

THE RISE AND FALL OF LAW AND ECONOMICS: AN ESSAY FOR JUDGE
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Introduction

In this Essay I use law and economics and efficiency reasoning in the law as a proxy in attempting to predict the fate of U.S. intellectual leadership in the law. I argue that law and economics has significantly contributed to the attainment of worldwide hegemony by U.S. legal scholarship, mostly thanks to early work, such as that pioneered by Guido Calabresi in the 1960s and 70s. I claim that later aspects of the style and politics of law and economics have consumed much of its early capital of prestige, and that the decline phase of the economic approach in legal reasoning is well on its way. I further argue that the fall of law and economics, due to its over-formalism, parochialism, and western-centrism, allows a more general prediction on the beginning of a decline phase of U.S. legal scholarship in the global scenario.

At the outset of this Essay I should make it clear that the political success of a given scholarly legal paradigm (both domestically and internationally) should be seen as a social phenomenon quite independent from that of the intellectual prestige of such a paradigm. For example, legal formalism (in its many forms) has been (and, in part, still is) the triumphant approach to legal reasoning in the arena of legal practice, well after its intellectual prestige began its declining phase. Similarly, law and economics can be intellectually very prestigious, but at the same time politically very weak (such as during the 1980s through Europe), or it can be politically very powerful and intellectually very weak. I argue that this last

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scenario is the case today, when the mighty institutions of global governance (World Bank, International Monetary Fund (IMF), World Trade Organization (WTO)) endorse (and enforce) some of the most notoriously simplistic ideas of law and economics. Also today mighty organizational efforts (such as the European Association of Law and Economics (EALE)) produce a climate of optimism and self congratulation that precludes many law and economics scholars from understanding the beginning of a decline in their international prestige.

Also, at the outset, I must add that this Essay is concerned only with what can be seen as the *core consensus of law and economics as an approach to legal reasoning*, which I consider to be the only relevant version of law and economics. In a sense, I deal here with the mainstream approach, and I do not do justice to the many, more or less successful and influential, attempts to get beyond the mainstream. Approaches such as comparative law and economics or behavioral law and economics are too circumscribed to be relevant at the global level, and they, moreover, often times cannot be seen as genuine

challenges to the core consensus.² Consequently, my central argument cannot be rebutted by showing specific samples of nonparochial, non-ethnocentric, nonsimplistic, and non-ideological uses of the economic approach. What has been turned into an industry, losing the original critical bite that accounts for its rise as a global paradigm of legal reasoning, is this core consensus of law and economics pundits.

Finally, a note on my method. Because one of the most commonly diffused tactics in establishing hegemony is to naturalize the status quo, as if social phenomena were not the product of history but an epiphany of a somewhat unchallengeable

² For a variety of approaches, all of which I consider variations on the same consensus, see NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997) (providing a noncritical overview of the dominant schools of thought in the law and economics movement). A significant omission from this study on parochialism is the comparative law and economics school of thought, which is perhaps the only radical break with the mainstream consensus. It is neither mentioned nor discussed in the book. For an in-depth discussion of comparative law and economics, see UGO MATTEI, COMPARATIVE LAW AND ECONOMICS (1997).

nature of things, I will discuss law and economics in a relatively deep comparative and historical context. In other words, I will begin my discussion well before 1960, the established year of the birth of law and economics, and I will compare the present situation of U.S. legal hegemony with times in which other countries, notably France and Germany, were hegemonic in the Western legal tradition. There is a need for U.S. academics to understand that their present position of international privilege and scholarly advantage will not last forever.

I. The United States as a Context of Reception

In previous papers I have outlined the fundamental structure of what I call "the professional rule of law" and the historical reasons for current American intellectual leadership in the world's legal landscape.³ The fundamental structure of

³ This section of the Essay is drawn from a previously published

paper: Ugo Mattei, *A Theory of Imperial Law: A Study of U.S.*

Hegemony and the Latin Resistance, 10 IND. J. GLOBAL LEGAL STUD. 383

(2003) [hereinafter *A Theory of Imperial Law*]. See also Ugo

Mattei, *Three Patterns of Law: Taxonomy and Change in the*

World's Legal Systems, 45 AM. J. COMP. L. 5 (1997) [hereinafter

Three Patterns of Law] (explaining "the rule of professional

law"); Ugo Mattei, *Why the Wind Changed: Intellectual*

American law has unfolded to become a politically legitimized system in which the straight political power of the government is counterbalanced by a set of professional (counter-majoritarian) checks: a judicial check and an academic check. Such a system is the result of imports from Europe digested and made spectacular by way of expansion in the United States.

By the early part of the last century, U.S. law had received from Europe, and digested in a genuinely original way, the fundamental components of its legal structure. The English common-law tradition transmitted to the former colony the ideal of judges as oracles of the law and of a strong, independent judiciary as an institutional framework in which judges can perform their role as guardians of individual rights. American law has developed this legacy and expanded it to the point of inventing constitutional adjudication, an achievement that was not accomplished even by the great Sir Edward Coke.⁴ Judges are

Leadership in Western Law, 42 AM. J. COMP. L. 195 (1994)

[hereinafter *Why the Wind Changed*] (examining U.S. leadership in the law).

⁴ Coke's dictum in *Dr. Bonham's Case*, 77 Eng. Rep. 638 (K.B.

1610), is usually acknowledged as the English ancestor of the

American concept of judicial review outlined in *Marbury v.*

Madison, 5 U.S. (1 Cranch) 137 (1803). J.H. BAKER, AN INTRODUCTION

not only the oracles of the law and the leaders of the professional legal system, but they also have the power to declare, in the process of adjudication, political decisionmaking as unconstitutional.⁵ Because of such outstanding judicial power within American law, the belief, already noticed by Alexis de Tocqueville,⁶ that any political problem may be sooner or later adjudicated by a court of law, has been carried to its symbolic extreme in the Nuremberg Trials, and possibly to

TO ENGLISH LEGAL HISTORY 100 (1971); ROBERT LOWRY CLINTON, *MARBURY V.*

MADISON AND JUDICIAL REVIEW 38 (1989). Lord Coke wrote that

in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

Dr. Bonham's Case, 77 Eng. Rep. at 652.

⁵ See *Marbury*, 5 U.S. (1 Cranch) at 178.

⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

its very limit in *Bush v. Gore*.⁷ Most importantly, the United States has invented a legal tool--constitutional adjudication--that is now part of the global legal consciousness.⁸

The civil law tradition has also transmitted to the United States several fundamental modes of thought that U.S. law has been busy expanding. Throughout the nineteenth and twentieth centuries, France has conveyed to the United States the idea of universal individual rights. These "negative" rights (or so-called "rights of first generation") have been enshrined in the U.S. Constitution, influential as they were on the majority of

⁷ 531 U.S. 98 (2000); see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). See generally Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) (providing a discussion of the decision in light of legal history).

⁸ I use legal consciousness in the sense of Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 634 (2003).

the Founding Fathers.⁹ Not only has the universalistic ideal been carried to the extreme, as witnessed by, among other things, notions of universal jurisdiction of U.S. courts in the vindication of such rights, but negative rights, in the absence of thick notions of sovereignty and statehood developed by the Jacobean, became a genuine limit to the redistributive activity of the American state. Notions of freedom from government intrusion were by no means limited to judicial lawmaking in the *Lochner* era.¹⁰ A strong limit to any proactive role of government, except in such areas as military and defense where massive transfers of wealth routinely happen, can be traced back to French-inspired notions of (economic) rights.

In addition, Germany has transmitted to the United States one of its fundamental present-day characteristics: the presence of strong, independent academic institutions that serve as a professional check on the political process. It was only because the law was considered a science, a clear legacy of German historicism, that it was natural to argue for its teaching in university contexts.¹¹ Otherwise law could have

⁹ For a recent, fascinating discussion of their credo and

ideology, see JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY*

GENERATION (2000).

