Comparative Law & Economics and the 'Egg-Laying Wool-Milk Sow'

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INTRODUCTION

Proponents of a new discipline of 'comparative law and economics' emphasise the complementarity of 'comparative law' and 'law & economics'.[1] I share this view to some extent. For this contribution, however, I was asked to highlight some of the problems that researchers pursuing the 'comparative law and economics' approach may encounter.

My word of caution is, in a nutshell, that a good comparative law and economics analysis would be an *eierlegende Wollmilchsau* (an 'egg-laying wool-milk sow')—an imaginary cross-breed creature that has come to signify an impossible combination of desirable attributes.[2] The reason is not only that it is difficult to find legal comparatists with a good knowledge of sophisticated economics, or economists with a good knowledge of sophisticated comparative law. Any such deficiency could be addressed by collaborative research, although the incentives for such collaborative research present their own problems. More importantly, a good legal comparison and

* I would like to thank the organisers of the workshop for the invitation and endless patience. The contribution is an amended version of the workshop presentation and retains its conversational style.

[1] See in particular Mattei, UA (1998) *Comparative Law and Economics* University of Michigan Press, passim; Mattei, UA, Antoniolli, L, and Rossato, A (2000) 'Comparative Law and Economics' in Bouckaert, B, and De Geest, G (eds) *Encyclopedia of Law and Economics* Vol I Cheltenham, Edward Elgar at 505-538; see also the collection De Geest, G, and Van den Bergh, R (eds) (2004) *Comparative Law and Economics* Vol I-III Edward Elgar; more recently Carson, LD (2013) 'Restoring Law in Comparative Law and Economics' available at: <http://ssrn.com/abstract=2297660>. The attempt to establish a new discipline has not met with universal approval. Legrand has complained about the 'tedious banality of so-called "comparative law and economics,"' (Legrand, P (2009) 'Econocentrism' (59) *University of Toronto Law Journal* 215 at 219 in below note 6), and Faust concludes that 'just as systematic interpretation should not be considered a separate discipline, comparative law and economics should not be considered a discipline in its own right either.' Faust, F (2006) 'Comparative Law and Economic Analysis of Law' in Reimann, M & Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press 837 at 864. More recently, the discussion about 'comparative law and economics' has been dominated by the legal origins literature. See below note 45.

[2] Ludwig Renn, a writer who was sentenced for high treason by the Reichsgericht 80 years ago (on 16 January 1934) after being arrested by the Nazis in the night of the fire in the Reichstag, penned a satirical poem entitled '*Der Kampf um das eierlegende Wollschwein*' ('The Battle for the Egg-laying Wool-Pig') mocking the Nazis' obsession with the Nordic race (in the poem, a breeder seeks to create 'asses with red cheeks and a Germanic neck' so that 'one could better understand the concept of the Nordic race': 'Esel gäb's mit roten Backen / Und germanenförm'gen Nacken, / Daß man von der nordischen Rasse / Klarere Begriffe fasse.'). In the poem, Hitler reacts furiously to this insult and demands instead the development of 'a pig that wears merino wool and lays eggs'. The breeder eventually creates a pig that crows in the morning and lays eggs, but the eggs turn out to be brown, smelly and ugly. Renn, L (1959) 'Der Kampf um das eierlegende Wollschwein' ('The Battle for the Egg-laying Wool-Pig') reprinted in *Ludwig Renn zum 70. Geburtstag* Aufbau-Verlag at 135-136. It is unclear whether Renn invented the expression of the egg-laying wool (milk) pig or built this poem around a pre-existing idiom, but today it is a fixed expression in the German language.

a good economic analysis follow diametrically opposed routes.[3] A good legal comparison aims to be as rich in its description and fine-grained in its analysis of the law in action and identification of functional equivalents as possible.[4] In contrast, a good economic model is a parsimonious simplification of reality that still allows good predictions—not a one-to-one map.[5]

A separate problem of the 'comparative law and economics' approach is that both comparative law and law & economics aspire and sometimes purport to be more 'scientific' than other modes of legal reasoning.[6] However, both approaches leave ample scope for the researcher's normative preferences to be reflected not only in the policy recommendation (what 'ought' to be done), but sometimes also in the descriptive part (relating to the 'Is'), through the choice of methodologies, assumptions, or variables used.

The result of a *legal comparison* can be biased because of a strategically or inadvertently non-representative selection of jurisdictions, or because of the choice as to the depth or breadth of the comparison.

The result of an *economic analysis* can, and often will, change depending on the underlying assumptions, the inclusion or omission of variables, and whether the question is addressed through intuitive economic reasoning, purely theoretical, neo-classical analyses with untested assumptions and predicted outcomes (as is still too often the case in 'traditional' law & economics approaches), or through empirical analyses based on experimental, survey, or field evidence.

Combining the comparative and economic approaches compounds the problem. With a grain of salt, just about *any* desired result can be cloaked in the ostensibly scientific disguise of a 'legal and economic comparison'.

A final mundane, but practically important aspect to be considered is that legal comparisons and economic analyses are time-intensive and costly endeavours, even taken individually. Legal comparisons take time, increasing more or less proportionately with the number of jurisdictions surveyed. Economic analyses, in particular in the form of empirical work, are often costly and time consuming. The combination of both approaches compounds these problems.

Most of this piece focuses on this point, on the considerable *costs* confronting the researcher who combines comparative and economic approaches. It is an

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[3] See Legrand P 'Econocentrism' and Carson, LD 'Restoring Law'', both supra note 1; Michaels, R (2009) 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (57) *American Journal of Comparative Law* 765 at 778-779.

[4] See below note 59 and Zweigert, K, and Kötz, H (1996/1998) *An Introduction to Comparative Law* (3rd ed, trans Tony Weir) Oxford University Press at 35-36. Functionalism is, of course, not an uncontroversial approach to comparative law. However, much of the criticism against functionalism seems overblown and over-theorised. True, from a postmodernist view everything in the law—including its functions—may be a social construct resulting in 'radical incommensurability' (see the quotation by Legrand, see below note 23). But this is just as unhelpful for operating in the real world as if we reverted to a solipsist approach in philosophy—it is not helpful to require, before one thinks about anything in the world, that it is first proven that the world is more than a figment of my imagination. To this extent I prefer under-theorised pragmatism to pure theory. For a well-balanced summary and discussion of the criticism against functionalism, see Siems, M (2014) *Comparative Law* Cambridge University Press at 33-40; for a discussion of postmodernist approaches to comparative law, ibid., 97-118.

[5] See the quotations by Joan Robinson and Lewis Carroll below, note 83.

[6] Cf Zweigert K & KötzH *An Introduction* supra note 4 at 4, 15, 33 (for comparative law); Mattei, UA *Comparative Law and Economics* supra note 1, 9 with footnotes 34 and 37 (pointing to the claim of a more scientific discourse by both comparative law and the economic analysis by separating the discussion of the positive is from the normative ought) and ibid, 21 (but see ibid, 22, acknowledging that 'both equity and efficiency are only techniques of legal argument').

elaboration on *William Twining*'s warning that 'it is easy to ignore or to underestimate the difficulties, theoretical and practical, of sustained interdisciplinary work.'[7] However, *Twining* continued that '[i]t is easy for inflated optimism to be replaced by sour disillusion',[8] and to avoid this trap, the final section this piece paints a more conciliatory picture, turning to the benefits that the combination of comparative law and law & economics can bring. As long as the researcher understands and openly confronts the feasibility constraints, and acknowledges the normative choices necessarily made even when describing the 'Is' (that is, in the ostensibly 'scientific' part, not to mention the normative part on what 'ought' to be done), both approaches have the potential to advance knowledge considerably, and the whole can be greater than the sum of its parts. However, it is in my view better to have separate in-depth legal comparisons and in-depth economic analyses, instead of sacrificing either the richness of a functional legal comparison or the rigour of the economic analysis in a combined 'comparative law and economics' approach. Instead of aiming for the brown, smelly and ugly eggs of the egg-laying wool milk sow,[9] it may be better to do it the old fashioned way and raise chicken, sheep, pigs, and cows side by side.

The second and third parts of this essay provide the background, by addressing the rise of both comparative law and law & economics, and the ways in which these methodologies may interact, respectively. Part four contains the main argument of this contribution and examines the pitfalls of 'comparative law & economics', in particular the need for, and problems of, dual qualifications or collaboration, the ill fit between the need for a rich description in comparative law and the need for parsimonious models in economics, the dangers of raising hopes for a 'scientific' solution of legal problems that are bound to be disappointed, the profession's hostility towards approaches that threaten its turf, and the high opportunity costs of sophisticated comparative law & economics. Part five concludes.

THE INCREASING IMPORTANCE OF BOTH COMPARATIVE LAW AND LAW & ECONOMICS

Comparative law and law & economics are two approaches which have thrived in legal scholarship in recent decades. Both approaches transcend the positive law of any given jurisdiction. Both approaches identify the functionality of the legal institutions as more important than the doctrinal forms through which this functionality is achieved.[10] Academics who are interested in an international discourse, or at least

[7] Twining, W (1973/1985), *Karl Llewellyn And The Realist Movement* Weidenfeld and Nicolson at 387.
[8] Ibid.
[9] Supra note 2.
[10] Generally on functionalism see Cohen, F (1935) 'Transcendental Nonsense and the Functional Approach' (35) *Columbia Law Review* 809. The importance of functionalism for comparative law is well established as one of the main approaches (Zweigert & Kötz *An Introduction* supra note 4 at 34 and passim; Siems, M *Comparative Law* supra note 4 at 25-40; Michaels, R (2012) 'Comparative Law' in Basedow, J, Hopt, KJ, Zimmermann, R & Stier, A (eds) *The Max Planck Encyclopedia of European Private Law* at 297-298) although functionalism is neither well defined nor uncontroversial, see Michaels, R (2006) 'The Functional Method of Comparative Law' in Reimann, M & Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press 339 at 343-362 (distinguishing between 'at least seven different concepts of functionalism'); see also ibid., 340 ('The functional method has become both the mantra and the *bête noire* of comparative law'). For law and economics the reliance on the (a?) functional method may be less obvious, but one of the chief proponents of the movement, Judge Richard Posner, has stated: 'I have long thought that one of the

international visibility, can, instead of writing for a narrow parochial market, adopt either or both of these approaches. The number of those interested in these approaches is growing, albeit for slightly different reasons and at different speeds.

Comparative Law on the Rise

There is a new wave of interest in comparative law. Globalisation and technological changes have led to an increase in legal transplants.[11] Harmonisation efforts, with their attendant need to take stock of the existing variety, have grown both regionally (eg, on the level of the European Union) and on the global level (eg, UNIDROIT, CISG). Where there is no harmonised law, the need for the application of private international law, which often requires an implicit comparison, has also grown with the increase of international trade, both before state courts and before arbitration panels. Formerly socialist countries have adapted their legal systems to the new economic environment in recent years and, in doing so, have drawn on the experience of other legal systems. It has become standard practice for lawyers in many countries to study abroad for a Masters or doctoral degree (LLM, MJur, JSD/SJD etc). To be sure, the study of foreign law is not the same thing as the study of comparative law.[12] However, not only is the study of foreign law a precondition for legal comparisons, but a trained lawyer studying foreign law will inevitably 'compare' the foreign law to the law of her home jurisdiction, at least on an intuitive level.[13] Moreover, once the interest is stimulated, a number of graduates will also engage in actual comparative research in their future careers.

