# THE MARKET FOR LEGAL INNOVATION: LAW AND ECONOMICS IN EUROPE AND THE UNITED STATES

Nuno Garoupa[1,2]

Thomas S. Ulen[3]

## Introduction

Our subject in this paper is legal innovations, specifically innovations in the legal academy, in how scholars think and write about the law. We seek to describe and explain the complex process by which a scholarly innovation first appears and gains acceptance (or not) within the legal profession. We hope to isolate the factors that generate legal innovations and contribute to their acceptance.

While we shall address this topic at a very general level, we shall also seek to apply that general model to a particular innovation of the last quarter-century—the economic analysis of law. We want to explain what we and many others perceive to be a significant and interesting difference between the reception of law and economics in North America and in the rest of the world. In the United States and Canada, law and economics has been warmly received in law schools and somewhat less warmly but, nonetheless, graciously received in economics departments. In contrast, law and economics has been given a relatively cold shoul-

[1] We are grateful to Lee Fennell, Tom Ginsburg, Richard McAdams, Larry Ribstein, and Steve Ross for comments on an earlier draft and to participants at workshops at the University of Illinois College of Law, the Comparative Law and Economics Forum, the University of Pompeu Fabra, the Graduate College of Law and Economics of the University of Hamburg, the Faculty of Law at the University of Ghent, the Faculty of Law at the University of Ljubljana, the 2005 annual meeting of the Israeli Law and Economics Association, the 2005 annual meeting of the Asian Law and Economics Association, and the Faculty of Law at the University of Rotterdam for their invitations to speak and for the valuable comments of the participants. We would also like to thank Ben Depoorter, Gerrit De Geest, Stefan Grundmann, Hein Koetz, Hans-Bernd Schaefer, Eli Salzberger, Gerhard Wagner, [and others] for their discussions with us about these matters. Nuno Garoupa acknowledges financial support by Nova Forum and FCT, POCTI/ECO/44146/2002.

[2] Associate Professor, Department of Economics, New University of Lisbon, and Research Affiliate, CEPR, London.

[3] Swanlund Chair, University of Illinois at Urbana-Champaign; Professor of Law, University of Illinois College of Law; and Director of the Illinois Program in Law and Economics.

der in European law schools but has been somewhat more pleasantly taken in by European economics departments.[4] In summary, law and economics has been one of the most important developments in North American legal scholarship of the twentieth century but has hardly registered as a scholarly innovation in Europe. Why this great difference in the reception accorded law and economics? Is law and economics destined to be a purely North American phenomenon? Or will other parts of the world eventually adopt it as an important or even central method for examining and reforming law?[5]

This Article offers answers to those questions within the context of a broader theory of legal scholarly innovation. In brief, we argue that the central explanations for the differences in the receptivity of the legal academy to scholarly innovations are two:

1. the remarkable competitiveness of the North American higher educational system, inducing legal education, and, somewhat relatedly,
2. the presence and success of an earlier legal realist revolution (an earlier innovation that, we argue, was an important precondition for the acceptance of law and economics and, possibly, other legal innovations).

Specifically, the United States has the most competitive and, we believe, highest-quality higher education system in the world. An important aspect of those characteristics is that North American universities place a high value on innovation in education, including innovations in legal education. Law and economics is only the most recent (and certainly not the last) of the innovations that has succeeded in the North American legal academy in the last 150 years.

An earlier innovation in the North American legal academy, legal realism, importantly paved the way for the acceptance of law and economics. Legal realism took several forms or had different strands, but two common themes among them were a skepticism of formalism and a concern for the actual effects of law on targeted behavior. Law and economics, it has been said, is the modern mani-

[4] In Part II we shall draw some more nuanced distinctions among the countries of Europe with respect to there receptivity to law and economics and shall also consider the state of receptivity in other parts of the world, such as East Asia, South Asia, Africa, the Middle East, and Central and South America.

[5] It is difficult to think of other legal innovations that have emerged from legal scholars working in countries outside of North America. Emblematic of our point is deconstruction or interpretive theory. Although Habermas, among others, applied the insights of that innovation to legal topics (see, for example, Hugh Baxter, *Habermas' Discourse Theory of Law and Democracy*, 50 BUFF. L. REV. 205 (2002)), the principal legal applications of interpretivism to law occurred in North America. For a critical view of those applications, see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989).

festation of legal realism with a powerful tool for predicting and evaluation the actual consequences of law on targeted behavior. To the extent that that assertion about the connection between legal realism and law and economics is correct, then a legal realist revolution is a prerequisite, a necessary but not sufficient condition for the later reception to law and economics. In that Europe has never had a successful legal realist revolution, it follows Europe will not have received law and economics.[6]

In contrast to the situation in North America, higher education (and particularly legal education) in Western Europe is not particularly competitive, either within each nation or across nations. Talented students and distinguished faculty are far more likely to go to North American universities than they are to go to another university in the European Union.[7]

Our argument proceeds as follows. We first take a moment to say what we mean by "legal innovation" and "law and economics"—our central example of a successful legal innovation—so that we can then look for the same manifestations of that field in different parts of the world. We then, in Part II, survey the various reasons (such as variations in the willingness to accept an implicit ideological bias in law and economics) that have been given for differences in the degree to which different legal education systems and different national legal systems have adopted law and economics. We reject almost all of those previously offered reasons but find that, as noted above, a prior legal-realist revolution and a highly competitive legal education system are the most promising candidates for explaining the difference. Then in Part III we offer a nontechnical model of the demand for and supply of innovation in legal education and suggest how that model would explain the stylized facts regarding the different rates of adoption of law and economics in North America and Europe. We then ask in Part IV what, in light of our model, the prospects for the expansion of law and economics in Europe (and elsewhere) are. In our concluding section we summarize the argument and speculate on what further investigation, including careful empirical investigation, could shed further light on the issues raised in this Article.

We want to make several important points at the beginning. Although we are both devoted practitioners of law and economics, we do not conceive of this Article as being an advocacy piece for law and economics. Rather, we have a different central focus—namely, why do some legal education systems generate innovative methods of teaching, research, and scholarship and others do not? That is, we are not so much seeking to explain why law and economics has succeeded

[6] We shall continue to speak of "Europe" as a distinguishing case to that in North America, but we really mean the comparison to be between the U.S. and the rest of the world.

[7] There is some evidence that this state of affairs is changing, but it is still too early to identify the European developments as trends. We discuss these matters in Part ___ below.

(as it most certainly has) or why other scholarly innovations, such as critical legal studies, have not succeeded as to explain why there are and have been so many innovations in U.S. legal education and so few in other nations' legal education systems.[8]

## I. What Is a "Legal Innovation"? And What Counts as "Law and Economics"?

By the term "legal innovation" we mean a scholarly innovation that brings a new technique, a new subject matter area, or the like into the study of either law generally or some area within the study of law. Legal realism might be an example of such an innovation, if one considers that innovation to consist of an emphasis on the actual consequences of the law.[9] Legal formalism, taken to be a focus on the logical coherence among doctrines and across fields of law, might be another.[10] The use of literary techniques of analysis and textual deconstruction to examine law might be another.[11] Feminist jurisprudence,[12] law and philosophy,[13] law and psychology,[14] critical legal studies,[15] public choice theory,[16] critical race theory,[17] law and economics, and empirical legal studies[18] are further examples.[19]

---

[8] Naturally, given our particular expertise, we shall focus on law and economics as the prime example of a successful innovation, but we do not mean to suggest that we have the key to explaining why law and economics has been successful or whether that success will last. Indeed, we recognize that even if law and economics has been the most successful and lasting recent innovation in North American legal education, it is not the last such innovation. We do not know what will come next. But we expect that the factors that we shall discuss here will allow us to predict with great confidence that the next innovations in legal education will occur in North America.

[9] Citation to Duxbury and others on legal realism.

[10] Citation to legal formalism symposium at U of C.

[11] Citation to articles using this technique. See also RICHARD A. POSNER, LAW AND LITERATURE (rev. & updated ed., 1998).

[12] Citation to feminist jurisprudence.

[13] Citation to law and philosophy.

[14] Citation to law and psychology or behavioral law and economics.

[15] Citation to Kelman and others.

[16] See, for example, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

[17] Citation to critical race theory.

[18] For examples, see issues of the new *Journal of Empirical Legal Studies*.

[19] We are avoiding the famous concept of a "paradigm" and of a "paradigm shift" from the work of the historian and philosopher of science, Thomas Kuhn. See THOMAS S. KUHN, THE STRUC-

A few more general observations about legal innovations may be in order. We want to draw a narrow boundary around the instances of what we would count as innovative. We do not, for example, mean to include as an example of scholarly innovation a novel interpretation of a particular case, statute, or administrative ruling. A scholar who convincingly shows that the consequences of a particular antitrust holding are not at all what conventional analysis would have predicted has, without doubt, made an important contribution to the corpus of antitrust learning. She has not, however, contributed a legal innovation in the sense in which we intend to use that term. To have done so, she would have had to show that her novel interpretive technique had wide application not just to the particular case on which she has focused but to most or all antitrust holdings past, present, and future.[20] This suggests that our focus is on broad techniques or styles of analysis and not on narrow claims. So, for example, we would count as innovative a claim that the legal system generally denigrates the interests of women, with an illustration taken from a particular set of family law disputes. But we would not take it as innovative to make the narrow claim that a particular holding in a particular family law dispute showed a disrespect for the women involved. Nor that a particular court had in its series of rulings on family law matters shown a marked disregard for the valid claims of women.

A related topic worth considering is whether it counts as innovative to have defined a new area of legal inquiry. Forty years ago environmental law was a novel area of law; in the 1940s civil rights law was unheard of; in the 1970s European Union law was confined to the interpretation of a few treaties and agreements; twenty years ago no one would have understood what "international intellectual property law" meant; and "international business transactions" was an extremely small course in which there were no texts. For these and other examples of new areas of the law, should those who organized these new subject-matter areas into coherent bodies of teachable law be recognized as "legal innovators"? Clearly, yes. It is an important aspect of the scholarly craft to be able to

---

TURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1994). (An example of Kuhnian paradigm shift is that in astronomy from a Ptolemaic—or Earth-centered—notion of our solar system to a Copernican—or heliocentric—notion. Kuhn wrote a classic on that shift, THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT (1957).) The reason is that we do not want to try to define the prevailing "paradigm" in legal scholarship and, therefore, what it would mean to shift to a new paradigm. We would rather focus on less thorough-going innovations. Some of the innovations that we discuss may purport to be changing the core of legal inquiry, but we need not address that issue. For a discussion of that possibility see Thomas S. Ulen, *A Nobel Prize in Economic Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875.