¹⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

¹¹ On the impact of the German professorial model in the United

States, see James Whitman, *Commercial Law and the American Volk:*

remained a practical business, as it continued to be in England until well after the Victorian age. Once imported to America, the German professorial system has been boosted by the proliferation of private academic institutions, typical of this side of the ocean. Today, American law schools (professional schools staffed with faculty that regard themselves as academic scholars) are the only schools in the world that offer basic legal education at the graduate school level. Consequently, and paradoxically for a system based on "professional schooling," the average American lawyer is exposed to more years of academic training than any other colleague in the world. Moreover, American academia can well be seen today as the global lawyer's graduate school; many ambitious lawyers worldwide complete their undergraduate legal education in the United States.¹² The graduate law program is, therefore, another powerful tool in the worldwide diffusion of U.S. law.

U.S. law in its early phase did not only import from Europe, but other fundamental characteristics of its structure can be seen as original reactions against European models of law. Among such, one should at least mention the written constitution--a reaction against the arbitrary nature of British

A Note on Llewellyn's German Sources for the Uniform Commercial

Code, 97 YALE L.J. 156 (1987).

¹² See Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 235 (1991) (describing the growing trend of European lawyers seeking an American legal education).

unwritten constitutional law--and, especially for purposes of this Article, the high degree of decentralization--another reaction against the strongly centralized nature of the English system of government. Decentralization is possibly the most original aspect of the fundamental structure of U.S. law.¹³ No other legal system in the world has developed a full-fledged federal judicial system as complete and complex as the United States has. The co-existence of a large number of federal and state courts made issues of jurisdiction and choice-of-law the primary concerns of the American legal profession from its very beginning. Moreover, the decentralized nature of the system makes it only natural to approach legal problems in light of a fundamental question: which, of the many possible, competing legal answers, is actually best? These issues again make it natural to compare possible legal solutions from an efficiency

¹³ See generally RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996).

perspective.¹⁴ No wonder law and economics, as an approach to legal reasoning grounded in efficiency concerns, emerged in the 1960s, right after the Harvard Legal Process, the school of thought whose method was grounded in comparative institutional analysis.¹⁵ Moreover, and most interesting for a study on the

¹⁴ See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 28-29 (1994) (explaining the importance of the comparative institutional analysis as a component of law and economics); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1 (1993) (noting that the federalist system of American corporate law enables businesses to choose the state whose legal structure minimizes their costs of doing business the most).

¹⁵ See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 83 (1995) (observing that the rise of law and economics coincided with the decline of the legal process school and the rise of comparative and interdisciplinary legal analysis).

expansion of the American pattern of jurisprudence, the issues concerning the everyday American practitioner (Which court has jurisdiction? What law applies?) are the very same issues on the table of any lawyer approaching a legal problem of international relevance.¹⁶ Thus, at the dawn of economic globalization, American lawyers already enjoy a legal culture and a political discourse that is broader than jurisdictional limits, and this makes them comparatively better equipped than their foreign colleagues to approach the problems posed by economic globalization. In this scenario, the "annexing" of one

¹⁶ See YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL

COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER

(1996).

more jurisdiction, wherever located, does not particularly change the U.S. lawyer's way of reasoning.¹⁷

The globalization of the economy and the global demise of the activist state, crucial to the neoliberal project and commenced in the early 1980s by the so-called Reagan-Thatcher revolution, proved to be the ideal nurturing environment for the rise of law and economics as the most influential global mode of

¹⁷ The very structure of the American judicial process privatizes power and activity by significantly reducing the "public domain"

aspects of litigation. Various activities within litigation

that are labeled "official" in European legal systems, including

service of process, discovery, or questioning of witnesses, are

already private matters in American law. RUDOLF B. SCHLESINGER ET

AL., *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 428, 448 (6th ed. 1998).

This creates a base for what has been recently called an

entrepreneurial transplant. See Jonathan M. Miller, *A Typology*

of Legal Transplants: Using Sociology, Legal History and

Argentine Examples to Explain the Transplant Process, 51 *AM. J.*

COMP. L. 839, 849-54 (2003).

legal thought in the aftermath of the Cold War.¹⁸ With (conservative) economists taking over the major role as policy makers both in the United States and abroad, it has been a natural consequence that those lawyers (mostly American) able to engage in a dialogue with economists, the masters of an hegemonic social science, would enjoy a major advantage.¹⁹ More generally, and again for a variety of reasons that are beyond the limited scope of this Essay, the prestige of U.S. law increased for legal professionals worldwide, so that the intellectual leadership of American law emerged as an undisputable fact. Is this leadership going to last? In this Essay, following the parable of law and economics, I argue that the rising phase is over, and that the declining phase has started.

II. U.S. Hegemony and Global Legal Consciousness

While, as shown in the previous section, the roots for the "naturalization" of the American way of reasoning in the global

¹⁸ Cf. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE*

WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES

(2002) (providing examples of the exportation of economic and legal institutions and practices to Latin American countries).

¹⁹ See generally Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260 (1982).

era can be traced quite far back, the parable of law and economics begins only during the heart of the Cold War, reaches its peak in the decade following the fall of the Berlin Wall, and, I argue, begins its intellectual decline at the very beginning of the new millennium, when American intellectual, political, and moral leadership is questioned worldwide with unprecedented energy. The growing resistance against the global neoliberalism led by American scholars seems to target many of its intellectual darlings, including lawyer-economists and other policy pundits, whose role, in the ironically short age of the "end of history,"²⁰ has been to attempt to turn conservative politics into neutral technology.

Generally speaking, the paradigmatic shift in legal reasoning, produced by law and economics as a fundamental challenge to the hierarchical relationship between the legal system and market activity, has been boosted by the globalization of the economy, where the boundaries of the markets are less and less limited by those of the state. In fact, markets today are stronger institutions than states themselves, so much so that the mighty corporate actors of the global economy control the legal system rather than being

²⁰ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992)

(discussing Hegel's concept that the end of history would occur with the adoption of liberal democracy as the preferred form of human government).

controlled by it.²¹ Because of this power shift, some "predictions" of law and economics turned out to be quite accurate, which serves as an argument in praise of law and economics as a realistic approach. Nevertheless, the prestige in the global arena of legal thinking is not only the result of cynicism in the description of the social "reality," which in present times appears, upon close look, even worse than the most cynical theorists are able to imagine. A scholarly paradigm in the law must provide some value judgment, and prestige usually stems from the strengths of its critique. Consequently, the rise and fall of law and economics should also be understood in terms of academic developments and modes of thought in the global arena of legal theories.²² There is no way to understand the impact and prestige of a legal movement if our perspective is only local.

For example, constitutional law scholars are the 'big dogs' in the United States without question, as they engage in the most rewarding and prestigious academic activity. Nevertheless, in the global arena, despite strong institutional and political efforts to export the ideas and notions of U.S. constitutional law worldwide, constitutional law is perceived as an intimately domestic business, making the famous U.S. constitutional law scholars, dominating as they are in the domestic academic

²¹ See NOREENA HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY* 7-8 (2001).

²² Today the literature on law and economics as an intellectual movement is quite extensive.

environment, quite irrelevant figures in the global perspective. In order to acquire some influence, these scholars must re-invent themselves as comparative experts, or as general jurists, which is by no means the case for the economists (and law and economics experts) who simply keep doing abroad what they are busy doing at home: discussing abstract models with little worry about the complexities of reality. More generally, in a world that is today largely privatized, the global arena is reserved for private law scholars, which is the area of the law in which most contributions of law and economics are located.

Because of the subject matter of this Essay, my concern is the influence of law and economics outside of its birthplace in the United States. I am also analyzing a context that has attracted much attention in international legal scholarship worldwide--that of legal transplants.²³ The recent wave of American legal hegemony can be seen more clearly (and is much more significant) as a change in legal consciousness, rather than as a pattern of transplantation of legal rules.²⁴ Legal

²³ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993). Watson explains that the theory of the legal transplants is the "moving of a rule or a system of law from one country to another, or from one people to another." *Id.* at 21.

