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THE LAW AND ECONOMICS VIRUS

*Spencer Weber Waller**

For theories and schools, like microbes and corpuscles,
devour one another and by their strife ensure the continuity of life.

—*Marcel Proust*¹

INTRODUCTION

The Law and Economics movement is a leading example of a highly successful legal ideology.² Law and Economics applies economic reasoning to legal questions and in general views the creation and enforcement of legal rules primarily in terms of how legal rules and institutions promote allocative efficiency and wealth maximization. In its strongest form, the Chicago School version of Law and Economics argues that Justice is Efficiency.³

This mixture of positive and normative analysis of the law has spread in numerous ways since its introduction in the University of Chicago Law School in the late 1940s. It has spread within the legal

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¹ 4 IN SEARCH OF LOST TIME: SODOM AND GOMORRAH 291 (C.K. Scott Moncrieff & Terence Kilmartin trans., D.J. Enright ed., Modern Library 2003) (1922).

² I use legal ideology throughout this essay as “the framework of ideas and beliefs that give meaning to legal concepts and shape legal thought and discourse” Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 217 (1990); see also MICHAEL E. TIGAR & MADELEINE R. LEVY, LAW AND THE RISE OF CAPITALISM 284 (1977) (“A legal ideology is a statement, in terms of a system of rules of law, of the aspirations, goals, and values of a social group.”); cf. DANIEL BELL, THE END OF IDEOLOGY (rev. ed. 1962) (defining ideology generally as an action oriented system of beliefs).

³ See generally Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

academy so pervasively that law and economics courses are taught at most schools, and it is the dominant form of discourse in many fields.

Law and Economics also has spread from its origins in antitrust law to a wide variety of legal fields, so that virtually any area of U.S. law can be analyzed from a law and economics perspective. Finally, it has spread from the United States to other legal jurisdictions, so that an increasing number of countries are creating, analyzing, and enforcing law with an eye toward its economic consequences, usually defined in terms of allocative efficiency and wealth maximization.⁴

Despite, or perhaps because of, its many successes, Law and Economics has engendered internal and external critiques. Numerous economic and non-economic critiques have been leveled, most centering around the Law and Economics notions of utility and wealth maximization, its methodologies, and the ability and desirability of treating all legal rights and remedies as commodities to be traded in markets.⁵

The Law and Economics movement has survived most of these critiques quite nicely to become one of the dominant legal ideologies of the late twentieth century and the beginning of the new millennium.⁶ Nevertheless, the influence of Law and Economics, particularly in legal academia, is uneven. It is the dominant, if not nearly exclusive mode of discourse at certain law schools and within certain disciplines, and yet is largely absent at other schools and within other fields of the law. Much ink has been spilled in chronicling the strengths and weaknesses of Law and Economics approaches to particular legal problems and disciplines and the substance of what rules should look like under an economic approach to the law. However, there has been far less analysis of why certain fields of law and legal jurisdiction have been prone to adopt a Law and Economics approach to the law and why others have been resistant to its appeals.

A proponent of law and economics methodology will be inclined to argue that this approach has taken hold, and should be adopted even

⁴ See generally YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002) (analyzing the influence of the Chicago School of Economics on the transformation of the economies and legal regimes of Mexico, Brazil, Argentina, and particularly Chile).

⁵ The literature of such critiques is vast. One amusing, but particularly caustic, example is Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000).

⁶ See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 301-05 (1995); BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 28-29 (1994); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 83-105 (1995); Eli M. Salzberger, *The Economic Analysis of Law—The Dominant Methodology for Legal Research?!* (Univ. of Haifa Faculty of Law Legal Studies Research Paper No. 1044382, 2007), available at <http://ssrn.com/abstract=1044382>.

more widely, because it is correct and produces good results in the real world. Opponents of this methodology have argued that Law and Economics has taken hold because it is aligned with powerful interests that benefit from the adoption of more market-oriented and laissez-faire legal rules.

This essay is the first one to go beyond this type of debate and analyze in a different light the successes and failures of the Law and Economics movement to influence the discourse in other fields and jurisdictions of law. It emphasizes the institutional characteristics of some of the fields of law where the Law and Economics movement, and in particular the Chicago School form of the movement,⁷ has had the most influence, and those where it has encountered the most resistance. I argue that the institutional characteristics of the field of law are a more significant determinant of whether the Chicago School takes hold or is rejected than the correctness or the error of the substance of the analysis that it offers or the interests that it serves or opposes. In so doing, I hope to shed light on where and why the Chicago School has been rejected even where it may well be correct or even where it serves powerful interests that would profit from its adoption.

I use the metaphor of the virus to capture the dynamics of how the Chicago School has spread by penetrating a new area of the law, replicating itself, and transmitting itself to new host bodies of law or legal jurisdictions. The viral metaphor is particularly apt, not just to the spread of the Chicago School but to the spread or rejection of all legal ideologies. It both describes and predicts how an intellectual approach gains entrance into a host body of law, uses the host to reproduce and spread within that body of law, and later expresses the now multiplied virus to other nearby hosts.

Despite the potential pejorative connotation of viral metaphors, they are not intended as such. There are certainly other metaphors drawn from biology and elsewhere that can be deployed, but they neither capture the active attack and resistance that best characterizes the relationship between the spread of ideology and the fields of law under examination, nor the positive and negative virulence that often accompanies the Chicago School as it makes its claim on the discourse in a particular body of law. Viral metaphors are most helpful because they shed light to both explain and predict why some fields and bodies of law eagerly embrace this way of thinking about the law while others couldn't care less.

This essay proceeds as follows: Part I explains the virus as metaphor and how it helps analyze the process by which legal ideology

⁷ See generally JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS* 11 (2007).

spreads from host to host within the legal system. Part II uses the viral metaphor to develop a theory of the spread of legal ideology. It sets forth two tentative hypotheses to explain the relative successes of the Chicago School in some fields and its relative failures to dominate the discourse in other fields. The first hypothesis is that a more centralized host body of law is more likely to be infected by a new ideological virus. The second hypothesis is that the presence of a strong competing first principle in the host body of law will act as an effective antibody immunizing the host from the successful introduction of a new ideology, be it the Chicago School or another way of thinking and speaking about law. In particular, a body of law with a strong existing first principle of a non-consequentialist nature will be much more resistant to new ideological viruses.

Part III tests these hypotheses by examining examples of different bodies of legal discourse where the Chicago School of Law and Economics originated or was introduced. Examples drawn from U.S. antitrust law, consumer protection, child and family law, and European Union (E.U.) competition law illustrate where the Chicago School has succeeded or failed in changing the legal discourse or where it is simply too soon to tell. I conclude with brief reflections on how the viral metaphor can be applied to analyzing the spread and rejection of other schools of thoughts and bodies of law as well as some ironies that the viral metaphor suggests about the future influence of the Law and Economics movement in competition with new ideological viruses that will inevitably arise.

I. LEGAL IDEOLOGY AS METAPHORIC VIRUS

While no one has applied the virus metaphor to analyze the spread and rejection of law and economics methodology, others have applied viral metaphors and related evolutionary and epidemiological concepts to a host of legal issues. Viral metaphors have been used by Duncan Kennedy in connection with the development of the Critical Legal Studies movement.⁸ Guido Calabresi, while still Dean at Yale Law School, relied on a similar metaphor in responding to correspondence as to why Yale, as the home of legal realist movement, didn't have any "crits" on its faculty by quipping: "[T]hose with Cow Pox don't get Small Pox."⁹ Jim Chen, writing under the pseudonym Gil Grantmore,

⁸ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 73 (1997); *see also* *Critical Legal Studies (Début de Siècle): A Symposium on Duncan Kennedy's A Critique of Adjudication*, 22 *CARDOZO L. REV.* 701 (2001).

⁹ Richard Michael Fischl, *The Epidemiology of Critique*, 57 *U. MIAMI L. REV.* 475, 478 (2003).

relied on the metaphor of the bacteriophage to analyze developments in the interpretation of the Second Amendment to the Constitution in light of the events of September 11th.¹⁰ More recently, former Federal Trade Commission (FTC) Chairman William Kovacic has invoked genetic and evolutionary metaphors to analyze the state of current U.S. antitrust law in terms of its intellectual DNA.¹¹

A. *The Importance of Metaphor*

Metaphors exist at virtually every level of legal discourse. Notable sources include: sports (“three strikes and you’re out”), the anthropomorphizing of inanimate objects or legal constructs (a corporation is a person), the body, nature, the animal kingdom, disease, health, direction, size, spatial orientation, and a host of others. These metaphors both reveal and conceal ideological choices.

In the legal context, metaphors perform an important conceptual function in framing a lawyer’s, scholar’s, or judge’s understanding of complex phenomena.¹² The default metaphors that we tend to accept uncritically are often crucial to understanding a case or doctrine and define the boundary lines between the legal categories that determine relevant rules.¹³ Or as Justice Cardozo observed, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”¹⁴

¹⁰ Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 492-94 (2002). A bacteriophage, or phage, is a virus hosted by a bacterium, rather than an animal.

¹¹ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1.

¹² GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* 81 (1999).

¹³ *Id.* at 81-83.

¹⁴ *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926). There is, however, a debate in legal scholarship as to how exactly metaphors work. An important group of legal scholars have relied upon the cognitive psychology work of George Lakoff and Mark Johnson to argue that metaphors are deeply rooted in the cognitive functioning of the human mind and that legal reasoning, like any other form of human reasoning, would be impossible without routine resort to metaphor. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2002); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); 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); Carl S. Bjerre, *Mental Capacity as Metaphor*, 18 INT’L J. SEMIOTICS L. 101 (2005); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004); Steven L. Winter, *The Power Thing*, 82 VA. L. REV. 721 (1996). A slightly different view of the importance of metaphor in cognitive science is set forth in the work of Steven Pinker and summarized in his latest book, which contends that metaphor is our crucial talent as human thinkers. STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* (2007).