[20] The broad innovative aspect may lie latent in the scholar's article, so that another scholar may take that innovation and apply it to a wider-ranging set of issues.

recognize (or event to foster) an emerging area of the law and to collect the holdings and commentaries in that area into a coherent body that others can use to instruct themselves and others.[21]

Let us contrast this organization of a new subject-matter area of law with the innovation of applying a new technique to an existing area of law—for example, redoing criminal law from a feminist point of view. Both are importantly innovative scholarly work. We recognize that there is a serious question regarding whether these innovations are equal or one is more desirable or important than another. But we want to avoid those questions by simply recognizing both tasks as, for our purposes, legal innovations.[22]

We do not want to dwell on these and related points because line-drawing exercises are inherently tedious and almost impossible to resolve conclusively. We leave the matter in this unsatisfactory but, we believe, accurate manner: we are looking at "big" legal innovations, those that change the manner in which we look at the law and the legal system, that alter our perceptions of how the law works or is able to accomplish its ends.

We take law and economics to be a legal innovation within the meaning in which we want to give that term. But before turning to a discussion of what exactly we mean by "law and economics," we want to pause very briefly to distinguish this example of legal innovation from some of those that we have just been discussing. For example, law and economics is not a new field of law in the sense that elder law, environmental law, and cyberlaw are new areas of legal expertise. Strictly speaking, law and economics refers not to a particular field but rather to a methodology or set of tools—the use of microeconomic theory, econometric empirical techniques, and the like—for investigating legal issues. Therefore, law and economics is innovative in the same sense in which critical legal studies or critical race theory is innovative—that is, it provides a new method or point of view from which to look at *all* areas of the law.

We now turn to a consideration of what counts as "law and economics." For our purposes we adopt a definition suggested to us by Professor Louis Kaplow: "law and economics" is the application of economic analysis to any area of the law except those areas where its application would be obvious. So, for example, applying this definition, "law and economics" would *not* include antitrust or

[21] A prominent example of a legal innovation is the creation of the field of elder law, a creation in which Professor Richard Kaplan of the University of Illinois College of Law was the leading figure.

[22] When one of us gave this talk to the Faculty of Law at the University of Ljubljana, Slovenia, Professor and Former Dean Janez Kranjc memorably said, "Legal innovation is not, by definition, law."

competition law, regulated industries, and taxation. But it would include the economic analysis of contract, intellectual property, tort liability, and criminal law.

This definition is not conclusive or precise. It leaves in limbo such issues as whether securities regulation or the regulation of financial markets or the law of corporate mergers and acquisitions are areas where the application of economic theory is obvious. And further complicating the use of this definition would be the fact that those whom we might identify as "law and economics" scholars have made significant contributions to the legal analysis of some of these obvious areas.

But these shortcomings notwithstanding, the definition will serve our purposes. We shall identify someone as working in the area of law and economics if they are producing scholarship about and teaching the application of economic analysis to a non-obvious area of the law. And a piece of scholarship will qualify as law and economics if it consists of the application of economic analysis to a non-obvious area of the law.

## II. Differences Between the U.S. and Europe with Respect to the Reception of Law and Economics

Almost everyone who has moved between North America and Europe has the same strong sense that law and economics is vibrant, widespread, and dominant in North American law schools but that it barely exists in European law schools. An important exception worth noting is the Erasmus Master's Program in Law and Economics. That Program is a cooperative venture among several European law schools and has recently been ranked among the top five programs in the European Union's Erasmus Mundus competition.[23] That competition was not among law programs but among *all* of the Erasmus programs (more than 150) that chose to submit a proposal. The law and economics program was the only law-related program that was selected for the prestigious award.

With that exception, however, law and economics does not have much of a presence in European law schools or economics departments.[24] Nor do any of the

[23] It is significant that the Program is cooperative and not centered in a single law school. Nor are there competing law-and-economics master's programs in Europe and elsewhere There is only one program, but not monopolized by one law faculty. We are told that many of the participating law schools were extremely skeptical of the worth of the Program until the recent award of the honor and its annual budget of millions of Euros. Now the law schools in which the Program is housed have begun to take an interest.

[24] There is a European Association for Law and Economics that has held 20 annual conferences. Incidentally, there are also regional law-and-economics professional associations in Canada, Australia, Greece, Scandinavia, Finland, Korea, Japan, Latin American and the Caribbean, Asia, and Israel. For a complete listing, see the website of the Australian Law and Economics Association.

other legal scholarly innovations mentioned in the previous section. By a "presence" we mean a discernible impact on the legal scholarly academy in their countries or across national boundaries and a large number of prominent and productive practitioners.

We believe that law and economics has become a prominent and perhaps predominant part of the tool set of the majority of law professors in the United States, regardless of their field of professional specialization. We would very much like to be able to substantiate that claim with empirical evidence. However, we cannot yet do so.[25] We can, however, offer some collateral evidence in the form of a table showing the increase in law-and-economics law professors in a recent 10-year period.

The table comes from Judge Richard Posner's recent book, *Catastrophe*, and was meant not to indicate the prominence of law and economics in the U.S. legal academy but rather the increasing receptivity to the social sciences in law school hiring.[26]

**Size of Fields of Academic Law, 1992-1993 and 2002-2003**

| | 1992-1993 | 2002-2003 | Difference | Percent increase |
|---|---|---|---|---|
| Jurisprudence | 658 | 808 | 150 | 22.80% |
| Law and economics | 123 | 209 | 86 | 69.92% |
| Law and science | 107 | 136 | 29 | 27.10% |
| Constitutional law | 1452 | 1679 | 227 | 15.63% |

Source: Posner, *Catastrophe*, and *Directory of Law Teachers 1992-1993* and *Directory of Law Teachers 2002-2003*.

[25] We have research assistants who are seeking to measure the frequency with which certain key terms in law and economics, such as "externality," "transaction cost," "property rule," "liability rule," "Coase Theorem," and the like, have been used in leading U.S. law journals between 1980 and 2000. Our hypothesis is that there will be a significant increase in the frequency of those terms over that time period and that that increase may be taken as indicative of the degree to which law and economics has become a common tool for U.S. law professors.

[26] See POSNER, CATASTROPHE 204-206 (2004), Table 4.2. The text says that the table "reports the number of law teachers in different fields today and a decade ago as recorded by the Association of American Law Schools (AALS). … The rapid growth of 'law and economics' attests to the increasing receptivity of law to the social sciences but is not matched by increased receptivity to the physical sciences."

There are, we believe, two noteworthy points illustrated in the table. First, not that law professors self-identified as being in law and economics have shown far and away the greatest rate of growth in the period 1992-2002 of any of the fields considered. Second, we believe that as revealing as the figure is, it, nonetheless, significantly understates the impact and importance of law and economics on the U.S. legal academy. This understatement arises from the fact that there are many professors who routinely use or at least fully understand and value law and economics who would not classify themselves as specialists in law and economics for the AALS *Directory of Law Teachers*. For example, at the University of Illinois College of Law the most recent *Directory* identifies only [insert figure] people at Illinois as being in the field of law and economics. In point of fact, we estimate that at least five people currently on the faculty are fully capable of teaching a full course in the economic analysis of law and a significant majority of the remaining 30 or so of the faculty members know and use law-and-economics concepts in their scholarly work.[27]

For the moment, we simply assert, without substantiation, that law and economics does not have an important presence in legal academies outside North America. What evidence can we point to regarding the lack of a presence in Europe and elsewhere? Unfortunately, we do not have systematic empirical evidence on this matter (although we are hopeful of gathering some).[28] However, we do have provocative anecdotal information. Consider, for example, that there is, to our knowledge, only one economist with a full-time appointment in a German law school—the distinguished scholar Hans-Bernd Schäfer of the University of Hamburg.[29] There is not a single chair in law and economics in Germany.[30]

---

[27] In subsequent drafts we shall develop further evidence of the importance of law and economics in U.S. law schools. Here we draw attention to some unsystematic but highly suggestive evidence—namely, the increase in the number of Ph.D./J.D. degree holders who have joined law school faculties in the last several decades. For example, the Associate Dean for Faculty and Research at Boalt Hall reported to us that 20 percent of that school's faculty has a Ph.D. in economics, and a recent Appointments Committee chair at the University of Pennsylvania Law School reported to us that there are seven economics Ph.D.s on that distinguished school's faculty. Larry Solum's Legal Theory Blog annually reports information on entry-level hires in U.S. law schools. His most recent compilation reported that nearly 50 percent of entry-level hires for the 2005-2006 academic year had a Ph.D. in addition to a J.D.

[28] Our intention is to perform a study of the presence of the same key terms from law and economics in leading European journals like that described above for leading U.S. law journals.

[29] To our knowledge there is no economist appointed to a law school as resident faculty in the United Kingdom, France, Belgium, Switzerland, Spain, Portugal, or Italy.

[30] In European parlance a "chair" means what Americans would call a "faculty line," although a European chair usually includes special privileges for the faculty member that go beyond the rewards that a faculty line would entitle one to receive in the U.S. In U.S. parlance a "chair" is a

There is a *European Review of Law and Economics*, but it is not sponsored and staffed (as are U.S. law journals) by a particular European law school or university. Only one European law school (Bar-Ilan University of Israel) has a law-and-economics working paper series at the Social Science Research Network, whereas almost every one of the top 30 law schools in the U.S. has such a series. In the United Kingdom, which will later assume a central role in our search for explanations for the differences between the U.S. and Europe, there is no endowed professorship in law held by a scholar in law and economics. And, finally, while it is virtually impossible to have a substantive discussion about a legal matter in the U.S. without having input from law and economics, it is almost impossible for law and economics to become part of any substantial discussion of law within any nation in the European Union. We want to distinguish very carefully between the lack of law-and-economics input in *national* legal discussions in Europe and the increasing importance of law-and-economics input in *European Union* legal discussions.[31]

Another anecdotal but significant indication that law and economics has not influenced U.K. legal scholarship can be seen in the recent *Oxford Handbook of Legal Studies*.[32] There are more than forty chapters in the *Handbook* surveying substantive areas of the law, the legal academy, and the legal profession with a focus on the United Kingdom, and yet, even though there are chapters on regulation, corporations, competition, labor, intellectual property, environmental law, the history of legal studies, and the role of academics in the legal system, there is no reference to standard law-and-economics insights. Nor is there any mention of law and economics in the chapters on contract, tort, property, and criminal law—all of which areas have been significantly affected by the economic analysis of law. To see our point, it is almost inconceivable that a *Handbook* written on exactly the same topics with a focus on the U.S. would not contain literally hundreds of law-and-economics insights.

Contrast this paucity of law and economics in this particular Oxford handbook with another, the *Oxford Handbook of Jurisprudence and Philosophy of Law*.[33] In contrast to the *Handbook of Legal Studies*, that of jurisprudence and philosophy was written largely by Americans. The chapter on the philosophy of private law says "law and economics views are the most prevalent in private law

---

particular form of endowed professorship, usually the result of a substantial gift to the university and generally awarded to the most prominent scholars in the university.