²⁴ This section of the Essay is again drawn from Mattei, *A Theory of Imperial Law*, *supra* note 3, at 407-11.

reception is a highly creative activity,²⁵ and legal transplants would be severely misunderstood in their nature if they were approached only as a mechanical import-export exercise.²⁶ It is

²⁵ See ELISABETTA GRANDE, *IMITAZIONE E DIRITTO: IPOTESI SULLA CIRCOLAZIONE DEI MODELLI* (2000); see also P.G. Monateri & F.A. Chiaves, *Shifting Frames: Law and Legal "Contaminations,"* in *INTRODUCTION TO ITALIAN LAW* 21, 21-30 (Jeffrey S. Lena & Ugo Mattei eds., 2002)

(analyzing the importation of rules and institutions into the Italian legal culture from France and Germany). The literature on legal transplants is now very extensive.

²⁶ Considering the law as a mechanical commodity that can be imported or exported like a TV set or a Land Rover is also a strategy of governance. See Ugo Mattei, *Legal Pluralism, Legal Change and Economic Development,* in *NEW LAW FOR NEW STATES: POLITICA DEL DIRITTO IN ERITREA* 23 (L. Favali et al. eds., 1998). See generally LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* 117-

thus important to approach the impact of law and economics, as “invented” in the United States by Guido Calabresi and diffused in Richard Posner’s simplified form, in the broader historical and transnational context of legal scholarship.²⁷

The institutional background of U.S. law provided the highly original context in which the legal process school, the first genuinely original paradigm of American legal scholarship,

67 (2002) (examining hegemonic processes in the law from colonial and contemporary settings).

²⁷ For a discussion of changes in current private law thinking in Europe, see MARTIJN W. HESSELINK, *THE NEW EUROPEAN LEGAL CULTURE* (2001) (arguing that European scholars should study the economic effect of different rules of private law and uphold one rule over another if it is more efficient). For a more nuanced position, however, see Mathias Reimann, *Droit positif et culture juridique: L’américanisation du droit européen par réception*, 45 *ARCHIVES DE PHILOSOPHIE DU DROIT: AMÉRICANISATION DU DROIT* (2001) (discussing Americanization as a change in mentality).

developed its analysis in the 1950s.²⁸ Before legal process, scholarly movements in the United States were mere reproductions of European modes of thought, such as German dogmatic thinking (known in the United States as formalism) or sociological jurisprudence (known in the United States as legal realism). Because the United States is the only *fully federalized* judicial system in the world, U.S. law must, therefore, cope with a unique number of potential conflicts between institutional actors. This practice naturally forces lawyers to develop a

²⁸ The legal process school has received a recent revival of attention thanks to the 1994 publication of its defining book, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958). For an analysis that merges legal process and law and economics, see KOMESAR, *supra* note 14. Predating the legal process school, the roots of both legal formalism and legal realism can be traced to Europe. See Kennedy, *supra* note 8, at 637-40 (discussing the globalization of the European classical legal thought).

tremendously sophisticated consciousness of the practical importance of who decides what in litigation matters.²⁹

Within the U.S. legal culture, the unprecedented degree of anti-formalist reasoning, due to forty years of legal realism dominance, called for some reaction. In Germany and France, the two leading exponents of the civil law tradition, sociological jurisprudence (also known as anti-formalism) has never succeeded in moving beyond the status of a critical current of legal thought; it remains only marginally influential outside of legal scholarship.³⁰ In the United States, on the other hand, legal realism seized the leading posture among legal approaches in academia, and became important in the judiciary and the

²⁹ For some flavor, see the other "classic" publication on the legal process school, Hart and Wechsler's *The Federal Courts and the Federal System*. FALLON ET AL., *supra* note 13; see also Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)).

³⁰ See 2 CARLO AUGUSTO CANNATA & ANTONIO GAMBARO, *LINEAMENTI DI STORIA DELLA GIURISPRUDENZA EUROPEA: DAL MEDIOEVO ALL'EPOCA CONTEMPORANEA* (4th ed. 1989).

administrative state.³¹ As a result, when American lawyers began performing their role as "hidden law givers"³² too candidly, they began experiencing a loss of legitimacy that weakened their professional project.³³

Attempts to reinforce that legitimacy and the professional project of lawyers produced the legal process school in public law (remember Wechsler's "Neutral Principles"³⁴), and law and economics in private law. These movements had no foreign models to inspire them, and were consequently genuine "inventions" of U.S. legal scholarship.

³¹ For appraisals of the realist hegemony in U.S. law, see GRANT

GILMORE, *THE AGES OF AMERICAN LAW* (1977), and BRUCE A. ACKERMAN,

RECONSTRUCTING AMERICAN LAW 105-10 (1984).

³² See Antonio Gambaro, *Il Successo del giurista*, 106 *IL FORO*

ITLAIANO 86 (1983).

³³ I use the term 'professional project' in the sociological

sense developed in MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A*

SOCIOLOGICAL ANALYSIS (1977).

³⁴ Herbert Wechsler, *Toward Neutral Principles of Constitutional*

Law, 73 *HARV. L. REV.* 1 (1959).

If seen in the domestic perspective of U.S. law, both legal process and law and economics share an ambiguous relationship with formalism and realism. There are, however, important structural differences between the two. It would be difficult to imagine the birth of the legal process school outside of the very peculiar U.S. federal system; meanwhile, because of the nature of economic reasoning, economic analysis of the law tends to be a universalistic paradigm.³⁵ As a consequence of this different degree of local specificity, only law and economics has become a worldwide hegemonic form of legal consciousness.

III. The Rise of Efficiency Reasoning in the United States

Herman Oliphant, a leading legal realist, urged law students and lawyers to get out of the libraries.³⁶ The law

³⁵ See Mattei, *Why the Wind Changed*, *supra* note 3, at 216 (noting "that law and economics is . . . an effort to understand the forces that are at play in the law and not in any particular legal system").

³⁶ See Herman Oliphant, *The Public and the Law--The Three Major Criticisms of the Law and Their Validity*, 18 A.B.A. J. 787, 793 (1932). Professor Oliphant stated:

[S]uch have been the traditions of legal scholarship among which all students of law have grown up that, with enough time

library, and the legal materials therein, have long been the entire universe of the Western lawyer. To the textual tradition dominant in the Continent at least since the age of the glossators, only a very limited correction has been posed by the common-law tradition, despite its self-portrait as "nonwritten" law. Christopher Columbus Langdell used to say that appellate opinions, themselves a literary form, are the *raw materials* in

to review, almost any one of them could probably expound the technical legal definition of larceny and win for it general admiration of the symmetry and completeness of the logical development which legal scholarship has given it. But if he were asked to state something as to the limits of the criminal law's effective control of pawnbrokers as possible culpable receivers of stolen property, he might ransack law libraries but would have to stand mute.

Id.

the laboratory of the lawyer-scientist.³⁷ Consequently, getting out of the libraries was indeed a revolutionary program in the 1930s because lawyers had never really dwelled outside of them.

In order to get out of the library, lawyers needed guides. Karl Llewellyn, another leading legal realist, knocked at the door of anthropologist E. Adamson Hoebel to explore forms of "legal life" outside of libraries.³⁸ Many other realists, too, agreed that nonlawyers were needed on law faculties in order to develop non-textual paradigms of thought.³⁹ Among such non-lawyers appointed in law faculties we find many of the founding

³⁷ G. Edward White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 220-22 (1978). On the Langdell and the realist critique, the most interesting and vivid read remains, in my opinion, Grant Gilmore's *The Ages of American Law*. GILMORE, *supra* note 31, at 42-48. For a more recent and longer narrative of the intellectual events surrounding the development of legal realism, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

³⁸ NADER, *supra* note 26, at 85-101.

³⁹ See GILMORE, *supra* note 31, at 87-88.

fathers of law and economics, including leading Chicago economists, Aaron Director and Ronald Coase.

During the age of triumphant realism, some lawyers, rather than choosing economists as co-authors, preferred a first-hand journey in economic knowledge. Among these scholars equipping themselves to venture alone, out of libraries, one finds the true creator of law and economics: Guido Calabresi.

