties in the situation without making the other party worse off—better or worse off referring to the individual, subjective perceptions and preferences of the parties;¹⁰⁶ and *potential Pareto improvements* or *Kaldor-Hicks efficiency*, in which incremental gains in benefits or incentives created by a change in action exceed incremental losses or costs imposed by the change in action.¹⁰⁷

The language of efficiency is intended to facilitate full and complete communication to members of the economics discourse community and facilitate a persuasive level of communication to communicate and advocate the findings of the discipline to the outside world. Within the discipline, the rhetoric of law and economics assumes that it is easier to conceive of models of efficiency and form hypotheses of efficiency and to test these models and hypotheses of efficiency through scientific and mathematical methods of analysis than it would be to test fairness, morality, and justice using scientific and mathematical analyses. The models and forms that are developed give the appearance of rigorous scientific analysis that “proves” the hypotheses that a certain course or change in law produces efficient results,

679, 690–91 (2000). See also COOTER & ULEN, *supra* note 2, at 17; WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 611–20 (9th ed. 2004).

¹⁰⁵ See VILFREDO PARETO, 4 THE MIND AND SOCIETY: THE GENERAL FORM OF SOCIETY 1459, 1465–69 (1907) (Andrew Bongiorno et al. trans., 1935) (1907); VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY (1906) (Ann. S. Schwier trans., 1971); POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 12.

¹⁰⁶ See COOTER & ULEN, *supra* note 2, at 17; POLINSKY, LAW AND ECONOMICS, *supra* note 105, at 7 n.4; POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 13, 14, 26; Jules L. Coleman, *Efficiency, Exchange and Auction: Philosophical Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221 (1980); Richard A. Posner, *The Ethical & Political Bases of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491 (1980); Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980). See also ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 103–10, 433–35 (8th ed. 1920); ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 31–43 (1952); HAL R. VARIAN, MICROECONOMIC ANALYSIS 160–71 (3d ed. 1992).

¹⁰⁷ See COOTER & ULEN, *supra* note 2, at 18.

whichever of the three forms of “efficient” results are assumed in the models and hypotheses.

The success or failure of models and hypotheses concerning one or more of the economic definitions of efficiency is easier to observe through scientific and mathematical methods of analysis of statistics and econometric data than it would be to test a model or hypothesis of fairness, morality, or justice. Success or failure is a highly desirable observation of any practical study, and models and hypotheses of fairness, morality, and justice may suffer from the fact that they may be tautological and non-falsifiable within the rhetorical definitions of fairness, morality, and justice in the law, philosophy, or ethics. However, rational humans embrace concepts of fairness, morality, and justice, and act on them, which complicates economics predictions and prescriptions as to the effect of law and legal conditions. The result of prescriptions concerning unregulated, unconstrained, but “efficient” financial markets is revealed in stark detail in the Great Recession.

4. The Contemporary Theory of Rational Choice

Law and economics presumes that human actors in legal situations are rational and will act in rational ways in response to legal conditions. The early adopters of the law and economics analysis of law accepted a rhetorical assumption that when faced with choices, humans will respond rationally in making their choices, rather than acting randomly and capriciously; most importantly for the discipline of law and economics, it is assumed that humans will act *predictably*.¹⁰⁸ The rhetoric of this position is known generally as rational choice theory.¹⁰⁹

Over the last five decades, rational choice theory employed by law and economics analysts has produced marked success in explaining and predicting human behavior when humans are confronted by incentives, costs, or opportunities, and many of these successes have been applied to make accurate predictions of

¹⁰⁸ See KOROBKIN & ULEN, *Law and Behavioral Science*, *supra* note 4, at 1055.

¹⁰⁹ *Id.*

the effect of existing laws or changes in the law on the behavior of humans subject to the laws.¹¹⁰ The successes produced under the rational choice theory lead some to argue that rational choice theory, defined broadly enough, and shaped to encompass all areas where predictions are reliable and verifiable and to exclude the areas and phenomena where predictions are unreliable and refutable, is all that an economic approach to the law requires.¹¹¹ In fact, some argue that the “correction” applied to economics by behavioral science—to reject many if not most of the assumptions represented by the rational choice theory—means that a behavioral approach to law and economics does not fit within the rhetoric of economics or law and economics at all.¹¹² They argue that analysts of behavioral science may be applying psychology, or sociocultural, or cognitive theories to the law, but they are not applying economics.¹¹³ This is indeed a crisis within the rhetoric of the discipline.

The definition of what it means to be “rational” in response to legal conditions and the weight given to the presumption of rationality differs depending on the legal situation that is being studied and the legal economist that is studying the situation. Cognitive science has indicated that situations affect decision making in ways that are contrary to traditional rational choice theory of maximizing self interest.¹¹⁴ A large part of the correction in the rhetoric of traditional law and economics advanced by the proponents of a behavioral approach to law and economics is a correction in the definition of rationality and the weight given to

¹¹⁰ See *id.* at 1053–54.

