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ECONOMIC ANALYSIS OF LAW AND ECONOMICS

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ECONOMIC ANALYSIS OF LAW AND ECONOMICS

Abstract

The academic world is wonderful. Like few other professionals, we can choose what we want to do and what questions we think are important, which in our line of work means choosing what topics we want to research. But what influences our choices? This paper examines what drives scholars to select Law and Economics (L&E) as a topic for research. It does so by implementing the methodology of many L&E papers – by assuming that regulation and incentives matter.

Legal scholars face very different academic incentives in different parts of the world. In some countries, the academic standards for appointment, promotion and tenure encourage legal scholars to concentrate on L&E. In others, they strongly discourage such research. Thus, we should expect wide variation in the rate of participation of legal scholars in the L&E discourse across countries. On the other hand, economists are evaluated with similar yardsticks everywhere. Thus, participation of economists in the L&E discourse is likely to vary much less from one place to another.

The hypothesis of this paper is that the academic incentives are a major factor in the level of participation in the L&E scholarship. This "incentives hypothesis" is presented and then examined empirically on data gathered from the list of authors in L&E journals and the list of participants in L&E conferences. The data generally supports the hypothesis. In the legal academia, the incentives to focus research on L&E topics are the strongest in Israel, they are weaker in North America and weakest in Europe. In fact, the data reveal that lawyers' authorship of L&E papers weighted by population is almost ten times higher in Israel than in North America; while in Europe it is almost ten times lower than in North America. By comparison, the weighted participation level of economists – who face relatively similar academic environments across countries – in L&E research is not significantly different across countries.

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ECONOMIC ANALYSIS OF "LAW & ECONOMICS"

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[*] Assistant Professor, University of Haifa, Faculty of Law. This paper greatly benefited from comments of Jochen Bigus, Phil Curry, Gerrit DeGeest Henrik Lando, Francesco Parisi and JJ Prescott. I want to thank everyone who helped me gather the information about academic incentives in different countries including Anne van Aaken, Ronnie Eklund, Nuno Garoupa, Gerrit DeGeest and Henrik Lando. Michael Taksyak, Yonatan Kehat and Nardeen Sbait supplied excellent research assistance.

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INTRODUCTION

In the last half a century, Law and Economics (L&E) has become one of the most influential movements in legal academia. Many law scholars and economists direct much of their time and energy to this field. But what drives them (or should I say, us) to L&E? If we want to pat ourselves on the back, we would probably point to the virtues of the methodology and our interest in promoting knowledge for the benefit of all. But if we want to be more consistent with our methodological approach, we must also look for other, more direct and self-serving explanations. If consumers and suppliers, tortfeasors and contracting parties are assumed to maximize their wealth and self-interest, why aren't we?

The aim of this paper is to examine to what extent academic incentives drive scholars to L&E. Before explaining the method, let me assuage some of the possible objections, emotional or rational, to such a project. For purposes of this paper, I am both the scientist and one of the laboratory mice. It would probably be hard for a laboratory mouse to convince its colleagues that he knows what drives them to turn the running wheels. It is especially hard here. Any attempt to use economics to show that L&E scholars are not driven solely by the search for truth, might be resisted by both supporters of the methodology, who might dislike the conclusion, and opponents who are unconvinced (and perhaps unwilling to be convinced) by the method. Hence, I should explain my aim upfront. By examining the effects of incentives on L&E scholarship I do not mean to say anything about the content of L&E research, or the validity of its approach to the study of law. After all, the

bread of the baker may be excellent, even if he is partly (or even solely) interested in maximizing profits.[1] My point is not normative, but descriptive. I will try to explain why some scholars choose to engage in the L&E discourse and others do not, but by doing so, I say nothing about the importance or validity of their work.

My hypothesis is that participation in L&E weighted by population is greater where the academic incentives to be a L&E scholar are higher.[2] Therefore, I examine the academic incentives to write L&E papers, especially with regards to academic appointment and promotion procedures. I show that for economists, wherever they are, the academic incentives drive them to similar tracks. Research in L&E is equally valuable to the academic career of economists on both sides of the Atlantic. In contrast, law scholars are evaluated differently in different places. In some places, like Israel, being a L&E scholar is very beneficial. In others, like most of Europe, it is hardly a plus. Hence, one would guess that, if incentives matter to legal scholars, authorship of L&E papers is likely high in Israel, low in Europe and somewhere in the middle in the United States and Canada. On the other hand, one would predict that participation of economists in such projects is approximately the same everywhere.

The remaining of the paper is organized as follows. Part I compares the academic incentives to publish L&E papers, for economists and legal scholars in Europe, North America and Israel. Part II analyses data gathered from the lists of authors from L&E journals and examines whether it supports the incentives assumption. A few comments about the future of research in L&E are presented in the concluding part of the paper.

I. WHAT COUNTS FOR ACADEMIC SCHOLARS?

What affects academic researchers' prestige and promotion? Almost all around the world academicians are rewarded for publication. The publish-or-perish mantra has become a household motto for faculty members, at least at the early stages of their career.[3] Mostly unofficial

[1] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (James E. Thorold Rogers ed., London, Clarendon Press 1869)

[2] Weighting the number of participants in L&E per the number of scholars in Law or in Economics generally could have been a more accurate indicator to the effects of academic environment, yet it is difficult to define who is a legal scholar and to gather national data about the number of legal scholars. The differences in the rate of participation per population are probably a good proxy. *See also* note 26 *infra*.