[31] We elaborate on this distinction in Part V below.

[32] PETER CANE, ED., OXFORD HANDBOOK OF LEGAL STUDIES (2003).

[33] JULES COLEMAN AND SCOTT SHAPIRO, EDS. OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY (2002).

scholarship today."[34] Other chapters cite or quote the work of Richard Posner, Steven Shavell, Ronald Coase, and other law-and-economics scholars.[35]

We do not want to leave the impression that the problem is one peculiar to law and economics. It is, rather, a pervasive failure to recognize any scholarly innovation from outside law as worthwhile. For example, in the *Oxford Handbook*, Nick Wikely remarks that neither critical legal studies nor more leftist approaches have been very influential in Europe.[36] He complains that, although there is excellent progress in modern legal scholarship of the welfare state, few British law schools have taken that scholarship seriously. He says that researchers active in these fields could comfortably fit into a small seminar room.

We must draw attention to two important exceptions to our assertion that law and economics has no presence in Europe. The first is the Netherlands, a nation that has long prided itself on its innovative practices in a wide variety of fields. There are nine law schools in the Netherlands, and because of the relative size of the country, students from anywhere in the country can attend any one of those schools. There is, therefore, some competition among the schools to attract students. That competition, as well as the country's long tradition of innovation, has led to chairs in law and economics being available at five of the country's nine law schools. That is a startling departure from the European norm.

Another departure is the practice in Israel. The legal academy in that country is international in its aspirations and activities, with a particular focus on staying in touch with and emulating the U.S. Legal academics seek to publish in U.S. law journals, and many of the brightest young talents in Israeli law schools have taken temporary or permanent positions on U.S. law school faculties.[37]

A final point that bears making is that the difference we note between Europe and the U.S. with respect to legal innovations, particularly law and economics, does not seem to be a generalizable problem in the sense that it attends all other disciplines within the academy, not just law. European and U.S. medical schools are teaching the same topics and techniques. Although we cannot be certain of this, we strongly suspect that such differences as exist between U.S. and European medical schools may have to do with resources available to try new technologies and some predictable differences between the health care delivery systems. Similarly, we do not perceive a significant difference between the recep-

---

[34] See Benjamin C. Zipursky, "Philosophy of Private Law," at 624.

[35] For instance, Posner, Shavell, and Coase are quoted in chapters dealing with responsibility, and natural law and pragmatism.

[36] See Wikely, "The Welfare State," *Oxford Handbook of Legal Studies* 397 – 412 (2003).

[37] The recently published program for the 2005 annual conference of the American Law and Economics Association shows that 10 percent of those presenting papers at the conference are either Israeli law professors or received their first law degree at an Israeli law school.

tivity to innovative scholarship in European and U.S. business schools. Nor is there an obvious difference between U.S. and Europe with respect to innovations in other social sciences, such as anthropology, economics, physics, psychology, political science, public administration and public policy, sociology, and the like. If there is a difference in receptivity to innovation between the European and U.S. academies, it appears to be particularly significant in the study of law.

## III. Some Possible Reasons for These Differences

If our description of the differences between the reception of law and economics in the U.S. and Europe is accurate and is representative of the differences in receptivity in the U.S. and Europe to other legal scholarly innovations, then the central question is, "Why should there be these differences to receptivity scholarly innovations?" We are not the first ones to remark on this difference, and so there have already been numerous attempts to explain why law and economics has been so successful in the U.S. and Canada and not nearly so successful in other countries.

Our purpose in this part of the Article is to articulate and evaluate the various explanations that have been offered for these important differences. As will become evident, we find most of these explanations to be unpersuasive. This conclusion will go much against the prevailing wind of explanation, which holds, for example, that law and economics is a particular product of the common law systems or is particularly attractive to those countries that espouse a vibrant liberal (in the 19th century sense) political ideology. To foreshadow our conclusions, we find that the most important factors in explaining legal innovations will be the degree of competitiveness in a nation's higher education sector and whether the nation's legal educators have had a prior innovation that approximates legal realism.

### *A. Political Ideology*

One common explanation for the difference between Europe and the U.S. in receptivity to scholarly innovations has to do with a perceived difference in the prevailing political ideologies generally and, specifically, within the legal academies of the two regions. The U.S. is said to be far friendly toward free-market, classic liberalism than is Europe, and the legal academy in the U.S. is thought to be far more receptive to classical liberal arguments than is the European legal academy. In so far as law and economics is perceived to be a legal version of free-market or Chicago school economics, then its warm reception in the U.S. and cold shoulder treatment in Europe are only reflections of differences in dominant

ideologies in the two regions.[38] So, if the prevailing political ideology in U.S. law schools is politically conservative and an academic method of examining law appears that seems to be conservative, then it is adopted in U.S. law schools. By contrast, if European law schools are principally politically leftist, then they have rejected law and economics because it strikes them as antithetical to their core ideological values.

There are three principal problems with this possible explanation. First, U.S. law schools tend not to be politically conservative but to be left-of-center.[39] Of course, one could argue that there are certain U.S. law school faculties that are conservative, such as those, it is alleged, at the University of Chicago and the University of Virginia, and others that are liberal and that only the conservative law school faculties have adopted law and economics. But that is simply not true. The characterization of the University of Chicago Law School faculty as particularly conservative is far out of date, if it was ever true. Moreover, there are law faculties that are well known for being leftist, such as that of the Yale Law School, that have magnificent strengths in law and economics. The receptivity of law and economics in the U.S. is far too widespread to be explained by looking at the center of political gravity on particular faculties.

Second, we suspect that the political leanings of law school faculties in the U.S. and in Europe are reasonably close—namely, that they are generally left-of-center. Given the differences in the receptivity to law and economics but the similarities in terms of prevailing political ideologies of the faculties, there must be some other reason that explains the differences.

Third, if innovations in legal scholarship were to be explained by the prevailing political ideologies of law school faculties (in the sense that leftist faculties adopt leftist innovations; rightist faculties, rightist innovations—a view of which we are deeply skeptical), then one would expect the innovations to be skewed toward the left-of-center innovations and that those innovations would be the same, regardless of country, if the prevailing political ideologies were the same.

But the rate of adoption of innovations is very different. Left-of-center innovations, such as critical legal studies, have not caught on in either the U.S. or

---

[38] There are other variations on this theme, such as that the differences in receptivity to law and economics reflect underlying legal cultural differences or predilections for utilitarianism *versus* Kantianism. We deal with these variants later in this part.

[39] Citation to Lindgren's study. A recent article in the *New York Times* reported that a survey of university faculty in the U.S. found that Democrats outnumbered Republicans on average 7 to 1. http://www.nytimes.com/2004/11/18/education/18faculty.html. We have no reason for believing that the ratio between Democrats and Republicans on law school faculties is any different from that reported in the survey. See also the article by ___ of Emory University in the *Chronicle Review*, a part of the *Chronicle of Higher Education*. _____.

Europe. All sorts of innovations have had a fling in the US—law and literature, public choice or positive political theory, law and society—and very few innovations have appealed to the relatively similar, in terms of political ideology, European law schools.

There is another aspect of this phenomenon that is worth remarking—its potential path dependence.[40] If right-leaning faculties tend to adopt rightist innovations and left-leaning faculties tend to adopt leftist innovations, then once a faculty tips one way or the other, that might set in motion a process that continually reinforces the starting political ideology of the faculty. If we add to this process a very plausible corollary that rightist faculties tend to hire other rightists and leftist faculties tend to hire other leftists, then there would seem to be an almost inevitable drift of faculties toward one extreme or the other. But our impression is that this very rarely happens. We do not assert that there is necessarily a regression toward the mean such that faculties identify when they are straying too far in one ideological direction in their course adoptions, hiring practices, and other collective decisions. Or that university administrations correct perceptible ideological drifts in the constituent units of their universities. Or that external shocks, such as a change in the prevailing social climate, cause corrections. We have no idea which of these or similar forces are at work to prevent extreme ideologies from dominating scholarly disciplines. But subject to the observations made in the footnote on the previous page about the general left-of-center equilibrium in most college and university faculties, we strongly suspect that there are forces that prevent both ideological drift to extremes and the single-minded adoption of innovations according only to their political ideological content.

We conclude that either the characterization of law and economics as a rightist (or classically liberal) innovation is incorrect or that the prevailing political ideology of law school faculties does not provide much explanatory power in accounting for the rate of adoption of legal innovations.

### *B. Money and the Success of Law and Economics*

A variation on the argument that finds political ideology to be a significant factor in explaining legal innovations generally and the success of law and economics specifically is that money plays an important role in legal innovation. Could it be, for example, that the willingness of parties external to the academy to subsidize scholarly and other work in a particular innovation is a significant factor in explaining the academic success of that innovation?[41]

---

[40] For more on this theory, see §J below on "Informational and Reputational Cascades."

[41] We are speaking particularly of *private* external support for legal innovations. Research and other support provided by the government—through, say, the National Science Foundation in the US—might have a notable effect on the adoption or furtherance of innovative scholarship, but we

That is an argument that we have frequently heard in explaining the spread of law and economics in North America. By implication the argument makes two important and broad claims—(1) that a significant factor in explaining the acceptability of any legal innovation is the availability of external (to the academy) resources available to proponents of the innovation, and (2) that innovations that lack that external help will have a more difficult time succeeding than the merits of the innovation would otherwise dictate. In this section we shall first sketch the mechanisms that this contention postulates and then evaluate whether this contention helps to explain recent patterns of legal innovations.[42]

For our purposes here and to illustrate how this mechanism might be said to work, let us assume that at any given time there are a host of innovations assailing the legal academy. One might think, for concreteness, that large numbers of younger scholars are seeking to make their way into the discipline by undertaking original work that adopts some innovative method of examining a legal topic. Some of these innovations are more plausible than others, but we could even assume that they are uniformly distributed across some innovativeness spectrum.

Now suppose that after an innovation has appeared in the work of one or a few legal scholars, an external group identifies that legal innovation as very congenial to its goals or view of the world. And if that group has the resources, it will seek to further that innovation by making funding available to those schools and those scholars who are likely to continue work in that area. It is even possible that some scholars who otherwise would not have found that innovation a plausible or attractive method of conducting their research projects might find the funding possibilities so alluring that they switch to the innovative method of scholarship in an effort to win a share of the external funding.

The question that now arises is whether this sketch is a helpful guide to the pattern of recent innovations in the legal academy. For instance, could one plausibly explain the demise of critical legal studies by the fact that it had no external resources to subsidize its adoption? Similarly, could the presence of substantial

---

do not focus on that possibility here. We recognize that this may be a mistake because public support may be (and in theory *is*) a very important factor in explaining academic innovation, particularly in the basic and natural sciences. We focus on the role of private sources of support because those sources have been frequently referred to as critical to the academic success of law and economics. There is, however, a very important difference between the U.S. and Europe with respect to accessibility to private and public funds for research. We shall comment on the effect of those differences below.