¹¹¹ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1553–58 (1998) [hereinafter Posner, *Rational Choice*].

¹¹² *Id.* at 1558 (“If there is any theory in their approach, it is not an economic theory.”). See *infra* Part III.C.

¹¹³ Posner, *Rational Choice*, *supra* note 116, at 1558 (“They take a psychological approach to phenomena that are sociological and psychological as much as they are economic, yet call their approach economic. . . . [Their approach] would be easier to understand if it were offered to the reader as a contribution to the psychological analysis of law rather than to the economic analysis of law.”).

¹¹⁴ See generally Hanson & Yosifon, *The Situation*, *supra* note 5; Hanson & Yosifon, *The Situational Character*, *supra* note 1.

the presumption of rationality in the face of various legal conditions.¹¹⁵ The behavioral approach asserts that the definition of rationality and its weight in making predictions about human behavior in the face of legal conditions must be modified with the knowledge and understanding gained from behavioral science, which gives a clearer picture of the nature and limits of human rationality in response to legal situations.

The acceptance or at least the acknowledgement that rational choice is more bounded than traditional rational choice theories and models have predicted presents a problem for the rhetoric of the discipline and complexity in the use of rational choice theory as a rhetorical lens for legal discourse. The rhetoric of the discipline can redefine its theories and definitions of “rational” so as to incorporate the empirical observations of seemingly non-traditional, irrational behavior in legal situations requiring a choice.¹¹⁶ For example, in response to the ultimatum game studies,¹¹⁷ “rational” as a definition may be modified from a strict

¹¹⁵ There is considerable debate within both the economics and law-and-economics communities about precisely what rational choice theory is and is not. As it is applied implicitly or explicitly in the law-and-economics literature, however, it is understood alternatively as a relatively weak, or thin, presumption that individuals act to maximize their expected utility, however they define this, or as a relatively strong, or thick, presumption that individuals act to maximize their self-interest.

Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1055 (inner citations omitted).

¹¹⁶ In fact, it is only rational for law and economics scholars to attempt to preserve the theory of rational choice by expanding the definition of “rational” as this will avoid throwing out the entire canon of rational choice as an operative foundation for economic models, theories, and predictions.

¹¹⁷ Ultimatum game studies test the theory that when a person is assigned a sum and asked to offer a portion of the sum to another person with the understanding that if the other person accepts the offer, both will take away something—the offeror keeps the remainder of the sum not offered, and the offeree keeps what was offered and accepted—but neither person will take away anything if the offer is not accepted. Traditional rational choice theory predicted that a tiny sum would be offered because this maximizes the offeror’s pecuniary self-interest, while allowing the offeree to take away something, however small. The studies belied this prediction by observing that offerees routinely rejected

position that one will act to maximize selfish pecuniary interests to a broader definition that one will act to maximize his or her own interests of whatever kind, one interest being the motivation to be and to be perceived as being fair in bargaining.

Whether the rational choice theory is definitional (e.g., humans rationally make choices to maximize their ends),¹¹⁸ or based on a conception that humans make choices to maximize their expected utility from the choices made,¹¹⁹ or based on an assumption of human self-interest,¹²⁰ or humans' motivation toward wealth

small offers, for example less than 20% of the sum, and offerors tended to offer much larger sums, frequently in the range of 40–50% of the sum assigned. Theories arising from these empirical data revolve around the concept of fairness and the parties' perception of what is fair in the situation—that offerees will not accept an offer that is perceived to be unfair even though any offer, no matter how small, increased their pecuniary well being, and offerors offered a greater portion with an apparent motivation of trying to be fair or at least to be perceived as being fair. This prompts researchers to include fairness and the perception of fairness as factors in conceptions of rational self-interest. See, e.g., Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 33–39 (1999); Kent Greenfield & Peter C. Kostant, *An Experimental Test of Fairness Under Agency and Profit-Maximization Constraints (With Notes on Implications for Corporate Governance)*, 71 GEO. WASH. L. REV. 983 (2003); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435, 474–75 (2000); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1818–19 (2000); Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 459.

¹¹⁸ See Richard A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 24 (1997); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1061.

¹¹⁹ See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 18 (1994); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 83 (1993); Geoffrey Brennan, Comment, *What Might Rationality Fail to Do*, in *THE LIMITS OF RATIONALITY* 51, 52 (Karen Schweers Cook & Margaret Levi eds., 1990); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1062.

¹²⁰ Jennifer Arlen, Comment: *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1766 (1998); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1320 (1986); Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1065.

maximization,¹²¹ the consequences for legal discourse points to the same goal: that law should be communicated to people in a manner that maximizes the incentives to the reader to accept and be persuaded by the legal communication, and minimizes the costs imposed by the communication.

