This sixth volume of the Polish Yearbook of Law & Economics contains a collection of articles selected, following a separate review process, from papers delivered at 4th Polish Law & Economics Conference, which took place at the Warsaw School of Economics on October 23–24, 2015. About 70 scholars, students and practitioners were participants of this Conference organised by the Polish Association of Law & Economics (PSEAP) and Warsaw School of Economics, in cooperation with the Centre for Economic Analyses of Public Sector (CEAPS) at Faculty of Economic Sciences of the University of Warsaw.

"From the fundamentals to concrete applications. The yearbook has it all. It takes the reader on a challenging and informative journey regarding current theoretical and practical contributions in Law and Economics and its most recent applications in Poland. A great read."

Prof. Peter Lewisch, University of Vienna Law School, Board Member of the European Association of Law and Economics

"The impressive sixth volume of the Polish Yearbook of Law & Economics presents important and interesting papers, which mostly analyze Polish economic and legal regulations. This is especially important for introduction of rules of Law and Economics to legal practice and proper shaping of government policies in our country. Therefore I welcome this Yearbook with great enthusiasm."

Prof. Andrzej Baniak, Department of Economics, Central European University, former Director of the MA Program in Law and Economics

Polish Yearbook of Law & Economics Vol. 6 (2015) contains papers by scholars both from various Polish universities and from abroad. They include: Prof. Ejan Mackaay, Prof. Alexander Wulf, Dr. hab. Piotr Tereszkiniewicz, Prof. Włodzimierz Szpringer, Mariusz Szpringer, Prof. Krystyna Nizioł, Dr. Marcin Menkes, Agnieszka Orfin, as well as the winner of the Best Student Paper Prize competition accompanying the Conference (Anna Lewczuk). Topics covered range from reflections on the origins, essence, and future of Law and Economics, to specific issues within such areas as contract law, financial law, and economic analysis of crime.
Polish Yearbook of Law & Economics
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From the Editors

Jarosław Bełdowski (Warsaw School of Economics)
Katarzyna Metelska-Szaniawska (University of Warsaw)
Louis Visscher (Erasmus University Rotterdam)

We have the pleasure to present the sixth volume of the *Polish Yearbook of Law & Economics* encompassing a collection of articles selected on the basis of an additional review process from papers presented at 4th Polish Law & Economics Conference. This conference, organized five years after the inaugural Polish Law & Economics Conference, took place at Warsaw School of Economics on October 23-24, 2015 and was a joint initiative of the Polish Association of Law & Economics (PSEAP), Warsaw School of Economics, and the Centre for Economic Analyses of the Public Sector (CEAPS) at the Faculty of Economic Sciences of the University of Warsaw. With its two days of presentations, covering a wide range of topics analyzed from the Law and Economics perspective, the conference brought together 70 scholars, students and practitioners interested in the Economic Analysis of Law and related disciplines, both from Poland and other countries. The conference program consisted of keynote lectures delivered by Prof. Ejan Mackaay (Université de Montréal) and Prof. Hans-Bernd Schäfer (Bucerius Law School), more than 20 regular presentations, as well as a student panel (three speakers). Detailed information about the Conference is available at the Polish Law & Economics Conference website (http://www.lawandeconomics.pl).

This sixth volume of the *Polish Yearbook of Law & Economics* contains three sections: Featured Article with Ejan Mackaay’s “Law and Economics: From where, to where”; the Articles section including six papers selected from those presented during the aforementioned conference (their final versions resulting from an additional review process); as well as a Student Section consisting of the paper, which was awarded the 1st prize in the Best Student Paper Prize contest accompanying the Conference.
In his occasional paper, based on the keynote lecture delivered during the 4th Polish Law & Economics Conference, Ejan Mackaay reaches down to the origins and essence of Law and Economics as a research program. His overview of where this research program came from, what it has done and where it may be heading emphasizes the role of Law and Economics in identifying social effects of legal rules and, therefore, alerting law-makers and entire societies to situations where legal texts fall out of line with their social functions. While various legal institutions have proven their tremendous significance for economic growth throughout the centuries, inspired by the recent seminal work by Deirdre McCloskey, Ejan Mackaay argues that the legal community also needs to pay due attention to promoting the public debate by safeguarding basic freedoms – of expression and of religion, and providing open access to the world of ideas. Such a perspective on the role of Law and Economics is likely to open doors for new questions and developments within the Economic Analysis of Law.