Law & Economics on the Rise

Law & economics has prospered for slightly different reasons. Unlike the academic discourse in most other jurisdictions, which tend to focus on doctrinal analysis of the positive law, the academic discourse in the United States is largely uncoupled from positive law, partly as a result of the American legal realism movement,[14] partly because of the federal structure of the United States.[15] Policy reasoning is given much greater weight in the United States than the niceties of the positive law in both legal teaching and legal scholarship. This has not always been welcomed. Current Supreme Court Justices have famously criticised the fact that the typical US law review article picks a topic that may have been 'of great interest to the academic that wrote it, but

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most valuable contributions that economics has to make to law is simply to show that there is less functional variety in the legal system than there is doctrinal and institutional variety.' Posner, RA (1997) 'The Future of the Law and Economics Movement in Europe' (17) *International Review of Law and Economics* 3 at 6; also *cf* Siems M *Comparative Law* supra note 4 at 26-27.

[11] I do share William Twining's distaste of ill-defined 'globa-babble and globa-hype' (Twining, W (2007) 'Globalisation and Comparative Law' in Örücü, E & Nelken, D (eds) *Comparative Law—A Handbook* Hart Publishing 69, 70). What I mean here is merely the intensification of international trade, often within the same production and supply chain.

[12] Zweigert, K, and Kötz, H, *An Introduction* supra note 4, at 6; Michaels, R'Comparative Law' supra note 10 at 297.

[13] Michaels, R 'Comparative Law' supra note 10 at 297.

[14] Zweigert, K, and Kötz, H *An Introduction* supra note 4 at 246-249; Eidenmüller, H (1995/1998) *Effizienz als Rechtsprinzip* ('Efficiency as a Legal Principle') Mohr Siebeck at 406-410.

[15] Zweigert, K, and Kötz, H *An Introduction* supra note 4 at 251.

isn't of much help to the bar',[16] and that 'there is evidence that law review articles have left terra firma to soar into outer space.'[17] The complaint is of course not a new, nor a specifically American, one. As *Rudolph von Jhering* remarked in 1884 about Germany: 'There is unanimity that not all is well in our private legal practice. The academics [...] think that the root of the evil is that legal practice is not sufficiently theoretical, the practitioners that legal theory is not sufficiently practical.'[18] Yet, what American scholarship (allegedly) lacks in practicality, it makes up in terms of policy reasoning and interdisciplinary approaches.

Since the 1970s, economics has arguably been the discipline with the greatest influence on legal policy arguments in the US. Law & economics is pervasive in US teaching and scholarship.[19] A large proportion of students studying abroad attend US law schools, where they are inevitably confronted (to a greater or lesser extent) with the discipline of law & economics. Some of these students take knowledge about this discipline, or at least an awareness of it, with them once they move elsewhere. We have seen law & economics on the rise in various other jurisdictions in the world in recent decades—even though with a substantial time lag compared to the US.[20]

Part of the explanation for this time lag is arguably the greater focus on the positive law in practically all jurisdictions outside the United States. The traditional doctrinal exegesis of codified law in many civil law jurisdictions is less well suited to the integration of law & economics insights than the policy discourse that prevails in US law schools and, at least to some extent, US courts. Conversely, most common law jurisdictions outside the US, such as England and Wales, have not had the benefit of the pruning and systematisation that took place in the US, for example, in the drafting of the various Restatements and the Uniform Commercial Code. As a consequence, these other common law jurisdictions spend many their resources on reconciling centuries worth of case law. This means that for the most part a *historical* exegesis of these earlier cases plays a similar role in England and Wales (and I suspect many other common law jurisdictions) as does the *doctrinal* exegesis of

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[16] Newton, BE (2012) 'Law Review Scholarship in the Eyes of Twenty-First Century Supreme Court Justices: An Empirical Analysis' (4) *Drexel University Law Review* 399 in n 1, quoting Chief Justice John Roberts.

[17] Breyer, SG (2008) 'Response of Justice Stephen G. Breyer' 64 *New York University Annual Survey of American Law* 33. See also Liptak, A (2007) 'When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant' *New York Times*, 19 March 2007, A8; Liptak, A (2013) 'The Lackluster Reviews that Lawyers Love to Hate' *New York Times*, 22 October 2013, A15.

[18] von Jhering, R (1884/2006) *Scherz und Ernst in der Jurisprudenz* ('Joking and Seriousness in Jurisprudence') Elibron Classics at 100 (my translation).

[19] Not all students welcome this trend. See Hamilton, T (2014) 'Why Law School's Love Affair with Economics is Terrible for the American Legal System' *Salon*, 26 July 2014, available at: <http://www.salon.com/2014/07/26/why_law_schools_love_affair_with_economics_needs_to_stop/>.

[20] See, eg, Posner 'The Future of Law' supra note 10; Van den Bergh, R (1996) 'The Growth of Law and Economics in Europe' (40) *European Economic Review* 969-977; Cooter, R, and Gordley, J (1991) 'Economic Analysis in Civil Law Countries: Past, Present, Future' (11) *International Review of Law and Economics* 261-263; Mattei, UA, and Pardolesi, R (1991) 'Law and Economics in Civil Law Countries: A Comparative Approach' (11) *International Review of Law and Economics* 265- 275; Kirchner, C, (1991) 'The Difficult Reception of Law and Economics in Germany' (11) *International Review of Law and Economics* 277-292; Ota, Shozo (1991) 'Law and Economics in Japan: Hatching Stage' (11) *International Review of Law and Economics* 301-308. *See also* the (by now slightly dated) bibliographic information in the various national contributions in Bouckaert, B, and De Geest G (eds) (2000) *Encyclopedia of Law and Economics* (vol I) Edward Elgar at 118-382 (available online at: <http://encyclo.findlaw.com/>).

codified law in civil law jurisdictions.[21] Neither the doctrinal nor the historical approach is completely closed to insights from law & economics, but neither approach is particularly amenable to law & economics arguments.

It remains to be seen what the impact of the efforts to harmonise, for example, European contract law will be in this respect.[22] It could go either way. It could be that the harmonisation efforts boost law & economics. Economics could be used, as Posner suggested, as a 'common idiom': 'Rather than having to translate the legal culture of one nation into the legal cultures of the other nations of the European Union, the economic analyst of law offers to translate all those legal cultures into the language of economics, which is a universal language—even more so than English.'[23]

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[21] It is telling that the famous quotation by Holmes that 'the man of the future is the man of statistics and the master of economics' (below text at n 115) precedes the sentence: 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.' Holmes, WJ (1897) 'The Path of the Law' (10) *Harvard Law Review* 457 at 469.

[22] I am here only interested in the effects of these harmonisation projects on the use of law & economics in the interpretation of these harmonised instruments, not in the desirability of harmonisation. On the latter question, there are of course many views, ranging from principled rejection (Legrand, P (2006) 'Antivonbar' (1) *Journal of Comparative Law* 13-40, available at <http://wildy.com/jcl/pdfs/legrand.pdf>; for greater emphasis on celebrating diversity in the European contract law debate: Miller, L (2011) *The Emergence of EU Contract Law—Exploring Europeanization* Oxford University Press, passim and summarising at 226-228) to scepticism as to the current implementation (Eidenmüller, H, et al (2008) 'The Common Frame of Reference For European Private Law—Policy Choices and Codification Problems' (28) *Oxford Journal of Legal Studies* 659-708; Eidenmüller, H, et al (2012) 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht—Defizite der neuesten Textstufe des europäischen Privatrechts' ('The Proposal for a Common European Sales Law —Deficits of the Newest Version of European Private Law') (67) *Juristenzeitung* 269-289; Wagner-von Papp, F (2010) 'European Contract Law: Are No Oral Modification Clauses Not Worth The Paper They Are Written On?' (63) *Current Legal Problems* 511 at 512-516, and in particular 591-593, 595-596, with further references at 515 footnote 15) to wholehearted support (Hesselink, MW (2012) 'The Case For A Common European Sales Law In An Age of Rising Nationalism' (8) *European Review of Contract Law* 342-366; Beale, H (2007) 'The Future of the Common Frame of Reference' (3) *European Review of Contract Law* 350; Schulte-Nölke, H (2007) 'EC Law on The Formation of Contract—From the Common Frame of Reference to The "Blue Button"' (3) *European Review of Contract Law* 332). From an economics perspective, the economics of federalism can tell us that whenever harmonisation on a higher level in a multilevel governance system is involved, there will be a tradeoff between various factors (such as between the benefit of economies of scale to be achieved by harmonised law, eg, in legal education, versus the costs of harmonised law where there is a heterogeneity of preferences or problems, or the loss of regulatory competition). See Kerber, W (2008) 'European System of Private Laws: An Economic Perspective' in Caffaggi, F, and Muir-Watt, H (eds) *Making European Private Law—Governance Design* Edward Elgar 64, 75-87; Linarelli, J (2003) 'The Economics of Uniform Laws and Uniform Lawmaking' (48) *Wayne Law Review* 1387-1447. The decision whether harmonisation is desirable turns on the relative weights one attributes to these factors. Of course, it is far from clear whether the Common European Sales Law proposal is going anywhere. Even if the Council adopts the proposal in the form given to it by the European Parliament, it is not entirely clear that parties have a sufficient incentive to opt into an instrument whose interpretation is an unknown, and without parties opting into the instrument, no body of case law will develop, so that the instrument does not become more attractive over time. From this perspective, the opt-out mechanism of the Convention on Contracts for the International Sales of Goods (CISG) might have been a preferable approach. The opt-out mechanism can be criticised as entrapping unsophisticated parties (Cuniberti, G (2006) 'Is the CISG benefiting anybody?' (39) Vanderbilt Journal of Transnational Law 1511-1550), but in this way at least led to an increasingly comprehensive body of case law.

[23] Posner 'The Future of Law' supra note 10, at 6. For a radically different view see Legrand, supra note 1, at 215:

> I advocate processes of comparison that are no longer bound to commensuration. I argue in favour of incommensurability as the radical absence of common ground between different orders of legal knowledge. "Common ground", any "common ground," must assume a

In addition, if a European contract law instrument became a reality, it could lead to a greater importance of policy arguments. Any such instrument would need to be interpreted autonomously and could therefore not draw on any existing case law for the interpretation of its language. One of the interpretative approaches to be used for breathing life into the letter of the law could be law & economics. Such a shift in interpretative approaches to harmonised instruments could have spillover effects to the interpretation of domestic law.

Alternatively, a new harmonised instrument might lead to a revival of doctrinal research on the new instrument, similar to the development in the late 19th and early 20th centuries in Germany, when doctrinal research on the then new German Civil Code largely killed the momentum of the '*Interessenjurisprudenz*' and the '*Freirechtsschule*' in Germany that had sought to overcome the doctrinal excesses of the '*Begriffsjurisprudenz*' of the pandectists.

The current approach to the harmonisation efforts with respect to European contract law is basically one of replicating and combining provisions of existing civil codes and the *acquis communautaire*, rather than a fresh start. The German Civil Code is frequently castigated for being a backward-looking Code that was geared to solving the issues of the preceding century.[24] Mutatis mutandis, the current discussions on contract law harmonisation give the impression that we are hoping to solve the problems of the 21st century by combining 19th century codes with their 20th century amendments. Even to the extent that economic analysis was considered at all in the discussions on the Draft Common Frame of Reference, it was a rather superficial exercise of invoking (US) textbook law & economics terminology, instead of an empirical analysis of the legal problems which have occupied European courts and which problems will likely occupy the courts in the future.[25]

Another part of the explanation for the more sluggish uptake of law & economics in at least some jurisdictions outside of the United States is that there is greater resistance in such jurisdictions than in the United States to utilitarian approaches and greater emphasis on moral philosophy in the tradition of, for example, Immanuel Kant. This is certainly the case in Germany, where the constitutional discourse after the Second World War is firmly grounded in Kantian philosophy.