[42] We shall argue in our model of legal innovation in Part IV that the costs of adopting an innovation are an important determinant of the success of a new scholarly method of looking at the law. So, to the extent that some external factor lowers the cost of adoption, we would confidently expect the innovation so subsidized to be more likely to be adopted than it would be if it were not subsidized.

external support for law and economics be a significant factor in explaining both the North American success of that innovation and the lack of its success in other parts of the world? From a social viewpoint what would be particularly disquieting would be the situation in which a *non-meritorious* innovation gets a boost from external sources and then entrenches itself in the academy (through, for example, some variant of the path dependence mentioned in the previous section). If there was reason to believe that there are some innovations that ought not to have been adopted (because, for example, they bias research agendas or distort the search for scholarly truth) but that have been adopted and become influential in the academy, then one would have cause to be deeply concerned. But we cannot think, in the history of the last several hundred years, of a scholarly innovation in any field that was adopted and held sway over an academic discipline because of money made available by external sources and was then later shown to have been wrong at the time that it was adopted. That is, money has never, to our certain knowledge, managed to purchase an entire discipline's point of view that would have been correctly rejected but for the support of external money.

There are good reasons for not believing too fervently in this "scholarship follows the money" theory of legal innovation. First, most scholars are fiercely independent, as anyone who has attempted to bend a faculty to his or her view of things can testify. Robert Maynard Hutchins, a lawyer and former president of the University of Chicago, once described the modern university as a "collection of independent entrepreneurs connected by a common heating system."[43]

Second, universities are particularly sensitive to charges that their neutrality has been compromised by external funding and have put in place fairly stringent and effective mechanisms for guarding against charges that their research results were "purchased" in exchange for external funding. As an example, one might think of an agricultural pesticide company's willingness to fund research that leads to findings that pesticides have no environmental harm, tobacco companies' seeking to fund research that downplays the health risks of tobacco consumption, and a wealthy individual's offering to donate a large sum of money in exchange for a department's commitment to hire a faculty member of a particular political persuasion. Our strong belief is that every reputable university anywhere (not just in North America), no matter how hard-pressed for more research funds, would strongly resist becoming involved in any of these escapades. It simply is not worth it to compromise one's scholarly reputation by taking funding in exchange for particular scholarly results.

Third, for money to be able to induce the general acceptance of a legal innovation, we need to supplement the money hypothesis with either a conspiracy theory or a manipulation theory. For instance, there must be some fraction of

[43] Citation.

those who adopt the innovation who are knowingly intellectual dishonesty. That is, they know or strongly suspect that the innovation is wrong, but they follow it in pursuit of the money. In addition, those who were previously critical of the innovation must be purchased to stop their criticism. And new conspirators must continually be brought into the conspiracy—strategic defectors who seek to get a better deal by threatening to expose the conspiracy; new young faculty who must be initiated into the conspiracy; and university administrators, who must be constantly reassured that this is a genuine scholarly innovation and not simply an outside group unduly influencing an academic unit.

As everyone knows, conspiracies that involve more than one person are fragile. And a conspiracy among a large number of academics in different universities seems to us to be a ludicrous idea.

Alternatively, scholars could be manipulated into accepting the innovation through a widespread delusion or hysteria. That is, they must be persuaded that the emperor's new clothes are, all appearances to the contrary notwithstanding, gorgeous.[44]

Third, if either the conspiracy or manipulation hypothesis is correct and law-and-economics proponents are members of a conspiracy or suffer from a mass delusion, there should be a separating equilibrium,[45] with some schools specializing in law and economics and some not. But actually what one has is a mixed or pooling equilibrium in which each faculty has some law-and-economics people and some of other schools. Harvard has Duncan Kennedy and Steve Shavell. Yale has Jack Balkin and lots of law-and-economics scholars. Stanford has Mark Kelman and Mitch Polinsky. Illinois has Daria Roithmayr and Tom Ulen. The vast majority of law schools do *not* specialize in one or another of the various legal innovations that have appeared in the last several decades. They all seem to recognize that they are far stronger if they have mixed faculties of competing and different views. Old-fashioned though it may sound, the academy is one of the few places in our society where contending views willingly and nonviolently clash and discuss differences with a shared view of advancing collective understanding through passionate, reasoned argumentation.

In the long run and sooner or later, innovations must prove their worth to the scholars learned in the discipline. As a result, those innovations that are wrong—alchemy, the notion of an ether, theological justifications for governance

[44] The only mechanism that we can imagine that might explain the persistence of the conspiracy or the delusion is the status quo bias. But that seems a very slender reed to support a large theory of conspiracy or of mass delusion. True, academics are subject to biases, but they are also inquisitive and contrary, characteristics that make them particularly unfertile ground into which to plant the seeds of conspiracy or hysteria. Another point that bears on this is the paradox that if the whole point is to maintain the status quo, how did the innovation get going in the first place?

[45] Explanation of separating and pooling equilibria and citations.

structures (all examples of views for which people were burned for contesting these ideas)—simply do not survive in a vibrant, competitive academy.

Ultimately our sense is that the academy is almost always skeptical of innovation, that there is what Thomas Kuhn called a "paradigm" that has a powerful grip on any entrenched discipline within the academy. What Kuhn called a "paradigm shift" away from that conventional paradigm occurs only when a compelling alternative presents itself. That is, every discipline is conservative with respect to change: those learned in the discipline have made a significant investment in the prevailing paradigm and must incur significant costs in investing in a new paradigm. Presumably they will incur those costs only when there is a high return to doing so. Remember that the scientific revolution itself was an innovation that took a long time to become accepted.[46] And think how difficult it was for geology to accept the plate tectonic theory.[47] If this is, as we believe it to be, a fair characterization of most academic disciplines, the burden on legal innovations to prove their worth is very high. And money is not one of the criteria that figures most prominently in the acceptance of any scholarly innovation.

### *C. Common Law versus Civil Law*

Another frequent assertion is that the receptiveness to legal innovation has to do with the characteristics of the different underlying legal systems. The common law, it is sometimes argued,[48] is much more receptive to law and economics than is the civil law system. One hallmark of the common law is that it is necessarily "under-theorized"[49] in the sense that a common law judge's decision of a dispute is not an instantiation of an explicit theory for resolving disputes of the type before him or her. Rather, common law judges work incrementally, fitting seemingly new fact patterns into existing precedent without overly scrupling to articulate the theory of the area of the law that the dispute represents.

---

[46] See generally ALFRED W. CROSBY, THE MEASURE OF REALITY: QUANTIFICATION IN WESTERN EUROPE, 1250-1600 (1996) and LISA JARDINE, INGENIOUS PURSUITS: BUILDING THE SCIENTIFIC REVOLUTION (2000). See also the fictionalization of the remarkable story of the empirical revolution in Europe in NEAL STEPHENSON, QUICKSILVER (2003), THE CONFUSION (2004), and THE SYSTEM OF THE WORLD (2004).

[47] See, for many examples, not just that of plate tectonics, BILL BRYSON, A SHORT HISTORY OF NEARLY EVERYTHING (2003).

[48] Citation to Posner, 1996, *Law and Legal Theory in the UK and US*, and 1995, *Overcoming Law*, chapter 1, also Posner 1997, "The Future of the Law and Economics Movement in Europe", *International Review of Law and Economics*, 17, 3-14, and Posner, 2004, "Law and Economics in Common-Law, Civil-Law, and Developing Nations", *Ratio Juris*, 17, 66-79.

[49] Citation to Cass R. Sunstein, "Incompletely Theorized Arguments."

This undertheorization of the common law process creates a significant demand for unifying theory.[50] First, because it does not strive to be comprehensive, the common law necessarily has gaps in its coverage. Judges cannot fill those gaps until presented with fact patterns that demand gap-filling decisions. Commentators—for example, law professors—can fill the gaps by suggesting an overarching theory that comprehends both the decided cases and those that might be presented in the interstices of those cases.

Second, the fact that common law judges do not, in the normal course of resolving disputes, produce overarching theories allows those knowledgeable about the legal system to provide those theories. There have been, in the U.S. at least, many organizations and enterprises dedicated to this goal. The American Law Institute and its *Restatement* projects; the Uniform commissioners, and doctrinally inclined law professors are, one might argue, devoted to providing a comprehensive and coherent account of areas in the common law.

By contrast, the civilian legal systems provide a theory of areas of the law in the form of the enabling codes that judges then apply to individual cases. Commentators—such as law professors—do not need to supply the theories; rather, their principal task is to explicate the theory embodied in the code or to show how the theory needs refining. Almost never do they need to recharacterize the theory—it is already provided to them.

Third, a frequent claim about the common law is that, in the words of Lord Mansfield, it tends to "work itself pure"[51]—that is, to get things right eventually. Or, to put the claim in its modern form, the common law tends towards efficiency. The gist of that contention is that in a common law system there are incentives for repeat players to litigate inefficient rules but not to litigate efficient rules. Whether judges decide cases by a flip of a coin, by the satisfactoriness of their breakfast, by consulting an ideological template, or by close analogical reasoning to precedent, this mechanism will inevitably lead to an increase in the stock of efficient legal rules.[52] This increase, one might then suggest, would lead to some scholars trying to work out why the laws were developing in a particular direction, and this inquiry might then lead to law and economics.

Fourth, one might read this argument to make a negative contention that systems that rely upon legislatures to make the bulk of their law are inevitably going to have less efficient laws because legislatures pay more attention to distributive matters than to efficiency.[53] So if the bulk of law in the common law

---

[50] See n. 6, p. 12.

[51] *Omichund v. Barker*, 1 Atk. 21, 33 (K.B. 1744).

[52] Citation to the voluminous literature on this matter.

[53] Posner makes this claim.

systems is judge-made and is tending toward efficiency and the bulk of law in the civil law system is legislative and is not moving noticeably toward efficiency, then there is likely to be a much greater interest in efficiency in the common law than in the civil law systems.[54]

There are two problems with these last two explanations for why law and economics is more suitable for common than for civil law. First, the selective litigation hypothesis (that there is an incentive to litigate inefficient but not efficient rules) should be true in *any* legal system or, possibly, is only slightly stronger in the common than in the civil law. The key difference between the systems in this regard is that judges can clearly make law in the common law system and that judges are more constrained in making law in the civil law system. As a result, the incentive to litigate an inefficient rule might be less strong in a system that did not allow judges to alter the inefficient rule. But most comparatists downplay this distinction between the systems, finding almost the same flexibility to alter law in both systems.[55] It could be, moreover, that even if this difference is true, repeat players in the civil law system may have a strong incentive to make repeated appeals to the legislature for relief.