[3] According to Wikipedia "'Publish or perish' refers to the pressure to constantly publish work in order to further or sustain one's career in academia. The competition for tenure-track faculty positions in academia puts increasing pressure

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and often ambiguous standards guide scholars to the most rewarding venues for publications. These standards are thus one of the most important factors for academic success. Though other factors can also be categorized as academic incentives, it seems that publication is the most important verifiable factor and hence it can serve as a good starting point.[4]

Economists are usually evaluated according to the same standards everywhere. Economists on both sides of the Atlantic are most rewarded

on scholars to frequently publish new work." *See* Wikipedia, http://en.wikipedia.org/wiki/Publish_or_perish

[4] Other factors might also play a role in inducing a certain type of research. Money is clearly one such factor. The Olin foundation gave about $370 million to different projects over the years, and a large part of the money went to support L&E scholars or projects. For the importance of Olin to the development of L&E *see* Henry G. Manne, *How law and economics was marketed in a hostile world: a very personal history*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS, Francesco Parisi, Charles K. Rowley, eds., pp. 309-327, 2005 Available at SSRN: http://ssrn.com/abstract=745944, at 322-323. Some argue that money cannot buy success for an academic discipline because scholars are fiercely independent and universities are sensitive to charges that their research was "purchased" in exchange for external funding. *See* Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States* at http://esnie.u-paris10.fr/pdf/garoupa_2005/Legal_Innovation.pdf. The careful reader might have noticed by now that I do not subscribe to this view. Monetary inducements work on academicians in the exact same way they work on other people. Obviously in most cases they would not convert a devoted opponent of the methodology to a supporter. But when a young scholar has to choose between few potential tracks that interest her, it is hard to believe that monetary incentives, that can also help her to advance her research, would have no effect on her decision. Still, I do not think the Olin Foundation has substantially altered the demography of the L&E scholars. See Jon Hanson & David Yosifon, *The Situation*: *An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PENN. L. REV. 130, 272-84 (arguing that the Olin Foundation played a pivotal causal role in the success of the L&E movement). People that applied to Olin grants and those who joined Olin centers were probably those who believed they could benefit from being L&E scholars. Thus, many Israelis received grants from Olin or worked for centers supported by the Olin foundation while only few European did the same. Olin might have enlarged the pie of L&E, but did not substantially change its distribution. Another factor that is sometimes mentioned as a reason for the attraction of L&E is role models. In the United States, Judge Richard Posner is usually the example. In Israel, Lucian Bebchuk might be the one. Seven of the Israeli papers in the sample below were authored by students of Lucian Bebchuk. *See* Lucian Bebchuk website at http://www.law.harvard.edu/faculty/bebchuk/CV_January%202006.pdf. Yet, again, students follow Bebchuk or Posner at least partly because they know it can help their future academic career. Hence I believe role models play a limited role in the distribution of L&E scholarship.

for publishing in core economic journals like Econometrica and the American Economic Review. L&E journals are also equally rated in most places, with the Journal of Law and Economics usually at the top of the list.[5] If the incentives hypothesis it true, then the similarity of the evaluation standards is likely to result in a similar rate of participation of economists in the L&E discourse.

Lawyers, on the other hand, face different evaluation standards in different places. In Europe, legal scholars are usually not required to publish in foreign languages at all.[6] Law is perceived as mainly a local field of research. For appointment, promotion and tenure decisions, publications in L&E journals are of limited importance and are not more valuable than a legal paper in the local language about the local law.[7] In fact, they are often of much less value. For example, for an Austrian or German candidate for a position in the academia, the need to find a chair in a university requires covering the topics of a relevant field doctrinally. There is no chair in L&E.[8] True, there are exceptions. In some countries in Europe, like Belgium, the starting point was, until lately, that every publication is equally valuable, with no advantage for publication in international journals. But since most lawyers would find it easier to publish about their own legal system in their native language, writing a L&E paper, even in such places is usually not a time-effective way to promote their career. The Netherlands is the only exception to the rule, where a few positions are reserved for L&E professors, and for them L&E publications are required. Still, the remaining legal scholars in the Netherlands are not required to write papers in non-Dutch

[5] The Journal of Law and Economics is considered a good second tier venue and, in some impact factor rankings, the Journal of Law Economics and Organization is also ranked in the list of the top 50. See Pantelis Kalaitzidakis, Theofanis P. Mamuneas & Thanasis Stengos, *Rankings of Academic Journals and Institutions in Economics*, 1 Journal of the European Economic Association, 1346, 1349. See also Pedro C. Vieira, *Top ranking economics journals impact variability and a ranking update to the year 2002*, at http://www.fep.up.pt/investigacao/workingpapers/04.06.21_WP149_Pedro%20C.%20Vieira.pdf

[6] There are few exceptions. In the field of international law, scholarly writing in English and American journals is sometimes necessary for a scholar in this field. In some countries, like Denmark, there are few academic incentives to publish in English lately, but these publications do not have to be in a reviewed journal and can equally be a chapter about Danish law in a book. Therefore, even in these cases, there are no incentives for law scholars to divert resources for the study of L&E or other non-local legal fields.

[7] Most of the information about the standards for academic success come from interviews with European scholars and email exchanges.

[8] The only exception is the Chair held today by Hans-Bernd Schäfer, an economist, at the University of Hamburg.