Other scholars and philosophers do not view metaphors in cognitive terms, but still recognize that they are powerful organizational devices that can give rise to surprising new

Outside of law, the viral metaphor is increasingly common as well. References to computer viruses are well-known in ordinary parlance. The growth of so-called viral marketing is quickly becoming equally well known.¹⁵ The everyday ordinary use of viral terminology outside of medical discourse suggests that the virus may in fact transcend metaphor altogether and simply constitute a non-metaphoric figure of speech that helps ordinary non-medical persons understand a wide variety of phenomena being studied.¹⁶

B. *The Viral Metaphor*

Understanding the nature of a virus is central to its metaphoric value. Viruses are the most abundant biological entities on the planet and second in terms of biomass.¹⁷ They are also among the most mysterious. Even the basic question of whether viruses are alive in the normal sense of the term is hotly debated, since they cannot reproduce on their own.¹⁸

meanings. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 16-20 (1989). Even those scholars not inclined to give metaphor a central role in legal thought nonetheless concede that it is an effective rhetorical device to jolt one out of an unquestioning frame of reference. RICHARD A. POSNER, *OVERCOMING LAW* 523-24 (1995). Closely related to metaphor is the notion of memes, which are hypothetical units of cultural transmissions. Thomas Cotter, *Memes and Copyrights*, 80 TUL. L. REV. 331 (2005). See generally J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 42-73 (1998); SUSAN BLACKMORE, *THE MEME MACHINE* (2000); RICHARD BRODIE, *VIRUS OF THE MIND: THE NEW SCIENCE OF THE MEME* (1995); RICHARD DAWKINS, *THE SELFISH GENE* 189-201 (3d ed. 2006); STEPHEN SHENNAN, *GENES, MEMES AND HUMAN HISTORY: DARWINIAN ARCHAEOLOGY AND CULTURAL EVOLUTION* (2003).

¹⁵ See MICHAEL BRYCE, *VIRAL MARKETING: POTENTIAL AND PITFALLS* (2007); *CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION* (Justin Kirby & Paul Marsden eds., 2006); RUSSELL GOLDSMITH, *VIRAL MARKETING: GET YOUR AUDIENCE TO DO YOUR MARKETING FOR YOU* (2002); RICHARD PERRY & ANDREW WHITAKER, *VIRAL MARKETING IN A WEEK* (2002); DAVID MEERMAN SCOTT, *THE NEW RULES OF MARKETING AND PR: HOW TO USE NEWS RELEASES, BLOGS, PODCASTING, VIRAL MARKETING AND ONLINE MEDIA TO REACH BUYERS DIRECTLY* (2007).

¹⁶ SAM GLUCKSBERG, *UNDERSTANDING FIGURATIVE LANGUAGE: FROM METAPHORS TO IDIOMS* (2001); cf. Alex Kotlowitz, *Blocking the Transmission of Violence*, N.Y. TIMES, May 4, 2008, § 6 (Magazine), at 52; Spike.com, *Popular Viral Videos*, <http://www.ifilm.com/channel/viralvideo> (last visited Oct. 15, 2009).

¹⁷ Trevor Douglas & Mark Young, *Viruses: Making Friends with Old Foes*, 312 SCIENCE 873 (2006).

¹⁸ Luis P. Villarreal, *Are Viruses Alive?*, SCI. AM., Dec. 2004, at 100; see, e.g., EDWARD K. WAGNER & MARTINEZ J. HEWLETT, *BASIC VIROLOGY* 9 (2d ed. 2004) (explaining that viruses are only “live” when in the active process of infecting a cell and replicating in that cell); Scott LaFee, *Pandemic’s Box: How Do You Contain an Evolving Avian Flu and the Threat to People?*, SAN DIEGO UNION-TRIB., Jan. 25, 2006, at F1 (“No organism is hardier than a virus, in part because it’s not really alive. Unlike bacteria and other cell-based life forms, viruses consist only of incomplete bundles of RNA or DNA. To replicate, they require the reproductive machinery of a host cell.”); Michael D. Lemonick, *The Killers All Around*, TIME, Sept. 12, 1994, at 62 (“[V]iruses are only half alive at best.”); All the Virology on the WWW—Frequently Asked

While it is debatable what viruses are in a conceptual sense, there is widespread agreement as to their composition and behavior. One of the leading medical texts states: "In essence, viruses are collections of genetic information directed toward one end: their own replication. They are the ultimate and prototypical example of 'selfish genes.'"¹⁹ In more lay terms:

They consist of little more than a shell of protein and a bit of genetic material . . . which contains instructions for making more viruses—but but no machinery to do the job. In order to reproduce, a virus has to invade a cell, co-opting the cell's own DNA to create a virus factory.²⁰

A virus also needs a method to transfer itself from one host to another.²¹ The nature of the method of transmission determines how infectious the virus will be.²² The effect of a virus also depends to a great extent on the nature of the population to which it spreads. A person, who has developed sufficiently powerful immune responses to prevent or destroy infection before it affects him, may not fall ill no matter how he first became exposed to the source of infection. Even the most easily spread or the most potent virus will have little consequences if the infection kills the patient before he has any contact with other members of the community or if the virus does not survive the demise of its host. Similarly, if the population is highly dispersed, then even a significant viral infection will have little chance to spread absent the most powerful method of transmission. In contrast, a densely packed population with frequent contact between persons may be a fertile breeding ground for infection and transmission, even if the virus is not particularly virulent nor the method of transmission particularly effective.

Questions, <http://www.virology.net/garryfavwebfaq.html> (last visited Oct. 15, 2009) (describing generally accepted views of viruses over time). *But see* Monika Haring et al., *Independent Virus Development Outside a Host*, 436 NATURE 1101 (2005) (describing an exceptional property of a newly discovered virus to develop outside of a host under certain conditions).

¹⁹ WAGNER & HEWLETT, *supra* note 18, at 3.

²⁰ Lemonick, *supra* note 18; *see also* Douglas & Young, *supra* note 17 ("The essential nature of all viruses is to infect a host cell, replicate, package its nucleic acid, and exit the cell."). As one standard virology text states: "By the most basic definition, viruses are composed of a genome and one or more proteins coating that genome. The genetic information for such a protein coat and other information required for the replication of the genome are encoded in that genome." WAGNER & HEWLETT, *supra* note 18, at 10; *see also* Villareal, *supra* note 18.

²¹ WAGNER & HEWLETT, *supra* note 18, at 15.

²² For example, the HIV virus, although devastating to its victims, is in fact relatively hard to transmit. Its principal vectors are through the direct transmission of the virus between the blood or other bodily fluids of infected persons (for example, through unprotected sexual contact), blood transfusions, or the sharing of needles between intravenous drug users. Other viruses such as the common cold and the flu are far more infectious, and can be easily transmitted through coughing and sneezing, but fortunately are far less serious for most recipients. Still other viruses can be transmitted only through insect bites or the consumption of infected food. WAGNER & HEWLETT, *supra* note 18, at 22-23.

Viruses can have a constructive, as well as a destructive, impact on society.²³ Because viruses reproduce so quickly, and without precise duplication of their genomes, mistakes happen. A gene sequence is transcribed; a protein is added, dropped, or reassigned. Viruses also can freely swap genes with each other in a process called “reassortment” that can generate new strains as well.²⁴ In other words, random mutations occur frequently, some positive and some negative.²⁵ Further, exposure to viruses is the leading source of immunity to future infection. In addition, viruses can be used as delivery devices for a number of positive medical applications.²⁶ Good, bad, or indifferent, the virus represents a fundamental building block of life and a powerful metaphor when applied to law.

II. HOW LEGAL VIRUSES SPREAD

These principles can be distilled into two working hypotheses to measure the relative success or failure of the spread of the Chicago School virus between areas of the law and between legal jurisdictions. First, the more densely packed the field, the greater the likelihood of deep impact. The more diffuse a population, the smaller the chance of dramatic effect. Second, a virus or ideology spread among a population that has a robust ideological immune system has a lesser chance of creating a lasting impact than a virus spread among a population with no preexisting ideological immune system or one that is actually favorable to the new way of thinking.

A. *The Role of Centralization*

One can thus hypothesize that the Chicago School, or any legal ideology, will be most successful when it seeks to infect an area of law or legal jurisdiction where law-making is highly centralized and where the greatest number of significant law-making actors are close by. In such a case, all else being equal, one host can transmit a new ideology

²³ WAGNER & HEWLETT, *supra* note 18. For obvious reasons, one does not hear a lot about the helpful or innocuous viruses that inhabit our planet in massive numbers and in proportion to other biological organisms. Most viruses are, in fact, innocuous, and are a leading source of genetic innovation. Villareal, *supra* note 18.

²⁴ LaFee, *supra* note 18.

²⁵ *Id.*

²⁶ Douglas & Young, *supra* note 17; see, e.g., Maggie Fox, *Stem Cells Without Embryos—Skin Cells Transformed*, REUTERS, Nov. 20, 2007, available at <http://www.reuters.com/article/latestCrisis/idUSN20581750> (last visited Oct. 15, 2009) (describing use of viruses to induce cells to act like embryonic stem cells).

to another more quickly and effectively. Additionally, the host will have a much larger untapped body of subsequent hosts to which it can further transmit the ideology in the shortest period of time. This is quite similar to the way public choice theory would predict that law-making could be most easily captured if it were highly centralized into a single, all powerful entity that could be the focus of a sustained attack of the most intensely affected rent seeking body or bodies.²⁷

Centralization can occur in many different forms as set forth in Table 1. In general, the body of law most at risk for a viral makeover is federal: concentrated in a single agency, and preemptive of all state or private enforcement. Once the virus infects its federal host, the battle would be over for the foreseeable future. Conversely, one would assume that a highly diffuse body of law—with its law-making authority distributed widely among a large number of competing institutions and players at multiple levels—would be a much more formidable body to infect, capture, and retain for any given ideology.