Second, there is no particular reason why legislatures are not just as interested in the economic analysis of law as are judges. Indeed, we can think of reasons why legislatures, to the extent that they are always balancing costs and benefits at numerous margins, should be even more interested in economics than are judges.[56]

These characterizations may be correct, but they are not, we believe, helpful in explaining the difference between Europe and the U.S. in their receptivity to law and economics. Consider, first and foremost, the curious instance of England and Wales. Although England is the home of the common law system, England and Wales have been, like continental Europe, conspicuously uninterested in law and economics.[57] If the connection between common law and law and economics

---

[54] See Dau-Schmidt.

[55] Citations.

[56] This observation has some further implications. First, as we shall argue below, the European Union is finding law and economics to be of particular interest in its implementation of directives, an essentially legislative act. Second, some, such as Dau-Schmidt and ___, have argued that England is more like the continent than the U.S. in that it has a parliamentary system and that parliamentary systems are not particularly disposed to find law and economics useful. (This point would be used to show why the UK, even though a common law country, is more like the continental systems in relying relatively more on legislative than on judicial governance.)

[57] One might even argue that if the connection between the common law and the attractions of law and economics was so strong, then England should have been the *originator* of law and economics. Of course, in a sense it was, in that Ronald Coase is English. And more broadly modern

was strong, then England ought to have a vigorous interest in law and economics.[58] But clearly it does not. The best collections of legal scholars in the United Kingdom—the Universities of Oxford, Cambridge, Durham, Keele, Southampton, the London School of Economics, and Queen Mary College of the University of London—do not have a single scholar active in law and economics.[59] Only University College of London (Timothy Swanson) and the University of Manchester (Anthony Ogus and Andrew Griffith) law schools have a law-and-economics scholar. Most of the (relatively few) law-and-economics scholars in the U.K. are in departments of economics in provincial universities.[60] There are, to our knowledge, no law professors active in law and economics in Ireland and virtually none in Scotland and Wales.

Incidentally, the example of England disproves another possible hypothesis that originates in the work of Posner. That is the contention that law and economics stems from original work in a vibrant economics profession.[61] The suggestion seems to be that a necessary and perhaps sufficient condition for the development of interest in law and economics is that there are fascinating things going on in disciplines contiguous to the law. For instance, one might argue that there has to be interest generally in nonmarket economics, such as the economics of the family and of discrimination, in order for interest to develop in law and economics. Only through that mechanism can outsiders to economics see the applicability of the technical work of economists to their own discipline.

There are other puzzles about the contention that law and economics is appealing only to common law countries. India, the largest common law country, has virtually no interest in law and economics.[62] Australia and New Zealand, although there is an AUSLEA (Australian Law and Economics Association), have a very small number of law professors engaged in law and economics.

---

economics originated and was nurtured in Scotland and England, and its current economics profession is one of the most distinguished in the world.

[58] Notwithstanding Posner 1996 argues that some features of the English legal system have a Continental character.

[59] Information concerning the ranking of law departments provided by the 2001 Research Assessment Exercise: http://www.hero.ac.uk/rae/

[60] Cambridge, Nottingham, Royal Holloway, Surrey, York, Edinburgh and Strathclyde in Scotland.

[61] Posner makes this argument in *The Problematics of Moral and Legal Theory* and elsewhere.

[62] There are extremely distinguished law-and-economics scholars who are Indian, but all of them are expatriates working in U.S. law schools. There is, in mid-2005, some stirrings of interest in law and economics in Indian Departments of Economics. Law schools in India seem to be as immune to the blandishments of law and economics as are law schools in the U.K.

On the other side of the ledger, Israel, a civil law country, has a large number of law-and-economics scholars working at home and in the U.S. Their young scholars routinely come to the United States to get advanced degrees, and frequently those degrees concentrate on law and economics. Their young professors are encouraged to publish in U.S. law reviews and told that establishing a reputation in the North American legal academy is extremely important for their professional success. The Netherlands, another civil law country, has five of its nine law schools with chairs in law and economics.[63]

Canada presents a particular puzzle. That country takes much of its lead in legal matters from England, and yet with respect to law and economics, it takes its lead from the United States being almost as receptive to law and economics as has been the U.S. The leading Canadian law school, the University of Toronto, has been a world leader in the development of law and economics as a scholarly enterprise. It has hosted a vital and vibrant annual conference for the Canadian Law and Economics Association; Professor Michael Trebilcock was one of the founders of the American Law and Economics Association and has been that organization's president; and its current dean, Ron Daniels, was a finalist to be the Dean of Columbia Law School.

So, somewhat surprisingly, we do not see any reason inherent to the common law or civil law systems that makes one or the other more congenial either to legal innovations generally or to law and economics particularly.[64]

### *D. The Structure of Legal Education*

Those seeking to explain the difference between the U.S. and Europe with respect to the receptivity to law and economics frequently point to two very different aspects of legal education as being important. First, they note that in the United States, almost uniquely in the world, legal education is post-graduate education. Except for several countries (Japan and the Republic of Korea) that are currently revising their legal education systems to look more like that in the US, most lawyers in the world receive their legal education by taking law as their undergraduate major. That is simply impossible in the U.S. We shall elaborate below, but the gist of this contention is that every U.S. law student comes to the

---

[63] Notice how the predictions by Cooter and Gordley, 1991, "Economic Analysis in Civil Law Countries: Past, Present, and Future", International Review of Law and Economics 11, 261-263 have largely failed.

[64] In a subsequent draft we will report on the remarkable empirical literature that Florencio Lopez-de-Silanes and his coauthors have been developing on differences between common and civil law countries. See, for example, Djankov et al. "Courts"; Glaeser and Schleifer, "Legal Origins"; LLSV, "Law and Finance"; "Regulation of Entry"; "Regulation of Labor": "Judicial Independence."

study of law having already studied some other subject intensely. So, the argument goes, U.S. law students, being both more mature and already educated in some other field, are more inclined than are those who are either younger or learned in something else (or both) to see the law through the lens of some other field.

Second, higher education, including legal education, in the U.S. is a highly competitive industry, while higher education in other countries is not nearly as competitive. As a result, in the U.S. there is a strong incentive for each law school to adopt policies that will make that school better so as to attract more and better students, better faculty, and more resources. This incentive is pervasive in American higher education, not just in law schools. Although there are many first-rate institutions of higher learning outside North America, they do not yet have the same incentive to compete as vigorously as do the U.S. colleges and universities. To the extent that competition includes, as it does, an incentive to adopt innovate scholarly methods, then this competitive spur to innovate may explain why U.S. law schools have adopted law and economics (and other innovative methods of examining law) and European schools have not.

In this section we shall lay out and then evaluate these two arguments.

### *1. Law as a Graduate or Undergraduate Education*

Legal education in the U.S. is almost unique in the world in the sense that it is exclusively a postgraduate education, consisting of three years of education after the student has already completed a major in some other, non-legal field. It is impossible to study law for the baccalaureate degree in the US, although one can take cognate majors in forensic studies or criminal justice studies, majors that typically lead not to careers as lawyers but in the criminal justice system. In the rest of the world,[65] the study of law is a baccalaureate or undergraduate course of study.

Some argue that there is a strong connection between the fact that students in the U.S. have already completed studies in a nonlaw major and the welcoming reception to law and economics in the U.S. The chain of causation is somewhat obscure but might run as follows. Because U.S. law students have already achieved some depth of knowledge in other disciplines, they come to the study of the law through a variety of different disciplinary lenses. Those who were undergraduate engineering majors see the law through a technical or engineering lens.

[65] Japan and South Korea have recently (Spring, 2004) reformed their legal education systems to include postgraduate education in law on the U.S. model. The reasons for these reforms are complex. In Japan, the central reason given is to increase the number of attorneys in Japan from the very low per capita figure today to a figure approximating that in France, which has the lowest percentage of lawyers per capita of any developed country. For background on the Japanese reforms, see www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

Those who were English literature majors see it as an interpretive exercise like the textual exegeses that formed the core of their undergraduate studies. Those who were political science majors see the law as a meeting ground of political interests. Those who were anthropology or sociology majors see the law through the lens of social group formation and interaction and impersonal social forces. Those with a historical background are struck by the historical aspects of legal study. And those who were undergraduate economics majors may be struck by the efficiency aspects of legal rules.

This stew of different disciplinary backgrounds, the argument suggests, makes U.S. law students far more open to multiple ways of looking at the law. Because all law professors were once students of something else, they, too, find this cross-disciplinary method of approaching law to be congenial. So, they as well as their students are receptive to innovations that come to the law from other disciplines.

As with all the other explanations that we have canvassed for the differences between the U.S. and Europe with respect to the receptivity to law and economics and other legal innovations, there are problems with this one, too. At the most general level, this explanation does not seem to adequately distinguish law from other disciplines in the academy. The hypothesis can be understood to be making one of two claims: either that *no* scholarly innovation will succeed where students' first and only brush with the topic is as undergraduates or that scholarly innovations will occur *only* when students' first brush with it occurs in a post-baccalaureate context. Either view seems implausible. And if either is a theory generalizable to other subjects within the university, we should be greatly surprised. At any rate, neither applies to the study of business, a field in which there has been significant scholarly innovation, regardless of whether the first and only education in that field is at the undergraduate or graduate level. Nor could the second prong of the hypothesis be seriously applied to the study of medicine anywhere in the world.

Another significant problem with the theory that there is a strong (casual) connection between postgraduate legal education and law and economics (and other legal innovations) is that there are three examples of countries that have law as an undergraduate education—Canada, Israel, and the Netherlands—that have wholeheartedly adopted law and economics as an important part of their legal education and their approach to legal scholarship.

Yet another problem is that in some continental European legal educations the course of study is five years and allows for significant other disciplines to figure in the education. In Italy, for instance, almost every law student is required to take courses in microeconomic theory and public finance. In Belgium the typical law student must complete cognate courses in other subjects as part of the undergraduate legal degree. These systems seem to have significant similarities to the

situation in the U.S. so that if it were the familiarity with another discipline prior to the first exposure to law that were controlling in the adoption of legal innovations, then Italy and Belgium should be as innovative as the U.S. legal academy. But they clearly are not.

A third problem with the theory is that it does not satisfactorily explain what would appear to be a central tenet of any legal education system—to inculcate in students a discipline-specific methodology and set of precepts. Even in the U.S., one of the central goals of the first year of legal education is said to be to get the new student "to think like a lawyer"—whatever that may mean. At first blush, there should seem to be just as much effort in the U.S. as elsewhere directed at getting the students to forget what they might have learned before and pay attention to what the learned professors are telling the students that they need to know. Our sense is that nothing much would change in U.S. legal education if the average age of law students fell by four years (the length of U.S. undergraduate education) or if the average age rose by 10 years.