Lawyers, to be sure, did not limit themselves to using their guides for an intellectual journey outside of textual reasoning. Not all of them, however, were searching for critical approaches to challenge the status quo of the law, and sought, with the tool of economics, better approaches for looking into "dark places."⁴⁰ Many lawyers, particularly those located on the more conservative side of the political spectrum, felt that decades of dominant legal realism required a restructuring of the lawyer's legitimacy and the professional project. The law, as a fundamentally conservative construct, needed to be refurbished in order to reclaim some objectivity if legal scholars and judges were to keep their role as "hidden law givers."⁴¹ To consider the law as the fiat of the last decision-maker, as legal realists did, exposes the legal profession to a fundamental challenge: if law is as biased as the political preferences of the decision-maker, then why should the decision-

⁴⁰ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 180 (1982) ("As a scholar, it is my job to look in dark places and try to describe, as precisely as I can, what I see.").

⁴¹ See Gambaro, *supra* note 32.

maker be a professional lawyer rather than a politician, a doctor, or a car dealer?

In Western jurisprudence, science has traditionally served the purpose of asserting the special role of lawyers as decision-makers, despite their lack of political legitimacy. But if the metaphor of biology and geometry, much cherished by Langdell and his formalistic followers,⁴² could no longer serve that purpose, "social science" would do the trick.⁴³ And among the social sciences, the queen, to be sure, was economics.⁴⁴ Richard Posner is associated with this fundamental contribution—saving the lawyer's profession from the legitimacy consequences of being too "candid."⁴⁵

⁴² GILMORE, *supra* note 31, at 42.

⁴³ *Id.* at 87-88.

⁴⁴ MATTEI, *supra* note 2, at 25 (citing Cooter, *supra* note 19, at 1260-61).

⁴⁵ A lawyer from the University of Chicago, with no formal economics training, Richard Posner, later to become a federal appellate judge, started to flood legal scholarship with his tremendous productivity from the early seventies. His book, *Economic Analysis of Law*, is considered a classic in the field.

Hence, economics could offer a good guide outside of the black letter law and a new, strong source of legitimacy. After all, economists were focusing on incentives, and incentives meant focusing on the behavior of the recipients of legal precepts. Thus, something began happening outside of and beyond the legal texts. Economists, moreover, while working on public-choice theory, were themselves focusing on something outside of the text. These economists worried about the production of norms, about law in the making, the processes and the forces determining its content (e.g., rent-seeking).⁴⁶ While traditionally the lawyer, including American legal realists as fundamentally *positivistic* lawyers, focused on the legal norm and precepts *as they are* (or as they should be), economists, by contrast, were claiming that the focus should be turned toward what is before (public choices) and after (incentive-reactive behavior) the legal precept. These economists argued that the

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (6th ed. 2003)

[hereinafter *ECONOMIC ANALYSIS*].

⁴⁶ See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (describing a theory of collective choice); Jonathan R. Macey, *Public Choice and the Law*, in 3 *THE NEW PALGRAVE: DICTIONARY OF ECONOMICS AND THE LAW* 171 (Peter Newman ed., 1998).

focus should be on *the process* and on the social consequences of the outcome of such process.⁴⁷

As to legitimacy, economics handbooks mostly contained rhetoric grounded in science and objectivity.⁴⁸ The early success of efficiency reasoning in the law can thus be justified by at least two factors: (1) once the focus is on the process, then anyone would accept that the process should be efficient; and (2) efficiency claimed objectivity, an essential element in a strategy of legitimization.⁴⁹ While justice is the domain of subjective feelings, efficiency is the domain of objectivity, as it offers only a few clearly spelled out concepts.⁵⁰

Economists had their agenda too, so law and economics not only was serving the needs and the curiosity of lawyers, but

⁴⁷ Public-choice theory here was teaching the same lesson of the Harvard Legal Process.

⁴⁸ See DEIRDRE N. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (2d ed. 1998).

⁴⁹ My explanation for these two factors that account for the early success of efficiency reasoning in the law is developed in MATTEI, *supra* note 2, at 20-22.

⁵⁰ *Id.* at 4 ("there are only a couple notions of efficiency accepted by the established economic paradigm . . . and there are as many notions of justice as judging individuals").

those of economists too. And that agenda, even for the economists, was common to both conservatives and progressives. The more open-minded economists, such as Ronald Coase early in his career, believed that the disciplinary segregation between the legal and economic disciplines was absurd.⁵¹ After all, earlier, law and economics were not even separate disciplines, as proven by the fact that the founding father of modern economics, Adam Smith, was a professor of jurisprudence.⁵² It was only positivism, an approach that by the late nineteenth century had conquered both disciplines, that almost paradoxically created the cultural impossibility to communicate between them.

For economists, positivism meant the full separation between facts and values, between the *is* and the *ought*, between positive and normative discourses.⁵³ Economists simply could not communicate with lawyers anymore, given the constant confusion between the levels of discourse that characterizes lawyer-talk about justice. The few economists, such as Thorstein Veblen or John Commons, who attempted to overtake the logic of economic

⁵¹ *E.g.*, R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 31 (1988).

⁵² MATTEI, *supra* note 2, at 41-42; see ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin Paul Malloy & Jerry Evensky eds., 1994).

⁵³ MATTEI, *supra* note 2, at 6-11; see also Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229 (1996).

positivism by maintaining a dialogue with lawyers and institutions, focused on issues of distributions naturally falling between the two domains.⁵⁴ Consequently, they were accused of socialism and marginalized by the economic orthodoxy.⁵⁵

For lawyers, to the contrary, positivism meant full separation of the domain of law from that of morality, politics, society, and whatever is considered to be "outside" of that which the authority poses as law.⁵⁶ Positivism meant, in Kelsenian terms, a *pure theory* of the law. In this perspective, economists were tainted by their constant policy discourses, something beyond the pure idea of the legal system.⁵⁷

⁵⁴ See MARK BLAUG, *ECONOMIC THEORY IN RETROSPECT* 700-03 (5th ed. 1997)

(discussing institutional economics and the contributions of Veblen and Commons).

⁵⁵ *Id.* at 702-03.

⁵⁶ HANS KELSEN, *PURE THEORY OF LAW* 1 (Max Knight trans., Univ. of Cal. Press 2d ed. 1967) (1934).

⁵⁷ See *id.* ("The Pure Theory of Law is a theory of positive law.

. . . It is a science of law (jurisprudence), not legal politics.").

This separation of lawyers and economists exacted a high toll that became quite visible when the oil crisis of the 1970s compelled us to rethink some priorities. On the lawyer's side, the welfare state had been constructed with very little attention to the economic impact of its regulations, so that by the time of the oil crisis, its sustainability began to be questioned more and more successfully, particularly in England and the United States. On the economist's side, Keynesian policy, so crucial in recovering from the depression of the 1930s, was developed without considering the legal structure of its implementation, in particular the autonomy and strengths of the legal and bureaucratic structure capable of defeating, by complex patterns of resistance, any macro-reform.

Consequently, while some economists were eager to better understand the legal picture, hence overcoming the costs of decades of incommunicability, other economists, attacking Keynesian policy, were assessing the legal structure of property rights. These economists also assessed the political process from a public-choice model in order to reclaim for micro-economics what Keynesianism had transferred, arguably unsuccessfully, at the macro-economic policy level.⁵⁸ Public-choice theorists, monitoring the distortions of the political process (in particular those of legislation and regulation) were finding their natural allies in the early work of apologists of the common-law tradition, such as Richard Posner. An alliance in the name of efficiency and objectivity developed, where issues of distribution and justice, so crucial to both the

⁵⁸ Macey, *supra* note 46.

analysis of Guido Calabresi and the realist legacy of the New Deal, were simply left behind.⁵⁹

Law and economics would not have attained a dominant, global role if it had not been leveraged, beginning in the Reagan years, by a full-fledged political agenda and a real industry, capable of flooding with cash any movement that gave cultural prestige to deregulation and other reactionary politics of those years. It is proof enough to look at the early lukewarm reception of the law and economics movement in Europe to understand how much lawyers were willing to resist the ideal of efficiency in the name of justice and distribution.⁶⁰ But the multiplication of prestigious law professor chairs, endowed research facilities, and fellowships, such as the U.S. academia (the global graduate school), created a certain recipe for global success.⁶¹

⁵⁹ See Francesco Pulitini, *Quante analisi economiche del diritto?*

Riflessioni su Yale e Chicago, 1 MERCATO CONCORRENZA REGOLE 139

(2003).