²⁷ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

Table 1. Centralizing Forces in American and International Law

Types of Centralizing Forces	Selected Examples
Exclusive or Primary Federal Jurisdiction, or Specialized Court	Antitrust; Securities Regulation; Class Action Fairness Act; Court of Appeals for the Federal Circuit
Agency Driven Law-Making	Federal Communications Commission, Securities Exchange Commission, Internal Revenue Service rulings and letter opinions; DOJ and FTC antitrust enforcement and policy guidelines, agency rules, agency advisory opinions, and consent decrees
Restricted Private Rights of Action	Private Securities Litigation Reform Act; Securities Litigation Uniform Standards Act of 1998; Judicially created immunities and abstention doctrines; heightened pleadings standards; state tort reform statutes
Uniform Law-Making Process	American Law Institute; National Commission on Uniform State Laws; Model Laws
Soft Harmonization of Law Internationally	Organization for Economic Cooperation and Development; International Competition Network; Basel Accords in Banking; Memoranda of Understanding
Conditionality in National Funding or International Lending Programs	Conditions imposed on federal funding of state programs; International Monetary Fund conditions on loans to developing countries
Treaties and International Conventions	World Trade Organization; European Union; regional trading blocs; United Nations Conventions; Bilateral Treaties
Common Law Processes	Rapid spread of precedent; adoption by influential jurisdictions; scholarly consensus

The presence of a uniform law-making body in an otherwise diffuse decentralized system or body of law would represent a different kind of centralizing mechanism. The presence of a specialized court with exclusive jurisdiction, such as the Court of Appeals for the Federal Circuit in patent matters, would have a similar effect. An important state such as California or New York adopting a particular ideology in a particular area of the law also could be the impetus for the spread of that approach to other states, achieving a degree of uniformity. At the international level, soft harmonization of law, conditions attached to loan and aid agreements, and treaties play a similar role. Whatever the precise method of centralization, this part of the hypothesis accounts for both the method of transmission and the population density in analyzing the effect and rate of viral spread and whether there is likely to be a minor infection or an entire population at risk.

B. *Preexisting Ideology as Antibody*

A strong preexisting ideology is analogous to the presence of strong antibodies in a patient. In terms of legal ideology, persons are most likely to have a strong negative reaction to the introduction of a new way of thinking, if they already have a previous strongly formed alternative way of looking at the same issue.²⁸

A strong commitment to a preexisting competing ideology or deep attachment to a differing first principle (particularly if deontological in nature) will render a body of law or legal jurisdiction more immune to

²⁸ Psychologists refer to this as cognitive dissonance, where a strong precommitment to one way of thinking renders subjects prone to reject different approaches as untrue, regardless of the actual merits of the new position. JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY (2007); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). Cognitive psychologists also analyze such thought patterns in terms of prototypes and family resemblances, where subjects cannot make connections between different objects or concepts unless and until the concepts under study bear enough features in common to be accepted as belonging together. WINTER, *supra* note 14, at 25-27; Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1069 (1995); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 66-68 (1998); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235. In more literary and philosophical terms, participating in one form of discourse makes us blind to the value of seeing any other way of analyzing an issue as a true or authentic form of science or analysis. MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE OF LANGUAGE (A.M. Sheridan Smith & Rupert Swyer trans., 1st American ed. 1972); MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 82-87, 117, 126-33, 233 (Colin Gordon ed., Colin Gordon et al. trans., 1980); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283 (2001). In the history of science, this is similarly revealed in the nature of paradigms and the resistance to alternative scientific theories until the old world view is literally overwhelmed and a new paradigm prevails and becomes entrenched. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

the introduction of new legal ideology, all other things being equal. Similarly, a body of law or legal jurisdiction with no coherent existing ideology, an ideology in transition or in internal conflict, or an existing similar ideology will be more receptive to the introduction of a new ideology. In viral terms, the strength, coherence, and degree of difference of the existing ideology to the invading ideological force, represents the antibodies and immune system of the existing body of law and the ability to defeat the new ideological virus seeking to find willing receptors to draw itself into the new host.

C. *The Twin Hypotheses of Centralization and Preexisting Ideologies*

The interaction of the two hypotheses, in terms of how they affect the introduction of a new legal ideology into a field or jurisdiction of law, can be set forth in a simple two-by-two table. This basic dynamic is set forth in Table 2, which depicts the expected results when a new ideological virus is introduced into a new host.

Table 2. The Relationship Between Centralization and Preexisting Ideology

Ideology/Centralization	Weak Preexisting Counter-Ideology	Strong Preexisting Counter-Ideology
High Degree of Centralization	Infection Most Likely to Succeed	Infection Contested, Outcome Indeterminate
Low Degree of Centralization	Infection Contested, Outcome Indeterminate	Infection Least Likely to Succeed

The twin hypotheses of centralization and competing first principles suggest that the bodies of law and legal jurisdictions that are most centralized and the most in disarray ideologically should be the most prone to infection and the most likely to serve as fertile hosts for retransmission of the ideological virus to other disciplines and jurisdictions. Conversely, those fields of law that are most decentralized and imbued with strong preexisting competing first principles should prove to be the most inhospitable hosts, generally rejecting the initial introduction of competing ideologies, isolating and rejecting the handful of members within the population advocating the new ideologies, and forcing the new ideology to look elsewhere for its

propagation and survival. Otherwise, the results are indeterminate and harder to predict in advance. What follows next is a series of real world examples that test these hypotheses in the various permutations of centralization and decentralization and strong versus weak preexisting ideologies.

III. THE VIRUS IN ACTION

This Part traces how and when the Chicago School virus has spread from one body of law to another and from one jurisdiction to another. Most new viruses begin with a mutation and then begin their spread. For the Chicago School strain we most care about, that mutation began in the field of antitrust, a body of law it has come to dominate. This Part begins with a brief review of the rise of the Chicago School in antitrust and continues with a look at where it has most successfully spread and where it has encountered the most resistance in order to test the working hypothesis of centralization and competing first principles as the key to understanding the spread of, and resistance to, legal ideology.

A. *Antitrust as the Beginning*

The story of the Chicago School and its influence in the legal academy, the judiciary, and the antitrust enforcement agencies has been told many times, but normally in order to either praise or to criticize its influence and policy prescriptions. Virtually all versions of the story begin with the influence of Aaron Director at the University of Chicago Law School.²⁹ Professor Director was a brilliant academic economist, teacher, and mentor, but published next to nothing.³⁰ This writer's block led to his failure to even complete his Ph.D. dissertation and an eventual appointment at the University of Chicago law school, after he was

²⁹ VAN OVERTVELDT, *supra* note 7, at 69-70 (2007) (analyzing Director's role as part of the broader history of the Chicago School of Economics); 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 309, 309 (Francesco Parisi & Charles K. Rowley eds., 2005) [hereinafter Manne, *Marketing*]; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-26 (1979); Henry G. Manne, *An Intellectual History of the George Mason University School of Law*, <http://www.law.gmu.edu/econ/history.html> (last visited Sept. 13, 2009) [hereinafter Manne, *Intellectual History*].

³⁰ One of the few antitrust pieces by Director was a co-authored essay for which his co-author and close friend, Edward Levi, almost certainly did most of the actual writing. See Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

unable to secure an appointment with any economics faculty.

Director had close personal and professional ties with the free market economist Milton Friedman³¹ and viewed antitrust through the lens of price theory, gradually building a coherent philosophy of antitrust out of his examination of discrete issues in the field. His insights included a skepticism of the then prevailing wisdom that most examples of market power, vertical restraints, and vertical integrations were anticompetitive in intent or effect. He gradually developed a view that such practices were almost always an efficient response to the elimination of free riders and other inefficiencies in the distributional process; below-cost pricing was rarely if ever anticompetitive; and unilateral conduct was rarely a matter of serious antitrust concern. In his view, the focus of antitrust law and enforcement should be cartels and only those horizontal mergers producing monopoly, or nearly so.

Director's influence as a teacher alone was such that the very concept of an economic approach to law and the specific neo-classical price theory approach to antitrust championed by Director soon spread within the University of Chicago law faculty and then elsewhere in antitrust and related disciplines through the work of former students, disciplines, and later adherents such as Ward Bowman, Lester Telser, Harold Demsetz, Wesley Liebeler, Henry Manne, Richard Posner, Edward Kitch, and Robert Bork.³²

Henry Manne identifies a key event in the spread of law and economics (but not necessarily a Chicago School approach) within the legal academy as the hiring of Guido Calabresi as a professor at the Yale Law School.³³ Calabresi was a lawyer and Ph.D. economist who did groundbreaking work applying law and economics principles to the tort and insurance fields.³⁴ For Manne, this was key since Calabresi was the first prominent scholar in the field without either a University of Chicago affiliation or pedigree.³⁵

Another key event was Manne's own relentless proselytizing of a law and economics approach that helped spread the approach and the ideology to the rest of legal academy through his own scholarship in the corporate law area and through a series of summer institutes for law

³¹ Friedman was married to Director's sister. VAN OVERTVELDT, *supra* note 7, at 69.

³² NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND* (2d ed. 2006); Manne, *Intellectual History*, *supra* note 29; Colloquy, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983).

³³ Manne, *Intellectual History*, *supra* note 29.

³⁴ 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).

³⁵ Manne, *Marketing*, *supra* note 29, at 312.

professors.³⁶ Manne also credits a similar set of programs and conferences for judges in helping to expose the judiciary to the Chicago School approach to law and economics as well.³⁷ The marketing of law and economics in general, and the Chicago School in particular, continued through an equally effective series of programs and fellowships endowed by the Olin Foundation and related organizations that helped to spread the methodology among junior faculty in law and other disciplines.³⁸

Such marketing was viral in nature, certainly in the modern colloquial sense of the term. Colleagues found these new ideas exciting. They brought them back to their own institutions and applied them to their research (or judicial decisions), exposing the ideas to their colleagues, who in turn adopted them in their own work.

The appearance of then Professor Posner's textbook *The Economic Approach to Law*,³⁹ and many similar texts was the next logical step in the spread of the virus. These texts made it easy for a professor to adopt this approach as a teaching or research methodology in virtually any field.

Returning to antitrust, it is important to understand in viral terms why antitrust was so receptive to the Chicago School in order to also understand why it fared less well in other areas of the law. Antitrust is a prime illustration of the hypothesis that the Chicago School, or any legal ideology, spreads most effectively in those hosts that are more centralized and lack a strong competing ideological antibody to new schools of thought.

The federal judiciary and the two federal enforcement agencies are the key players for antitrust law-making, given the relatively rare exclusive federal jurisdiction for federal antitrust cases. An early adopter of Chicago School thinking in Supreme Court antitrust cases

³⁶ Manne, *Intellectual History*, *supra* note 29 (estimating that close to 600 law professors had completed the summer institute by 1993); Manne, *Marketing*, *supra* note 29, at 313; *see also* Larry E. Ribstein, *Henry Manne: Intellectual Entrepreneur* (Univ. of Ill. Law & Econ. Research Paper No. LE08-009, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094904.