> metalanguage; but the empirical fact is that there is *no* language that can dispense with idiomaticity. What there is across laws, and all there is, is an abyss—an untranslatable abyss.

Legrand argues vigorously against those who claim that 'that there exists a "referential" language called "economics"' (ibid., 216).

[24] See Zweigert, K, and Kötz, H *An Introduction* supra note 4 at 143-144 (citing Radbruch and Zitelmann's criticism).

[25] The Economic Impact Group (EIG) within the CoPECL did not have a large impact on the DCFR (either the text or the comments; but see the lip-service paid to efficiency as one of many principles in Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law—Draft Common Frame of Reference, Full Edition* at 59-63), the Feasibility Study, or the Commission Proposal for a Common European Sales Law. On the EIG's work, see eg Larouche, P and Chirico, F (2010) *Economic Analysis of the DCFR—The Work of the Economic Impact Group within CoPECL* Sellier European Law Publishers; see also Wagner, G (2009) *The Common Frame of Reference: A View from Law & Economics* Sellier European Law Publishers. In much of the discussion, the US focus of the underlying literature is clearly visible, reflecting what Mattei has called the 'municipal misconception' of the law & economics literature (Mattei *Comparative Law and Economics* supra note 1, at 73). For law & economics approaches to aspects of the Commission Proposal, see, *eg*, Gómez, F, & Gili-Saldaña, M (2014) 'Termination as a Remedy in the Common European Sales Law: A Law and Economics Approach' (10) *European Review of Contract Law* 331-364.

While there were and are, of course, eminent moral philosophers in the US,[26] my impression is that, in general, utilitarian approaches prevail in practical reasoning in the United States, while the Kantian approach clearly dominates the German legal discourse.[27] And while Richard Posner famously tried to argue that his approach to law & economics was *not* grounded in utilitarianism (and hence was not subject to the criticism against it),[28] this argument was never really convincing.[29]

Yet another reason why law & economics took root more quickly in the US is that a certain proportion of US American law students come to law school after majoring in economics in their undergraduate degrees in college.[30] In contrast, in

[26] Eg, the late Ronald Dworkin; for his views on law & economics, see eg, the Dworkin-Posner exchange from the early 1980s. Dworkin, RM (1980) 'Is Wealth a Value?' (9) *The Journal of Legal Studies* 191; Dworkin, RM (1980) 'Why Efficiency?' (8) *Hofstra Law Review* 563; Posner, RA (1980) 'The Value of Wealth' (9) *The Journal of Legal Studies* 243. Richard Posner later acknowledged that Dworkin's criticism, 'though it overstated his case', caused him (Posner) to change his views 'albeit grudgingly [...] and with a lag' (Posner, RA (2007) 'Tribute to Ronald Dworkin' (63) *New York University Annual Survey of American Law* 9 at 11-12). My own view comes closest to the one expressed in Calabresi, G (1980) 'An Exchange: About Law and Economics: A Letter to Ronald Dworkin' (8) *Hofstra Law Review* 553. See also Kronman, AT (1980) 'Wealth Maximization as a Normative Principle' (9) *The Journal of Legal Studies* 227. For a morality-based view of contract law from the US perspective, see Fried, C (1981) *Contract as Promise—A Theory of Contractual Obligation* Harvard University Press; Fried, C (forthcoming) 'The Ambitions of Contract as Promise' in Klass, G; Letsas, G and Saprai, P (eds) *Philosophical Foundations of Contract Law* Oxford University Press Chapter 1.

[27] For example, based on my experience of the prevalence of economic reasoning in the legal discourse in the United States, I have difficulty imagining a US American court subscribing to the Kantian position which the German Federal Constitutional Court adopted when it decided a situation that can best be understood as an extreme version of the trolley hypothetical. The German court assessed the constitutionality of a statute that would have allowed the military (after complying with certain procedural safeguards) to shoot down an airplane in circumstances akin to the 9/11 scenario. The German Court struck down the statute as unconstitutional to the extent that innocent passengers or crew would be killed, among other things on the ground that this would treat any innocent passengers on the airplane purely instrumentally, as means rather than ends, and would therefore objectify them in a way that infringed their constitutionally guaranteed human dignity. The Court added that there would practically always be a non-zero chance that the catastrophe could be averted otherwise, that therefore it was not made out that the innocent passengers on the hijacked airplane were dying anyway, and that it was incompatible with the constitutionally guaranteed right to life and human dignity of the innocent passengers to weigh their lives against the saved lives on the ground. *Bundesverfassungsgericht* (German Federal Constitutional Court), 15 February 2006, 1 BvR 357/05, 115 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 118, at paragraphs 118ff, available at: <http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html>. For a summary of the decision in English, see (101) *American Journal of International Law* 466. For comparative analyses into the attitude to trolley-type scenarios (though not including German subjects in the sample) see, eg, Gold, N, Colman, AM, and Pulford, PD (2014) 'Cultural Differences in Responses to Real-life and Hypothetical Trolley Problems' (9) *Judgment and Decision Making* 65; Hauser, MD; Cushman, FA; Young, L; Jin, RK-X and Mikhail, J (2007) 'A Dissociation between Moral Judgments and justifications' (22) *Mind & Language* 1.

[28] Posner, RA (1979) 'Utilitarianism, Economics, and Legal Theory' (8) *The Journal of Legal Studies* 103, 117ff.

[29] Kronman 'Wealth Maximization' supra note 26.

[30] Although it appears that the proportion of economics majors is not as large as one could think. In a sample of 34,234 law school matriculants (a sample containing only majors with at least 150 students), only 1,499—or about 4.4 per cent—self-reported being economics majors. See Muller, D (2014) 'Sorting Law School Matriculants by Major, LSAT & UGPA' available at: <http://excessofdemocracy.com/blog/2014/4/sorting-law-school-matriculants-by-major-lsat-ugpa>. However, many other students major in related subjects or subjects that acquaint them with quantitative methods.

most other jurisdictions law is an undergraduate degree, with students joining immediately after finishing their secondary education. Accordingly, the supply of law students and lawyers with knowledge of economics is greater in the US than in other jurisdictions.

Lastly, the politically conservative tendency of the law & economics movement has led to substantial funding of the law & economics movement from conservative groups. Perhaps the causality runs the other way. Law & economics is not inherently conservative—there are also proponents of law & economics on the 'left'.[31] Nevertheless, much of the 'traditional' law & economics movement is found on the conservative, libertarian side of the political spectrum, and this trend has certainly been helped by targeted funding of Chairs and scholarships.

However this may be, despite the more favourable conditions for the law & economics movement in the US, the increased academic exchange through studies abroad, combined with a certain saturation in the field of purely doctrinal research, has led, even in civil law jurisdictions, to a gradual acceptance of law & economics approaches, at least among the younger generations.

Given that both comparative law and law & economics attracts academics who are less interested in the particular status quo of the positive law in a particular jurisdiction at a particular point in time,[32] it is no wonder that there is an overlap between those interested in comparative law and those interested in law & economics.[33] And even comparatists who have no intrinsic interest in law & economics are nowadays forced to acquire a working knowledge of basic law & economics concepts, because the positive law of the United States integrates parts of this approach's reasoning.[34] For those interested in combining the two disciplines, there are various options, to which we now turn.

THE GOOD FIT OF COMPARATIVE ANALYSIS AND LAW & ECONOMICS

Faust has helpfully distinguished four categories of interaction between economic and comparative analysis.[35]

First, economic analysis can be an 'ancillary discipline to comparative law'.[36] As a descriptive tool, efficiencies can provide an explanation for transplants or for autonomous developments in the law. Some law & economics scholars argue that the well-known (though controversial) *praesumptio similitudinis* in comparative law[37] is a

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[31] Mattei, UA *Comparative Law and Economics* supra note 1, at 5-6.

[32] For the (obvious) status of comparative law and law and economics as non-positivistic approaches see eg Mattei, UA *Comparative Law and Economics* supra note 1, 6.

[33] Eg, Mattei, UA *Comparative Law and Economics* supra note 1; Kötz, H (2000) 'Precontractual Duties of Disclosure: A Comparative and Economic Perspective' (9) *European Journal of Law and Economics* 5-19 (reprinted in De Geest & van den Bergh, supra note 1, Vol II at 429-443); also compare Zweigert, K, and Kötz, H *An Introduction* supra note 4 at 249, and Kötz, H, and Schäfer, H-B (2003) *Judex Oeconomicus* Mohr Siebeck.

[34] While it is true that US American courts do not often engage in an in-depth economic analysis (except in fields like antitrust, where economic reasoning is pervasive), they frequently do apply law and economics reasoning, explicitly or implicitly—in particular where law and economics scholars are on the bench, such as Richard Posner and Frank Easterbrook in the Seventh Circuit or Guido Calabresi in the Second Circuit.

[35] For more detail see Faust, F 'Corporate Law and Economic Analysis', supra note 1, at 845-863.

[36] Faust, F 'Corporate Law and Economic Analysis', supra note 1, at 845-849.

[37] For the original formulation see Zweigert, K, and Kötz, H *An Introduction* supra note 4, at 39-40; for a critical discussion see Michaels, R 'The Functional Method' supra note 10 at 369-372; Dannemann, G (2006) 'Comparative Law: Study of Similarities or Differences?' in Reimann, M &

result of the common quest for, or tendency towards, efficiency.[38] In addition, economic analysis may provide one of the yardsticks to assess the merits of the legal solutions that are employed by different jurisdictions in the normative part of a comparative analysis.[39] For example, after noting that the approaches to agreed damages clauses differ between English and US American law on the one hand, and civilian jurisdictions such as France or Germany on the other hand, the normative question which of the approaches to favour could be answered by examining the relative efficiency of these approaches.[40]

Conversely, comparative law can be an 'ancillary discipline to economic analysis'.[41] Comparative law provides ample fodder for rules to be analysed and compared from an economic perspective, and also shows how these different rules play out in actual life.[42] If, for example, the default rules between two jurisdictions are diametrically opposed, and we can observe that the actors in one jurisdiction always or nearly always opt out of the default position in favour of the solution adopted by the other jurisdiction, we may assume, absent special circumstances,[43] that the default rule in the other jurisdiction is more efficient because it seems to mimic the outcome of *Coasean* bargaining and lowers transaction costs.[44] On a more sophisticated level, the economic effects of different legal rules in different jurisdictions may be made the subject of an econometric analysis that seeks to isolate the extent to which the different legal rules explain the difference between the values of the independent variable.[45]

Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press 383; Siems M *Comparative Law* supra note 4 at 37-39.

[38] Mattei, UA, U (1994) 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (14) *International Review of Law and Economics* 3-19; Faust, F 'Corporate Law and Economic Analysis' supra note 1 at 846.

[39] Kovač, M (2011) *Comparative Contract Law and Economics* Edward Elgar 11; Faust, F 'Corporate Law and Economic Analysis' supra note 1 at 847-849. For the controversy about the question if the search for a 'better law' should be part of a legal comparison at all, see Siems supra noteote 4 at 39.

[40] Cooter, R and Ulen, T (2012) *Law & Economics* (6th ed) Pearson at 321-325 (ibid., 321: 'Some economists now believe that the civil law countries are right to enforce penalty clauses'). See also the DCFR, Full Edition, at 62 (Principle 60). The classic reference to the economic analysis is to Goetz, CJ, and Scott, RE (1977) 'Liquidated Damages, Penalties And The Just Compensation Principle: Some Notes On An Enforcement Model of Efficient Breach' (77) *Columbia Law Review* 554 (see also the case Wasserman v Township of Middletown, 645 A2d 100 (NJ 1994), which discusses the Goetz & Scott analysis; however, it far from clear that the penalty rules should have been applied in the first place, see Goldberg, V (2006) *Framing Contract Law—An Economic Perspective* Harvard University Press 313-324).