The contributions included in the Articles section of this Yearbook focus on topics falling within three important areas of Law and Economics: (1) contract law – with Alexander Wulf’s empirical analysis of cross-border consumer contracts in the European internal market; (2) financial law – with three papers by Włodzimierz and Mariusz Szpringer (on the role of central counterparties in promoting financial market stability), Krystyna Nizioł (on interchange fee regulation), and Marcin Menkes (on regulation of the Polish corporate bond market); as well as (3) crime – with Agnieszka Orfin’s contribution on the efficiency of criminal proceedings. The papers represent a stimulating blend of theory and empirical analysis, yielding valuable recommendations and confirming the role of Law and Economics as an important complement to traditional legal scholarship.

Finally, the Student Section of this volume presents a paper by Anna Lewczuk – winner of the Best Student Paper Prize contest accompanying 4th Polish Law & Economics Conference, entitled “Assessment of the French Crime Prevention Policy in the Light of Various Economic Theories of Crime”.

Having briefly presented the contents of the volume we leave the Reader to explore the subsequent chapters in more detail.
Chapter 1

Law and Economics: From where, to where

Ejan Mackaay (Université de Montréal and CIRANO)

1.1. INTRODUCTION

The major discoveries laying the foundations for what we now know as “Law and Economics” are about half a century old. To see how far we have come, let us step back to the middle of the 20th century to see how we then saw law and the neighbouring sciences and compare it with how we now see it (section 1.2 below). Within the social sciences, Law and Economics has had the most to contribute to our understanding of law and we will have to explore why that is (section 1.3 below). Much as we may agree that the efficiency improvements that Law and Economics focuses on are worthwhile, they do not explain by themselves the fantastic jump in growth (30 to 100 times over the past two centuries) experienced in the developed countries and now being exported to other regions. What was it that caused the jump in growth and what does that have to say to Law and Economics scholarship? (section 1.4 below).

1.2. LAW AND THE SOCIAL SCIENCES

In the middle of the last century, there was renewed interest in exploring what the social sciences could contribute to the law, empirically as well as theoretically. In America, this drive may have been due to the influence of the American Legal Realists and of Sociological Jurisprudence. The American jurist, Oliver W. Holmes had written in 1897 already: “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 the master of economics” (Holmes

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1 Based on the keynote lecture delivered by the author at the 4th Polish Law & Economics Conference on 23 October, 2015.
The drive to bring scientific methods to bear on the law was well expressed in a 1949 article by Lee Loevinger (Loevinger 1949). He used the term “jurimetrics” to designate it. The drive, but not the term, appealed to sociologists, political scientists, psychologists and, from the 1960s on, information technologists. A special issue of the American law review *Law and contemporary problems* published in 1963 was devoted to Jurimetrics (Baade 1963). Significantly, economists were absent from these early initiatives.

By 1969 the Norwegian scholar Aubert was able to put together a reader displaying a whole range of insights that sociology might contribute to law (Aubert 1969). Political scientists looked into the mind and background of justices of the top courts in an effort to predict how they would decide (Schubert 1964, 1965). Psychologists attempted to find out what their discipline had to say about the reliability of witnesses and other aspects of procedural justice (Thibaut, Walker 1975). Other psychologists tried to use insights from their discipline to design a procedure for legal problem solving as a teaching tool (Crombag et al. 1975). Many of these explorations were linked to the use of logic and of computers, the new tool that seemed to hold promise for improved data processing, text retrieval, formalisation of legal reasoning and even artificial intelligence for legal purposes.

By the late 1960s these explorations were still considered exploratory, peripheral to legal scholarship. They were referred to as the “law and the elephant disciplines”. In 1969, a 1060-page reader was published in the US under the title *Law and the Behavioral Sciences*, collecting what we then thought we knew (Friedman, Macaulay 1969). A review of the book describes it as the “latest forward thrust in the long campaign to bring lawyers and social scientists together in mutual understanding” (Nunez 1970, p. 96). And the reviewer adds: “To date, too little is known about the operation of law as social institutions (e.g., juries, bail procedures, effectiveness of drug and divorce laws, the economic consequences of licensing and economic control, etc. — not known as social facts as distinguished from formal legal procedures)”.