³⁷ Manne, *Intellectual History*, *supra* note 29 (estimating that over 400 judges had completed one or more such programs by 1993).

³⁸ John J. Miller, *Foundation's End: The Last Days of John M. Olin's Conservative Fortune*, NAT'L REV. ONLINE, Apr. 6, 2005, <http://www.nationalreview.com/miller/miller200504060758.asp> (summarizing law and economics work of the John M. Olin Foundation and its disbursing final grants before ceasing operations by 2008). For an analysis of the more general societal influence of the Olin Foundation and similar conservative foundations, see JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996).

³⁹ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, at xix, 23 (6th ed. 2003) (emphasizing coverage of almost the entire legal system); *see also* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (5th ed. 2007) (covering property, contracts, torts, the litigation process, and criminal law from an economic perspective).

was Justice Lewis Powell who played an important role in antitrust jurisprudence in the 1970s and 1980s.⁴⁰ The trend toward a Chicago School approach accelerated during the Reagan Administration, which adopted a deliberate strategy of appointing a significant number of judges to the federal appellate courts who had intellectual or literal ties to the Chicago School and substantial interest and experience in antitrust.⁴¹ Of equal importance was President Clinton's Supreme Court appointment of Stephen Breyer, who brought a strong law and economics orientation of a slightly different nature to the bench.⁴²

The Chicago School also spread to the enforcement agencies during the Reagan administration through the appointments of William Baxter, a renowned law and economics professor at Stanford and later Douglas Ginsburg, a professor of similar stature at the Harvard Law School, who attended the University of Chicago Law School and had taught antitrust and regulated industries at Harvard from an economic perspective.⁴³ During their tenure, and continuing to this day, the role of the economist and economic analysis by the legal staff has increased dramatically and remains the dominant form of discourse within both the Antitrust Division, and its sister enforcement agency the Federal Trade Commission.

While antitrust originally started as a form of federal common law in the courts, in recent decades the balance of law-making power has shifted to the federal enforcement agencies. The Antitrust Division of the Justice Department, often in concert with the Federal Trade Commission, has strongly centralized the law-making function in

⁴⁰ E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1606-16 (2004); Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, 17 ANTITRUST 8 (2002) (detailing the Chicago School influence on Justice Powell in key antitrust decisions of the Supreme Court).

⁴¹ Such appointments included Richard Posner, Robert Bork, Frank Easterbrook, Douglas Ginsburg, and Ralph Winter. VAN OVERTVELDT, *supra* note 7, at 308-11 (discussing judicial appointments of Judges Posner, Bork, and Easterbrook); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295, 332 (2008) (discussing Judge Winter's relationship with the Chicago School); Douglas H. Ginsburg, University of Chicago Law School, <http://www.law.uchicago.edu/faculty/ginsburg> (last visited Oct. 7, 2009).

⁴² STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982). The congruence between the views of Justice Breyer and those of the Chicago School is discussed in Kovacic, *supra* note 11, *passim*.

⁴³ See Stanford Univ. Senate of the Academic Council, Memorial Resolution for William Francis Baxter, Jr. (Apr. 27, 2000), <http://histsoc.stanford.edu/pdfmem/BaxterW.pdf> (last visited Oct. 15, 2009) (detailing the career of William Baxter); Ginsburg, Douglas—George Mason Law, <http://www.law.gmu.edu/faculty/bio.php?fac=20> (last visited Oct. 15, 2009) (summarizing the career of Distinguished Adjunct Professor and Judge Douglas Ginsburg). Subsequent to his executive branch service, Douglas Ginsburg was appointed to the D.C. Circuit where he currently serves as Chief Judge. *Id.*

antitrust through case selection, the exercise of prosecutorial discretion, the issuance of influential joint antitrust guidelines covering most areas of the law, the negotiation of consent decrees with defendants, the revision or elimination of older consent decrees that no longer reflect the agencies' vision of current law and/or policy, the issuance of business review letters and advisory opinions, the filing of amicus briefs in private antitrust litigation, the holding of hearings, and the issuance of reports and research.⁴⁴ The end result has been a long standing reliance on an economic approach to antitrust, normally of a Chicago School variety, most noticeably in the Republican administrations since 1980.⁴⁵

These changes have been aided by the fact that antitrust has always had strong receptors attracted to economic theory. Antitrust as a discipline has relied on economics heavily throughout most of its existence and has tended to reflect the dominant economic discourse of any particular era. Antitrust, in fact, can be thought of as an ongoing conversation between legal and economic thinking, waxing and waning with the prevailing economic paradigms.⁴⁶ The antitrust agencies are not just ideologically receptive to economic thinking, but also institutionally structured to receive such thinking, having incorporated economists into the Antitrust Division since the 1930s, and well respected lawyer/economists, such as Donald Turner, as heads of the Division in the 1960s, and a similar history at the FTC.⁴⁷

An equally important part of the centralization of the antitrust field has been the relative diminution of private antitrust litigation as a source of antitrust law-making. While private antitrust litigation continues to dwarf the number of cases brought by the federal enforcement agencies, private cases are not a source of new antitrust doctrine, and are, if

⁴⁴ See generally Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).

⁴⁵ These changes have also diminished the importance of state enforcement of the antitrust laws. The states have been important enforcers of their own antitrust laws and, as plaintiffs, of the federal antitrust laws. They often have taken positions at odds with the federal agencies and a Chicago School approach. Although beyond the scope of this essay, the states' role has also come under increasing criticism and calls for restriction as antitrust has centralized and adopted a more Chicago School perspective. See generally Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, in ANTITRUST LAW IN NEW YORK STATE ch. 1 (Robert L. Hubbard & Pamela Jones Harbour eds., 2d ed. 2002).

⁴⁶ Waller, *supra* note 28, at 296-310.

⁴⁷ SUZANNE WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION 28-31, 128-29 (1977). One small example is the elevation of the head economist in the Antitrust Division from the title of Special Assistant to the Assistant Attorney General to Deputy Assistant Attorney General, the only non-legal Deputy Assistant Attorney General in the Justice Department outside of the purely administrative area. Similarly, in the FTC, the Director of Bureau of Economics is the highest staff position, co-equal to the Directors of Consumer Protection and the Bureau of Competition, and normally the only non-lawyer at that level in the agency.

anything, an opportunity for the federal courts to further limit the reach of antitrust. Most private antitrust cases are treble damage cases seeking overcharges from alleged price fixing. Often these cases follow (or occur simultaneously) with criminal investigations or prosecutions by the Justice Department. While vital to recovering damages for direct purchasers, they are not a vital source of new doctrine creation in the antitrust field.

Even the most routine private antitrust case now faces a large and growing number of hurdles. First, the private antitrust plaintiffs bar faces all the general hurdles that the plaintiff and class action bars face in bringing cases under the heightened pleadings standard of *Twombly*,⁴⁸ getting expert testimony into evidence⁴⁹ and getting class actions certified under the Federal Rules of Civil Procedure and the Class Action Fairness Act.⁵⁰ More specific to antitrust, plaintiffs face specialized rules of standing, antitrust injury, jurisdiction, direct purchaser requirements, causation, and proof of damage requirements that make even the most routine antitrust cause of action a long and risky proposition.⁵¹

Those cases which stray outside the bounds of the consensus condemnation of price fixing by competitors unaccompanied by any proof of efficiencies (i.e., hard-core cartels) face even higher hurdles. Most lower court cases allowing novel theories or actual recoveries beyond the price fixing area have attracted the notice of the federal enforcement agencies and more often than not amicus briefs arguing for the defendant's position. The Supreme Court recently has shown more interest in antitrust and since 1993 has uniformly ruled for defendants, using private litigation as a way to further narrow, rather than expand, antitrust's domain.⁵²

In addition to centralization, antitrust is an example of a field that did not have a sufficiently robust set of competing first principles to resist the influence of the Chicago School when it entered the field. In

⁴⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁴⁹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

⁵⁰ FED. R. CIV. P. 23; Class Action Fairness Act, 28 U.S.C. §§ 1453, 1711-1715 (2006).

⁵¹ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (eliminating jurisdiction over claims by most foreign victims of antitrust violations); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (setting standing rules for private plaintiffs in antitrust cases); *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (limiting suits for damages from unlawful overcharges to direct purchasers of product or service in question); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (requiring demonstration of antitrust injury).

⁵² *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that state attorneys general stated claim in suit against foreign insurance companies and related parties); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (reversing summary judgment for defendant in private suit alleging unlawful tying of parts and services for copier machines).

the 1950s, antitrust was characterized by numerous rules that held that different types of agreements and corporate conduct were per se unlawful. There were few unifying themes to many of these cases. The prevailing economic model relied on a paradigm that industry structure largely determined industry behavior and economic performance.⁵³ As a matter of law, this paradigm normally did not provide easy rules to apply in individual cases, and as a matter of economics, was increasingly subject to empirical challenges. In the end, the old paradigm proved insufficient as a defense to change.

A strong argument can be made that as a result of this combination of factors, the dominant strain in antitrust law and enforcement for the foreseeable future in the United States is that of the Chicago School. Despite the assertion of numerous post-Chicago and non-Chicago approaches to antitrust,⁵⁴ many commentators argue we are all Chicago School now and that the Chicago School has absorbed most of the competing approaches. As early as 1979, then Professor Posner argued that the so-called Chicago and Harvard schools of antitrust were largely on the same page in analyzing any particular antitrust issue.⁵⁵ While critiquing the early Harvard school approach as episodic, impressionistic, and largely non-theoretical, he argued that most commentators had already accepted the basic Chicago School position that the proper lens to analyze antitrust was that of price theory and most, but not all, Chicago School followers had accepted various refinements and modifications of Director's original teachings.⁵⁶ He then explored the convergence of the two approaches on most doctrinal issues with the exception of economic concentration.⁵⁷ In more recent years, now Judge Posner and other commentators have forcefully continued to press the theme of convergence and Chicago School triumphalism in a wide variety of other writings and speeches.⁵⁸

⁵³ See, e.g., JOE S. BAIN, *INDUSTRIAL ORGANIZATION* (1959); Edward S. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949).