[41] Faust, F 'Corporate Law and Economic Analysis' supra note 1 at 849-852.

[42] Cf Mattei, UA *Comparative Law and Economics* supra note 1 at 1-2; Mattei, UA, Antoniolli, L and Rossato,A 'Comparative Law and Economics' supra note 1 at 507; Faust, F 'Corporate Law and Economic Analysis' supra note 1 at 849-852; see also Siems supra note 4, at 33.

[43] Eg because the jurisdiction where actors opt out of the default rule deliberately uses a penalty default rule to elicit information. For the reasoning behind penalty default rules see Ayres, I and Gertner, R (1989) 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (99) *Yale Law Journal* 87; see also Bebchuk, LA and Shavell, S (1991) 'Information and the Scope of Liability for Breach of Contract: The Rule of *Hadley v. Baxendale*' (7) *Journal of Law, Economics and Organization* 284. There is a debate under what circumstances the information-revealing function of penalty default rules is superior to other defaults (Maskin, E (2006) 'On the Rationale for Penalty Default Rules' (33) *Florida State University Law Review* 557) and whether penalty default rules are actually used in reality (Posner, EA (2006) 'There are No Penalty Default Rules in Contract Law' (33) *Florida State University Law Review* 563).

[44] Coase, RH (1960) 'The Problem of Social Cost' (3) *The Journal of Law & Economics* 1.

[45] See especially the growing 'legal origins' literature (overview in La Porta, R, Lopez-de-Silanes, F, and Shleifer, A (2008) 'The Economic Consequences of Legal Origins' (46) *Journal of Economic*

Thirdly, economic analysis can be made the subject matter of a comparative analysis. It is hardly a secret that economic analysis is much more pervasive in US legal research than in the rest of the world. A comparative analysis of the reception of law & economics in different jurisdictions could investigate the reasons for the different pace.[46]

Conversely, comparative law can be made the subject matter of an economic analysis. Why do legislators, academics, courts, or legal practitioners employ comparative law? On the level of legislation, for example, it may be that the marginal cost of copying a foreign solution is so much lower than the marginal cost of devising a new 'custom-made' solution from scratch that the cost savings justify even a legal transplant that is marginally less efficient than the custom-made solution would be. Or it could be relevant that the marginal cost savings of using a transplant accrue to those drafting the legislation, while the loss in the rule's efficiency is borne by others. In this respect, public choice approaches may shed light on the reasons for the use, or lack of use, of comparative law by the drafters of legislation. Or, more cynically, the sponsor of a bill may employ a selective comparative analysis, giving the politically favoured proposal the appearance of international acceptance in order to reduce the cost of getting the bill through the legislative process.

PITFALLS

There are, of course, pitfalls for comparative legal scholars who engage in economic analysis, as well as for proponents of the economic analysis of law who venture into comparative territory.[47] The pitfalls mentioned in the introduction can be summarised as follows:

(1) Not every good economist is also a good comparatist.

(2) Not every good comparatist is also a good economist.

(3) Collaborative research between good economists and good comparatists is rare.

Literature 285; La Porta, R, Lopez-de-Silanes, F, and Shleifer, A (2013) 'Law and Finance after a Decade of Research' in Constantinides, GM, Harris, M and Stulz, RM (eds) (2013) *Handbook of the Economics of Finance* Vol 2A, 425), but also the more nuanced 'numerical comparative law' approach proposed by Siems, MM (2005) 'Numerical Comparative Law—Do we Need Statistical Evidence in Law in order to Reduce Complexity?' (13) *Cardozo Journal of International and Comparative Law* 521-540.; Siems, M *Comparative Law* supra note 4 at 146-190. For more detail, see the contribution by Dionysia Katelouzou in this volume; Carson supra note 1; the contributions to the American Journal of Comparative Law Symposium on Legal Origins (eg Michaels, R 'Comparative Law' supra note 3; Spamann, H (2009) 'Large-Sample, Quantitative Research Designs for Comparative Law' (57) *American Journal of Comparative Law* 797); see also the contributions to the Spring 2009 issue of the University of Toronto Law Journal with its focus on economics and comparative law (eg, Michaels, R (2009) 'The Second Wave of Comparative Law and Economics?' (59) *University of Toronto Law Journal* 197; Hadfield, G (2009) 'The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law' (59) *University of Toronto Law Journal* 223; Legrand supra note 1).

[46] Compare the brief discussion above.

[47] Comparatists, however, should be used to the dangers of venturing into unknown territory. See Rabel, E (1951) 'Deutsches und Amerikanisches Recht' (16) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* ('The Rabel Journal of Comparative and International Private Law') 340, 341; Zweigert, K, and Kötz, H *An Introduction* supra note 4 at 36.

(4) The compromise between the 'rich' description of the comparatist and the 'abstract' model of the economist is difficult—or perhaps impossible—to strike.

(5) Both comparative law and the law & economics cloak themselves in the aura of scientific respectability, but bear the danger of deliberate or inadvertent bias. By combining these approaches, the danger of a mismatch between promise and performance is increased.

(6) Combining the comparative and the economic approach makes the argument vulnerable to the general criticism against both these approaches, and the opposition to the law & economics approach is likely to prove substantial in some quarters.

(7) Empirical research is very time-consuming and expensive compared to doctrinal legal research. Comparative research is time intensive. A combination of both approaches compounds these problems.

The following sections take a closer look at these pitfalls.

Not Every Good Economist is Also a Good Comparatist

As Zweigert & Kötz have pointed out, even 'the cleverest comparatists sometimes fall into error' because of the 'traps, snares, and delusions' which can 'lead him quite astray'.[48] It is not surprising, then, that an economist without formal training in comparative law occasionally falls into such a trap as well.

There is, first, the danger of very crude comparisons. Even trained lawyers often speak of 'the Common Law' (or 'Anglo-American Law') and 'the Civil Law', as if there were no significant differences, for example, between the Common Laws of England, the United States, Nigeria and Singapore, or between the Civil Laws of China, France, Germany, Italy and Japan (to pick a random selection).[49] What is more, the labels 'Civil Law' and 'Common Law' were primarily defined according to a jurisdiction's approach to traditional private law issues. They may be completely misleading when addressing other, for example regulatory, issues,[50] or issues influenced by EU law (where the European Common Law jurisdictions will often be closer to the Continental position than to other Common Law countries), or Constitutional law (where Germany and the US and Canada have more in common

[48] Zweigert, K, and Kötz, H An Introduction supra note 4 at 36.

[49] Cf the complaint about ' "educated" persons such as lawyers who often nourish stereotypical misapprehensions about each other's legal systems.' Markesinis, BS, Unberath, H, and Johnston, A (2006) *The German Law of Contract—A Comparative Treatise* (2nd edn) Hart Publishing at 16; for a concise summary of the errors made in overemphasising the similarities of all civil law jurisdictions, the similarities of all common law jurisdictions, and the differences between 'the Civil Law' and 'the Common Law', see, eg, Siems, M *Comparative Law* supra note 4 at 64-68. My own course on comparative contract law is geared to show students that in certain areas of contract law the similarities between German law and 'US' law are greater than the similarities between English and 'US' law (partly, but not only because of the influence by Karl Llewellyn on the Uniform Commercial Code), and in other areas English law and German law may be closer to each other than English law and US law (partly, but not only because of the influence of European Union law).

[50] Cf Siems, M *Comparative Law* supra note 45 at 528 (criticizing the use of civil law in the context of corporate/commercial law).

than the UK and the US or Canada). What is more, different legal cultures (or, as Patrick Glenn, who recently passed away, preferred: legal traditions)[51] may have influenced any given jurisdiction to varying extents at different times, making a general attribution of the jurisdiction to one or another 'legal family' practically impossible anyway.[52]

The influential legal origins literature compared jurisdictions with 'Common Law' and 'Civil Law' origins on various measures and confidently declared the superiority of the Common Law.[53] Even the legal origins literature itself, however, presented a more complex picture once 'French civil law', 'German civil law' and 'Scandinavian civil law' origins were separately assessed. German civil law and Scandinavian civil law came close to the efficiency of the common law at least on some of the measures. The main proponents of the legal origins theory, however, did not stop presenting their results as 'Common Law versus Civil Law'. They merely added the disclaimer that 'while we occasionally speak of the comparison between common and civil law, most of the discussion compares common law to French civil law. This is largely because each tradition includes a large number of countries, but also because they represent the two most distinct approaches to law and regulation.'[54] One might add: perhaps also because the sweeping claims would not necessarily hold true in relation to other civil law traditions, which raises the question whether the explanations for the stark differences really lie in 'the civil law' as such, or in something else, such as, for example, the different colonial style of French and English colonists.[55]

Even excellent comparatists sometimes fall into the very human habit of over-generalisation. For example, in discussing the differences between jurisdictions in the rate of uptake of law & economics, one author speculates that there is intuitive appeal to the proposition that the economic analysis enjoys more support in case law systems than in codified systems.[56] The problem with this speculation is that the author implicitly tries to *verify* rather than *falsify* his hypothesis. He sees support in the wide acceptance of the economic analysis in the United States. If he had tried to falsify the theory, he would have had to look no further than England and Wales, or to just about any Common Law jurisdiction outside the United States. In these jurisdictions law & economics remains as marginalised as in most Civil Law jurisdictions. On the other hand, my impression is that law & economics thrives in the Netherlands even though it is a codified system. I should hasten to add, however, that my impression is based, too, on anecdotal rather than systematic evidence. More generally, Ugo Mattei and others have long argued that Civil Law judges have enough leeway to integrate economic analysis in their reasoning if only they wanted to.[57]

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[51] Glenn, HP (2014) *Legal Traditions of the World* 5th edn Oxford University Press.

[52] Michaels R 'Comparative Law' supra note 3 at 782-783; Siems, M *Comparative Law* supra note 4 at 85-94.

[53] See supra note 45.

[54] La Porta et al 'Law and Finance' supra note 45 at 432.

[55] Voigt, S (2008) 'Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory' (5) *Journal of Empirical Legal Studies* 1 at 4-7; for similar criticism see the references in Carson supra note 1 nn 36-40. [PLEASE PROVIDE CORRECT PAGE NUMBERS]

[56] Faust, F 'Corporate Law and Economic Analysis' supra note 1, at 857-859.

[57] Mattei, UA *Comparative Law and Economics* supra note 1 at 78 *et seq.*; see also Schäfer, H-B, and Ott, C (2004) *The Economic Analysis of Civil Law* Edward Elgar at 15-19. But see *Eidenmüller* supra note 14 at 414-449 (arguing that the use of economic analysis is solely for the legislator, not the judge); yet, *Eidenmüller* acknowledges that economic considerations are unproblematic where statutory law pursues economic policies (ibid., 452-454), and are also possible where economic considerations are just one—rather than the exclusive—yardstick (ibid., 454-456). His argument, then, is mainly against

I mention this example not to criticise the author who suggested the link between codification and uptake of law & economics. Indeed, he clearly states that he is not making a positive assertion, but only mentions a plausible hypothesis as an illustration.[58] I merely want to point out that legal comparatists should be careful when pointing fingers at economists that miss nuances which may appear obvious to comparatists.

Second, for researchers not formally trained in comparative law it may be more difficult to identify all the relevant functional equivalents and to identify the law in action. It is not the 'law in books' that counts, but the 'law in action', including not only statutory and case law, but also, for example, the contracting practices, enforcement institutions, and extra-legal social norms.[59]

For an easy example, let us turn to an old hobby horse of law & economics: the discussion about 'efficient breach'.