A further observation in the review may capture the mood of the time: “In 1969, a Special Commission on the Social Sciences reported to the National Science Foundation, ‘For at least half a century able men in the legal profession have recognized the potential contribution of social science to law. For most of this period the potential has remained undeveloped. There was a strong flurry of interest (part of the ‘legal realist’ movement) during the 1920s and 1930’s, but few social science techniques or findings were actually used by lawyers. In recent years, this interest has been renewed, and seems here to stay, because the issues and problems confronting our legal institutions demand more background than the background typically brought to these problems by persons with traditional law school training’” (Nunez 1970, p. 97).2

To see how far we have come along the path outlined here, contrast a study conducted in the early 1950s by Vilhelm Aubert on the Norwegian

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The Norwegian study looked at new legislation adopted to put an end to the often abusive working conditions for live-in workers in Norwegian households (“housemaids”). The new Act replaced the older Law of Servants and instituted such measures as a general limit of 10 working hours a day, including time for meals; a clear definition of what constituted overtime and how much it was to be paid as well as a general cap on the amount of overtime that could be asked during a given week.

The first purpose of the 1950 empirical study was to see if the Act actually worked (Aubert 1967, p. 99). It was found that not only did the Act not produce its intended effects in over 90% of the cases, but it turned out to be unknown to a majority of the intended beneficiaries, the domestic workers, as well as to the housewives who employed them. In the 1960s, that an Act did not have its intended effect was apparently sufficiently newsworthy to report.

Contrast this with the Brazilian study on divorce. Until a recent constitutional reform, Brazilian couples could undo their marriage only by going through a two-year separation of bed and board. The reform, by way of a constitutional amendment that came into force on 13 July 2010, allowed them to file for divorce directly on the basis of such grounds as irreconcilable differences. The study looked into the rates of divorce and of separation for the remainder of 2010. It followed up on a similar study conducted in Portugal (Coelho, Garoupa 2006).

The researchers predicted that as the “cost” of divorce came down, more couples would choose it and that separation, being no longer required to get to a divorce, would fall out of use. These are exactly the results they found, even immediately following the coming into force of the new rules. A further interesting finding was that divorce rates were higher in municipalities with relatively higher incomes. This finding is compatible with the idea that marriage can act as a reciprocal insurance for the partners, an insurance that becomes less necessary as both of them have independent incomes.

The Brazilian study shows how we would now approach empirical studies about the law. The law affects costs and benefits faced by persons subject to it. We expect – and hence predict – that they will react to a change in the law by changing their behaviour in a largely rational manner, so as to minimise costs they incur and to maximise benefits to which they have access. Of the social sciences it is foremost economics, latecomer to the “law and the elephant” research, that has pushed this way of thinking. Let us take a look at the economic analysis of the law, or Law and Economics.

1.3. LAW AND ECONOMICS – HOW FAR WE HAVE COME

Law and Economics, though a latecomer to the drive to bring scientific methods to bear on the law, became a game changer once on board: “In any discussion
of “Law-And-”, the elephant in the room is Law and Economics (“L&E”). Economic analysis has had greater success than any other discipline as a colonizer of legal scholarship. The main contenders, Law and Society and Law and Humanities, are certainly robust in their own rights, but relative to L&E, these approaches are underweight, and their adherents have been known to seethe at the capacity of L&E scholars to smother practically every legal field in sight” (Rose 2010, p. 369).

In thinking about this “colonisation” – but, really, was economics that imperialistic? (Brenner 1980) – we might ponder the following questions: What does L&E do that traditional legal scholarship does not? What is the relationship between law as text and law as impact?

1.3.1. What L&E does that traditional legal scholarship does not do

Law and Economics started as playful explorations by economists outside their charted territory. Up until the 1950s, economists would study the market process focusing on “economic” factors affecting performance: specialisation, exchange, competition, innovation. They would recognise property rights, contracts, civil liability (tort) law, corporate and securities law, regulatory law as essential parts of the framework that allows markets to work, but saw them as fixed outside economics, to be defined and changed for reasons proper to the law and having nothing to do with optimal economic performance.