⁵⁴ See generally *POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW* (Antonio Cucinotta et al. eds., 2002) (a collection of works discussing the extent to which competition law has incorporated Chicagoan views of the economics of competition and whether this incorporation will continue). For an argument that antitrust law has moved away from Chicagoan views since the 1990s, see Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, in *POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW*, *supra*, at 69-71; Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257; *Symposium on Post-Chicago Economics*, 63 ANTITRUST L.J. 445 (1995).

⁵⁵ Posner, *supra* note 29.

⁵⁶ *Id.* at 932.

⁵⁷ *Id.* at 933-34.

⁵⁸ RICHARD A. POSNER, *ANTITRUST LAW*, at vii-x (2d ed. 2001); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995) (comparing Chicago School and post-Chicago perspectives); Kovacic, *supra* note 11, at 13-14; William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71

What is equally interesting is the growing trend for those associated with the Harvard School and other approaches to view antitrust law in similar terms. Professor Herbert Hovenkamp, the author of the current edition of the treatise begun by Phillip Areeda and Donald Turner, two of the key legal figures for the Harvard School, analyzes the growth of the law in almost identical terms.⁵⁹ The policy prescriptions in the current edition of the treatise and in his other writings are simply not that different from those advocated by a more traditional Chicago School perspective, even where Professor Hovenkamp analyzes matters in a slightly different fashion.⁶⁰ A current FTC Commissioner has referred to the convergence of both schools of thought as the intertwined intellectual DNA of modern antitrust.⁶¹

These trends are unlikely to change dramatically any time soon.⁶² Even a change in the politics or antitrust philosophy in the Executive Branch does not quickly alter the composition or discourse of the federal judiciary or the composition of the civil servants at the enforcement agencies. Legislation to reverse specific Supreme Court decisions is notoriously hard to accomplish. Agency guidelines can be modified, but are rarely jettisoned or radically altered en masse. The private antitrust bar remains subject to the same doctrinal, procedural, and practical restrictions regardless of which party occupies the White House. Moreover, the federal agencies would face many of the same problems even if they turned on a dime and suddenly began bringing more numerous and different types of antitrust cases than they have in recent years.

In addition, viruses sometimes destroy their hosts. What is more important, however, is that a virus propagates and transmits itself to other hosts before it does so. Whether positive or not, the Chicago School has transformed antitrust law, making dramatic future changes unlikely because of the very institutional and ideological changes that the Chicago School has engendered in the field. Unlike the case of antitrust in the 1950s through the 1970s, antitrust is now heavily

ANTITRUST L.J. 377 (2003) (criticizing view of antitrust history as pendular in nature and emphasizing continuity of recent enforcement regardless of political administration); Timothy J. Muris, Chairman, Fed. Trade Comm'n, Remarks at the American Bar Association Antitrust Section Fall Forum: How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy (Nov. 19, 2003), <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>.

⁵⁹ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (2d ed. 2000).

⁶⁰ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 305-12 (2005).

⁶¹ Kovacic, *supra* note 11. *But see* Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 *COMPETITION POL'Y INT'L* 59 (2007).

⁶² *See* Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, 3 *COMPETITION POL'Y INT'L* 25 (2007).

centralized with a robust set of first principles to defend. While antitrust history is hardly over, it is likely to be more resistant to the attack of new legal ideologies for some time to come for precisely the same reasons antitrust was so receptive to the introduction of the Chicago School in the first place.

The Chicago School virus, like most viruses, has mutated into more benign and more virulent forms. So-called post-Chicago economics⁶³ and behavioral economics⁶⁴ have each made a claim that antitrust intervention is warranted in a wider group of areas than current government policy; and libertarian⁶⁵ and Ayn Randian critiques⁶⁶ have suggested that intervention should be further restricted or eliminated altogether. With rare exceptions,⁶⁷ none of these more recent variants have seriously affected the case law or enforcement programs.

Antitrust was the first body of law to embrace the Law and Economics approach and remains the best example of how centralization and the lack of a strong opposing counter-ideology make a body of law susceptible to a new ideological virus. While antitrust is even more centralized than it was at the beginning of the Chicago School attack, it is the stronger ideological core that should protect the current approach for a considerable time to come.

B. *Consumer Protection Law: Decentralization as Defense*

If one were mapping the physical and intellectual relationships of fields of law, consumer protection law is probably the closest field to antitrust law.⁶⁸ One would suppose that law and economics would have migrated early and naturally from its initial successes in the antitrust

⁶³ See Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 762-72 (2004); Waller, *supra* note 28, at 304-06.

⁶⁴ See, e.g., Avishalom Tor, *A Behavioural Approach to Antitrust Law and Economics*, 14 CONSUMER POL'Y REV. 18 (2004); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002).

⁶⁵ EDWIN ROCKEFELLER, *THE ANTITRUST RELIGION* (2007); DOMINICK ARMENTANO, *ANTITRUST: THE CASE FOR REPEAL* (2d ed. 1999).

⁶⁶ *THE ABOLITION OF ANTITRUST* (Gary Hull ed., 2005).

⁶⁷ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

⁶⁸ See Neil Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Neil Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007); Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001); Spencer Weber Waller, *Antitrust as Consumer Choice: Comments on the New Paradigm*, 62 U. PITT. L. REV. 535 (2001); Spencer Weber Waller, *In Search of Economic Justice: Considering Competition and Consumer Protection Law*, 36 LOY. U. CHI. L.J. 631 (2005) [hereinafter Waller, *In Search of Economic Justice*].

field to consumer protection law, where it would have enjoyed similar success. However, this simply is not so. Law and economics analysis has been applied to any number of consumer protection issues and the law has often moved in the direction of a more economic approach to selected issues. But as a field, consumer protection law has no single organizing principle and has been highly resistant to organizing itself solely around the insights offered by economically oriented legal commentators.

Unlike antitrust law, consumer protection is highly decentralized and only partially federalized.⁶⁹ The Federal Trade Commission, the one key federal player in the field, is in fact the body where law and economics analysis has enjoyed its greatest success. The FTC enforces both competition and consumer protection law through section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair and deceptive acts and practices.⁷⁰

The FTC also has explicit additional statutory authority to proceed in a wide variety of areas affecting consumers. The FTC can, depending on its enforcement priorities, budget, and manpower, police outright fraud in all forms including the internet, false and misleading advertising, consumer credit, advance deposit loan schemes, consumer warranties, deceptive labeling practices, mail order purchases, negative option sales, the do-not-call rules for telephone solicitations, spam email practices, door-to-door sales practices, as well as a potpourri of statutes assigned to it by Congress, ranging from the Hobby Protection Act to the Child Online Privacy Act.⁷¹ In addition to investigating and bringing cases, the FTC can issue trade regulation rules covering broad categories of conduct in particular industries as well as carry out broad, sweeping investigations and issue reports on practices within its jurisdiction.⁷²

Even the breathtaking expanse of the FTC's jurisdiction is merely a part of the federal government's role in the consumer protection area. Virtually every cabinet level agency and numerous sectoral regulators have a significant consumer protection role, including the Food & Drug

⁶⁹ See David Adam Friedman, *Reinventing Consumer Protection*, 57 DEPAUL L. REV. 45, 46 (2007) (characterizing consumer protection as sprawling and reactive).

⁷⁰ 15 U.S.C. § 45 (2006). See generally STEPHANIE KANWIT, FEDERAL TRADE COMMISSION (2003 & Supp. 2009) (discussing the FTC's enforcement powers under section 5 of the Act).

⁷¹ The full range of the FTC's statutory authority is summarized in ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 30-52 (2007); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW (2007); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW (2007) [hereinafter PRIDGEN & ALDERMAN, CONSUMER PROTECTION]; see also FED. TRADE COMM'N, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION (2007), available at <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf> (last visited Oct. 15, 2009) (summarizing FTC enforcement actions of past fiscal year).

⁷² See 2 KANWIT, *supra* note 70, chs. 19, 27.

Administration, the Consumer Products Safety Commission, the National Highway Transportation Safety Board, the various federal bank and savings & loan regulators, the Federal Communications Commission, the Department of Transportation, and so on.⁷³

Consumer protection at the state and local level is even more bewildering.⁷⁴ While most states do not have a direct analogue of the Federal Trade Commission, the Attorneys General of all fifty states have one or more attorneys specializing in consumer protection matters. In the larger states, there may be dozens of attorneys organized into a Consumer Protection Bureau. In the smaller states, there may be as little as one attorney splitting her time between consumer protection and other duties, often antitrust matters.⁷⁵ These offices bring both criminal and civil actions to combat various forms of fraud.

Every state also has some form of a public service commission which regulates energy and communications with a healthy consumer protection component as part of its statutory responsibilities. Most states also have one or more executive branch or independent agencies with regulatory authority over specific sectors such as insurance, banking, transportation, or professional services that have additional responsibilities in the consumer protection area. Larger counties and municipalities may have their own local prosecutors with criminal and civil jurisdiction over fraudulent conduct, and often times a city level Department of Consumer Services with substantial regulatory authority over local transportation, weights and measures, and other deceptive retail practices that harm consumers.⁷⁶

The final piece of the puzzle is the presence of differing private rights of actions at the federal and state levels. Although the FTC Act itself has no private right of action, many of the other statutes enforced by the FTC have explicit private rights of actions including statutory minimum damages plus attorneys' fees and costs for prevailing plaintiffs.⁷⁷ Furthermore, class actions are available if plaintiffs meet the requirement of Rule 23 of the Federal Rules of Civil Procedure or state law equivalents.⁷⁸ Even common law fraud can be the basis of a

⁷³ Spencer Weber Waller & Jillian G. Brady, *Consumer Protection in the United States: An Overview*, in STRENGTHENING THE CONSUMER PROTECTION REGIME (forthcoming), available at <http://ssrn.com/abstract=1000226>. For the full array of the federal government's consumer functions, see <http://consumer.gov/> (last visited Oct. 15, 2009).

⁷⁴ Friedman, *supra* note 69, at 51-52 (highlighting problem of overlapping jurisdiction making it difficult for consumers to know where to direct complaints).

⁷⁵ Waller, *In Search of Economic Justice*, *supra* note 68, at 635.

⁷⁶ See, e.g., City of Chicago—Department of Consumer Services, <http://www.cityofchicago.org/ConsumerServices> (last visited Oct. 15, 2009).