At least in early law & economics accounts, it was (and in parts of the literature still is) assumed that, in civil law countries, specific performance is the standard remedy and damages are the exception, whereas the reverse is true for the common law. Looking at the black letter law, this is certainly correct. Yet it is trite comparative law that there is little incentive for the promisee to insist on specific performance in those cases in which the promisor has proven unreliable by breaching her promise and the promisee can easily enter into a cover transaction on the market. Accordingly, even in civil law countries the legal default of specific performance is little more than a conceptual starting point. The reality is that promisees in civil law countries usually choose damages as a remedy, and seek specific performance only where damages would not be adequate to compensate the innocent party fully—and those are often the situations in which common law would also consider granting specific performance, such as the purchase of unique goods or, more controversially, other reasons why cover cannot be obtained on the market.[60]

So the difference in the black-letter legal default rule is not necessarily reflected in the law in action—a result that should not come as a great surprise either to comparatists (given the *praesumptio similitudinis*) or to economists (given the *Coase* theorem). The real difference between the common law and the civil law

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an *exclusive* or *uncritical* use of economic analysis. Yet few law & economics scholars actually argue for such exclusivity. There is, of course, the argument that efficiency incorporates all fairness arguments and that therefore efficiency should be the sole criterion (Kaplow, L & Shavell, S (2002/2006) *Fairness versus Welfare* Harvard University Press), but this argument has been criticised, in my view correctly, as being circular (Coleman, JL (2003) 'Review: The Grounds for Welfare' (112) *Yale Law Journal* 1511-1543). Most other law & economics scholars concede that efficiency is merely one of several goals that the law may choose to pursue. Cf Calabresi supra note 26 at 557-558; Katz, AW (forthcoming) 'Economic Foundations of Contract Law' in Klass, G, Letsas, G, and Saprai, P (eds) *Philosophical Foundations of Contract Law* Oxford University Press Chapter 9.

[58] Faust, F 'Corporate Law and Economic Analysis' supra note 1 at 857.

[59] Seminally Pound, R (1910) 'Law In Books And Law In Action' (44) American Law Review 12; Llewellyn, K (1962/1971) *Jurisprudence: Realism In Theory And Practice* The University of Chicago Press 21-41; for more contemporary interpretations see, eg, Zweigert, K, and Kötz, H An Introduction supra note 4 at 35-36; Sacco, R (1991) 'Legal Formants: A Dynamic Approach to Comparative Law' (39) *American Journal of Comparative Law* 1 at 21-34; Siems, M *Comparative Law* supra note 4 at 19, 34-35; on the importance of social norms generally, Posner, EA (2002) *Social Norms* Harvard University Press.

[60] Lando, H and Rose, C (2003) 'The Myth of Specific Performance in Civil Law Countries' *Lefic Working Paper No*. 2003-14 available at: <http://ssrn.com/abstract=462700>. See also Scalise, RJ (2007) 'Why No Efficient Breach in the Civil Law? A Comparative Assessment of the Doctrine of Efficient Breach of Contract' (55) *American Journal of Comparative Law* 721.

approach is who has the power to make the choice between specific performance and damages—the innocent party or the court. Relevant issues to be discussed here are, among other things, asymmetric information about the parties' preferences (which may be better revealed where parties are forced to reveal their preferences by being forced to enter into *Coasean* negotiations by a specific-performance rule), transaction costs (which will increase with the need for additional voluntary negotiations), and distributional consequences with the dynamic incentives they entail.[61]

Another example, this time from the area of comparative antitrust law, is the economic assessment of rules on 'economic dependency' and 'superior bargaining power'. These rules constrain unilateral conduct by non-dominant firms which nevertheless have some 'power' over suppliers, customers or competitors. In antitrust law, the need for an economic approach is no longer in question (although the question of *what kind* of economic approach is to be used is hotly contested). Observers from the US are usually quick to condemn European jurisdictions with economic dependency rules (and I fully agree with their criticism of economic dependency rules based on the economic assessment).[62] What these observers do not often acknowledge, however, and sometimes even actively deny,[63] is that various rules in the US outside the antitrust laws, mostly in state law, may lead to results which are very similar to those which come from the European rules on economic dependency. Beside the Robinson-Patman Act, there are franchisee protection laws, laws against sales below cost (or even sales below cost plus markup), contract law rules invalidating resale price maintenance agreements and so on.[64] From a comparative perspective, these rules are functionally equivalent to 'economic dependency rules'.[65]

Even for comparative lawyers it is difficult not to miss relevant but remote functional equivalents. The challenge is greater for the economist trying to do interdisciplinary research. In addition, it may be more difficult to get good data on the 'soft' legal formants and to operationalise them. This challenge is in principle also well-known to comparative lawyers, but becomes even more complicated in the context of quantitative research.[66] Econometric analyses often require the comparison of a sufficient number of jurisdictions to yield significant results. The broader the

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[61] For more nuanced economic analyses, see, eg, Klass, G (forthcoming) 'Efficient Breach' in Klass et al supra note 57 Chapter 17; Shavell, S (2006) 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (84) *Texas Law Review* 831 (distinguishing between contracts to produce goods and services and contracts to convey property).

[62] Wagner-von Papp, F (2014) 'Comparative Antitrust Federalism and the Error-Cost Framework' in Petit, N & Ramundo, E (eds) *An Antitrust Tribute, Liber Amicorum for William E. Kovacic* (vol II) Institute of Competition Law 21-91 (draft available at: <http://ssrn.com/abstract=2391258>); Wagner-von Papp, F (2013) 'Brauchen wir eine Missbrauchskontrolle von Unternehmen mit nur relativer oder überlegener Marktmacht? Novellierung der allgemeinen Missbrauchskontrolle' ('Do We Need a Control of Abuses by Undertakings with Relative or Superior Market Power? Reform of the General Control of Abuses') in Bien, F (ed) *Das deutsche Kartellrecht nach der 8. GWB-Novelle* ('German Competition Law After the 8th Amendment') Nomos at 95-154.

[63] See ICN Task Force for Abuse of Superior Bargaining Position *Report on Abuse of Superior Bargaining Position* 7th Annual Conference Kyoto (April 14-16, 2008) at 10, where the United States authorities claim in response to a survey that not only do they not have economic dependency rules in their competition laws, but also that they do not have equivalent rules in their competition or non-competition laws.

[64] Wagner-von Papp F 'Comparative Antitrust Federalism' supra note 62 at 64-74.

[65] Wagner-von Papp F 'Comparative Antitrust Federalism' supra note 62,64-74 and 78-79, and passim.

[66] See Michaels, R 'Comparative Law' supra note 3 at 776-777.

comparison becomes in terms of jurisdictions, the more difficult it becomes to have a sufficiently deep look into how the law in action works on the ground in each of these jurisdictions. Granted, surveys sent to practitioners may overcome some of these problems. However, such surveys often skew the results, because narrow questions which do not quite fit other legal systems are the norm rather than the exception. I have often received survey questions to which the answers are in fact 'yes, but …' or 'no, but …', but which require a yes/no answer.[67] A better approach leading to more nuanced answers would be the use of case scenarios (as under the Common Core approach). However, the more complex responses under this approach make it more difficult to group answers together, and this complicates economic analyses.[68]

Third, comparatists are well aware that they should state their findings about other jurisdictions with great humility, both out of respect for the foreign jurisdiction, and in order to hedge their bets in case the findings turn out to be based on a misconception of how the foreign law works in practice. Skilled comparatists know very well that a perceived inferiority of a foreign legal system is often due merely to the fact that they have not properly included all relevant functional equivalents, or have misunderstood the ways in which different legal formants interact.[69] Furthermore, being humble is simply good advice from a political perspective. Economists and proponents of economic analysis have by their America-centrism perhaps created more resistance by being confrontational than they would otherwise have encountered.[70] This is particularly true for the intersection of comparative law and law & economics. Much of the early research emanating in the US was geared to showing the superiority of the common law over the civil law. This research could well be a worthwhile endeavour. However, the blunt assertions in early works have often proven to be based on either bad economics, or bad comparative law, or both. In the meantime, many civil lawyers felt insulted, and the obvious flaws made it easy to discard the economic approach as irrelevant nonsense. Outside Fawlty Towers, insulting potential consumers is not usually a good business strategy.

Not Every Comparatist is a Good Economist

Sometimes 'a little learning is a dangerous thing'.[71] There is a danger that the comparatist who dabbles in economics does not conform to the state of the art of economics. Most law & economics that is employed by non-economists stays at a relatively simplistic level. Statements from law & economics textbooks, which do not necessarily reflect the state of the art in economics, or reflect idiosyncratic views of particular authors, are readily transferred to contexts to which they may not be transferable. For example, where comparatists refer to law & economics in the context of 'efficient breach' and the choice between specific performance and damages as the standard remedy, they often do not take into account the more nuanced treatment of the issue in more recent law & economics publications. Instead,

[67] Cf the example of confounding survey questions in Sacco supra note 59 at 10.
[68] Michaels, R 'Comparative Law' supra note 3 at 779-780.
[69] Siems, M *Comparative Law* supra note 4 at 23 ('The comparative lawyer is, however, well-advised to think twice before suggesting that a foreign country should follow the comparatist's own law. It is not unlikely that she will be accused of applying her own values in considering what is best for others [...]').
[70] Cf Mattei, UA, Antoniolli, L and Rossato,A 'Comparative Law and Economics' supra note 1 at 507: 'law and economics [...], until recently, has suffered from a severe American-centric provincialism'.
[71] Pope, A (1709/11, 2005) *An Essay on Criticism* Project Gutenberg, available at: <http://www.gutenberg.org/ebooks/7409> line 215.

the simplistic message that reaches comparative lawyers is often the contention that specific performance deters efficient breach and is inferior to damages as a remedy,[72] an overbroad statement that has been substantially qualified in the newer law & economics literature.[73]

Advanced game theory and advanced statistics/econometrics are not in the standard repertoire of most legal academics or practitioners. To paraphrase *William Twining*'s assessment of the legal realists' interdisciplinary work, as economists most legal academics are 'at best, intelligent amateurs.'[74] Some make the counter-argument that simplistic methods will often do, and that adding fancy mathematics often does not change the result.[75] Yet, whether or not the result changes can really only be assessed after doing the research. After all, no legal scholar would accept the equivalent proposition that knowledge of the law is not necessary to solve a case just because laymen can often predict the correct result by using common sense.

There are several things one can do about comparatists' and economists' mutual lack of knowledge about the other discipline. The obvious solutions are either to train lawyer-economists or to seek collaboration between lawyers and economists. Training lawyer-economists who have a good understanding of the law and foreign jurisdictions *and* a good understanding of (graduate) economics is costly. Collaborative research presents its own problems (below (3)). A third best solution is to do as best as one can and be open about one's own limitations and to build on economic research done by others. Much would be improved if we trained lawyers at least to become intelligent *consumers* of economic research, and economists to have a basic knowledge of comparative law. Where there is sufficient common ground between the followers of the two disciplines, the discourse between the specialists in the fields can become fruitful.

Collaborative Research between Good Comparatists and Good Economists is Rare

Collaborative research between good comparatists and good economists would seem to be the natural solution to the issue of both absolute and comparative advantages of the specialists in their respective fields. In practice, such collaborative research is often prevented by the different incentives and time horizons for legal and economic research.