A fourth problem with the hypothesis is the unlikelihood that the character or background of a discipline's students would have such a profound effect on the nature of the scholarship that the professors in that discipline practice. Rather, most professors, in whatever discipline, would seem to take pride in dictating the nature and content of their disciplinary education with no regard whatsoever for the sensibilities of their students. Students had better accommodate themselves to what the professors expect or seek a different discipline. It is true that universities, as we shall shortly argue, are becoming more competitive so that they are, to a degree, catering to their customers—students—to a greater extent than they previously have.[66] Nonetheless, it seems to strain credulity to suggest that the legal professoriate adopts scholarly innovation in an effort to accommodate their students' educational backgrounds. Moreover, the particular pattern of innovations that have stuck in the legal academy and those that have not does not seem to us amenable to analysis by referring to the (shifting, perhaps) educational backgrounds of law students—a pattern that ought to hold if this hypothesis were correct.

There is an important and clear empirical implication to this hypothesis about the connection between the undergraduate-graduate structure of legal education and the adoption of legal innovations: if countries were to switch their method of legal education, their receptivity to innovation might change. So, to

[66] Of course, universities make accommodation to changing mores by, for example, scheduling fewer early morning classes and more late afternoon classes. The food served in student dining halls has, we are told, changed to keep up with alterations in student taste, and living arrangements within dormitories have also changed to make students feel more comfortable. But these caterings generally become far less flexible when students reach the classroom door. Faculty in nearly every discipline jealously guard their control over classroom and curriculum.

take prominent examples, the fact that Japan and the Republic of Korea are partially switching their systems of legal education from undergraduate to graduate education might alert scholars to look for an *increase* in the receptivity to legal innovation in those countries some years after the switch has been implemented.

There may be other factors that we have missed that make U.S. postgraduate legal education particularly open to innovation merely because it is postgraduate education. But our conclusion is that there does not seem to be any clear reason for thinking that legal innovations generally or law and economics in particular will thrive where legal education is postgraduate and languish where it is undergraduate.

### *2. Competition in Higher and Legal Education*

Although we have been unable to find much explanatory power in the particular fact that legal education, almost uniquely in the world, is postgraduate education, we find a great deal of explanatory power in the fact that U.S. legal education is part of a very highly competitive industry while legal education in the rest of the world is not.

Economists find much to admire in competition. Indeed, this is one of the central teachings and tenets of the discipline. Competition lowers prices, increases quantities available to consumers, maximizes consumer well-being, creates incentives to innovate, and, suitably regulated, minimizes deviations from socially desirable ends. This is true of markets for both goods and services and applies just as forcefully to the market for legal education as to the market for desktop computers. The central thrust of this section is to argue that competition in higher education generally and in legal education particularly is a principal factor in explaining why there is a significant incentive to innovate in legal scholarship in the U.S. and not in most other parts of the world.

Why would institutions of higher education compete with one another? Presumably for exactly the same reasons that sports teams compete—to win—and that private firms compete with one another—to increase profits and prestige. "Winning" in this context means nothing more elaborate than to do better than one's rivals—to attract a student for which both schools were competing, to persuade a prominent professor to join your faculty rather than someone else's, to rise in the rankings of law schools, to have more resources to do exciting and innovative things, including offering more student scholarships and higher faculty and staff salaries, to attract a prestigious conference, to raise lots of extracurricular money, and so on.

Prestige, a high reputation, follows success in competition, and in the academy prestige is much sought-after. Indeed, one could make a strong case for the proposition that being held in high regard by one's peers is the greatest moti-

vation for many professors.[67] In contrast to competition among private business firms (where profit plays the central role and prestige plays a smaller role in competition), profit is not so much a direct aspect of successful competition in higher or legal education. Most but not all universities, even those that are fully private, are nonprofit organizations. And yet having a higher revenue has the great advantage of allowing a law school or university to have higher costs—that is, to spend more money on salaries, scholarships, amenities of the educational process, and so on.

In North America competition for prominent and promising law school faculty and for the most talented students is vigorous. This is, we repeat, because success in this competition has significant payoffs. There are greater resources available for everyone associated with a higher-prestige school, including greater prestige.

A significant factor in signaling success or failure in legal and other university competition is tuition. Students in professional schools in North America pay a significant annual amount in tuition (and, of course, incur substantial opportunity costs in foregoing employment while in school). For example, students at a public law school may expect to pay up to $15,000 per year in tuition, and those at a private law school may pay over $30,000 per year. Students and their families will clearly be unwilling to pay these substantial amounts if the education they receive is not worth those fees. To that extent, students are very much like consumers for goods who demand that the items they buy give them greater pecuniary satisfaction than the dollars they surrender in exchange for those items. If students believe that the faculty at a particular law school are famous, that they are good teachers and accessible and that an education at that law school promises lucrative and exciting employment opportunities, they will gladly pay the tuition in just the same way that consumers gladly part with their money for goods that give them satisfaction.

A law school that is not competing effectively—that is, for instance, falling in the rankings—is one that will have difficulty in attracting prominent and promising faculty, first-rate students, and other resources. Indeed, that school may find that its costs exceed its revenues, that it is losing money in just the same way as does a failing business. Even if the law school is not paying attention to these matters, the university administration may notice this unsuccessful competition and may demand changes to stop the losses (and the subsidization of those losses from central university resources).

In contrast, within most other countries competition among universities for students, faculty, and other resources is muted, if not nonexistent. First and most importantly, there is either no or only a nominal tuition for attending an institution

[67] See generally GEOFF BRENNAN AND PHILIP PETTIT, THE ECONOMY OF ESTEEM (2004).

of higher education, including taking an undergraduate major in law.[68] As a result, the only cost of attending college or university is the opportunity cost of foregone employment, which means that, all other things equal, the demand for places at institutions of higher education is relatively higher than it is in the U.S. Most foreign universities deal with this potential excess demand by strictly limiting—through a *numerus clausus*—the number of positions open to new students.

A further implication of this divorce from competition and the market in foreign higher education is that administrators there do not have much incentive to put great effort into improving the quality of their institutions. Revenues are determined by governmental ministries and not by tuitions that vary with the quality of the product provided. Salaries paid to faculty are not discretionary; rather, they are centrally determined. As a result, particularly productive or accomplished faculty members are paid the same amount as are those faculty members who are not productive or accomplished (whether as teachers, colleagues, or researchers). One might hypothesize that private resources could make up for all these deficiencies but for the fact that nonpublic resources are almost unheard of in foreign universities.

There are several important implications of this great difference between U.S. and foreign universities. One is that there is almost certainly a net outflow of talented faculty and students—a general "brain drain"—from the rest of the world to the U.S. With respect to faculty the U.S. is almost unique in the world in the degree to which it is eager to hire talented faculty from anywhere in the world.[69] Put starkly, there is no "hire American" campaign, either implicitly or explicitly in U.S. institutions of higher education and certainly not in law schools.[70] In other parts of the world this freedom to hire talented faculty is tightly circumscribed, not just by the fact that U.S. scholars are generally paid more (about which more in a moment) but by explicit laws or strong informal norms to hire local talent.

With respect to graduate students, there is and has long been a strong pull exerted by high-quality U.S. research universities on talented students from around the globe. Indeed, by a substantial proportion, the U.S. attracts a larger

---

[68] Include an account of the Labor Party's proposal to charge tuition at British universities, but only *ex post* an education.

[69] As one measure of this effect, we have in mind to measure the number of Nobel Prize winners who are working in the U.S. but were born and educated in other countries. Our suspicion is that there are a large number of such faculty in the five academic fields in which Nobel Prizes are awarded. By comparison, there are, we hypothesize, very few U.S.-born academics working in other countries who have won Nobel Prizes while affiliated with foreign universities.

[70] This is only slightly disingenuous. U.S. law schools would prefer their faculty to have taken a U.S. law degree, but that is not a hard requirement, only a preference.

number of foreign students than any other country and grants more advanced degrees to foreign students than does any other country.[71]

What does the presence or absence of competition have to do with the incentive to engage in legal innovation? Scholarly innovation is one of the forms that competition among law schools (and universities) takes. Participants in the competitive race strive to innovate in all manner of ways—by offering new degree programs, smaller classes, courses on new topics, distance learning, interesting speakers and conferences, and the like. Faculty members who are known to be innovative are highly desirable and sought after by schools that seek to enhance their prestige. So, if a scholarly innovation appears and a faculty member who has fostered that innovation can persuade his or her colleagues of its novelty, nonobviousness, and utility, then the school may use that innovation to attract new students, new faculty, external resources, more interesting outside speakers, and the like.

There is, of course, a problem in identifying which innovations are worth backing and which are not, but that is a pervasive problem in any competitive industry, not just in legal education. A certain amount of risk-taking is required in following any innovation, and sometimes those who take the risk prosper, and at other times they falter. We have already identified the essential conservatism of most academic disciplines—their desire to accept change only when the case for doing so is overwhelmingly strong—and one might reasonably conjecture that there is a strong tension between this conservatism and the incentive to innovate. And so there is. But it is precisely that tension that makes legal education in the U.S. so exciting and its absence, so ploddingly dull in other countries.

There is another tension worth noting in a competitive and, therefore, innovative legal education—the tension, potential or real, between the legal academy and legal practitioners. Some, but not all, scholarly innovations have the effect, largely unintended, of heightening differences between legal academics and the practicing bar. To a large degree, practitioners are willing to delegate to law professors the determination of the content and process of legal education. But there are limits to that delegation, and some innovations may cross over those limits. Judge Harry Edwards, once a distinguished law professor, has drawn attention to what he calls a "growing disjunction" between what is being taught in law schools and what is valuable to practitioners.[72] Without commenting on whether this disjunction is real or growing (we believe that it is), we simply raise this mat-

[71] But this lead may be shrinking, in part because of the heightened scrutiny of foreign students since September 11, 2001, and in part because foreign universities have begun to compete for the custom of foreign students. See *Economist* article on competition for foreign graduate students.

[72] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

ter to suggest that where the practicing bar's control over legal education is stronger, the weaker is the ability of law professors to innovate in ways that seem to be of little use to practitioners. As a corollary, we assert that the more vocational in nature and quality is legal education, the less likely is it to be innovative. A legal educational industry whose self-justification is principally the creation of more lawyers will have no more incentive toward scholarly innovation than will automobile driving schools.

The considerations of this section suggest some additional empirical hypotheses. The most obvious of these is the contention that the more competitive the higher education or legal education sector becomes, the greater the incentive will be to innovate, including to innovate in scholarship. One might believe, for example, that as the European Union continues to liberalize its education sector, legal education in the 25 nations of the Union may become vigorously competitive, particularly to the extent that there is a continuing easing of restrictions on practicing law in countries other than the one in which one is educated or licensed. Additionally, as the international competition for law professors increases, as it appears to be doing, the incentive toward scholarly innovation will increase. Somewhat paradoxically but explicably, we also predict that as the degree of public support for higher education, including legal education, falls, the incentive to compete will increase and with it, so, too, will the incentive to innovate. To take but one example, there is today in Germany only one private law school—Bucerius in Hamburg; all others are state (*land*) institutions that take students largely from their respective *lander* or states. Imagine the pressures to innovate that will be exerted on the German state institutions if the private school prospers.