⁷⁷ See, e.g., 15 U.S.C. § 1640(a) (2006) (specifying which provisions of the Truth in Lending Act are subject to statutory damages in private litigation).

⁷⁸ FED. R. CIV. P. 23. *But see* Edward F. Sherman, *Decline and Fall*, 93 A.B.A. J. 51 (2007) (surveying procedural and substantive changes in law affecting consumer class actions).

federal lawsuit if the statutory requirements of diversity jurisdiction⁷⁹ can be met, or if the Class Action Fairness Act permits the case to be brought or removed to federal court.⁸⁰

Under state law, the array of potential private consumer protection cases is even broader. Many state statutes incorporate the standards of the FTC Act into their own state law and allow suits for actual and punitive damages.⁸¹ State law would also allow concurrent jurisdiction for most violations of federal law, explicit and implied private rights of action for state statutory violations, and common law theories of recovery, including old-fashioned fraud.

Even this survey of the field suggests that consumer protection law is barely a field, in the sense of a single unified body of law and procedure. It is more probably a number of different fields loosely stitched together under the rubric of consumer law, more for ease of teaching and enforcement, rather than because of any unifying principle. As a leading commentator has noted, “[m]odern consumer protection law is actually a legal reform effort addressing certain inequities perceived in traditional legal doctrine.”⁸²

While this spirit of reform can be viewed as a mild form of ideology, it is the extensive decentralization of the field that best protects it from capture by more coherent ideologies. There is simply no effective set of receptors for the Law and Economics ideology, or any other ideology, to take hold and colonize the field. Without the existence or the prospect of a single host, capturing consumer protection law would require the capture of the entire federal, state, and common law legal systems even in the absence of a strong competing ideology. Unsurprisingly, there is little likelihood of dramatic change.

C. *Child and Family Law: Decentralization and Competing Ideology Combine to Fight Off Infection*

One prototypical example of a field where law and economics has gained little traction is child and family law. In the abstract, there is no reason why this should be so since a wide variety of non-market behavior, including family law issues, can be analyzed in economic terms.⁸³ Indeed, Gary Becker of the University of Chicago won the

⁷⁹ 28 U.S.C. § 1332 (2006).

⁸⁰ 28 U.S.C. §§ 1711-1715 (2006).

⁸¹ See, e.g., Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2, 505/10a (2008) (providing for a private right of action for damages for violation of the Act, which includes acts in violation of section 5 of the FTC Act).

⁸² PRIDGEN & ALDERMAN, CONSUMER PROTECTION, *supra* note 71, at 2.

⁸³ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 145-66 (6th ed. 2003); RICHARD A. POSNER, SEX AND REASON (1992).

Nobel Prize in Economics in 1992 for just such work.⁸⁴

However, the real world impact of such academic work has had little of the effect that law and economics has had in other regulatory, statutory, or even common law areas. Much of the teachings of law and economics have been affirmatively rejected, and even ridiculed, in a way that is simply different from other areas of the law. For example, Richard Posner received virulent, and often unfair, criticism in response to scholarship that recommended the introduction of greater market forces into the adoption process.⁸⁵ Critics more often than not responded with charges of “baby selling,” rather than a serious examination of the ideas proposed by then Professor Posner.⁸⁶

One potential explanation for the relatively tepid reception for law and economics in the child and family law area is that this field of law deals with non-market behavior rather than the classic market paradigms for antitrust, corporate, and commercial law, where law and economics has enjoyed its greatest successes.⁸⁷ A more sophisticated explanation lies in the two-step model in which the traditional non-market nature of child and family law is merely one aspect of the immune response of the family law host to the introduction of law and economics principles.

First, there is no body of American law that is more decentralized than family law, making it virtually impossible for any new ideology to capture the field. There is no federal department or agency for family affairs. Obviously, the Departments of Education, Housing and Urban Affairs, and Health and Human Services make policies that have profound effects on families, but they do so primarily through the

⁸⁴ Gary S. Becker Winner of the 1992 Nobel Prize in Economics, <http://almaz.com/nobel/economics/1992a.html> (last visited Oct. 15, 2009). See generally GARY S. BECKER, A TREATISE ON THE FAMILY (1981); GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976). As Professor Becker’s biography in Encyclopedia Britannica notes, Becker analyzed the household as a sort of factory, producing goods and services such as meals, shelter, and child care. Applying theories of production to household behavior, he was able to make predictions about family size, divorce, and the role of women in the workplace. Encyclopedia Britannica Online Entry for Gary S. Becker, <http://www.britannica.com/eb/article-9014037/Gary-S-Becker> (last visited Oct. 15, 2009); see also VAN OVERTVELDT, *supra* note 7, at 109-53 (analyzing Becker’s broader body of work and impact upon academic economists).

⁸⁵ Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987).

⁸⁶ On October 24, 2009, a Google search of the internet produced over 850 hits for “Posner” and “baby selling.”

⁸⁷ In addition, commentators have noted the modern rejection of the legal treatment of women and children as property. Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents’ Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998); Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992). This is another factor that leads to the relative lack of appeal of the law and economic methodology to the extent that such an approach would recommodify aspects of family relations.

administration of benefit programs, rather than the direct setting of legal policy. While these benefit programs come with many restrictions and conditions, they do not seem to have been used systematically to require the adoption of a Chicago School perspective at the state or local level.⁸⁸ If anything, offshoots of the existing non-economic approach have been incorporated into many of these federal programs, reinforcing the existing ideological structure.⁸⁹

Moreover, the federal courts have little jurisdiction over issues of family law and there is a strong tradition of federalism that delegates family law issues to the states. Even when the formal requirements for federal jurisdiction are present, the federal courts have developed prudential doctrines of abstention that limit access to the federal courts for family law matters under most circumstances.⁹⁰

⁸⁸ In several instances, conditions on federal funding have been an important centralizing factor for the introduction of economic incentives which have arguably injected more of a cost-benefit analysis consistent with a Chicago School approach into the decision making process for adoptions and reunifications of families. For example, the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.), requires states to adopt certain plans to more quickly reunite children with their families or place them for adoption. States that do so receive financial incentives for children permanently placed within the meaning of the Act. For example, states receive \$4000 in federal funds per fiscal year for each foster child adoption which exceeds a certain base and an additional \$4000 for special needs adoptions. 42 U.S.C.A. § 673b(d)(1)(A), (d)(1)(B) (West 2003 & Supp. 2009). Every state has promulgated new legislation in response to the Act to maintain their eligibility for federal funding. See Steve Christian, *State Child Welfare Legislation: 2001*, ST. LEGIS. REP. (Nat'l Conference of State Legislatures, Washington, D.C.), Feb. 2002, available at <http://www.ncsl.org/programs/cyfl/stleg.htm>; Carmela Welte, *Detailed Summary of the Adoption and Safe Families Act*, <http://www.casafnet.org/reference/asfa-summary.htm> (last visited Sept. 13, 2009).

However, this type of financial incentive to better achieve permanency planning can be characterized as consistent with the prevailing best interests of the child ideology of the field. Such financial incentives for underfunded agencies and services are an important fact of life, but the effects of these incentives on any individual case normally are contested when perceived as in conflict with the best interest of the child, thus limiting the paradigm altering effect of such incentives in this area of the law. See generally Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1 (2001); Paul Anthony Wilhelm, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617 (2002).

⁸⁹ Many of these benefits programs have promoted the adoption of what is known as permanency planning in the child welfare area, which is consistent with the best interests of the child paradigm that is one of the principal ideological bulwarks in child and family law. See RICHARD P. BARTH ET AL., *FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES PATHWAYS AND PLACEMENTS* (1994); ANTHONY N. MALUCCIO ET AL., *PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS* (1986); *THE CHILD'S JOURNEY THROUGH CARE: PLACEMENT STABILITY, CARE PLANNING, AND ACHIEVING PERMANENCY* (Dorota Iwaniec ed., 2006).

⁹⁰ RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1278-83 (5th ed. 2003); Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131 (2009). The limits and exceptions to the related so-called probate exception to federal jurisdiction were most recently discussed by the Supreme Court in the estate claims brought by Anna Nicole Smith. *Marshall v. Marshall*, 547 U.S. 293 (2006).

At the state level, it is not clear how one would capture the field, even if one were so inclined. Few states have a cabinet level department for family matters. Rather, family law regulation is ubiquitous, but highly diffuse. There are literally hundreds of local and county level offices for welfare, guardianship, and child and family services.

The private litigation picture in state courts is virtually the opposite of the federal courts. Family law issues are heard in virtually every specialized and general state court in all fifty states, with a large and vigorous bar of private practitioners and child welfare advocates enforcing and defending the majority of claims.

Outside of a handful of international treaties dealing with specialized custody and adoption issues, there is no uniform law-making body that would impose order on this sprawling body of law. Like in consumer law, one would literally have to commandeer the entire common law, private, and public law-making apparatus of the United States in order to persuade or impose the adoption of law and economics or any other legal ideology.

If the utter decentralization of child and family law makes it difficult to capture by any outside force or ideology, the presence of a strong coherent ideology of its own over the past thirty years makes it strongly resistant to those strands of new ideology that somehow penetrate the system. The best interest of the child is just such an ideology.⁹¹ This principle further has been codified in the statutes and regulations of most state and local laws and affirmed numerous times in common law court decisions.⁹² The fact that such a core enduring principle has little to do with the market focus and the efficiency goals of the law and economics movement has only reinforced the immune response of this area of the law when law and economics principles and other non-traditional views have sought to influence this area of law and policy.

To the extent that child and family law has been predisposed to adopt an interdisciplinary approach, it has historically turned to psychology and social work, and not economics, for its inspiration. For example, the field of social work dates back to the work of Jane Addams and the growth of settlement houses in Chicago to address the needs of the poor and immigrant communities unmet by public

⁹¹ See generally JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

⁹² CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., *DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS*, http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interestall.pdf (last visited Oct. 15, 2009) (summarizing state laws using best interests of the child as basis for determination of placement and custody).

institutions.⁹³ According to the Code of the Ethics of the National Association of Social Workers:

The mission of the social work profession is rooted in a set of core values. These core values, embraced by social workers throughout the profession's history, are the foundation of social work's unique purpose and perspective:

- service
- social justice
- dignity and worth of the person
- importance of human relationships
- integrity
- competence.⁹⁴

The point is not whether social workers or the family law community are more or less virtuous than anyone else; or whether the field would benefit from the market oriented efficiency goals associated with law and economics analysis. Rather, the above characterization of family law—as a decentralized field with a deep, long-established commitment to a competing ideology and discourse—demonstrate why family law is a highly unlikely host for the law and economics virus.