Legal scholars tend to work on their own for various reasons. First, the norm is still doctrinal research, which can be done on one's own. Secondly, 'it is difficult to strike a balance between professional self-confidence and willingness to seek help from the outside.'[76] Thirdly, co-authored journal articles or books are viewed with suspicion when it comes to the attribution of the ideas in the article to the authors, for

[72] Cf Miller, L (2007) 'Specific Performance in the Common law and Civil law; Some Lessons for Harmonisation' in Giliker, P (ed) *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* Martinus Nijhoff 281 at 302, who, despite citing to economic analyses reaching conflicting recommendations, concludes: 'Whilst there is often heated debate as to the remedy that best advances economic goals, the common law preference for damages over specific performance is most often advocated as best according with economic goals.'

[73] See references supra note 61.

[74] Twining, W *Karl Llewellyn* supra note 7 at 387.

[75] Cf even Posner 'The Future of Law' supra note 10, who states at 14 that 'economic analysis of law need not be conducted at a high level of formality or mathematization. The heart of economics is insight rather than technique.'

[76] Twining W *Karl Llewellyn* supra note 7 at 387.

example by appointment or promotion panels. Some panels are said to disregard completely any co-authored pieces for purposes of appointments or promotion. Others discount the contribution of each author disproportionately.

Perhaps these external incentives are not decisive, and the intrinsic value of scholarship that lies in getting closer to the truth is enough to motivate young scholars to engage in collaborative research. However, those legal scholars that have a penchant for law & economics may be *particularly* attentive to external incentives—or, in this case, lack of incentives. It would be naive to believe that publications are written exclusively for their own sake, and not (also) for their instrumental value. The responsiveness of publications to the way in which funding, appointment, and promotion decisions are made in various jurisdiction is clearly visible. Where peer-reviewed journal articles are rewarded, this is the preferred avenue for publication; where student-edited law journals are the norm, there is competition to publish in these; open-access journals have sprung up after funding bodies started to favour publications with open access; where a post-doctoral thesis ('habilitation') is a requirement for a Chair, young scholars will concentrate on writing their 'second book' (or choose to emigrate); when long articles are favoured, authors pen long articles, and when the social norm switches to short articles, exactly the same ideas happen to be expressible in short articles. These publication choices could be an interesting topic for a comparative law & economics article, but this is not the place. The point here is merely that disfavouring co-authored articles by discounting their value disproportionately provides a disincentive for collaborative research in general.

Yet another reason for the limited collaboration between lawyers and economists is the different time horizon. A theoretical economic model may be conceived by a bright mind in approximately the time it takes to write a law journal article. However, the integration of a theoretical economic model in a legal publication without any empirical evidence on the realism of its assumptions or the accuracy of its predictions is likely to meet with resistance from doctrinal lawyers, in particular because of the need for economic models to be parsimonious. 'That is alright in theory, but does not work out in practice' is a criticism that has made it into George Stigler's list of frequent comments at economists' conferences,[77] and lawyers are particularly fond of this criticism vis-à-vis economists. Experimental economics does not fare any better. Again it is the necessary abstraction from the complexities of real life in the design of an experiment that will make it objectionable in the eyes of doctrinal and practicing lawyers. The criticism against experimental evidence is likely to be that the experimental results may be interesting, but that their external validity is problematic: that the subjects were students and not representative of the actors in a 'real-life' context; that the rewards for the students were too small to reflect the large incentives in reality; that the experimental environment was artificial and not representative of the complex issues that arise in the 'real world'; and so on.[78]

Empirical economic field work, such as econometric evidence, has in principle a better chance of being accepted by lawyers, because it is less open to the objection that things are different 'in real life'. Yet, lawyers would not be lawyers if they did not find a way to put economists into a Catch-22 position. The very fact that empirical field work analyses correlations between variables in a complex world enables lawyers to come up with all sorts of alternative explanations. 'But did you control

[77] Stigler, G (1977) 'The Conference Handbook' (85) *The Journal of Political Economy* 441 at 443 (note 27).

[78] All these are issues that will be addressed by well-designed experiments. See, eg, Lawless, RM, Robbennolt, JK, and Ulen, TS (2010) *Empirical Methods in Law* Wolters Kluwer at 36-50, 93 et seq.

for...?' is likely to meet even the most refined econometric model. What makes matters worse is that this form of research is usually particularly costly and time intensive, at least if the underlying empirical data have to be generated from scratch.

Part of the problem, it seems to me, is that traditional legal scholars are not accustomed to the idea of cumulative evidence. One and the same article has to give the complete answer. If there is any omission in the study, it is discarded. The objection that 'this model does not account for X' is not seen as a prompt for a complementary follow-up study that tries to reject the null hypothesis that X is insignificant, but is considered a fatal flaw. The anticipation of such objections of lawyers against all sorts of economic reasoning make it unattractive for (especially young) legal scholars to invest substantial resources on collaborative research with economists. It is unlikely that traditional lawyers are likely to appreciate the work that has gone into painstaking empirical research. Less resource-intensive theoretical musings, based on traditional doctrinal research and gut feeling, are much more likely to be accepted and rewarded.

Nor are economists particularly keen on collaboration with lawyers. Lawyers seek to introduce complexity where economists prefer abstraction. Where economists propose a parsimonious model, lawyers will object that it is 'simplistic'. This is, once again, the lawyer's criticism '[t]hat [it] is alright in theory, but does not work out in practice'.[79] Indeed, the main contribution that lawyers can bring to the table is their knowledge about the complexities of life, gained from their practical experience: with cases that come before the courts, with advising clients, with contractual negotiations between parties, with negotiating settlements, with managing compliance schemes, with the inner workings of the administrative, legislative, and justice systems, and so on. Modelling all these complexities often becomes intractable, and this leads to the converse criticism by economists that 'this may work in practice, but it cannot work in theory'. The necessary quantitative data to test such complex models may simply not be available or may be too expensive to acquire. From the economist's perspective, research questions may need to be framed around the available data, whereas the lawyer tends to assume that one should build the model around the complexities of real life and then see what data can be obtained. As the next section shows, these problems are exacerbated when it comes to comparative law.

Comparatists' 'Rich' Description and Economists' 'Abstract' Models

There is an inherent tension between the comparative approach and economic approaches.[80] Good legal comparisons try to develop a rich model of a jurisdiction—the 'law in action' as opposed to the 'law in the books'.[81] Economic modelling, however, necessarily has to reduce the complexity of the real world.[82] As Joan Robinson put it: 'A model which took account of all the variegation of reality would be of no more use than a map at the scale of one to one.'[83]

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[79] Above note 77.

[80] Michaels, R'Comparative Law' supra note 3; Legrand supra note 1.

[81] Supra note 59.

[82] For an excellent, balanced account of the advantages and disadvantages see Hadfield supra note 45 at 225 et seq.

[83] Robinson, J (1962) *Essays in the Theory of Economic Growth* Macmillan at 33. Robinson was undoubtedly inspired by Lewis Carroll, who made 'Mein Herr' say in Carroll, L (1893) *Sylvie and Bruno Concluded* Macmillan at 169: 'We actually made a map of the country, on the scale of a mile to the mile!'; but 'Mein Herr' had to admit that: 'It has never been spread out, yet', because 'the farmers

Integrating economic analysis into comparative law risks either using a superficial approach to the legal systems under review, or a model that is so rich that it may be excellent at explaining reality, but is not capable of making any predictions. One has to realise that much economic analysis will have to work with models that to a traditional comparatist look woefully inadequate. The relevant question is whether we can still get interesting insights from the research, despite the simplification of the model. Milton Friedman often emphasised that the question is *not* whether the model is 'as close to reality as possible'[84] but that instead the 'only relevant test of the validity of a hypothesis is comparison of prediction with experience'.[85]

If we accept that all that matters is the ability of a model to predict outcomes, there is still a problem within the discipline of economics, and in particular with the parts of economics that are integrated into law & economics. In too many cases, the models start from a few assumptions and then solve the problem mathematically, without *ever* testing whether the predictions the model allows are good ones before jumping to policy recommendations. There is a reason that the following joke is well-known in economists' circles:

> A physicist, a chemist and an economist are stranded on an island, with nothing to eat. A can of soup washes ashore. The physicist says, "Let's smash the can open with a rock." The chemist says, "Let's build a fire and heat the can first." The economist says, "Let's assume that we have a can-opener [...]"[86]

Only with the rise of experimental and behavioural economics have economists really started to test the reliability of the predictions of the models used. And, of course, the predictions of quite a number of economic models turned out to be spectacularly wrong. Standard assumptions of rationality, self interest and willpower have had to be qualified. Of course it would be a misunderstanding to claim that traditional economists ever argued as a descriptive matter that all humans are perfectly rational, are purely self-interested and have perfect self-control. Instead, the accusation that the assumptions were unrealistic was usually rejected by pointing out: (1) that irrational actors would not survive in the market place; (2) that while there are departures from rational behaviour, they are symmetrically distributed around rational behaviour; (3) that while the predictions of models based on perfect rationality were imperfect, there was no better alternative available; or (4) that the economic models were not meant to be predictors but normative in the sense that this is how actors *should* behave.

There are several problems with these counter-arguments.

First, not all departures from rational behaviour necessarily lead to 'Darwinian extinction'.[87] Second, for many economic (especially game-theoretic) models it

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objected: they said it would cover the whole country, and shut out the sunlight! So we now use the country itself, as its own map, and I assure you it does nearly as well.'

[84] Faust, F 'Corporate Law and Economic Analysis' (supra note 1 at 849) considers this a necessary requirement for a model 'in order to assist in solving real-life problems.'

[85] Friedman, M (1953) *Essays in Positive Economics* University of Chicago Press at 8-9 and passim.

[86] Available at: <http://economics.about.com/od/termsbeginningwith1/g/assume_a_can_opener.htm>; the popularity of this version (also cf <http://en.wikipedia.org/wiki/Assume_a_can_opener>) perhaps underlines my point that not all economists have a knack for the comparison between laws—here the laws of physics and chemistry.

[87] Langevoort, DC (1997) 'Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harm)' (146) *University of Pennsylvania Law Review* 101 at 104.

makes a big difference if, on the one hand, *all* actors are perfectly rational and there is common knowledge about this perfect rationality of all actors, or, on the other hand, if there is a probability (even if it is small or only perceived) that the other player does not act rationally. In an environment with a few boundedly rational actors, it may be rational for rational actors to mimic these boundedly rational actors. For example, where a prisoners' dilemma game is repeated a finite period of times, the rational response is always to cheat—*if* all actors are known to be rational. Where there is a certain probability that the other player may act reciprocally (even though this is not the rational response), it can become rational for rational players to cooperate as well. Experimental evidence suggests that many players act boundedly rational in finitely repeated prisoners' dilemma games and other games where cooperation is a dominated strategy, even though the effect may disappear over time once the players get more experienced with the game.[88]

Second, empirical evidence from the 'heuristics and biases' literature indicates that the departures from the rationality assumption are not randomly distributed, but tend to be biased in several important ways.[89] This counters the assertions that we can use models based on perfect rationality as predicting the 'average' outcome, and that no models arriving at better predictions than rational choice models are available. The counter-argument that this is how actors 'should' behave may apply in some instances. Quite often, however, behaving in the prescribed way in a real-world environment would actually lead to worse, not better results. Cheaters may soon learn the hard way that a pay-off matrix that does not include social stigmatisation of cheaters was incomplete. If you have doubts, just try offering one penny to the other player in an ultimatum game.

The behavioural law & economics literature that grew out of the failure of the traditional models to predict real-life behaviour accurately has found more resonance with legal scholars, in part because it reaffirmed so much of the criticism (and some prejudices) that lawyers had always had against the 'unrealistic' assumptions in the more parsimonious models. However, there are two caveats when it comes to embracing behavioural law & economics as the way forward.