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journals at all. Therefore, for a European legal scholar it is usually not recommended to divert recourses to L&E study.[9]

In Israel, on the other hand, academic nomination, promotion and tenure decisions are made by interdisciplinary committees, not by lawyers. For them a paper in Hebrew is considered much less important than a paper in a prestigious foreign journal. Since the committee is not comprised only of lawyers, the publications are not required to be in legal journals. An economic journal is equally valuable and a L&E journal is even more so. True, Israeli legal scholars can still write doctrinal legal papers for American or other non-Israeli law journals, but if they want the paper admitted to a highly ranked law journal it better be about the legal system of the reviewers. Here, obviously, Israeli scholars face relative disadvantage. At least initially they know less about the details of the local legal system and culture. On the other hand, in L&E, they need to know much less about the local law and hence can compete on more equal terms. Consequently, there is a strong incentive to concentrate on L&E, even for scholars who do not define themselves L&E scholars.

American lawyers are not required to publish papers about foreign law. Yet, the federal system encourages papers that can be relevant to different legal systems within the federation, and L&E often analyze general doctrines that are not specific to one legal system. In addition, the heritage of legal realism encourages interdisciplinary legal research.[10] Hence, the highly rated law reviews are very amenable to L&E papers, much more than they are to local doctrinal papers. Still, for an American legal scholar, L&E competes with other avenues for legal research which are equally beneficial for academic promotion, including constitutional law and legal analysis of general American legal doctrines and practices. Thus, if academic incentives are the most substantial factor, the rate of participation of lawyers in the L&E discourse is likely to be the highest in Israel, lower in the United States and the lowest in Europe.

II. WHERE DO LAW AND ECONOMICS SCHOLARS COME FROM?

A. *Method*

In this section I examine the background of authors of L&E papers. Data were gathered from the table of content of L&E journals and list of

[9] See also Gerrit De Geest *Law and Economics in Belgium*, THE ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert and Gerrit De Geest, eds., 2000)
[10] See Garoupa & Ulen, supra note 4.

participants in L&E conferences during the years 2004 and 2005. The list of L&E journals was taken from Wikipedia and includes nine journals from Europe and the United States.[11] Since I am concentrating on North America and Europe, the conferences examined were of the European and American L&E associations. Each person who participated in writing a paper that appeared in a conference or a journal was counted. Those participating in writing more than one paper were counted several times accordingly. The bibliographic data about each participant were gathered from the internet and, when the data on the web was lacking, through questions directed to the scholars.

Relying on L&E journals and conferences in estimating the rate of participation in the L&E discourse may generate a number of objections. It can be argued that lawyers use economic arguments without being part of the international L&E movement. For example, Schäfer argues that although L&E is not openly used in the German legal academia, German legal scholars use economic arguments de-facto often.[12] Yet, when I refer to L&E I define it narrowly. I do not mean to refer to any legal paper using consequential arguments or to the economic effect of legal rules. For my purpose here, "Law and Economics" means the field of research that follows the work of Ronald Coase,[13] Gary Becker,[14] Guido Calabresi[15] and Richard Posner.[16] At the risk of being inaccurate I would say that what characterizes this field is usually the conscious use of economic models and methodology in legal reasoning. For that purpose, the L&E journals and conferences are good representatives of the scholarship in the field.

Participants were divided to groups, according to their nationality

[11] The journals are American Law and Economics Review, Erasmus Law and Economics Review, the European Journal of Law and Economics, the International Review of Law and Economics, the Journal of Law, Economics, and Organization, the Journal of Law and Economics, the Journal of Legal Studies, the Journal of Law Economics and Policy and the Review of Law and Economics.

[12] *See* Hans-Bernd Schäfer, *What are the Practical Implications of Law and Economics Research in Germany?* (Manuscript) (pointing out that lately corporate law scholars are referring to policy and economic consequences of legal rules in their writing)

[13] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1

[14] *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169

[15] *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, (1972)

[16] See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, (1st edition, 1970)

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(U.S.A., Canada, Europe[17], and Israel) and discipline (Lawyers and Economists). Since many participants move to the United States, temporarily or permanently, the nationality was not defined according to the current affiliation of the scholar, but according to the country in which the scholar gained his or her first academic degree.

B. *The Data*

The following table (which appears in more details in the appendix) presents the demography of the authors in L&E journals in 2004 and 2005, both in real numbers and weighted by population:

		Number of Participants				Per 10,000,000 people			
Population		Law	Econ.	L&E	Neither	Law	Econ.	L&E	Neither
299,093,237	U.S.A	31	164	40	15	1.04	5.48	1.34	0.50
32,251,238	Canada	2	17	3	1	0.62	5.27	0.93	0.31
7,109,929	Israel	5	10	9	0	7.03	14.06	12.66	0.00
400,369,441	Europe*	16	143	21	5	0.40	3.57	0.52	0.12
	Other	3	31	3	1				

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

In this table, authors were categorized according to their formal education. Authors with formal degrees in both law and economics were counted in the L&E column[18] and those with no degree in law or economics appear in the "neither" column. Importantly, the number of economists authoring L&E articles is higher than the number of lawyers everywhere. Yet, in Israel it is only two times higher than the number of lawyers, in the United States it is four times higher and in Europe it is 8.5 times higher. While the rate of participation of lawyers in the L&E discourse is extremely different from one place to another, the number of economists participating in L&E writing is relatively well correlated to the population. In the United States, Canada and Europe, there are between 3.5 to 5.5 authors per ten million people. Somewhat unexpectedly, the data reveal a high rate of Israeli economists per population in the sample, three times higher than the rate the United States or Canada.

[17] Europe, for the purpose of this paper, includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.
[18] Economists who work in law schools were also counted as L&E scholars.