D. *European Competition Law: Infection and Resistance*

What is equally fascinating is how the Chicago School's success is significant, but far more limited, when transmitted from the United States antitrust context to that of European competition law.⁹⁵ One might have assumed that the virus would have jumped the pond given the highly similar nature of the field and the similar backgrounds,

⁹³ JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* (1910); JAMES LINN, *JANE ADDAMS: A BIOGRAPHY* (2000).

⁹⁴ Code of Ethics of the National Association of Social Workers, <http://www.socialworkers.org/pubs/code/code.asp> (last visited Oct. 15, 2009).

⁹⁵ Although beyond the scope of this paper, there is a growing debate about the extent of the influence of the law and economics movement on European law generally. See Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 *HASTINGS INT'L & COMP. L. REV.* 295 (2008) (arguing that law and economics is more prominent in U.S. legal academia because of the different philosophical roots and attitudes towards utilitarianism and consequentialist thinking in both systems); Thomas S. Ulen & Nuno Garoupa, *The Market for Legal Innovation: Law and Economics in Europe and the United States* (Univ. of Ill. Law & Econ. Research Paper No. LE07-009, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972360 (arguing that lack of competition in European higher education accounts for relatively weak reception of law and economics in European law); Kilian Reber, *Once Upon a Time in America: Barriers to the Diffusion of Law & Economics* (July 16, 2008) (modified unpublished Ph.D. dissertation, University of Basel, Switzerland), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161129.

connections, and networks between people working in the field.⁹⁶ Here again, the twin hypotheses of centralization and competing first principles help explain the tensions within the current discourse of European competition law and why it is too soon to tell the final outcome of the struggle.

What we call antitrust law, Europe calls competition law. Competition law has been enshrined in the EEC Treaty of 1957 and all subsequent amendments. The current Article 81 of the E.U. treaty prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.” Then it lists a series of non-exclusive examples of such unlawful agreements.⁹⁷ Article 81(2) holds that any such illegal agreement is void and Article 81(3) lists a series of conditions under which illegal agreements can be granted an exemption. Article 82 bars the abuse of a dominant position and includes a list of illustrative examples similar to that contained in Article 81.⁹⁸ Finally, in a marked departure from U.S. antitrust law, Article 86 applies these competition provisions to “public undertakings and undertakings to which Member States grant special or exclusive rights.”⁹⁹

⁹⁶ Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997). See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 36-64 (2004) (discussing trend toward transnational networks of government regulators, including in the competition field).

⁹⁷ The examples of prohibited agreements are those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty Establishing the European Community art. 81, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty].

⁹⁸ Such abuse may, in particular, consist of:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 82.

⁹⁹ For a comparison of U.S. and E.U. policy on this point, see Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 118-24 (2000); Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL

Enforcement of the competition provisions did not begin until 1962 with the passage of Regulation 17, which established the European Commission for all practical purposes as the sole enforcer of E.U. competition law.¹⁰⁰ Regulation 17 granted the European Commission the exclusive power to investigate potential violations, impose penalties for non-compliance with an investigation, grant exemptions pursuant to Article 81(3), and impose fines up to 10% of the world-wide annual turnover for enterprises found to have violated the E.U. competition provisions. A key provision barred the imposition of fines for agreements that were notified to the Commission in connection with a request for an exemption until the Commission had reviewed and denied the requested exemption. Later regulations required firms to notify the Commission of “concentrations” of a “Community dimension” and empowered the Commission to investigate and prohibit any such notified transactions if incompatible with the Community.¹⁰¹

The Commission quickly found itself drowning in the review of routine commercial agreements that had little potential to injure competition. The Commission’s early response to this deluge of notifications was to issue “group exemptions” and other notices that contained a list of conditions, which if satisfied, would automatically confer exemption under Article 81(3) and not require any advance notification to the Commission.¹⁰² Thus, until recently, the European Commission was the center of the E.U. competition law universe.

Although highly centralized, E.U. competition law had strong ideological reasons why it initially was highly unreceptive to Chicago School ideology. Whatever was borrowed from the United States came before the influence of the Chicago School. In addition, E.U. competition law historically was strongly rooted in *ordo-liberalism*, a body of thought associated with the German Freiburg School that sought to create a proper legal environment for the economy and maintain a healthy level of competition through democratic measures

LEGAL STUD. 409 (1994).

¹⁰⁰ Council Regulation 17/62, 1962 J.O (13) 204 (as amended).

¹⁰¹ Council Regulation 139/2004, On the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 (EC) (as amended, replacing Council Regulation 4064/89, 1989 O.J. (L 395) 1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>.

¹⁰² See, e.g., Commission Regulation 772/2004, On the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_123/l_12320040427en00110017.pdf; Commission Regulation 4087/88, On the Application of Article 85(3) of the Treaty to Categories of Franchise Agreements, 1988 O.J. (L 359) 46 (repealed); Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community, 2001 O.J. (C 368) 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF>; see also 2 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 16.3 (3d ed. 1997); RICHARD WHISH, COMPETITION LAW 168-69 (5th ed. 2003).

that adhere to market principles, but which limited the economic, political, and social power of individuals or groups of private actors.¹⁰³

E.U. competition law also came equipped with a second set of founding principles that acted as a deterrent to rapid ideological change. For at least its first forty years E.U. competition law was ruled by the “integration imperative,” a different but equally strong deontological first principle. The integration imperative viewed competition law as a vital part of achieving the overall vision of an integrated European Common Market (later a European Union) with freedom of movement for goods, services, people, and money.¹⁰⁴ Thus, where references to competition policy appear throughout the E.U. Treaty, they normally do so in the context of helping to achieve and complete the overall goals of the European Union.¹⁰⁵

Both of these original motivations for E.U. competition law faded and faced challenges as direct study and personal, professional, and academic contacts between the U.S. and E.U. competition communities introduced E.U. competition jurisprudence to the Chicago School. This meant that decisions by U.S. courts and agencies—as well as increasing contacts between the U.S. and E.U. enforcement agencies in light of the globalization of antitrust enforcement—would inevitably expose E.U. decision-makers to Chicago School jurisprudence.¹⁰⁶

The growing success of the completion and expansion of the internal market within the E.U. also meant that the integration imperative had been largely achieved, for at least the earliest group of member states, allowing for a more tolerant attitude toward certain vertical restraints that began to appear in E.U. enforcement policy.¹⁰⁷

Specific developments within E.U. competition jurisprudence have accelerated the introduction of law and economics reasoning in certain areas of the field but not others. The E.U. suffered a series of embarrassing defeats in merger cases before the Court of First Instance

¹⁰³ See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998); Nicola Giocoli, *Competition vs. Property Rights: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy*, J. COMPETITION L. & ECON. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987788.

¹⁰⁴ GERBER, *supra* note 103, at 4, 7; WALLER, *supra* note 102, § 16.1, at 16-2 (“EU competition law must be understood in the context of the need to break down the national boundaries between Member States of the EU and to complete the unification of the common market.”).

¹⁰⁵ See, e.g., EC Treaty, *supra* note 97, arts. 2, 3, 5.

¹⁰⁶ See generally Waller, *supra* note 96. While beyond the scope of this paper, the past thirty years have also featured an increasing degree of contacts between E.U. officials and U.S. educational and non-profit institutions featuring Chicago School perspectives through graduate schools, conferences, personnel exchanges, and international organizations like the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), and the International Competition Network (ICN).

¹⁰⁷ GERBER, *supra* note 103, at 384, 389.

(CFI), the judicial body which initially reviews Commission competition decisions. In these cases, the CFI reversed Commission decisions prohibiting certain mergers on the grounds that the Commission had failed to show harm to competition in economic terms.¹⁰⁸

In response, the Commission issued merger guidelines that track quite closely the type of agency enforcement guidelines that have been in place in the United States since 1982.¹⁰⁹ The Commission also announced that it was hiring for the first time a Chief Economist and creating an economics unit similar to what had been in place in the United States for decades.¹¹⁰ Moreover, when the Commission decided high profile merger cases such as Boeing/McDonnell and GE/Honeywell differently than its U.S. counterparts, it was subject to fierce U.S. criticism that at times degenerated into name calling and insults.¹¹¹

The change in tone and focus was further illustrated in a long term project to review E.U. competition provisions relating to abuses of a dominant position to reformulate enforcement policy in more economic

¹⁰⁸ Case C-12/03 P, *Comm'n v. Tetra Laval BV*, 2005 E.C.R. I-987, *aff'g* Case T-5/02, 2002 E.C.R. II-4381; Case T-77/02, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4201; Case T-310/01, *Schneider Elec. SA v. Comm'n*, 2002 E.C.R. II-4071; Case T-342/99, *Airtours PLC v. Comm'n*, 2002 E.C.R. II-2585. In 2007, the Court held that the Commission may be liable to the private parties in *Schneider Electric* for the unlawful prohibition of the merger. Case T-351/03, *Schneider Elec. SA v. Comm'n*, 2007 E.C.R. II-2237. Recently, that ruling was somewhat tempered on appeal. See Case C-440/07 P, *Comm'n v. Schneider Elec. SA* (July 16, 2009), available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en> (enter "C-440/07" into the case number field and then follow the second "C-440/07 P" link from the top).

¹⁰⁹ *Compare* Commission Regulation 802/2004, Implementing Council Regulation 139/2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 133) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF>, with U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (rev. ed. 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

¹¹⁰ See Chief Competition Economist for the European Commission's Directorate General for Competition, http://ec.europa.eu/dgs/competition/economist/role_en.html (last visited Sept. 13, 2009).

¹¹¹ Eleanor M. Fox, *The European Court's Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence*, 20 ANTITRUST 77 (2006); William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533 (2002); William Kolasky, *GE/Honeywell: Narrowing but Not Closing the Gap*, 20 ANTITRUST 69 (2006); William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies—New and Old*, Remarks at the International Bar Association Conference on Competition Law and Policy in a Global Context (Mar. 18, 2002), available at <http://www.usdoj.gov/atr/public/speeches/10845.pdf>.