## *E. The Treatment of the Legal Professoriate*

The factors on which we focused in the previous section were drawn with a very broad brush. Although we mentioned the effects of competition for high-profile professors as being an important factor in explaining the incentive to innovate, we did not mention other aspects of the lives of professors that might have an important effect on the incentive to innovate. Here we want to elaborate on some of those aspects, drawing particular attention to institutional differences between the lives of law professors in the U.S. and the rest of the world that might help to explain the differences in receptivity to legal innovation.

### *1. Tenure and Legal Publications*

In the U.S., law professors are expected to engage in original, high-quality scholarship about legal topics. During their first several years in the academy, law professors seek to establish a record of scholarship so that at some point between their fourth and six years in the profession their colleagues will seek to co-

nvert their appointments from a probationary to a more permanent status. Although most research universities in the U.S. insist that teaching and public service will count as much or nearly as much as will scholarship in making this determination, most observers believe that the central determinant of the promotion decision will be a solid record of original scholarship.

In addition, U.S. law professors publish their scholarship in law reviews that are nearly all edited and managed by third-year law students.

In contrast, most foreign law professor experience far less pressure to publish original scholarship than do U.S. law professors, and where they are expected to publish, the principal outlets are those for practitioners. Also, most law reviews outside the U.S. are not edited by students but by practitioners or by established law professors.

Might these two differences between the U.S. and the rest of the world help to explain differences in the receptivity to law and economics and other scholarly innovations? Certainly. Let us assume, as seems reasonable, that student-edited law reviews are more open to innovation and less tied to the practice of law than are legal publications edited by practitioners or by established law professors. And let us further assume that a professoriate that must produce original scholarship in order to prosper generally tends to produce more original scholarship and more innovative scholarship than a professoriate that faces either no or a light publication requirement or that must prudently appeal to the established professoriate in order to be published in outlets controlled by those older faculty. Those two assumptions guarantee the result that the promotion and publication incentives facing U.S. law professors are bound to result in more original scholarship and, therefore, more openness to legal innovation than is the case in the rest of the world.

### *2. Compensation for Law Professors*

A very important aspect of the legal academic market in the U.S. that differentiates it from legal academics in other countries has to do with salary and the terms and conditions of employment. Briefly put, college and university professors in the U.S. are relatively strictly isolated from market activity. By custom, university statute, and legislation, U.S. professors are typically supposed to limit their outside consulting activity to one day per week during the academic calendar year, which usually runs from early September through early May.[73]

For law professors in the U.S. the upshot of this restriction is that there is a relatively strong wall separating the practice of law from the practice of being a legal scholar. There are very, very few U.S. law professors who work part-time

[73] Professors are nominally free to spend all of their time during the non-academic calendar consulting, although many are paid by their college or university employers during that period.

as attorneys and part-time as law professors. One is usually full-time in one profession or the other. There are, of course, notable exceptions to this blanket statement. First, every law school has adjunct law professors—practitioners who teach, usually, a single course per academic year in their professional specialty. But as valuable as their contribution to the educational enterprise in the legal academy may be, they are not judged according to the same criteria as full-time law professors. Second, a full-time law professor who finds that his or her consulting work is beginning to demand a greater share of time than that allowed by the university's customs or rules will often experience pressure to leave the academy—temporarily, perhaps—to finish the consulting opportunity. Failing to do so may result in his or her administration putting pressure on him or her either to stop the consulting or to resign from the professoriate. These matters are all subject to exceptions. Nonetheless, as a general matter, U.S. university professors in all fields, including law, are expected to be researchers, teachers, and colleagues first and foremost and to keep their outside business interests to a minimum.[74]

This strong limitation on outside employment has the inevitable result of making the compensation of U.S. law professors very handsome—not, surely, as handsome as the compensation that the professor could earn in the full-time practice of law but still handsome by comparison to the average compensation level in other disciplines within the university. The simple fact is that if U.S. law professors were not paid a high salary, they would be more inclined either to continue practicing law, rather than coming full-time to the academy, or to work part-time as an attorney to supplement the inadequate or unsatisfying university compensation.

The result of this bargain between U.S. law professors and their universities is that the professors are expected to look like other university professors more than they look like practicing lawyers.[75] Although it is very rare to have the terms of this bargain made explicit, the gist of it is that U.S. universities expect

[74] These walls separating the academy and practice are thinnest in the professions. In medicine, for instance, one could sensibly argue that a professor who had never practiced and did not continue to practice surgery should teach that subject to others. One used to hear similar things said in U.S. law schools—namely, that professors who had not practiced in the area of insurance law should not teach insurance law. But that connection seems to us to hold less force than it did, say, 20 years ago.

[75] As noted, most universities recognize that professors of medicine will be more effective as instructors and researchers if they continue to practice medicine—to a degree. But U.S. universities typically do not insist that professor of social work, professors of education, professors of journalism, professors of business administration, and other professors in professional schools continue to have an explicit practice component in addition to their scholarly responsibilities. But professors of drama and of other fine arts frequently continue to perform as they teach. We do not recognize in this pattern of sometimes forbidding and sometimes requiring continuing contacts with one's profession a coherent philosophy.

U.S. law professors to be researchers, teachers, and public servants first and foremost. And in their role as researchers U.S. universities expect law professors to aspire to the same general indicia of quality and quantity as do their peers in physics, art, anthropology, medicine, and so on. That is, U.S. universities expect law professors to be innovative, to be leading *scholars* in their fields.[76]

In contrast, law professors in the rest of the world are typically not paid at the same level as are U.S. law professors. We are not certain whether the central reason for this is a desire to economize on law-school salaries—tacitly encouraging continued practice by professors by paying them a fraction of what they make as attorneys—or a conscious desire to maintain a close connection between what is taught and what is practiced or both. Whatever the reason, the implication is that in most countries other than the U.S. law professors also practice law. As a result, foreign law professors have far less time than do U.S. law professors to devote to original scholarship. So, even if foreign law professors had a strong desire to innovate as scholars, they might not have time to do so. Nor are they likely to be rewarded for doing so, as we have already seen.

An additional and probably unintended consequence of this foreign penury in paying law professors (or in failing to forbid their continuing practice) is that there is likely to be a much closer connection in countries other than the U.S. between legal educators and practicing lawyers. This inevitably means that the vocational aspects of legal education will dominate the scholarly aspects. Moreover, the ability—for better *and* worse—of U.S. law professors to stray from the immediate oversight and demands of the practicing bar and to experiment with all sorts of scholarly innovations is simply not available in those foreign countries where law professors continue to practice law.

There is a clear empirical implication of these observations. If other countries adopt the U.S. practice of discouraging their legal educators from practicing law, scholarly innovation will increase in those countries. Perhaps separately or in conjunction with that development, the greater the real salary paid to law professors relative to practitioners, the greater will be the legal educator's incentive to devote energies to scholarly innovation.

### *F. Utilitarianism versus Kantianism*

Some commentators point to a more thorough-going but less precise difference between the U.S. and Europe as being central in explaining the difference between the two areas in their receptivity to law and economics. Legal scholars in Europe, they say, are part of a Kantian tradition that, to do actionable violence

[76] We have already remarked on the fact that this status of U.S. law professors creates a distance between them and the practicing bar.

to that tradition, holds that legal rights and responsibilities are absolute or nearly so, not contingent on shifting circumstances.

On this understanding, utilitarianism implies a thoroughgoing cost-benefit analysis applied to legal issues. Importantly that would seem to suggest that there are no legal rights that are beyond that calculus. Rather, they are all contingent and subject to revocation or nonenforcement if the costs of doing so can be shown to exceed the benefits (although there is nothing inherent in this understanding of utilitarianism that precludes demanding a stronger showing of costs over benefits—a "clear and convincing" standard, as it were—for nonenforcement of certain rights).

So, the argument continues, Europeans are reluctant to incorporate law and economics into their legal analyses because that innovation seems to necessitate subscribing to utilitarianism and abandoning Kantianism.

We do not know what to make of this point. If utilitarians and Kantians do, in fact, have these distinct points of view; if it is accurate that there are far more utilitarians than Kantians in the U.S. and far more Kantians than utilitarians in Europe; and if, finally, subscribing to utilitarianism as a guiding principle is a precondition for finding value in law and economics, then the point may have explanatory force. However, we are not certain of the truth of any of these assertions.

First, we are not adept enough in jurisprudence to evaluate the claim about the relationship between utilitarianism and Kantianism. Second, we are not aware of any empirical evidence that suggests that U.S. law professors tend to be utilitarians while European law professors tend to be Kantians. Perhaps they do. We simply don't know. Third and finally, we are skeptical of the claim that finding value in law and economics and a belief in noncontingent legal rights are incompatible. To take a sample of two, we both find a surface plausibility in the assertion that some rights are more important than others and that there are legal rights that are more contingent than others.

## *G. Legal Realism*

In our discussions with law professors around the world about law and economics, we have certainly noticed that U.S. law professors are far more likely to be concerned with the real effects of law on targeted behavior than are law professors in Europe (and elsewhere). Put baldly, U.S. law professors seem far more willing to reform any given law upon a showing that the law is not having its intended effect or is have an undesirable unintended effect than are professors in Europe. Let us characterize this concern with the actual or consequent effects of law as "legal realism."

Legal realism became an important scholarly innovation in U.S. law schools in the 1920s and 1930s, largely as a reaction to the formalism that had

characterized the first half-century or so of the academic study of law.[77] For a host of reasons, some of which may have to do with an essential and distinguishing aspect of U.S. culture, legal realism became a core part of the U.S. way of looking at law.

By contrast, realism in this sense has never caught on among European law professors. Professor Hans-Bernd Schäfer of the Faculty of Law at the University of Hamburg has suggested to us that realism of this sort is associated with a Marxist sociological view of law that sought to gain a foothold in European law in the 1960s but was discredited. The same criticisms that led to the general decline of Marxism as an academic field of study also led to the decline of a realist jurisprudence—at least in Germany. The strong gravitational pull of the late 19th and early 20th century systematizers of the civil law reasserted itself after this brief flirtation with realism. And as Professor Schäfer says, that grand synthesis embodies a coherent theory of law that obviates the need for any alternative theory, such as that propounded by law and economics.

What is the connection between legal realism, as we have characterized it, and receptivity to law and economics specifically and legal innovation generally? As to openness to innovation generally, there is nothing particular to be gained in looking at the failure of legal realism to gain a foothold in Europe. Whatever explanatory power that the factors we have already examine might contribute to assessing that failure will surely play a role in explaining this particular failure to adopt an innovation. To that extent, the particular success or not of legal realism does not contribute to a general understanding of the market for legal innovation.