⁶⁰ See R. Cooter & J. Gordley, *Economic Analysis in Civil Law*

Countries: Past, Present, Future, 11 INT'L REV. L. & ECON. 261,

262 (1991).

⁶¹ For example, millions of dollars were donated by the

conservative John Olin Foundation to the development of law and

To be sure, I do not wish to explain every social and political phenomenon as determined by economic forces and incentives. It is certainly true, nevertheless, that for the young American scholar graduating in the early 1980s, it was a smart career move to get into law and economics rather than, say, comparative law. Nevertheless, there are other reasons, too. In the comparative literature, for example, it has been pointed out that the success of an academic paradigm in the law is connected to its apparently easy adaptability in different contexts, which is mostly due to more or less marked forms of universalism. Alan Watson, for example, has offered evidence of the widespread diffusion of nutshells and other teaching manuals such as Gaius's *Institutes*, or Blackstone's *Commentaries*.⁶² The same insights emerge from comparing the rate of diffusion of the very simple Napoleonic Code with the technically sophisticated

economics research centers at some of the most prestigious

universities in the United States such as Harvard, Yale, and

Berkeley. See, e.g., Press Release, Harvard Law School, Harvard

Law School Receives \$10 Million Grant from John M. Olin

Foundation (May 19, 2003), available at

http://www.law.harvard.edu/news/2003/05/19_olin.php.

⁶² Alan Watson, *The Importance of "Nutshells,"* 42 AM. J. COMP. L. 1 (1994).

and complex language of the German civil code, the *Bürgerliches Gesetzbuch* (BGB).⁶³ More generally, it has been observed that the less a legal approach is positivistic and context-specific the more it circulates,⁶⁴ and other aesthetical characteristics of the law, such as self-portrayals of high advancement or general ambiguity, have been used to explain the diffusion of legal ideas.⁶⁵ Many such characteristics fit the economic reasoning in the law. Relative simplicity, political ambiguity,⁶⁶ self-congratulatory mood, nonpositivism (in the

⁶³ Mattei, *Why the Wind Changed*, *supra* note 3, at 201-03.

⁶⁴ See *id.* at 195-96 (positing "an inverse relationship between leadership in Western law and the degree of positivism and localism of a given legal culture").

⁶⁵ GRANDE, *supra* note 25; Anna di Robilant, *The Aesthetics of Law*,

1 GLOBAL JURIST ADVANCES, No. 2, Art. 1 (2001).

⁶⁶ This aspect is emphasized by Duncan Kennedy as a key to understanding the diffusion of legal ideas; legal theories and movements can successfully globalize if they are politically ambiguous and therefore adaptable to new contexts. Kennedy, *supra* note 8, at 634.

legal sense), and universalism are all characteristics of law and economics as exported world-wide by such 'nutshells' as Posner's or Polinsky's.⁶⁷

Historically, the way in which a new, politically powerful paradigm of research is able to seize a leading position in a plurality of cultural contexts is usually by making previous approaches look obsolete and primitive.⁶⁸ For example, French exegetic methodology is now considered obsolete by those who subscribe to the much more elegant and scientific German-Pandectist approach.⁶⁹ It may have also been the case of Franco-German inspired "social approach," which was advertised as a step forward in civilization from the previous Lochner-era's

⁶⁷ Two of the most successful "first generation" book-length

treatments of the discipline are: A. MITCHELL POLINSKY, AN

INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989), and POSNER, ECONOMIC

ANALYSIS, *supra* note 45.

⁶⁸ The following text is again drawn from Mattei, *A Theory of*

Imperial Law, *supra* note 3, at 409-10.

⁶⁹ Mattei, *Why the Wind Changed*, *supra* note 3, at 215. See

generally Rodolfo Sacco, *Legal Formants: A Dynamic Approach to*

Comparative Law, 39 AM. J. COMP. L. 1 (1991).

individualism.⁷⁰ Law and economics certainly used this strategy to seize a global role by offering an expansive universalistic model that expresses itself in English (the new *lingua franca*), that retains an open dialogue with economics (the queen of social sciences), and that claims to be the new natural legal order of the global age. The legal order thus proposed, short from being politically legitimized, receives its legitimacy and desirability from the intrinsic virtues of efficiency, the sole value capable of granting general access to the global capitalist marketplace.

The economic approach to the law, short from being a mode of governance in need of legitimacy like any other legal order, has thus become the technological backbone of the global market, something to be approached apolitically, to be described and modified only by technological practices. For the first time after the Cold War, funding became available for scholars who wished to be the technocrats and the engineers of this apolitical system. With these assumptions, any approach to the law that still considers itself a political institution that cannot be understood and described in graphs and numbers is disposed of as obsolete. Any approach that requires something other than a reactive minimal philosophy of governance is, after the fall of the Berlin Wall, entirely out of fashion. The law must create incentives for market actors. The skilled lawyer and policy-maker is unappreciated if his suggestions require a proactive and expensive activist government posture, let alone if he argues for economic redistribution by taxation or other obsolete Keynesian measures. The legal scholar can only count on the natural existence of markets: his role is to produce a

⁷⁰ See Kennedy, *supra* note 8, at 649-50.

correct set of market incentives. The quintessential example of this attitude is the celebrated "self-enforcing" model of corporate reform produced by leading corporate law scholar Bernard Black, for the Russian Federation.⁷¹

IV. Exporting Efficiency Reasoning: Europe as a Context of Reception

While it would be grossly exaggerated to claim that law and economics enjoys today the leading role as an approach to legal scholarship in European countries, we can, nevertheless, see that efficiency reasoning is the main intellectual vehicle used by the American legal consciousness to diffuse itself and to impose its hegemony in the center as well as in the periphery of the world.⁷² Efficiency is indeed the buzzword of the neoliberal project. It justifies most of the policies of the so-called "Washington consensus," from the demise of the welfare state to privatization, from downsizing to outsourcing. The expansionistic and universalistic blend of neoclassical economic analysis, together with the thick layer of ideological assumptions that are embedded in such an economic reasoning, lie

⁷¹ Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

⁷² This section adapts both Mattei, *A Theory of Imperial Law*, *supra* note 3, at 411-15, and Ugo Mattei & Alberto Monti, *Comparative Law and Economics: Borrowing and Resistance*, 1 GLOBAL JURIST FRONTIERS, No. 2, Art. 5 (2001).

behind the intellectual success of this approach to law.⁷³ A very clear bias in favor of the efficiency of the common-law adjudication process promotes the courts of law as the most important actors of the legal system.⁷⁴ The privatization and structural reforms sustained by the international institutions of global governance make law and economics one of the most important cultural currents that diffuse tacit assumptions of U.S. based, legal consciousness law.⁷⁵

Law and economics began to be transplanted into European contexts⁷⁶ by a systematic organizational structure, the European Association of Law and Economics, which began its operations in

⁷³ See generally Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998).

⁷⁴ See POSNER, *ECONOMIC ANALYSIS*, *supra* note 45, at 529-51 (comparing efficiency of common-law adjudication with the relative inefficiency of political process).

⁷⁵ MATTEI, *supra* note 2, at 226-27.

⁷⁶ Then, following the European lead, to Latin America, Asia, and elsewhere.

the late 1980s.⁷⁷ The most significant evidence of the relevance of the law and economics approach in Europe is not only the increasing number of specialized papers that appear in law journals, but also the increasing number of European publications in the area, as well as monographs, periodicals, and encyclopedias. Much more significant is that European scholars not self-identified as law and economics acolytes, many of whom are the very same scholars that throughout the 1980s rejected efficiency reasoning in the name of justice as the only polar star of the lawyer, are now becoming more and more familiar with the general jargon and ideas of law and economics. Very often today efficiency reasoning, in a somewhat simplified form, can be found even in more mundane legal scholarship.