This criticism has continued in the wake of the European Union's Microsoft decision, which affirmed liability on grounds different and beyond that dealt with in the United States' consent decree with the company. Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision (Sept. 17, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/226070.pdf. Such criticism in turn has produced equally strong defense of the decision and resistance by E.U. officials.

terms. However, this project has produced quite mixed results.¹¹²

Many of these changes also played out in the ongoing modernization effort. After years of study, the European Council finally adopted *Council Regulation 1/2003*, which took effect on May, 1, 2004¹¹³ along with a broader package of supporting reforms called the “Modernization Package.”¹¹⁴

Modernization is a mixed bag when it comes to the adoption of the Chicago School agenda. Several important developments in the modernization package suggest that the influence of the Chicago School virus is still contested, rather than dominant, in E.U. competition law. The Article 82 modernization process is apparently bogged down precisely over the question of how thoroughly the European Union should adopt the Chicago School policy prescriptions in this area.¹¹⁵ The *Microsoft* decision by the Court of First Instance is further evidence that the European Union is not prepared to accept the Chicago School as either the sole or principal tool for antitrust decision making.¹¹⁶ Moreover, the modernization package creates the right of member states to adopt even stricter measures to control the abuse of a dominant

¹¹² The Commission Guidance on the Enforcement of Article 82, the Staff Discussion Paper, and other information regarding the E.U.’s Article 82 project is available at <http://ec.europa.eu/competition/antitrust/art82/index.html>.

¹¹³ Council Regulation 1/2003, On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L1) 1 (EC) [hereinafter Regulation 1/2003], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>.

¹¹⁴ The “Modernization Package” consists of the implementing regulation found in Commission Regulation 773/2004, Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) 18, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_123/l_12320040427en00180024.pdf, and six accompanying notices: Commission Notice on Cooperation Within the Network of Competition Authorities, 2004 O.J. (C 101) 43, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0043:0053:EN:PDF>; Commission Notice on the Co-Operation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, 2004 O.J. (C 101) 54, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0054:0064:EN:PDF>; Commission Notice on the Handling of Complaints by the Commission Under Articles 81 and 82 of the EC Treaty, 2004 O.J. (C 101) 65, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0065:0077:EN:PDF>; Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty That Arise in Individual Cases (Guidance Letters), 2004 O.J. (C 101) 78, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0078:0080:EN:PDF>; Commission Notice, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0081:0096:EN:PDF>; Commission Notice, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF>.

¹¹⁵ Wolfgang Wurmnest, *The Reform of Article 82 EC in the Light of the “Economic Approach,”* in ABUSE OF DOMINANT POSITION: NEW INTERPRETATION, NEW ENFORCEMENT MECHANISMS? 1 (Mark-Oliver Mackenrodt et al. eds., 2008) (analyzing internal inconsistency in E.U. discussion paper on Article 82 reform).

¹¹⁶ Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601.

position if they so choose,¹¹⁷ which creates the type of decentralization that prevents easy ideological spread or capture.

As part of modernization, the E.U. has embarked on a general and quite radical decentralization of competition law and enforcement. The modernization package and later initiatives contained a number of important changes that devolve enforcement powers to national competition authorities, national courts, and private litigants. First, the Commission discontinued the practice of issuing comfort letters, a practice akin to both formal and informal advisory opinions about whether agreements are subject to E.U. competition law.¹¹⁸ Second, the Modernization effort eliminated the Commission's monopoly on the issuance and interpretation of individual exemptions set forth in Article 81(3) of the E.U. Treaty.¹¹⁹ Following modernization, national competition authorities and the national courts have the task of both interpreting whether a practice violated Article 81 and also whether it is protected by an individual or group exemption.¹²⁰ As a result, national competition authorities will enforce both E.U. and national competition law for the first time. Finally, the Commission issued a green paper on the promotion of private rights of action for damages for overcharges by cartels with the announced hope of increased private enforcement in national courts.¹²¹

The Commission hoped to accomplish several things in this extraordinary devolution of its enforcement powers. First, it hoped to avoid the need for most notifications and advance reviews outside the merger area, and focus its enforcement efforts on cartels, market segmentation, selected cases of the abuse of a dominant position, and significant mergers and acquisitions. Second, it hoped that national competition authorities would take up much of the slack and increase

¹¹⁷ Philip Lowe, Dir. Gen. of the European Comm'n's Directorate Gen. for Competition, *The Role of the Commission in the Modernisation of EC Competition Law*, Speech at the UKAEL Conference on Modernisation of EC Competition Law: Uncertainties and Opportunities (Jan. 23, 2004), available at http://ec.europa.eu/competition/speeches/text/sp2004_007_en.pdf ("For unilateral conduct the degree of harmonisation is less far reaching. However even for unilateral conduct it should be noted that there is some degree of harmonisation. The Regulation introduces a kind of minimum standard. In other words whilst Member States are free to apply stricter rules, the level of protection against anticompetitive unilateral conduct cannot go below the standard set by Article 82 of the Treaty.")

¹¹⁸ Regulation 1/2003, *supra* note 113.

¹¹⁹ EC Treaty, *supra* note 97, art. 81(3). Under the old practice, enforcement of E.U. competition law in member state courts and most private rights of actions were impractical because defendants would routinely raise issues of exemption that could only be resolved by often long delayed action by the Commission in Brussels.

¹²⁰ Regulation 1/2003, *supra* note 113, art. 1.

¹²¹ *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf; see also *Commission Staff Working Paper: Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC (2005) 1732 (Dec. 19, 2005), available at http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf.

enforcement of both national and E.U. competition principles acting alone and in concert with each other and the Commission through a new European Competition Network.¹²² Finally, it hoped that private enforcement would become a meaningful part of competition law in national courts.¹²³

The battle for the heart and soul of E.U. competition law thus continues without a clear winner. The Chicago School has shaped many recent initiatives, but has virtually no chance of creating amendments to the Treaty itself, which defines the legal structure for competition law at the E.U. level. While merger law and vertical restraints law has moved in the direction of the United States and its Chicago School influence, the law of unilateral conduct seems to be rejecting these influences in favor of the E.U.'s *ordo-liberal* roots.

One recent example is the split between the U.S. and E.U. approaches to the legality of Microsoft's conduct as the world's dominant supplier of computer operating systems. While the Antitrust Division agreed to a consent decree with Microsoft whose provisions expire shortly, the European Commission has litigated and prevailed, obtaining a judgment with both injunctive provisions and a substantial fine, all of which was recently upheld on appeal by the European Court of First Instance.¹²⁴

Additionally, the E.U. has become increasingly decentralized through increased member-state and private enforcement. This suggests that any new ideology will have a difficult time conquering the growing number of hosts that comprise competition law and policy in the European Union.

CONCLUSION

This Article has analyzed the relative successes and failures of the Chicago School's version of the Law and Economics movement in different bodies of law in viral terms. The viral metaphor creates a model that describes and predicts the spread or rejection of a legal ideology between legal jurisdictions and between bodies of law within the same jurisdiction.

The examples of antitrust in the United States and the European Union, consumer protection, and child and family law suggest that two factors principally determine whether a legal virus will successfully

¹²² See generally Kris Dekeyser & Maria Jaspers, *A New Era of ECN Cooperation*, 30 WORLD COMPETITION L. & ECON. REV. 3 (2007).

¹²³ See Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

¹²⁴ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601.

spread from host to host. First, the greater the degree of centralization, the greater the likelihood of the virus taking hold, multiplying, and expressing itself to new adjacent hosts. Second, the higher degree of a previous strong coherent counter ideology in any particular body of law, the greater the likelihood that the host will resist the new virus. Conversely, the greater the lack of a strong preexisting counter ideology (or antibody in viral terms), the greater the likelihood that the new ideology will take hold.

There is nothing about this approach that should be limited to the Chicago School specifically, Law and Economics more generally, or even the specific fields of law used as illustrations. Like any scientific hypothesis, the results and predictions of this approach should be tested and replicated in connection with other ideologies and fields of law. In particular, closely related areas of law, such as securities regulation and corporate law, contracts and commercial law, or environmental law and land use should be examined to see if centralization and the presence of a competing counter ideology help explain which fields have more broadly embraced the Chicago School and which have not. Similarly, more studies of comparative law can reveal the paths through which legal ideologies spread globally and where they meet resistance.

A viral approach to the spread of legal ideology also has some interesting and counterintuitive suggestions for either the proponents or opponents of the Chicago School or any other school of legal thought. For example, the Chicago School has long asserted that the common law is superior to either legislation or regulatory solutions, because the common law more closely tends to develop efficient rules that maximize wealth as opposed to other sources of rules that are more prone to capture and rent seeking behavior.¹²⁵ Whether or not this characterization is true, seeking to promote an emerging legal ideology using common law is probably a counter-productive strategy, because common law lacks a uniform law-making process or a similar centralizing agent. Promoting a legal ideology through common law also runs counter to the historical experience of the Chicago School itself, marked by early victories in antitrust and other areas of economic regulation. There, a well developed, highly centralized bureaucracy was the perfect host for the introduction of Chicago School methodology. Such methodology has spread more quickly and more thoroughly in similarly centralized fields of economic regulation as opposed to the more highly diffused common law world of state and federal private

¹²⁵ John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEG. STUD. 393 (1978); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEG. STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977).

litigation.

From a matter of strategy, the proponents of a new ideology similarly should seek out those hosts in ideological disarray or those with an ideological vacuum to fill, rather than those jurisdictions or bodies of law with a robust competing ideology that functions as an immune system to fight off the new introductions of new ways of thinking. Conversely, the defenders of the status quo should boost their host's immune system, lest new ways of thought overwhelm the existing defenses.

Finally, one cannot forget that viruses are one of the leading sources of genetic variation, mutation, and evolution. Thus, ideologies and other legal viruses will rarely stand still. They will develop all manner of variations and eventually altogether new forms which attack the old status quo. Thus, the hunter becomes the hunted and an ideology that previously colonized neighboring hosts finds itself under attack from new ways of thinking that evolved from what was once itself the new thinking in a particular field.