The analysis above disregards the participants who have both legal and economics education. In Israel, Canada and Europe, people with both legal and economic formal background outnumbered the lawyers with no economic background. Hence, I allocated the participants in this group by what seems to be their major subject, either law or economics. Most importantly, authors with formal education in both fields who work in law schools were counted as lawyers while those working in departments of economics, as economists.[19]

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	59	176	15	1.97	5.88	0.50
32,251,238	Canada	5	17	1	1.55	5.27	0.31
7,109,929	Israel	14	10	0	19.69	14.06	0.00
400,369,441	Europe*	27	153	5	0.67	3.82	0.12
	Other	4	33	1			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

After this categorization, the picture changes slightly. Still, more economists than lawyers participate in most places. The only exception is Israel, were lawyer participation is higher. But the big picture does not vary substantially. In Europe, the number of economists authoring a L&E paper is six times higher than the number of lawyers, in Canada and the United States it is only three times higher and in Israel economists are outnumbered by lawyers. And again, the rate of participation of economists is relatively similar in Europe, the United States and Canada, between 3.8 and 5.8 participants per 10 million people, with the only exception being Israel where the rate is three times that number.

When categorizing the same participants according to their current affiliation (instead of the country of first degree) a few changes can be observed. First, the share of the United States increases, and the others decreases, because many non-American scholars are often studying or working in the United States. More interestingly, the number of the

[19] In the previous table, people were classified to the L&E column in one of the following cases (the current classification is in brackets): 1. Economists who work mainly in law schools (economists); 2. Economists who work as economists but have a legal degree in addition to their degree in economics (Economists); 3. People with a post graduate degree in law and undergraduate degree in economics (Lawyers); 4. People with degrees in both fields who work in law schools or legal institution (Lawyers).

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Dutch lawyers increases (from three to eight).[20] This increase can be explained by the rapid increase in the number of positions for L&E scholars in Dutch law schools in the last couple of years, positions that were filled by lawyers from other European countries.[21]

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	69	202	16	2.31	6.75	0.53
32,251,238	Canada	2	13	0	0.62	4.03	0.00
7,109,929	Israel	7	9	1	9.85	12.66	1.41
400,369,441	Europe*	23	146	5	0.57	3.65	0.12
	Other	0	16	0			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

An examination of participants in L&E conferences reveals somewhat different distribution. The following table is based on data from the American Law and Economics Association (ALEA) conference of 2005 and the European Association of Law and Economics (EALE) conference of 2005. Nationality was determined by the country of the first academic degree. Accordingly, there were 230 participants in both conferences with the following background:

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	63	32	5	2.11	1.07	0.17
32,251,238	Canada	5	6	0	1.55	1.86	0.00
7,109,929	Israel	21	0	0	29.54	0.00	0.00
400,369,441	Europe*	11	60	3	0.27	1.50	0.07
	Other	3	19	2			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

Few things can be observed immediately. First, the conferences are

[20] This can be observed in the detailed table in the appendix.
[21] The non Dutch legal Authors who are currently affiliated to Dutch institutions are Christoph Van der Elst (Belgium), Gerrit DeGeest (Belgium), Alessandra Arcuri (Italy), Giuseppe Dari-Mattiacci (Italy, 3 papers) and Michael Faure. Two other Belgian legal scholars that were not on the list of authors during these two years are still clearly L&E scholars and are currently affiliated to Dutch law schools (Roger van den Bergh and Ann-Sophie Vandenberghe).

more balanced with almost an equal number of lawyers and economists (while the articles are written more by economists), mainly as a result of the dominancy of lawyers in ALEA.[22] The rate of participation of economists in the conferences is still very similar in Europe, Canada and the United states with Israel being the exception, this time with no economists at all (although seven of the lawyers have a formal postgraduate degree in economics). Again, per population, the participation of lawyers from Europe is by far the smallest; it is about 5 to 7 times lower than in the United States and Canada. The rate of participation of Israeli lawyers is more than 100 times higher than of European lawyers and more than 10 times higher than of American lawyers.

III. DISCUSSION

A. *Lawyers who Choose Law and Economics*

The above analysis is consistent with the claim that participation in the L&E discourse is highly correlated with academic incentives favoring that discipline. European lawyers usually do not need to write articles in English and for them papers in L&E do not carry substantial academic benefit in appointments and promotion decisions. To the contrary: in many cases such a paper would be much less valuable to their career than a doctrinal paper in their own language. Publishing an article about the local law in a local journal may be easier as well. These are strong disincentives to overcome language and disciplinary barriers.

For Americans and Canadians, interdisciplinary papers are as valuable as legal papers for academic career advancement. There are no language barriers, since the L&E journals are in English. The most prestigious journals are also looking for articles with a national or international interest and L&E papers, like other theoretical or critical legal papers, are often general enough for that purpose. Thus, L&E is another potential course a scholar can take; not necessarily more or less valuable than concentrating on any other legal subject or type of legal discourse. Thus, North Americans are much more likely than European lawyers to author and publish L&E papers.[23]

[22] 84 of the participants in the ALEA were lawyers, and 68 were Economists. In the EALE, 19 were lawyers and 49 economists.