First, in many cases the criticism that more realistic models can 'explain everything and predict nothing' applies.[90] While the fuller models used in behavioural economics allow some predictions (of the sort: a certain proportion of actors will behave unconditionally altruistically, others will act conditionally altruistically, and yet others will act in a purely self-interested way), these predictions are usually not as clear and unequivocal as those of the models based on pure rationality. While it is

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[88] Camerer, CF (2003) *Behavioral Game Theory—Experiments in Strategic Interaction* Princeton University Press at 16 et seq, 200 et seq, 236, 242 et seq, 258-259; Gintis, H (2000) *Game Theory Evolving* Princeton University Press at 95.

[89] Cf, eg, Korobkin, RB, and Ulen, TS (2000) 'Law & Behavioral Science: Removing the Rationality Assumption from Law and Economics' (88) California Law Review 1051, 1075 et seq; Sunstein, CR (2000) 'Introduction' in Sunstein, CR (ed) *Behavioral Law & Economics* Cambridge University Press 1-10, and Jolls, C, Sunstein, CR, and Thaler, RH (2000) 'A Behavioral Approach to Law and Economics' in Sunstein, CR (ed) *Behavioral Law & Economics* Cambridge University Press at 13-8; see also the contributions to the collections edited by Kahnemann, D, and Tversky, A (2000) *Choices, Values, and Frames* Cambridge University Press, and Gilovich, T, Griffin, D and Kahnemann, D (2002) *Heuristics and Biases—The Psychology of Intuitive Judgment* Cambridge University Press; Camerer, CF, Loewenstein, G and Rabin, M (2004) *Advances in Behavioral Economics* Princeton University Press.

[90] See Korobkin & Ulen supra note 89.

arguably better to have a vague but correct prediction than a precise and wrong one,[91] in some cases predictions of the behavioural model become as untestable as most horoscopes.

Second, there is a danger that proponents of the law & behavioural economics approach apply the experimentally identified heuristics and biases uncritically to contexts for which their relevance was not empirically tested. Biases such as the availability bias, confirmation bias, self-serving bias, or effects such as the endowment effect, have entered the mainstream and are often used by proponents of law & behavioural economics as the new rationality assumptions, without testing (or at least discussing) the external validity of the experiments that identified these biases in the first place. This is deplorable, especially since one of the most robust findings of the behavioural economics literature is that *context matters*.[92] Where even the 'framing' of a problem makes a large difference to the behaviour of the subjects (where, for example, labelling a game a 'Social Event/Community game' results in more cooperative behaviour than labelling the very same game as an 'Investment/Wall Street game'[93]), it may be problematic to extrapolate the behaviour of a few psychology or economics students in trading or not trading mugs[94] to decisions in the corporate world.

Where does this leave law & economics? There is no objection to thinking about problems either in terms of rational choice models or in terms of bounded rationality. However, law & economics proponents should be much more cautious of jumping from the predictions of any such models to making policy recommendations. In my experience, most economists (who are aware of the methodological limitations) are more careful in this regard than many law & economics proponents. Mere models should be treated as such (they are mere models), until their predictions have been empirically tested in a context that is representative for the context for which policy recommendations are sought. Experience from other jurisdictions that have implemented policies which should lead to different outcomes under the model may be an excellent test for such models, even though this will require controlling for other (for example institutional or cultural) differences between the jurisdictions. This is where comparative law & economics can provide significant added value. And even where there is empirical support for a model, policy choices are never free from value judgements, a fact that should not be obscured by the 'scientific' appearance of the model. This is the issue to which we now turn.

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[91] See von Hayek, FA (1974) 'The Pretence of Knowledge' Prize Lecture to the Memory of Alfred Nobel, 11 December 1974 available at:
<http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/hayek-lecture.html>.

[92] Korobkin & Ulen supra note 89 at 1102 et seq; Stout, LA (2003) 'On the Proper Motives of Corporate Directors (or, why you don't want to invite Homo Economicus to join your Board)' (28) *Delaware Journal of Corporate Law* 1 at 24.

[93] Camerer supra note 88 at 74-75 with n 11; Stout supra note 92 at 14 (citing Ross, L, and Ward, A (1996) 'Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding' in Reed, ES et al. (eds) *Values and Knowledge* at 103).

[94] Jolls, Sunstein & Thaler, supra note 89 at 18; Kahnemann, D, Knetsch, JL and Thaler, RH (2000) 'Experimental Tests of the Endowment Effect and the Coase Theorem' in Sunstein, CR (ed) *Behavioral Law & Economics* Cambridge University Press at 211.

The Danger of Deliberate or Inadvertent Biased Selectivity

Both comparative law and law & economics claim to be 'scientific' by distinguishing between the descriptive 'Is' and the normative 'Ought'.[95] Both, however, bear the danger of deliberate or inadvertent biased selectivity in establishing the 'Is'.

Justice Scalia, of the US Supreme Court, has long argued against the citation of foreign law for purposes of interpreting the US Constitution. One of his main arguments is that comparative citations are usually selective. Arguably, justices cite foreign law where it fits their purpose, and omit mentioning it where it does not.[96]

While I strongly disagree with Justice Scalia's conclusion that therefore constitutional courts should not cite foreign law in interpreting their constitution,[97] his

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[95] See Mattei, UA *Comparative Law and Economics* supra note 1 at 6-11 (who acknowledges the impossibility of a strict separation of the Is and Ought, ibid).

[96] Eg, *McDonald v City of Chicago, Illinois*, 130 S. Ct. 3020, 3055-56 (2010) (Justice Scalia concurring):

> When it comes to guns, Justice STEVENS explains, our Nation is already an outlier among "advanced democracies"; not even our "oldest allies" protect as robust a right as we do, and we should not widen the gap. Ibid. *Never mind that he explains neither which countries qualify as "advanced democracies" nor why others are irrelevant.* For there is an even clearer indication that this criterion lets judges pick which rights States must respect and those they can ignore: As the plurality shows, [...] this follow-the-foreign-crowd requirement would foreclose rights that we have held (and Justice STEVENS accepts) are incorporated, but that other "advanced" nations do not recognize—from the exclusionary rule to the Establishment Clause.

[emphasis in italics is mine].

See also the debate between Justice Scalia and Justice Breyer on the Constitutional Relevance of Foreign Court Decisions (American University, 13 January 2005), transcript available at: <http://www.freerepublic.com/focus/news/1352357/posts> (in the following: the 'Scalia-Breyer debate'), in the course of which Justice Scalia said:

> [T]ake our abortion jurisprudence, we are one of only six countries in the world that allows abortion on demand at any time prior to viability. *Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why haven't we changed that, if indeed the court thinks we should use foreign law? Or do we just use foreign law selectively? When it agrees with what, you know, what the justice would like the case to say, you use the foreign law, and when it doesn't agree you don't use it.* Thus, you know, we cited it in Lawrence, the case on homosexual sodomy, we cited foreign law—*not all foreign law, just the foreign law of countries that agreed with the disposition of the case*. But we said not a whisper about foreign law in the series of abortion cases.

[emphasis in italics is mine].

Also cf *Graham v Florida*, 130 SCt 2011, 2053 in n 12 (2010) (Justice Thomas dissenting, joined by Justice Scalia and (in the relevant part) Justice Alito).

[97] I find Justice Scalia's argument unpersuasive not because of the proposition that comparative observations can be selective, but because it postulates that something is only worth citing if it is binding authority. As many commentators have pointed out, foreign law may be persuasive, just like the opinion of authors of law journal articles, which are cited selectively without any apparent misgivings even by Justice Scalia. After all, if Justice Scalia perceives the sample used by others to be biased, he is free to cite to other jurisdictions. As Justice Brandeis wrote: 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.' (*Whitney v California*, 274 US 357 at 377 (1927)). On the death penalty, for example, the Court could then make a transparent choice whether they prefer the company of

> Afghanistan (14), Bangladesh (1), Belarus (3+), China (2000+), Gambia (9), India (1), Iran (314+), Iraq (129+), Japan (7), North Korea (6+), Pakistan (1), Palestine (6), Republic of China (6), Saudi Arabia (79+), Somalia (6+), South Sudan (5+), Sudan (19+), UAE (1), USA (43), Yemen (28+),
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> [Amnesty International (2013), *Death Sentences and Executions 2012* Amnesty International Publications at 9 (numbers in brackets indicate the number of executions in 2012)],

premise that comparative arguments are often based on a biased sample seems correct. Researchers doing individual research will often be constrained in the choice of legal systems to be included in the comparison by their language proficiency. Even where the researcher knows the language, she will most likely only grasp the full range of factors to be considered in terms of functional equivalents and legal formants after substantial immersion in the relevant jurisdictions. Taken together, the feasibility constraints of language and in-depth knowledge about the jurisdictions to be compared will reduce the number of jurisdictions to a handful or so. It is highly unlikely that this sample happens to be representative of the population of all legal systems.

The same danger of biased selectivity is also inherent in economic research. Emblematic is the joke where

> [a] mathematician, an accountant and an economist apply for the same job. The interviewer calls in the mathematician and asks "What do two plus two equal?" The mathematician replies "Four." [...] Then the interviewer calls in the accountant and asks the same question "What do two plus two equal?" The accountant says "On average, four—give or take ten percent, but on average, four." Then the interviewer calls in the economist and poses the same question "What do two plus two equal?" The economist gets up, locks the door, closes the shade, sits down next to the interviewer and says, "What do you want it to equal"?[98]

The point is that the outcomes of an economic analysis depend on the method used, on the underlying assumptions, and the variables included in any model.

First, one can use different methodologies. Where intuitive reasoning from the *Coase* theorem, a theoretical model, or experiments in the laboratory do not yield the desired result, an econometric study (with the 'appropriate' dependent variables) could be helpful. Or vice versa.

Second, within any given methodology, one can make an argument for virtually every position by making different assumptions or choosing different variables to be included in the underlying model.

We can, for example, use a theoretical model to 'show' that consumer protection is either undesirable or desirable, depending on the model's assumptions about the actors' rationality or risk aversion. We can use economic analysis to 'show' that specific performance is superior to damages, or vice versa, depending, among other things, on the assumed transaction costs and information available to the actors. Information exchange between competitors may (in a static scenario) be good or bad for overall welfare depending on the prevailing type of competition (Bertrand or Cournot), the type of information exchanged, the assumptions about pre-existing private and public information etc.[99]

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or that of, for example, the Member States of the European Union. For an in-depth discussion of the use of foreign law as an inspiration, cf, eg, Markesinis, B and Fedtke, J (2005) 'The Judge as Comparatist' (80) *Tulane Law Review* 11; Bell, J (2011) 'The Relevance of Foreign Examples to Legal Developments' (21) *Duke Journal of Comparative and International Law* 431; from a quantitative perspective Siems, M *Comparative Law* supra note 4 at 147-154 (cross-citations by courts), and more generally, 154-156 (influence of foreign academics), and 156-159 (influence of foreign statute law).

[98] Available at: <http://www3.nd.edu/~jstiver/jokes.htm>.

[99] Cf the references in Wagner-von Papp, F (2013) 'Information Exchange Agreements' in Lianos, I and Geradin, D (eds) *Handbook on European Competition Law—Substantive Aspects* Edward Elgar 130 at 133-134 in n 13.