Once transplanted outside of its context of production, law and economics displays a high level of ambiguity that allows it

⁷⁷ For more information on the European Association of Law and

Economics, visit <http://nts4.oec.uni->

osnabrueck.de/eale/index.html. This society, mostly composed of

European scholars, some of whom are former American law

students, has obtained considerable success. It has generated

quite a substantial network of European individuals and academic

programs active in the field, including a variety of specialized

programs and research centers.

to flourish.⁷⁸ Conservative scholars admire its intellectual elegance; more progressive and liberal scholars see its potential in subverting the highly formalistic and black-letter flavor of local law and claim that the conservative political bias is something that can be left on the other side of the ocean.⁷⁹ Initial resistance by the mainstream legal scholarship has been successfully tackled. Like the debates of the early

⁷⁸ See Kennedy, *supra* note 8, at 633-35 (explaining the

ambiguous, and thus adaptable, political nature of the legal movements that have globalized successfully over the last century).

⁷⁹ See Pulitini, *supra* note 59 (offering a critical appraisal by an early Italian scholar in law and economics on the opportunity to consider Chicago-style and other brands of law and economics as a movement sharing enough commonalities to be approached within a unitary taxonomic scheme).

1980s in the United States⁸⁰ and in Europe ten years later, law and economics persuaded a significant number of legal scholars and professionals that issues of distribution are better addressed by taxation than by adjudication.⁸¹ Efficiency reasoning, therefore, should become the polar star of legal interpretation. Thus many European scholars have become attracted to law and economics, and, even when carefully limiting its use to relatively safe areas such as patrimonial private law, continue to pave the way to a mode of thought subversive of the traditional relationship between the law and the market.

The distinctive American pedigree of law and economics, nevertheless, leaves open a variety of fundamental questions that should be approached within a broad historical context in which present trends are not taken for granted and the political meaning of local specificities are fully appreciated. Such an exercise is even more critical if law and economics aims to establish itself as one of the fundamental methodologies of the new global legal order. Unfortunately, questions of legitimacy, power, and hegemony are never posed by the European users of the economic reasoning in the law. There is no trace on that side of the ocean of the kind of fundamental discussions of the implications of economic legal reasoning that, in the early

⁸⁰ See *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L.

REV. 485 (1980); *Symposium, Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980).

⁸¹ See Robert COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3-4 (3d ed. 2000).

1980s (before law and economics was transformed into an industry), were posed in the United States by lawyers and philosophers who were willing to confront the intellectual arrogance and simple-mindedness of so many economists.⁸² To the contrary, efficiency reasoning is accepted as a form of necessary realism when facing such daunting tasks on the agenda of the modern European legal scholar as confronting the issue of private law integration.⁸³

Observing the European legal systems from the perspective of the reception of U.S. ideas, such as efficiency reasoning in the law, shows a greater division and a greater need to distinguish the differences that one might expect. Too apparent to be neglected is the wide gap between northern and Latin-European countries in the attitude towards the reception of American-inspired modes of legal thought. Northern countries, including Germany, Holland, Great Britain, and the Scandinavian states, have incorporated much of the new American attitude towards legal discourse as symbolized by law and economics. In these countries the assimilation of leading U.S. modes of legal

⁸² See Mattei & Monti, *supra* note 72, at 13-14 (offering a summary of these critiques).

⁸³ See STEFAN GRUNDMANN & JULES STUYCK, AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW (2002) (describing a commission on the harmonization of contract law in Europe and arguments for various options that imply an assumption of efficiency reasoning).

thought, such as balancing jurisprudence (including law and economics), have tremendously increased in the last ten years. The so-called "New European legal culture," mostly designed by scholars from northern countries where the University system does not lie in a state of disarray and the law professors are mostly full-time scholars or (some of them) policymakers, is much more similar to the U.S. legal culture than to the traditional European one.⁸⁴ This new European legal culture, dominated by northern scholars able to express themselves in English, is the most influential in European private law drafting. The outcome of such Northern reception is a technological attitude towards legal discourse, traditionally foreign to the European style, which legitimizes the strategy of those not politically accountable, techno-bureaucratic elites within the European Commission.

Nevertheless, legal Europe is not made up only by northern, Anglophone elites. A variety of resisting attitudes can be found, too, particularly in southern Latin countries that resent their marginalized status in the exercise of building European law. Such Latin counter-cultures are occasionally created simply out of the cultural incapacity to participate in policy-oriented discussions about the law, because their leading lawyers are still the product of a highly formalistic, interpretive culture. Sometimes, such resisting attitudes are due to the still notable strength of the "social mode of thought

⁸⁴ See HESSELINK, *supra* note 27, at 72-80 (discussing

characteristics of the "New European legal culture," such as antiformalist trends).

about the law," which views the welfare state as a sign of social progress.⁸⁵ This attitude more or less consciously leads to the belief that the neo-American model carries with it

⁸⁵ A recent effort to "upgrade" the social dimension of the law in order to make it a distinctive feature of a European model of private law can be found in a Manifesto on European social contract law produced by a number of European private law scholars concerned with the present trends of technocratic reasoning in European private law. SOCIAL JUSTICE IN EUROPEAN CONTRACT LAW: A MANIFESTO (Mar. 20, 2004) (unpublished third draft), available at <http://www.law.harvard.edu/programs/elrc/events/2003-2004/SOCIALJUSTICE.pdf>.

reactionary eighteenth-century models of capitalism.⁸⁶ Indeed the early resistance against law and economics in Northern European countries was politically motivated by the same belief.⁸⁷ Such resistance has eventually been dismantled. One wonders if the Latin resistance will end up following the same path, or whether they will be more skeptical towards the idea that taxation should address problems of distribution (particularly after two decades of tax reduction for the rich), in place of adjudication.

V. Parochialism, Re-invention of the Wheel, and the Decline of Law and Economics

Recent scholarship in the United States has pointed out that law and economics has entered a post-modern, interpretive phase of development, in which its grand discourse over the nature of law, which aims at objectivity, has yielded to a local

⁸⁶ Interestingly, important "social achievements" of the European

legal tradition, such as the "social function" of property

rights, have been abandoned in the socially inspired European

Charter of Rights. The Charter of Fundamental Rights of the

European Union, 2000 O.J. (C 364) 1, available at

http://www.europarl.eu.int/charter/pdf/text_en.pdf.

⁸⁷ For an account of the early reception of law and economics in

Europe, see Cooter & Gordley, *supra* note 60.

micro-strategy grounded in pragmatism.⁸⁸ Using such strategy, legal scholarship pursues hegemony and influence over the other sources of U.S. law by means of a radically neopragmatist attitude. Such critical development has been fostered by a general loss of faith (among experts) in the objectivity of efficiency-based discourses, the very same faith that in previous times has guaranteed law and economics (and to economics in general) its hegemony within post-realist approaches to legal scholarship and within other social sciences.⁸⁹ The importance of this evolution can be viewed from the perspective of the legitimacy of legal discourse, if one considers that the quest for objectivity had already been at the roots of the legal process school in the 1950s.⁹⁰ In the U.S.

⁸⁸ MINDA, *supra* note 15, at 85. *But see* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 130 (2000) (noting recent changes to law and economics scholarship, but arguing that "law and economics retains its distinctly modernist orientation").

This section is adapted from Mattei & Monti, *supra* note 72, at 13-16.

⁸⁹ *See generally* Cooter, *supra* note 19 (discussing the contribution of efficiency reasoning to legal scholarship).

⁹⁰ *See* Wechsler, *supra* note 34.

legal academy today, law and economics has finally been unseated from its throne of legal objectivity, so that its normative recipes need a new contingent and local legitimacy in order to compete against a variety of opposite political strategies.

Nevertheless the objective and naturally desirable value of efficiency is still a powerful ideology as soon as one abandons the cutting-edge academic discourse. The traditional grand theory of law and economics has been successfully received and implemented by the new, all powerful producers of global law, those international institutions of global governance both private and public (the World Trade Organization, the World Bank, the International Monetary Fund, the mega-law firms etc.).⁹¹ In this institutional scenario, even lively scholarly debates occurring in only one place (however hegemonic, such as the United States) cannot help but be parochial and ineffective, because the real impact of law and economics has now overtaken the domain of academia to conquer the domain of policy. Intellectual resistance and critique risk becoming marginalized at the academic level (let alone at the level where policy decisions are actually carried out) by the self-content posture held by the mainstream scholarship.

The a-critical reception of law and economics, with its grand discursive strategy based on efficiency and objectivity,

⁹¹ The scenario resulting from the ascension of these

institutions has been referred to as "empire" and "polyarchy."