[23] Per population, American lawyers appear more than Canadian lawyers in L&E conferences and journals. This is not true for economists. This might be, at least partly, because language issues and academic standards in Quebec are more similar to those in Europe. In fact, there were two economists but no lawyers from Quebec in the samples of journals and conferences. An examination of Canadian L&E

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For Israeli lawyers, there are several academic incentives that generate a preference for L&E. The requirement to publish in English, preferably in the United States, makes L&E one attractive research outlet. Another factor is that legal scholars in Israel do not necessarily need to publish legal papers, and are definitely not required to publish papers about Israeli law. In addition, Israelis suffer from a comparative disadvantage in writing doctrinal papers about American law, because they are usually less familiar with the nuances of the American legal system, and may have less credibility with American JD students, who make the bulk of acceptance decisions for prestigious American law reviews. This comparative disadvantage drives them to write papers that demand less acquaintance with the local rulings and legal developments and are peer reviewed. Hence, L&E is an excellent potential path for academic promotion. To the best of my knowledge, Israel is the only western country that requires legal scholars to publish in foreign law journals articles about foreign law for academic appointments and promotion, and this requirement may well explain the unique interest Israeli scholars have in such an interdisciplinary field.[24]

B. *Economists who Choose Law and Economics*

As for economists, the rate of their participation in L&E does not substantially differ in the different places. This is precisely what the

association members list gives a similar indication. Sixteen percent of the economists in the list (19 of 118) are from Quebec while only 10% of the lawyers are from that province (5 of 50) (These data excluded members with no indicated affiliation to a Canadian academic institution in the list) http://www.canlecon.org/CLEA%20members_09mar05.xls). Still, one cannot exclude the possibility that the difference between Canada and the United States is a mere coincidence because the number of Canadians in the sample is too small.

[24] Other interdisciplinary fields, like law and society or legal history, may also be appealing for Israeli lawyers, but often not to the extent seen with L&E, because excelling in these fields requires better language skills and familiarity with local culture. An examination of Israelis participation in authorship of international law articles and articles in law and society show that Israelis are much less dominant in these fields. Israelis were only 2.5% of the authors in journals of law and Society, 1.5% in International Law Journals and 0.5% of the authors in journals of legal history based on data from 2004. In L&E Israelis were 4.6% of the authors (24 out of 520). A similar difference can be found when comparing percentage of Israelis in conferences of law and society (2.6%), legal history (0.5%) or comparative law (0.9%) with the percentage of Israelis in L&E conferences (9.7%). *See* Oren Gazal-Ayal, *Comments on the State of Law and Economics in Israel*, BAR ILAN LAW REVIEW (forthcoming, Hebrew).

incentives hypothesis predicts because the criteria for evaluating an economic publication are quite similar everywhere. The only surprise the data supply is the rate of participation of Israeli economists. It is higher than expected in authorship of articles and lower than expected in participation in L&E conferences. This might be a coincidence; the overall number of Israeli economists is relatively small.[25] Subject to this reservation, however, the results are consistent with the hypothesis.

C. Additional Comments

One might argue that the reliance on population as a proxy for the number of scholars is flawed. It might be that Israel has more law scholars per population than the United States or Canada, and that there are more American law scholars, per population, than European. Yet, it is highly unlikely that the weighted number of Israeli law scholars is about 70 to 100 times higher than in Europe, or about 10 times more than in the US. In fact, an attempt to quantify the number of law scholars in the United States, Israel and two major European countries, Germany and France, seems to indicate that the number of European law scholars is at least as high, maybe even higher, than in North America or Israel.[26]

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[25] Only 10 economists participated in writing L&E articles. This rate is high given the size of Israel, but it is still too small to draw any conclusions. On the lawyer side, the number of participants in both writing articles and presenting in conferences is 28, which is less likely to be a result of coincidence. Moreover, to strengthen the statistical validity I also examined the number of participants in the EALE and ALEA conferences of 2004. The result is consistent with the conclusions (15 Israeli lawyers of the 185 participants).

[26] Based on the directory of the Association of American Law Schools, there are 8461 law school faculty in the United States (not including visiting professors, faculty who are not professors, lecturers and instructors). *See* Association of American Law Schools, STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS TABLES 2004 - 2005 at http://www.aals.org/statistics/0405/html/0405_T1A_tit4.html. In France there are 7600 law professors (2426 full professors, and 5174 Associate Professors (Maîtres de conferences)). *See* ftp://trf.education.gouv.fr/pub/edutel/dpd/rers2005/chap9_13.pdf. In Germany, there are only 1,262 tenured or tenure track law faculty (922 professors and 360 assistant professors (*doizenten*)) . *See* http://www.destatis.de/basis/d/biwiku/hochtxt.php. In Israel the number is approximately 250 (based on a count of the faculty in the web pages of the law schools in Israel, including all tenure and tenure track lecturers, full or part time). Per ten million people, there are approximately 250 American law professors, 350 Israeli law professors, 150 German law professors and about 1250 France law professors. The difference between the weighted number of law professors in Israel, the United States and Germany is not big enough to explain why the per

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The incentives hypothesis does not tell the whole story. For example it does not explain why different legal systems adopt different standards of evaluation. Garoupa and Ulen, argue that L&E is more popular in the American legal academia than in the European one because of the remarkable competitiveness of the North American higher education and the history of legal realism which created the necessary cultural basis for absorbing L&E.[27] I do not necessarily agree with their analysis. I believe it fails to explain why L&E was absorbed in Israel, where the academia is highly regulated and universities cannot compete over salaries or tuition fees. I also believe that their hypothesis cannot account for why L&E was well absorbed in departments of economics in Europe, which are subject to the same types of regulation as European law schools. Still, my hypothesis does not contradict Garoupa and Ulen's claim, because I do not try to explain why the academic incentives are so different in Europe, Israel and North America. One might argue that this difference is the result of the competition, culture, or some other factors, and still accept that whatever causes such differences may affect participation in the L&E scholarship only indirectly, through the academic incentives.[28]

Another interesting fact the data reveal is the higher participation of lawyers in the conferences, as compared to the authorship in the journals. One possible explanation for this fact is that most L&E journals are economic oriented. They are peer reviewed journals containing short papers usually with a formal model, a type of writing more familiar to economists. Lawyers often write L&E papers in regular law journals, where the methodological requirements are less

population rate of participation of law scholars in Israel is 10 times higher than in the United States and almost 100 times higher than in Germany. *See* tables 2, 3 and 4 in the appendix. Since the weighted number of law professors in France is so much higher than in the United States and Israel, the absence of French lawyers from L&E is even more puzzling than the per population data show. Thus, a possible difference in the number of law scholars does not seem to explain the results. It is equally unlikely that the differences between Israel, Europe and North America can be explained by the average number of papers a law scholar writes in each place.