Even econometric evidence is amenable to tampering or unconsciously biased selection, for example, by selecting a non-representative sample (after all, most samples used in practice are not truly random but more or less convenience samples), by not controlling for a relevant variable, by overlooking multicollinearity—or simply by doing numerous regressions, discarding the undesired results and using the desired ones. Especially on partisan issues, such as, in the US, the effectiveness of gun control laws or the death penalty, the result of empirical studies can usually be predicted by knowing just one meta-variable: the authors' political inclinations or source of financing. Similarly, it is not necessarily a coincidence that in antitrust cases econometric overcharge determinations by the plaintiffs' economic experts are higher (often by magnitudes) than those by the defendants' experts.

Third, the question is often what the yardstick is to be. Many theoretical law & economics models, for example, focus on static allocative efficiency to make policy recommendations. Surely, more allocative efficiency is better *ceteris paribus*. However, what could be allocatively efficient in a static context could be counterproductive if one considers dynamic efficiencies. This is generally acknowledged, for example, when it comes to:

> disclosure requirements for contract parties (a disclosure requirement allows both parties to make the best use of the existing information, but may disincentivise the acquisition of socially valuable information in the first place);[100]
>
> intellectual property (IP) rights (once an innovation/original work is created, it would be best to do away with intellectual property rights altogether from a static allocative perspective, but allowing a monopolistic reduction of output in the short run may lead to incentives to innovate for the IP owner in the first place and incentives for competitors to innovate around the existing IP right);[101]
>
> refusals to deal (again, if one focussed only on short term allocative efficiency, it would be best to avoid underutilisation by granting access to all competitors, but this may lead to underinvestment by the owner of the dominant firm or its competitors);[102] and
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> information exchange among competitors (while it could be allocatively efficient to have competitors exchange sensitive information *if they did not use this information to collude*, they can also use it to collude, resulting in overall harmful results for total welfare).[103]

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[100] From a comparative law & economics perspective see Kötz supra note 33 at 12-18.

[101] For this trite insight, see, eg, Turner, JDC (2010) *Intellectual Property and EU Competition Law* Oxford University Press at 3 ('Properly understood, intellectual property rights restrict some forms of competition (in production and distribution) in order to enable and enhance others (in innovation and quality) [...]').

[102] For this trite insight, see, eg, European Commission (2009) 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (2009) *Official Journal of the European Union* C 45/7, paras 75, 87.

[103] See Clarke, RN (1983) 'Collusion and the Incentives for Information Sharing' (14) *Bell Journal of Economics* 383: '[S]ociety faces a dilemma. Information pooling is good if firms behave competitively, but shared information makes anticompetitive agreements easier to construct.' Wagner-von Papp, supra note 99 at 133-134; Wagner-von Papp, F (2004) *Marktinformationsverfahren—Grenzen der*

Yet policy recommendations based on models following a static or dynamic perspective respectively will often conflict, even outside these categories. Often, dynamic efficiencies will be negatively correlated with short-term allocative efficiencies and outweigh them. They are, however, much more uncertain to materialise and difficult to quantify. There is a temptation for law & economics scholars, then, to focus on the static allocative efficiency effects, which may be less substantial but more amenable to measurement and calculability. The story comes to mind of the drunk who lost his keys in a dark place, but searched for them under the lamppost because it was lighter there.

And the choice between allocative and dynamic efficiency is not the end of the yardstick question. Is it total welfare we seek to increase? Consumer welfare? Utility? Wealth? Happiness?

The choices made as to the method, the assumptions, or variables used, and the yardstick applied are crucial for the resulting policy recommendations, and are, at least to a certain extent, a matter of normative choice rather than a matter of 'scientific' discovery.

All this is hardly a secret. One standard response is, quite rightly, that researchers must specify their criteria for selection ex ante and report all their results, rather than the ones they favour. However, it is obvious that no comparative researcher working alone can give an overview of the entire population of legal systems, or even of a representative sample, and it is also obvious that no economist can construct models on all possible variations of assumptions or use all available economic methodologies.

More realistically, the answer to this problem of necessary selectivity is that even selective results can advance knowledge. The accumulation of knowledge in complex areas necessarily proceeds step by step. It is not necessary for one and the same study to give the final result. Other researchers are free to complement the results by adding their research, using different approaches, assumptions, variables or jurisdictions. 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'[104] This accumulation of knowledge means that eventually a systematic review will eventually become necessary. Again, this will not necessarily provide 'definitive' results. Meta-studies sometimes have to compare apples and oranges. And even where the 'Is' is finally determined with sufficient certainty, normative choices will have to be made when determining what 'ought' to be done.

To some extent, the criticism against their selectivity is self-inflicted by comparatists and proponents of law & economics. Their claim to produce arguments that are more 'scientific' than doctrinal legal arguments suggests the absence of normative choices in the analysis. This is true neither for comparative law nor for economic analysis. Normative choices have to be made. Where they are properly disclosed and discussed, even evidence from a non-representative sample can advance knowledge.

Information im Wettbewerb ('Information Sharing Among Competitors—Limits to the Flow of Information') Nomos 81-82 (and passim).

[104] *Whitney v California*, 274 U.S. 357 at 377 (1927) (Justice Brandeis, concurring).

External Critiques against Law & Economics

Integrating economic analyses into legal comparisons makes the result vulnerable to all the external critique directed against the economic analysis of law in general, such as deontological arguments against egotistical utilitarian monsters, and the critique that wealth is not a value.[105] Researchers who follow a 'comparative law & economics' approach in jurisdictions which reject any law & economics arguments on such grounds should be bracing themselves for the blowback.

Time and Money

One very mundane but important point is that empirical legal research that collects and analyses new data, which arguably could bring the most interesting results to legal analysis, is very resource-intensive. It consumes time and money. It may take years to complete and can give no guarantee ex ante of uncovering any interesting results.

It is not clear what incentives there are for legal researchers to engage in such research when the alternative option for the researcher is to produce in the same time-span several perfectly 'REF-able'[106] contributions by writing 'doctrinal' articles, or articles that employ only light-touch law & economics arguments drawn from a textbook. True, interdisciplinary work will get a 'bonus', but hardly the bonus of 1000 per cent that would arguably be necessary to compensate for the increased time for empirical research. Comparative law, in turn, is also time consuming, because it multiplies the time and effort spent on legal research by the number of jurisdictions included. Comparative law and economics combines the time-consuming elements of both approaches. It seems one really can have the worst of both worlds.

ADVANTAGES OF THE COMBINATION OF COMPARATIVE LAW AND LAW & ECONOMICS

The main advantage of the use of economic analysis is the transparency of the argument. If done well, it discloses its assumptions and reasoning. This provides a more transparent and rational argument than claiming that one solution is 'fairer' or 'more just' than another. Being 'fairer' or 'more just' is a non-falsifiable assertion, unless these terms are operationalised. The economic analysis is essentially a mode of transparent reasoning.

Of course, economic arguments are not a panacea.

First, as discussed above, not everyone who argues from an economic perspective actually identifies the assumptions as clearly as they should. Indeed, many economic analyses do *not* clearly specify what they consider to be self-evident even though it is far from self-evident. What is it that the actors seek to maximise—is it wealth or utility or something else?[107] If utility, what is included in the utility function? Are other-regarding preferences to be included?[108] Is the model premised on

[105] See supra note 26.
[106] An adjective that will be known almost exclusively to UK-based academics (REF stands for Research Excellence Framework, a procedure for assessing the quality of academic output).
[107] See Korobkin & Ulen supra note 89 at 1060 *et seq*. (discussing various thin and thick versions of Rational Choice Theory).
[108] Ibid.

the assumption that actors want to maximise whatever the maximand is, or does the model work as well if the actors merely 'satisfice' certain parameters? What are the constraints and what kind of transaction costs are neglected or included? What rationality assumptions are made? What institutional background arrangements are assumed? A good economic analysis specifies these parameters explicitly instead of leaving it to the reader to know conventions or speculate.

Second, it has been mentioned above that many models are built not only on unverified assumptions, *but also there is no proof that their predictions are accurate, either*. With the increased use of empirical legal methods, the problem of 'unrealistic' assumptions is waning, or, more precisely, *shifting* to the question whether the statistical model includes the relevant variables, the operationalisation of these variables makes sense etc. This is a development that many opponents of the traditional, Posner-like economic analysis of law seem to overlook. Where we look at the data on the choices that human actors actually make, it becomes more difficult to deny the relevance of the results for the 'real life'.[109]

Lastly, hardly anyone argues that law & economics arguments should be more than *one* of several aspects under which legal problems should be analysed—other considerations, such as distributive consequences or moral reasoning, are no less weighty.[110]

Legal scholars too often dismiss economic arguments based on such perceived or real weaknesses, and instead revert to their traditional intuitive reasoning. What they conceive as a fatal flaw, however, is actually the main strength of the economic approach. The transparency of the reasoning and underlying data makes it possible to identify weaknesses or omissions, and build on and improve the analysis by adducing complementary data. Legal scholarship has to get accustomed to the idea that knowledge about the real world is acquired incrementally. Comparative scholars are used to the idea in their field: 'If the picture presented by a scholar is coloured by his background or education, international collaboration will correct it.'[111]

The main virtue of *comparative* law & economics seems to me to be that it can help to remedy the deficiency of too many law & economic models that lack empirical testing. I am less convinced by the project of stripping legal systems to their bare bones and then crunching the numbers on a macro-level, as is the case in the legal origins literature.[112] Yet, even if one does not agree with the approach of the legal origins literature, it is impossible to deny that the critical discussion of this approach has spawned an entirely new body of research with interesting results.[113] A rich legal comparison between systems that implement different solutions for a particular problem on the micro-level may well help to falsify hypotheses derived from some models—or provide interesting evidence supporting hypotheses.

However, in order to achieve these benefits, it is not necessary to commingle comparative law and law & economics. The two methodologies should be applied in clearly separated steps of the analysis. As such, there is nothing special about 'comparative law and economics'. Just as an economic analysis may benefit from

[109] At least where the empirical data comes from the field. Of course, opponents will continue to attack the external validity of empirical findings from experiments.
[110] See supra note 57.
[111] Rabel, E (1951) 'Deutsches und Amerikanisches Recht' 16 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* ('The Rabel Journal of Comparative and International Private Law') 340, 359 (as translated by Tony Weir in Zweigert, K, and Kötz, H An Introduction supra note 4 at 47).
[112] Similarly Carson supra note 1.
[113] Supra note 45.

being combined with a comparative analysis, it may benefit from being combined with a philosophical, public policy, psychological, or sociological analysis.[114] Mutatis mutandis, a comparative analysis cannot only be fruitfully complemented by an economic analysis, but also by, for example, a critical legal studies analysis or a feminist approach to law. There is nothing magical about the combination of comparative law and the economic analysis of law. The point is merely that it may be fruitful to consider one and the same problem from different and complementary angles.

CONCLUSION

Good comparative law and economics is still rare. The community of comparative lawyers is small, and the sub-set of comparative lawyers that are not only interested, but are also proficient, in economic approaches is yet smaller. And even those that are both interested and proficient often lack the incentives to engage in costly and time-consuming empirical research.

Oliver Wendell Holmes famously predicted in 1897: 'For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.'[115] More than a century later, we are not there yet. What is more, I hope we will never get to a point where law is reduced to a matter of statistics and economics. What I hope is that we will see more in-depth comparative law and more in-depth, empirically supported economic analysis of law. But this neither requires that the same researchers do the comparison and the economic analysis, nor should these efforts be to the exclusion of other methodological approaches that are capable of shedding light on an issue. Instead of the egg-laying wool milk sow with its brown, smelly and ugly eggs,[116] we should simply let the various farm animals concentrate on their absolute and comparative advantages.

[114] For a similar call for more interdisciplinary approaches, see Siems, M Comparative Law supra note 4 passim, with a summary at 314-315.
[115] See supra note 21.
[116] See supra note 2.