CONCLUSION

The rhetorical canons of law and economics did not cause the Great Recession. Canons of rhetoric are tools for legal discourse, not universal goals and not perfect solutions. Law and economics provides a rhetorical lens through which a legal author might examine and improve the persuasiveness of her discourse. But a lens, like any other tool, is only as good as its user. My examination and critique of the canons seeks to reveal the interconnected relationships of the canons so as to trace the canons, and the assumptions and theories that they represent, in ongoing legal economic discourse.

Modern and contemporary rhetoric has advanced and improved upon the basic perceptions of human behavior and knowledge of human nature of the ancient rhetoricians, but the more complex models of reasoning in contemporary rhetoric have not replaced the classical rhetorical concept of ethos. Contemporary rhetoric has learned lessons from cognitive studies and brain science that confirm the importance of the classical rhetorical concept of pathos and the necessity that rhetoric examine the values of the audience in the rhetorical situation so as to anticipate the emotional reaction of the audience to the discourse. Similar lessons are being learned in contemporary law and economics as brain science and cognitive studies add to our “understanding of understanding” and motivate our study of motivation, adding to the behavioral science that seeks to improve the designing of incentives in the face of new conceptions of rational choice. Each discipline can learn lessons

¹²¹ COOTER & ULEN, *supra* note 2, at 26; POLINSKY, LAW AND ECONOMICS, *supra* note 105, at 10; Korobkin & Ulen, *Law and Behavioral Science*, *supra* note 4, at 1066.

from the other about the motivation and persuasion of different audiences in different situations.

Contemporary rhetoric can learn much from the new school of contemporary rhetoric, law and economics. Efficiency, when used in appropriate ways in appropriate rhetorical situations, can improve discourse in style, arrangement, and invention. The expression of legal conditions and legal effects in the language of incentives and costs inspires imagination that allows better understanding of the advantages and disadvantages of laws and legal policy; its widespread acceptance in the law is only further evidence of the rhetorical power of the language across many areas of the law and many legal situations. The persuasiveness of mathematics and science extends to their forms and the substance of their proofs, and the use of the methods and forms may create meaning and inspire imagination that improves comprehension and understanding. The forms of mathematics and science can promote clarity and open demonstration, permitting examination of the workings of the discourse and promoting the opportunity for falsification and rebuttal.

The rhetorical tools of law and economics are powerful, but not universally persuasive. A topic of invention is a single place to find a method of argumentation, not the only place. Many audiences will not respond to mathematical and scientific forms, especially if they are used to attempt to avoid a primary question of fairness or justice. The intuitive uses of efficiency in form (elegance, openness, and clarity) and in the elimination of costs and waste may be widely persuasive, but other economic rhetorical turns on efficiency (*Pareto* and *Kaldor-Hicks* efficiency) are best left to the discourse of economists. Incentives and costs is a language, and many rhetorical situations accept this language, but the general application must fit the topic and the situation; simply identifying something as an incentive or a cost will not be persuasive if the audience or the situation demands a different topos for argument or a more apt trope of style.

The ethos of the speaker remains critical in the rhetoric of law and economics. Many of the sharpest and deepest criticisms of

contemporary economics start with the assertion that mathematical and scientific methods of daunting complexity are used to hide the workings of the reasoning, not to promote understanding or persuasion. The method is not rhetoric but a resort to the cudgel, used to overpower the audience with coercion not persuasion. The formula might hide the workings of the reasoning rather than openly demonstrate the reasoning for falsification or rebuttal, all under an implied challenge and a dare to rebut the force of such a powerful device. Charts and diagrammatics may be used to distract the audience or trick them into believing a mathematical or scientific analysis was performed to produce the assertions made in the rhetoric, when little or no math or science was involved. Quantitative analysis may crunch data the true meaning of which is buried in the assumptions made that chose what data to collect and what to exclude, and in the premises drawn from the assumptions that determined the possible conclusions that could be drawn from the experiment or analysis.

Law and economics relies on mathematics and science, efficiency, incentives and costs, and rational choice theory for full and complete communication with legal economists, but often uses the same topics and tropes as powerful props in communication with lawmakers and policy-makers—again, rightly or wrongly according to the ethos of the speaker and the communication.¹²² The canons of law and economics rhetoric, like the canons of the other schools of contemporary rhetoric, may be employed to promote effective communication for the purpose of persuasion, or be used as *mere* rhetoric, to distract, confuse, obfuscate, or coerce the audience. This is a lesson for all rhetoricians, those of law and economics and of general legal discourse.

¹²² My colleague, David Herzig, summarized this lesson by repeating the apt comment, “Statistics never lie—but liars use statistics.”