[27] *See* Garoupa & Ulen, supra note 10.

[28] One might argue that European law school lean more to the left, politically, then American law schools. According to this argument, L&E is stigmatized in Europe as a right-winged theory, and therefore is rejected by law schools. Yet, to the extent that this political factor is influential, it is again likely to impact indirectly through the academic incentives. Otherwise, one cannot explain why there are so many papers written by law school professors from the Netherlands, which is not so different politically from the rest of Europe, or why Israeli law scholars write so many L&E papers.

demanding. Economists, on the other hand, generally receive considerably less credit for law review publications. Yet, law review papers could not be counted here because it is impossible to strictly define a L&E legal paper. The number of publications in L&E journals is therefore only an imperfect proxy to the number of L&E papers. Economists are certainly over represented in this sample. Thus the conferences might tell a more accurate story about proportion of lawyers and economists in the L&E discourse.

One last comment about the different countries in Europe: aggregating data about Europe is always tricky since the cultural differences within Europe are bigger than within United States. However, examining each country is also problematic because the number of samples is too small to have any statistical validity. In any case, the examination of the data from each country indicates that the similarities are sufficient for aggregation. In almost every country, the number of economists authoring an article was at least three times higher than the number of lawyers.[29] Only one European country, Italy, had more than 4 lawyers authoring a L&E paper, a number still substantially lower than the number of American or Canadian, when weighted by population.[30]

Still, one European country, the Netherlands, justifies special attention.[31] As I mentioned before, several Dutch universities offer position for L&E scholars. As a result, members of Dutch law schools (not necessarily Dutch in nationality) often write L&E papers. Yet, like in the rest of Europe, most legal scholars are not encouraged to write for American or international journals. Hence these few L&E scholars often write for international L&E journals while other Dutch law professor almost never do. In comparison, in Israel and to some extent in North

[29] The exceptions were Greece (4 lawyers and 7 economists), Italy (6 lawyers and 14 economists), and Belgium (4 lawyers and 6 economists).

[30] Seven papers were written by Italian Scholars. Three of them were written by the same scholar, a lawyer with a Ph.D. in economics who works in a law and economics center in the Netherlands. Two other where written by graduates of the European Master Programme in Law and Economics, who are not on an academic track. Only one of them was authored by an Italian law scholar that works as a law professor in Italy.

[31] For participation of Dutch lawyers in the L&E research see tables in the appendix. Several Dutch universities have chairs for L&E, and thus appointment and promotion for these few scholars are affected by L&E publications. (I thank Gerrit DeGeest for this information). *See* Rudi W. Holzhauer & Rob Teijl *Law and Economics in Austria*, THE ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert and Gerrit DeGeest , eds., 2000) (arguing that "budget cuts during recent years put pressure on economics departments in law faculties to focus more on 'the law' and hence law and economics became an interesting issue for these departments".)

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America, many law professors that are not L&E scholars and that usually write regular legal papers for law reviews do from time to time write a L&E paper. Hence the relatively high rate of participation of Dutch scholars tells a different story than the American and Israeli one.

CONCLUSIONS

The different approach to L&E in Europe and North America has concerned many who described the development of the field.[32] Various explanations have been given to this difference.[33] A believer of economic analysis must also consider the economic explanation. Markets develop differently because of different regulation. So does the academic market for research. The regulation of academic appointments, promotion and tenure shape the incentives to participate in the L&E discourse. This simple economic insight is consistent with the data presented in this paper.

To the extent that academic incentives are a major cause for the difference in lawyers' participation in L&E research, the consequence of this analysis is substantial. If that is the case, the research in L&E can be put down or boosted up by an alteration of academic requirement. If, for example, European countries would start requiring legal scholars to publish in foreign law journals, and will reward publications in highly rated English journals, the legal academic in Europe may find much more interest in L&E. Changes in this direction are taking place in some European countries. In Flanders, a productivity measurement system is being developed (*commission Verbeke*), that will reward scholars who publish in international journals. A similar development is taking place in Italian academia. In Denmark, the ministry of science is beginning to reward publications in English. These developments might not be

[32] See Henry G. Manne, *How law and economics was marketed in a hostile world: a very personal history*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS, Francesco Parisi, Charles K. Rowley, eds., pp. 309-327, 2005 Available at SSRN: http://ssrn.com/abstract=745944, at 316-317 ("The entrepreneurial efforts in Europe were greater on the economics side than on the law side; though I do not understand why this should have been so.")

[33] *See* for example, Wolfgang Weigel, *Law and Economics in Austria*, THE ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert and Gerrit De Geest, eds., 2000) (arguing that economists were more willing to accept law and economics because they are more used to the methodology); Gerrit De Geest, supra note 9 (arguing that in continental Europe, legal science is generally seen as an autonomous science); Garoupa & Ulen, supra note 4 (arguing that the competitive nature of American Law Schools and the tradition of legal realism are the causes for the difference); Richard A. Posner, The Future of the Law and Economics Movement in Europe, 17 INT. REV. L. ECON. 3, (giving few reasons for the success of L&E in the United States)

sufficient to make a substantial change, because currently an English chapter in a book about the local Danish or Belgian law is equally rewarded and there is still no pressure on legal scholars in Belgium and Denmark to compete in the top reviewed journals. Yet these developments in the academic standards for promotion might be the first steps that would lead to an increase in European lawyers' participation in L&E. After all, even academicians are to some extent, self interest human beings.