In the 1950s, economists started to venture playfully outside their traditional turf. The trailblazer here was Gary Becker, who published in the late 1950s, the 1960s and 1970s studies on the economics of discrimination, of human capital and education, of criminal behaviour and of the family (Becker 1957, 1964, 1968, 1973, 1974). That pioneering work got him the Nobel Prize in 1992.

The playful ventures outside economics territory made researchers realise that legal institutions were not fixed once for all and varied across time and space. These variations in legal institutions could have perceptible economic consequences. They surmised that legal institutions might be chosen for their desirable consequences. Rationality might then dictate what legal institutions to choose as it does the usual economic decisions.

In the 1960s, various economic scholars ventured into the law looking for new insights. Coase, through the theorem bearing his name, showed that market participants would correct a misallocated property right (to their joint advantage) and that, where high transactions costs prevented correction, guidelines could be set indicating how to allocate rights optimally (Coase 1960). Calabresi found an economic rationale underlying much of tort law (Calabresi 1961, 1970). Demsetz showed how, when increased demand for fur made furry animals scarce amongst Indian tribes hunting them and led to conflict, the tribes resolved the problem by creating forms of (group) property rights (Demsetz 1967). Manne showed that limiting shareholder liability, far from being unfair to ordinary creditors, would improve access to capital for firms needing outside financing and so stimulate innovation (Manne 1967).
Once these discoveries were publicised, a research agenda sprang up: determine whether the content of other (indeed all) legal institutions could be accounted for not merely in terms of purely legal criteria, but (also) in terms of desirable economic effects (efficiency). The early explorations by economists were based on a few simple premises:

1. That laws, by attaching penalties or rewards to particular forms of behaviour, change incentives citizens face;
2. That citizens adjust their behaviour to such incentive changes (rational choice model);
3. That this allows one to predict the effects of rules in terms of citizens’ behaviour;
4. Hence, that one can then explore whether these effects push in the direction of increasing collective well-being (economic efficiency).

For the economic “take” on law to catch on amongst lawyers, two discoveries were necessary to consolidate economists’ playful explorations. First, it turned out that, when you explore this logic throughout all fields of law, most legal rules appeared to be framed as if aimed at achieving economic efficiency (First Discovery). Moreover, the rules that appear to have this aim also struck lawyers as fair or just (Second Discovery). This second discovery would provide a handle on lawyers’ notoriously fleeting concept of justice.

It took a lawyer, Richard Posner, to spell all of this out for other lawyers and to show how it applied across all fields of the American common law (Posner 1972). Posner formalised the first discovery as the thesis that the traditional common law rules are efficient and ought to be, a thesis he maintained throughout the different editions of his textbook (Posner 1972, p. 98; Posner 2011, p. 320). Privately he is said to have conceded that it is perhaps a bit of a stretch (Priest 2012, p. 221).

In the 8th edition of his textbook, published in 2011, Posner added the remarkable statement that “economics is the deep structure of the common law, and the doctrines of that law are the surface structure” (Posner 2011, p. 315). If true, it would mean that you can use economics to explain, predict or test what legal rules for particular areas are, may be or should be. And it would allow us to see an underlying unity in the law that would escape notice on a traditional doctrinal study of it.

Within the boundaries set by these discoveries and premises, Law and Economics has provided, and continues to provide, a wealth of surprising new insights to lawyers. Unlike other “law and the elephant” approaches, including Critical Legal Studies, the enthusiasm for it has not petered out. It continues to generate a rich literature. Kronman is of the view that it is “the intellectual movement that has had the greatest influence on American academic law in the past quarter-century [of the 20th Century]” (Kronman 1993, p. 166).

Although Law and Economics provides a wealth of surprising new insights, it should not be seen as a substantive theory of law replacing lawyers’ traditional understanding of the law. Law and Economics does not say what
is and what is not properly to be considered part of the law. It is rather a method for grasping the main social effects of legal rules, as they exist or could be adopted, an impact calculus, in other words. It complements and enriches lawyers’ understanding of the law. Posner puts it like this in the 1998 Coase lecture: “(…) the role of economics in moral and political debate is to draw attention to consequences or implications that people ignorant of economics commonly overlooked. What you do with those consequences is your business” (Posner 2000).