See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000); WILLIAM I. ROBINSON,

PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION, AND HEGEMONY (1996).

therefore becomes the ideological apparatus of global authority. Efficiency reasoning in the law is losing any critical potential as a scholarly tool because it legitimizes as scientific the ideological assumptions of dominating neoliberalism. Alternatively, if the post-modern vein of present-day U.S. law and economics is ever understood, its reception will remain embedded in postmodernism, which is "the logic by which global capital operates."⁹²

If one looks at the success of efficiency reasoning in the law as discussed in this Essay, he will find at least three fundamental reasons for it, both in the context of production (the United States) and in that of reception (the periphery, including Europe): (1) the capacity to provide a critical bite capable of deconstructing so many myths of the state-centric perspective of the lawyer (who can forget the impact of Calabresi's early observation that "[o]ur society is not committed to preserving life at any cost");⁹³ (2) a general framework to restructure the role and the legitimacy of the lawyer, weakened by the realist extreme "choice for candor"; and (3) a radically nonpositivistic intellectual attitude, which allows thinking about the law outside of local technicalities, and which is therefore easily understandable and adaptable in a variety of different contexts.

Beginning in the 1990s, after the relationship between the market and the law had been subverted in U.S. legal theory

⁹² HARDT & NEGRI, *supra* note 91, at 151.

⁹³ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 17 (1970) [hereinafter *THE COSTS OF ACCIDENTS*].

(today it is the market governing the law and not the other way around), the above traits had been transformed, making law and economics much less appealing. As a consequence, efficiency reasoning in the law today seems imposed by means of more or less violent practices (e.g., conditional loans) rather than freely chosen as a prestigious model by lawyers world-wide.

Let us briefly discuss separately these three points.

As to the role of law and economics as a critique of the established "state-centric" modes of thought, there is little doubt that, in this era of global, single thought, and with the demise of the state and the triumph of global corporate actors, the relationship between the state and the market has been completely subverted. What was once the positivistic notion of the omnipotent state, whose values and priorities, reflected in the law, could be carried out at any price (or without paying any attention to such prices), has been so effectively challenged, that today the law finds itself governed by the market rather than the other way around. Law and economics certainly played a strong intellectual role in this reversal. After all, the notion of the law as a set of incentives rather than as a pyramid of binding orders, as a carrot rather than a stick, was all important in unseating state-centrism from its once dominating jurisprudential status.

The global diffusion of notions, such as competition between legal orders, soft law, default rules, social norms etc., indicates the weakness of the traditional state centric-perspective, so that, what was once the most original contribution of Guido Calabresi's *The Costs of Accidents*, is today the accepted truth. As a consequence of this reversal of the relationship between the state and the market, the relationship between the law and the market has also been subverted. Not only has the law been freed from the lethal hug

of the state, but also the idea that the law is produced by market forces is now generally accepted. While public-choice economists were showing how regulation and legislation are captured, law and economics scholars were working out all sorts of Darwinian evolutionary theories by which "investment" in litigation resources was seen as producing "returns" in terms of efficient rules.⁹⁴ In this subverted scenario, reflecting its new dominant jurisprudential status, law and economics offers very little critical insight. On the one hand, its approach is self-proclaimed as "positive" rather than "normative," so that, because of its scientific self-portrayal, the economic approach willingly declines any political confrontation. Secondly, law and economics not only posits that the law is up for sale, but also that its sale is "natural" and it should be so. Its discourses are consequently located in the conservative mainstream. These discourses keep restating the usual, cynical ideological platitudes, and, as a result, they are unattractive and banal to inquisitive and critical minds. What do they expect? The political process is captured and adjudication reflects investments. To the contrary, *The Costs of Accidents* was a critique of the accepted, narrowly state-centric modes of thought, and contained a strongly normative argument in which justice and distribution, in addition to efficiency, claimed a role. Thus, Calabresi's approach has been so attractive worldwide, suddenly giving law and economics a reputation as a

⁹⁴ George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

civilizing movement, capable of using efficiency as a critique and of guiding choices in the name of justice.⁹⁵

As to the capacity to restore the lawyer's claim of objectivity, we have observed how pragmatism and micro-strategies have been substituted for the early grand discourses. Once law and economics conquered the mainstream status by marginalizing all openly normative and re-distributive arguments, it transformed the choice for candor, typical of realist jurisprudence, into an even more extreme choice for cynicism. Discourses on distribution and values, that were never marginalized by the early work of Calabresi, and which gave a "human face" to the law and economics movement, have been abandoned. Whoever (including this author) was writing about law and economics in the mid-1980s in Europe, was busy preaching that there was something else beyond the Chicago economic cynicism. The transformation of U.S. law and economics into an organized industry has expelled any distributional worry from the hard core of the discipline. Those scholars and lawyers who worried about values, about the just distribution of resources, about the problems of unconditionally accepting the paradigm of the *homo oeconomicus* are now depicted as bleeding-heart idealists, or naïve first-year law students, simply incapable of understanding the real logic that explains how things work. Of course there is not much to gain, in terms of legitimacy, for the legal profession to cynically recognize that (1) legal rules are up for sale and (2) that whoever can invest more in legal adjudication and law-making (including hiring more expensive lawyers and lobbyists) will "naturally" benefit from the returns of investment by winning the case or obtaining a business

⁹⁵ THE COSTS OF ACCIDENTS, *supra* note 93, at 24-26.

friendly legal environment. The loss of prestige for the lawyer's profession follows as much from being determined by political biases as being determined by business interests.

As to the nonpositivism, universalism, and adaptability of law and economics to different contexts, we can only observe here a dramatic involution into technicality and parochialism. The early grand pictures and theoretically ambitious reconstructions are being substituted more and more by incredibly boring papers, endlessly discussing, with an inconsiderate use of mathematics and graphs, irrelevant details of a manager's compensation scheme, improbable predictions of jury behaviors, or other similarly context-specific, detail driven, and user-unfriendly ideas. The cultural desolation of most of the papers presently circulating in the mainstream professional journals is evident to anyone that has approached the career of the legal scholar with a normal cultural endowment. There exists a tiny clique of insiders, usually repeating more or less the same stuff in dozens of papers, constantly cited, in what is little more than an exercise of *cut & paste*, accompanied by a display of trendy connections in Ivy League schools. I am not criticizing the complete lack of attention to anything that fails to occur in elite U.S. schools, as if these were the only places where scholarship was done. Even products of these elite institutions are simply ignored if they come from people not recognized in the tiny mainstream just mentioned. Think about the absence of communication between law and economics and neo-institutional economics, each one barricaded in its own little niche of professionalism. Or think about the appalling ignorance of so much of the literature dealing with social norms, where fundamental contributions of the legal anthropologist (I do not mean only in the French literature, but also in the Anglo-American literature), are

simply ignored in order to be re-discovered. When economists who are not legally-trained enter the business, the institutional characteristics of American law--very superficially gleaned from three years of law school (at best) or by second-hand quick reading or hearsay conversations with legal colleagues--are universalized and taken for granted.⁹⁶ They become a sort of an economist's reflection on the legal system, in which all the complexities and the power structures of the real life of the law are simply obliterated. This attitude exacts a toll, because so many of the solutions that are presented as universally efficient are, indeed (if they are at all), efficient only in the U.S. institutional environment--itself very different from most others. It does not take long for the scholar abroad, capable of accessing the rich treasury of worldly legal scholarship, and perhaps even that of neighboring disciplines, to observe that, in importing law and economics, he might have imported a "defective product." After its early grand promises (for which it was worth fighting), law and economics has evolved locally into a parochial tool of propaganda of an established anti-intellectual mainstream turning everything, even culture, into technological skills. When law is turned into an expensive technology, it becomes a product of culture.⁹⁷

⁹⁶ I develop this argument in MATTEI, *COMPARATIVE LAW AND ECONOMICS*, *supra* note 2.