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APPENDIX

Table 1

Participation in authorship of L&E Articles

(According to nationality of authors and educational background)

		Number of Participants				Per 10,000,000 people			
Population		Law	Econ.	L&E	Neither	Law	Econ.	L&E	Neither
299,093,237	U.S.A	31	164	40	15	1.04	5.48	1.34	0.50
32,251,238	Canada	2	17	3	1	0.62	5.27	0.93	0.31
7,109,929	Israel	5	10	9	0	7.03	14.06	12.66	0.00
400,369,441	Europe*	16	143	21	5	0.40	3.57	0.52	0.12
8,188,806	Austria	0	1	3	0	0.00	1.22	3.66	0.00
10,481,831	Belgium	2	5	4	0	1.91	4.77	3.82	0.00
5,425,373	Denmark	0	11	0	0	0.00	20.28	0.00	0.00
5,260,970	Finland	0	3	0	0	0.00	5.70	0.00	0.00
61,004,840	France	0	19	0	0	0.00	3.11	0.00	0.00
82,515,988	Germany	1	31	4	3	0.12	3.76	0.48	0.36
11,275,420	Greece	4	7	0	0	3.55	6.21	0.00	0.00
4,065,631	Ireland	0	1	0	0	0.00	2.46	0.00	0.00
59,115,261	Italy	3	12	5	1	0.51	2.03	0.85	0.17
4,632,911	Norway	0	2	0	0	0.00	4.32	0.00	0.00
10,501,051	Portugal	0	7	0	0	0.00	6.67	0.00	0.00
44,351,186	Spain	0	7	4	0	0.00	1.58	0.90	0.00
9,076,757	Sweden	0	3	0	0	0.00	3.31	0.00	0.00
7,488,533	Switzerland	0	6	0	0	0.00	8.01	0.00	0.00
16,386,216	Netherlands	2	12	1	0	1.22	7.32	0.61	0.00
60,139,274	U.K	4	16	0	1	0.67	2.66	0.00	0.17
20,750,052	Australia	1	5	1	0	0.48	2.41	0.48	0.00
128,389,000	Japan	0	1	0	0	0.00	0.08	0.00	0.00
10,060,684	Hungary	0	0	0	0	0.00	0.00	0.00	0.00
1,339,157	Estonia	0	1	0	0	0.00	7.47	0.00	0.00
50,633,265	Korea	1	2	0	0	0.20	0.39	0.00	0.00
105,149,952	Mexico	0	0	0	0	0.00	0.00	0.00	0.00
4,195,729	New-Zealand	0	2	0	0	0.00	4.77	0.00	0.00
143,682,757	Russia	0	4	0	0	0.00	0.28	0.00	0.00
22,896,488	Taiwan	0	3	1	0	0.00	1.31	0.44	0.00
184,284,898	Brazil	0	1	0	0	0.00	0.05	0.00	0.00
1,112,225,812	India	0	6	2	0	0.00	0.05	0.02	0.00
37,912,201	Argentina	0	1	0	0	0.00	0.26	0.00	0.00
27,392,442	Malaysia	1	0	0	0	0.37	0.00	0.00	0.00
74,709,412	Turkey	0	5	0	0	0.00	0.67	0.00	0.00
1,306,724,067	China	1	5	0	1	0.01	0.04	0.00	0.01
7,054,867	Hong Kong	0	0	0	0	0.00	0.00	0.00	0.00
30,182,038	Morocco	0	1	0	0	0.00	0.33	0.00	0.00
	Others	3	31	3	1				

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

Table 2

Participation in authorship of L&E Articles

(According to Nationality of authors and their dominant discipline)

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	59	176	15	1.97	5.88	0.50
32,251,238	Canada	5	17	1	1.55	5.27	0.31
7,109,929	Israel	14	10	0	19.69	14.06	0.00
400,369,441	Europe*	27	153	5	0.67	3.82	0.12
8,188,806	Austria	0	4	0	0.00	0.00	4.88
10,481,831	Belgium	5	6	0	0.00	4.77	5.72
5,425,373	Denmark	0	11	0	0.00	0.00	20.28
5,260,970	Finland	0	3	0	0.00	0.00	5.70
61,004,840	France	0	19	0	0.00	0.00	3.11
82,515,988	Germany	2	34	3	0.36	0.24	4.12
11,275,420	Greece	4	7	0	0.00	3.55	6.21
4,065,631	Ireland	0	1	0	0.00	0.00	2.46
59,115,261	Italy	7	13	1	0.17	1.18	2.20
4,632,911	Norway	0	2	0	0.00	0.00	4.32
10,501,051	Portugal	0	7	0	0.00	0.00	6.67
44,351,186	Spain	2	9	0	0.00	0.45	2.03
9,076,757	Sweden	0	3	0	0.00	0.00	3.31
7,488,533	Switzerland	0	6	0	0.00	0.00	8.01
16,386,216	Netherlands	3	12	0	0.00	1.83	7.32
60,139,274	U.K	4	16	1	0.17	0.67	2.66
20,750,052	Australia	1	6	0	0.00	0.48	2.89
128,389,000	Japan	0	1	0	0.00	0.00	0.08
10,060,684	Hungary	0	0	0	0.00	0.00	0.00
1,339,157	Estonia	0	1	0	0.00	0.00	7.47
50,633,265	Korea	1	2	0	0.00	0.20	0.39
105,149,952	Mexico	0	0	0	0.00	0.00	0.00
4,195,729	New-Zealand	0	2	0	0.00	0.00	4.77
143,682,757	Russia	0	4	0	0.00	0.00	0.28
22,896,488	Taiwan	0	4	0	0.00	0.00	1.75
184,284,898	Brazil	0	1	0	0.00	0.00	0.05
1,112,225,812	India	1	7	0	0.00	0.01	0.06
37,912,201	Argentina	0	1	0	0.00	0.00	0.26
27,392,442	Malaysia	1	0	0	0.00	0.37	0.00
74,709,412	Turkey	0	5	0	0.00	0.00	0.67
1,306,724,067	China	1	5	1	0.01	0.01	0.04
7,054,867	Hong Kong	0	0	0	0.00	0.00	0.00
30,182,038	Morocco	0	1	0	0.00	0.00	0.33
	Others	4	33	1			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