Ultimately, law must be judged by how well it works in society. Getting a handle on the effects of rules should give us a better grasp of why we have the rules we do and allow us to design different ones if that needs to be done. So, whilst Law and Economics is only one method to be used for a circumscribed purpose within legal thinking, what it allows us to discover is so essential to any understanding of the law that it accredits Law and Economics as a necessary part of the lawyers’ toolkit (Farnsworth 2007, p. ix).

Does Law and Economics work outside the American legal system where it was discovered? The place of discovery of a scientific truth should not determine its sphere of application. Origin is not destiny. That holds for law as much as for other disciplines. Think of a Civil Code exported to different countries or of human rights (Mackaay 1997). There is no reason to conclude a priori that civil law should not exhibit a similar tendency towards efficient legal solutions. There now exist several textbooks showing that Law and Economics has much to say about civil law systems (in English: Schäfer, Ott 2004; Mackaay 2013).

It has sometimes been objected that most initial discoveries of Law and Economics were made by economists at the University of Chicago and that that might give an objectionable slant to the conclusions, justifying deprecating labels like “ultraliberalism”. The objection does not hold water. The remarkable economic take-off we now observe in Asia, lifting a third of the world population out of dire poverty, relies on letting market logic into what were before centrally planned or directed economies. The open economy and the liberal values on which it relies are precisely what the Chicago economists promoted.

The essential role of markets and profits is well explained by McCloskey in chapter 59 of her 2016 book: “But if a profit occurs — at any rate, if the profit does not come from political favors, as it does to the sugar industry or the wind-farm industry — the economy is articulating something worth attending to. It is saying, “Do more of this. People want it strongly enough to pay for it”. If a loss occurs it is saying, ‘Don’t do that. People won’t pay for it.’ The articulation comes from the dollar votes of ordinary people, a democracy of what people in aggregate are willing to pay” (McCloskey 2016, pp. 564–565).

Only the open economy does that. McCloskey again: “Modern politics is a four-way tug of war between liberalism in the sensible part of the elite, socialism in the rest of the elite, traditionalism in the peasantry, and populism in the proletariat. Only liberalism works, but the others tug vigorously” (McCloskey 2016, pp. 136, 623).
Sowell explains the mystery: “While capitalism has a visible cost-profit that does not exist under socialism, socialism has an invisible cost-inefficiency that gets weeded out by losses and bankruptcy under capitalism. The fact that most goods are more widely affordable in a capitalist economy implies that profit is less costly than inefficiency. Put differently, profit is a price paid for efficiency” (Sowell 2000, p. 753).

All of these considerations justify the attention law and economics pays to the efficiency of legal arrangements.

1.3.2. The relationship between law as text and law as impact

But, you may ask, how do these considerations on the impact of law comport with law as a discipline concerned with authoritative texts forming a coherent and seamless web?

A written law text, be it a contract, a statute, a judicial decision, is meant to convey to its addressees a relative certainty as to what they may and may not do. A law text reflects a “deal” on which you should be able to rely to plan your affairs and to coordinate your plans with those of others. To put it differently, law texts guide action and this creates “pressure in the interpretation and application of legal norms towards consistency, coherence, stability, predictability, and finality” (Bix 2005, p. 977).

At the time when the texts were drafted, they appeared to be the best we could do for the different addressees: contracts creating win-win situations between the parties, normally a sign of an efficient arrangement; legislative and judicial texts reducing or even removing uncertainty that might otherwise handicap the action of individual agents.

For this certainty effect to work, agents have to be able to rely (1) for a reasonably long time (2) on law texts written in ordinary language (3) as one would normally understand and apply them. Even admitting, as Posner contends, that the deep structure of the law is efficiency, it would be unduly cumbersome, for any difference of opinion or dispute on what a legal rule allows one to do or not, to determine the efficient solution. The application of the law as a guidance process would become impossibly lengthy and burdensome, like playing football as a chess game. To turn this round, reliance on text is efficient in the usual law and economics sense: it economises on information costs.

That is not the end of the story. Beyond a certain level of volume, density and complexity, the law texts relied on impose a logic of their own. It becomes imperative to ensure access to them as well as coherence and absence of gaps amongst the law texts (seamless web). This is the autonomy of the law.

The extraordinary development of information technology, giving us electronic databases and increasingly intelligent text retrieval systems, allows us to find our way through masses of law, in our own country and elsewhere, that would have been inconceivable a quarter century ago. At first blush, one

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