⁹⁷ See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

American legal scholars at the beginning of the new millennium are themselves experiencing a decline in international prestige. Their legal ideology, marketed worldwide without attention to what is happening at home, is frequently the product of a good faith attitude often motivated by justice (such as the attitude of the international human rights movement). Nevertheless, the simple-mindedness following decades of intellectual leadership, the attitude of *always talk and never listen*, and to *always teach and never learn*, and the high degree of technocratic parochialism, has started to exact its toll. Despite being leveraged by institutions such as the World Bank and IMF, U.S. models fail to persuade the cutting edge international scholars because of the models' abstract technological nature, consequent cultural naiveté, and incapacity to account for local complexities and diversity. International scholars capable of first-hand observations and independent from local, biased accounts, today resent the decline of the legal academy's role as a powerful, independent check on the U.S. political process. American legal scholars have either abandoned their critical thinking following the remarkable degree of cosmopolitanism in the early season of legal realism, or, when self-perceived as critical, have lost every kind of political bite after being trapped in a variety of post-modernist attitudes. To understand the legal academy's lack of a critical role, look at the hundreds of pages devoted in American books on criminal procedure to the celebration of the procedural guarantees of due process at trial (mostly conquests of the Warren Court years). Unfortunately, no attention is ever devoted to the fact that only a very tiny minority of defendants

will end up at trial, and will therefore enjoy such guarantees.⁹⁸ Most defendants, overwhelmed by the superior economic and political power of the prosecutor, enter plea bargains.⁹⁹

Law and economics experts display even stronger loyalty to their own system, too often turning academia from a critical check on the political process into an agency of propaganda. Consider the dominating approach taken by experts after the Enron scandal. A humble reflection on this conflict of interest as a pervading market failure, possibly as difficult to conceptualize and as devastating for free-market ideology as externalities or monopolies, would have been in order. To the contrary, some scholars have been busy criticizing the Sarbanes-Oxley Act¹⁰⁰ for increasing the criminal sanctions without considering the literature arguing that fines are an efficient remedy against white-collar opportunism.¹⁰¹ Other papers have

⁹⁸ Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 251-52 (2000).

⁹⁹ *Id.*

¹⁰⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

¹⁰¹ See, e.g., Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 943 (2003).

pointed out the quick and effective reaction of the system to address an aberration claiming that the emergence of the scandal was proof that the market could cure itself.¹⁰² An approach attempting to benefit from the critiques of efficiency reasoning in the law would observe how the Sarbanes-Oxley Act was completely captured by the interests it was supposed to control, and that it is little more than a façade to mask the persistent under-funding of the Securities and Exchange Commission.¹⁰³

Lawyers, as a professional group, do not live in a world completely separated from their social context. It is therefore natural that their professional perception is, at least in part, the product of the general social perception. A loss of faith and a sense of betrayal from the "American model" of the rule of law are now more diffused even between cultivated European intellectual elites, of which lawyers are a constituent part. Scandals such as Enron, Guantanamo, Abu Ghraib, the "War on the

¹⁰² See, e.g., Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 3 (2002).

¹⁰³ Cf. Ugo Mattei & Filippo Sartori, *Conflitto continuo. A un anno da Enron negli Stati Uniti e in Europa*, 34 POLITICA DEL DIRITTO 177 (2003).

Bill of Rights,"¹⁰⁴ or the hundreds of accused individuals, mostly black, sitting on death row because they are incapable of "investing" enough in defense, are quickly consuming the residual capital of the worldwide prestige of the American rule of law.

Conclusions

Hegel once said that if there is something we can learn from history, it is that we can never learn from history.¹⁰⁵ Scholarship in social science should avoid gazing into the crystal ball because political variables are too complex to be predicted. Predicting the fall of an academic movement using data stemming from previous histories of declining patterns of prestige of academic movements in western law can be counterintuitive when the movement is as influential and mainstream as law and economics today. Nevertheless, observing the parable of efficiency reasoning in the law, through a global perspective, might be of some interest.

Once upon a time in New Haven, Connecticut, there was a young lawyer-economist, cosmopolitan in learning, and critical

¹⁰⁴ See NAT HENTOFF, *THE WAR ON THE BILL OF RIGHTS AND THE GATHERING*

RESISTANCE (2003) (discussing the erosion of individual rights through recent actions of the U.S. government in response to the events of Sept. 11, 2001).

¹⁰⁵ See generally GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (J. Sibree trans., Dover Publ'ns 1956) (1899).

in spirit. He taught lawyers worldwide that no value, not even human life, is protected at any price, and that acknowledging this reality could help us clarify our priorities. This insight has produced the final collapse of legal positivism and has opened a daunting space for legal creativity to imagine a better, fairer, and more efficient social organization. That lawyers and economists should work together for this common task was Calabresi's recommendation. Beginning in the 1980s, the interdisciplinary work and the merger of legal and economic approaches became dominant in the United States. This happened when a political program, known as Reagan-Thatcherism, was pursuing its final effort to win the Cold War. Deregulation, privatization, downsizing, outsourcing, and dismantling of the welfare sector were some of the strategies used to find the tremendous amount of money necessary to bring the military confrontation to a level impossible for the Soviet Union to face. This political program was friendly with what has been called the "Imperialism of Economics,"¹⁰⁶ and the economic aid it could offer caused it to prevail quickly over the ideological aspects of the economic approach (market conservatism), rather than the genuine tension of critical understanding. Law and economics has been transformed into an industry dominated by politically conservative economists. The models produced by this movement have been exported worldwide by organizational efforts (within and outside U.S. academic institutions) and by its tremendous influence in the programs of the international financial institutions. This triumphant model, nevertheless, merges with outdated aspects of both the legal and the economic approach, possibly because cutting-edge minds, both in the law

¹⁰⁶ Cooter, *supra* note 19.

and in economics, ended up abandoning the field, tired of its ideological and simplistic blend.¹⁰⁷

Economists have contributed to law and economics an ideology of individualism and of property rights that is too extreme and biased to reflect any kind of real-life institutional structure.¹⁰⁸ This idea, directly stemming from eighteenth-century naturalistic conceptions of property as a zone of individual sovereignty, insulated from public or private intrusion, cannot account for opportunistic behavior, conflicts of interest, rent seeking, or for the many other failures of markets and private institutions. Individualism cannot explain why the justice motive is many times more important than the profit motive as a justification for human behavior.¹⁰⁹

A variety of other assumptions typical of neoclassical economics, and of its monetarist amplification, have been subsumed in "structural reform" programs, without sufficient consideration of the many critiques and challenges to the paradigm of *homo oeconomicus* stemming from economists from the neo-institutional school: Paul David, Brian Arthur, or Herbert Simon in the United States alone.

¹⁰⁷ Calabresi's intellectual history is very revealing from this point of view.

¹⁰⁸ See MATTEI, *supra* note 2, at 56-57.

¹⁰⁹ See NADER, *supra* note 26, at 216-17 (stating that the justice motive is necessary to the "social legitimation of law").

On the other hand, sophisticated lawyers today are no longer stuck in a monistic and static conception of the legal order. For a long time lawyers have understood the complexity stemming from the plurality of legal orders, both private and public, that govern, in a polity, the relationship between individuals and social groups. These lawyers no longer believe in abstract formulas, in science as legitimization, and no longer do they just hide with numbers and formulas the platitudes whose only role is to grant some legitimacy to decisions biased in favor of the stronger market actors. These lawyers realize that many norms do not come from the public sector, but they also know that economic relationships must be governed by an effective and authoritative public sector, actually granting equal opportunities and taking care of imbalances of power. These lawyers understand that most recipes originating from the dominant blend of law and economics, and the structural reforms inspired by efficiency reasoning in the law, will leave us with the ruins of a public sector when we finally wake up from the neoliberal booze.¹¹⁰

When an approach to the law loses its critical strengths and merely legitimizes a status quo, it betrays the function that in western law has always granted prestige to academic thinking: a strong independent check on the political process.

Historically, when such a phenomenon happens, new movements and ideas seize a leading role, exposing the uncritical approaches as obsolete and unworthy of admiration. It is impossible to predict where the new paradigms will come from and how long it will take for the old ones to be substituted. Leading paradigms never came with simplistic answers. We know

¹¹⁰ See HERTZ, *supra* note 21.

that they emerged by asking basic questions, such as questions about the relationship between efficiency and distribution, which Calabresi posed more than forty years ago. To this question, law and economics--now an industry--has denied attention.