Table 3

Participation in authorship of L&E Articles

(According to countries of current institutional affiliation and dominant discipline)

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	69	202	16	2.31	6.75	0.53
32,251,238	Canada	2	13	0	0.62	4.03	0.00
7,109,929	Israel	7	9	1	9.85	12.66	1.41
400,369,441	Europe*	23	146	5	0.57	3.65	0.12
8,188,806	Austria	0	5	0	0.00	6.11	0.00
10,481,831	Belgium	3	6	0	2.86	5.72	0.00
5,425,373	Denmark	0	11	0	0.00	20.28	0.00
5,260,970	Finland	0	3	0	0.00	5.70	0.00
61,004,840	France	0	21	0	0.00	3.44	0.00
82,515,988	Germany	1	33	3	0.12	4.00	0.36
11,275,420	Greece	2	5	0	1.77	4.43	0.00
4,065,631	Ireland	0	1	0	0.00	2.46	0.00
59,115,261	Italy	0	8	1	0.00	1.35	0.17
4,632,911	Norway	0	3	0	0.00	6.48	0.00
10,501,051	Portugal	0	6	0	0.00	5.71	0.00
44,351,186	Spain	2	7	0	0.45	1.58	0.00
9,076,757	Sweden	0	5	0	0.00	5.51	0.00
7,488,533	Switzerland	0	5	0	0.00	6.68	0.00
16,386,216	Netherlands	9	8	0	5.49	4.88	0.00
60,139,274	U.K	6	19	1	1.00	3.16	0.17
20,750,052	Australia	1	3	0	0.48	1.45	0.00
128,389,000	Japan	0	1	0	0.00	0.08	0.00
10,060,684	Hungary	0	1	0	0.00	0.99	0.00
1,339,157	Estonia	0	0	0	0.00	0.00	0.00
50,633,265	Korea	0	3	0	0.00	0.59	0.00
105,149,952	Mexico	0	2	0	0.00	0.19	0.00
4,195,729	New-Zealand	0	1	0	0.00	2.38	0.00
143,682,757	Russia	0	2	0	0.00	0.14	0.00
22,896,488	Taiwan	0	4	0	0.00	1.75	0.00
184,284,898	Brazil	0	1	0	0.00	0.05	0.00
1,112,225,812	India	0	1	0	0.00	0.01	0.00
37,912,201	Argentina	0	0	0	0.00	0.00	0.00
27,392,442	Malaysia	0	0	0	0.00	0.00	0.00
74,709,412	Turkey	0	0	0	0.00	0.00	0.00
1,306,724,067	China	0	0	0	0.00	0.00	0.00
7,054,867	Hong Kong	0	1	0	0.00	1.42	0.00
30,182,038	Morocco	0	0	0	0.00	0.00	0.00
	Others	0	16	0			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.

Table 4

Participation in L&E Conferences

(According to Nationality of authors and their dominant discipline)

		Number of Participants			Per 10M people		
Population		Law	Econ	Neither	Law	Econ	Neither
299,093,237	U.S.A	63	32	5	2.11	1.07	0.17
32,251,238	Canada	5	6	0	1.55	1.86	0.00
7,109,929	Israel	21	0	0	29.54	0.00	0.00
400,369,441	Europe*	11	60	3	0.27	1.50	0.07
8,188,806	Austria	0	0	0	0.00	0.00	0.00
10,481,831	Belgium	2	2	0	1.91	1.91	0.00
5,425,373	Denmark	0	4	0	0.00	7.37	0.00
5,260,970	Finland	0	0	0	0.00	0.00	0.00
61,004,840	France	0	6	1	0.00	0.98	0.16
82,515,988	Germany	1	8	0	0.12	0.97	0.00
11,275,420	Greece	1	0	0	0.89	0.00	0.00
4,065,631	Ireland	0	0	0	0.00	0.00	0.00
59,115,261	Italy	3	11	1	0.51	1.86	0.17
4,632,911	Norway	0	1	0	0.00	2.16	0.00
10,501,051	Portugal	0	2	0	0.00	1.90	0.00
44,351,186	Spain	0	3	0	0.00	0.68	0.00
9,076,757	Sweden	0	4	0	0.00	4.41	0.00
7,488,533	Switzerland	0	2	1	0.00	2.67	1.34
16,386,216	Netherlands	1	4	0	0.61	2.44	0.00
60,139,274	U.K	3	11	0	0.50	1.83	0.00
	Others	3	19	2			

* includes the member states of the EU before the 2004 enlargement plus Switzerland and Norway.