But with respect to law and economics, the history of legal realism may contribute a great deal. Legal realism is a form of consequentialism, the view that the consequences of laws (and not just their justifications or formal coherences) matter in their evaluation. And to a great degree law and economics is the grand culmination of legal consequentialism (at least so far) in that it provides a comprehensive and coherent method of hypothesizing about and evaluating the real effects of law on targeted behavior. One might speculate that the attractiveness of law and economics to U.S. law professors arises precisely from its ability to provide the most satisfying method of talking about legal consequentialism (on the understanding that for many decades *all* or nearly all U.S. law professors have been consequentialists).

There may be other reasons to embrace law and economics, independent of its connection with legal realism. But to the extent that there is a strong connection between a widespread consequentialist view of the law and law and economics, then we might assert that a prior, successful legal realist scholarly innova-

[77] For an overview, see Neil Duxbury, "A Century of Legal Studies," in CANE, ED., OXFORD HANDBOOK OF LEGAL STUDIES (2003).

tion is a sufficient (but not a necessary) condition for the later adoption of law and economics.

Even if there is an intuitive plausibility to this connection between legal realism and law and economics, it is not, by itself, enough to explain widespread differences in the acceptability of scholarly innovations in law. A particular problem with this explanation is that it simply pushes the question back to trying to explain why the U.S. had a legal realist revolution and Europe did not. And in explaining that we are thrown back on the factors that we have already investigated in the sections above and in those to follow.

### *H. The Great Man or Woman Theory*

Another theory that we sometimes hear is that law and economics has prospered in North America because it has been championed there by a great man or woman or by great men or women. There are various candidates who are mentioned for this role, at least with respect to law and economics—Ronald Coase, Guido Calabresi, Henry Manne, and Richard Posner—all of whom have a valid claim to the position. The argument is that in any given time period there are many scholarly innovations, only a few of which survive. Those that survive typically have a noteworthy champion who, even if he or she was not the originator, has recognized the value of the innovation and has thrown his or her prestige and entrepreneurial abilities behind it. That champion may have taken the time and effort to organize the scattered sticks and branches of the innovation into a coherent whole, thereby allowing others to see the innovation in its entirety and, not unimportantly, enabling others to teach the new material.

Judge Richard A. Posner fits this model well. His *Economic Analysis of Law*, now in its sixth edition, defined the field in the 1970s and 1980s and was the only text to which those eager to teach the material could turn. The clarity and power of his writing and thought commanded attention, if not wholehearted agreement, and spurred others to scholarly efforts to fill in gaps in Posner's presentations. The volume and range of his scholarly writings were so great and wide that he almost single-handedly pushed economic analysis into every corner of the law. He helped to found the *Journal of Legal Studies*, one of the principal outlets for high-quality scholarship in the area. And in 1981 he was elevated to the federal judiciary and has served for many years as the Chief Judge of the United States Court of Appeals for the Seventh Circuit. In these and other ways, Judge Posner might be said to have breathed life into law and economics and made it a vital part of modern legal scholarship.

The implication of this view, if it is correct, is that Europe (and the rest of the world) will not have scholarly innovations unless they, too, have great men or women who champion them. One possibility that seems remote is that other nations will allow the scholarly champions from North America also to serve as

their national champions. So, Judge Posner could, where he so inclined, take his campaign to foreign venues and foster acolytes there. But typically, one needs a home-grown champion, someone with stature in the appropriate scholarly and professional circles to warrant a close look by potential domestic adopters. If such local champions have failed to appear for law and economics (and other scholarly innovations), the question then becomes, "Why have such champions appeared in North America but not elsewhere?"

We do not want to heap too much criticism on the "great man or woman" theory because we believe that there is a kernel of truth to it. But we do have some criticisms. First, we have already laid out our view that scholarship is not like commercial merchandise: one cannot make scholars adopt innovations through a glitzy marketing campaign or steep price discounts. Over the long run scholars almost never adopt innovations that are wrong or unproductive. Scholarship is subject to a rigorous test applied independently by thousands of practitioners learned in the field. Even if an incorrect or unproductive innovation were to bedazzle a generation of scholars, a subsequent generation would find the flaws in the innovation and lead the profession back to solid ground.[78]

The import of this point is that if an innovation has commanded a widespread consensus as valuable in a competitive scholarly discipline, then it probably—but not certainly—has something to be said for it. A champion can give an innovation a push, but he or she cannot sustain its momentum single-handedly or in the face of widespread skepticism or outright opposition. Others must help. And not just a few, but a large number, a significant percentage. The remarkable thing about law and economics is how many legal scholars (and how many remarkably talented people) have stepped forward to push it forward.

We have already remarked on our strong sense that there is an inertia or conservatism about many scholarly disciplines, keeping them in well-established paths. After all, the scholarly life is comfortable once one has mastered the materials that constitute the core tools of the profession. Scholars, like almost everyone else, do not like to be forced from those comfortable and established ways. And that is precisely what innovations do: they require scholars to rearm themselves and to do battle against those who would criticize older methods and conclusions.[79] We reiterate our earlier point that any scholarly innovation must overcome a strong presumption against it. If that is so, then those innovations that

[78] This is one of the important implications of Imre Lakatos, "Falsification and the Methodology of Scientific Research Programs," in *Criticism and the Growth of Knowledge* (Imre Lakatos & Alan Musgrave eds., 1970).

[79] Judge Posner in [citation] argues that there is a tendency for younger scholars in any field to adopt new methods as a means of making their way against the older, established scholars in the field. This tendency is clearly in tension with the desire of younger scholars to follow in the footsteps of those who will be judging them. "Science advances funeral by funeral."

survive have done so by surmounting a formidable series of obstacles placed in their ways. The broader audience (beyond those already converted) was skeptical; heroic efforts were necessary to convince them that the innovation is worth following.

Finally, there is an aspect of the "great man or woman" theory that may, in fact, interfere with the widespread adoption of a scholarly innovation—the fact that the innovation may become overly identified with the work of its champion. Our perception is, for example, that Judge Posner has assumed, among some critics or skeptics of law and economics (but, importantly, not among law-and-economics scholars), a papal role: his pronouncements on the economic analysis of law are taken to be *ex cathedra*, infallible, and the voice of the profession. Those who take issue with his analyses are thought to be in danger of excommunication. Law and economics, to these critics, is akin to a religious belief to which one subscribes by faith or not at all. Not much learning is required of devotees. Rather, they simply master a few holy texts, incorporate predictable phrases such as "collective action" and "externality" and are thereby re-born as scholars. As a result, for those who hold this preposterous view, one can criticize the entire corpus of law and economics by criticizing the work of Judge Posner.

But the truly significant fact about the field is that it has grown far beyond the work of one remarkable scholar or small group of scholars. No one person and certainly no committee of people serves to authenticate views as being true "law and economics"; those who profess law and economics are a diverse group among whom there are different styles, controversies, and emphases. Whatever it is that may account for the slow reception of law and economics in Europe and the rest of the world, it is *not* the absence of formidable individual national champions.

## *I. Legal Culture*

We have already alluded to the possibility of a general cultural disposition toward utilitarianism, competition, and consequentialism that may help to explain the adoption of legal innovation. In this section we want to explore very briefly the possibility that there is a particular *legal* culture that plays a leading role in these matters. By "legal culture" we adopt the view of Merryman and Clark, who define those words to mean "those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society."[80] A legal culture embodies more than the customs and behavior of those who work in and think about the law. It

[80] See J.H. MERRYMAN AND D.S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 29 (1978).

also reflects more general cultural attitudes and so may incorporate some of the more general dispositions that we have noted in previous sections.

Assuming that legal cultures are real and different across countries (or, possibly, families of legal systems), then these cultures may help to explain differences in amenability to legal innovation. For example, cultures may resist transplants from other cultures in the same fashion that the human body resists organs transplanted from other humans or other species. Suppose, as is reasonable, that law and economics (and many other innovations) are perceived by those outside the U.S. as quintessential American products. Other legal cultures may reject that transplant solely on the ground that it is an American transplant. However suitable it may be to the American legal culture, it is not at all suitable, they argue, for foreign legal cultures.

On the basis of their experience in France, Ken Dau-Schmidt and ___ Brun argue in a recent paper that this is precisely why the French have been reluctant to have anything at all to do with law and economics. They argue that law and economics embodies American individualism against the French social contract and the German concern for fairness and equity.

There may be something to this view, but we are dubious. First, the rejection of law and economics in France and Germany is not as violent, life-threatening, or traumatic as is that of the human body to an alien organ transplant. There have been some small successes in both France and Germany. It is the central thrust of this paper that there is a limit to these successes until some other conditions prevail, but, on the other had, we think that it goes too far to say that innovative transplants are doomed to failure. Second, in France, Germany, and elsewhere there have been successful transplants between the U.S. and those countries in other academic disciplines. If there were a distinctive medical or economic culture, as there is alleged to be for law, then one would expect there to be resistance to U.S. innovative transplants in those other areas. But there have not. Moreover, there have been some significant French and German transplants from those other academic disciplines into U.S. academic disciplines. To take but one example, consider the many contributions made by the economists Edmond Malinvaud and Jean Tirole to our understanding of economics.

There is another sense in which legal culture may play a role in precluding innovations from other countries. Professor Anthony Ogus has elaborate Merryman and Clark's definition of legal culture to include "a combination of language, conceptual structure and procedures, constitute[ing] a network which, because of the commonality of usage, reduces the costs of interactive behavior."[81] Therefore, a legal culture in Ogus' sense may serve the economic function of reducing the costs of resolving disputes.

[81] Anthony Ogus, "The Economic Basis of Legal Culture," 22 *Oxford J. Legal Stud.* 419, 420 (2002).

But Ogus stresses that there is a potential social cost to legal culture. Formalism and complexity may make the law inaccessible to all but experts, thereby creating a monopolistic position for those who can navigate the formalities and rituals of the system. The legal culture may, therefore, be exploited by a "dominant group with monopoly power," thereby generating economic rents for that group and raising the general price of legal services.[82]

This pessimistic view of the legal culture might make common cause with a view that we raised earlier in which practicing lawyers keep tight control on law schools so as to tamp down competition. So, to the extent that scholarly innovation threatens the group that is enjoying monopolistic returns in the practice of law, that group will have a strong incentive to stifle scholarly innovation. The failure to adopt innovation in Europe and elsewhere is simply, on this account, part of an anticompetitive strategy to realize supra-competitive returns in the practice of law.

There may be something to this view. U.S. law firms, for example, are notoriously more aggressive and competitive than are many foreign law firms, suggesting that they are comfortable with zealous competition in the provision of legal services. That is, a competitive domestic market for legal services may be a important causal factor in explaining the receptivity of legal educators to innovation in legal scholarship.[83]

An important implication of this view of the role of legal culture is that the spread of competition in legal services across national boundaries—the globalization of legal services—may have a liberating effect on scholarly innovation in law. As international markets open up and law firms move across jurisdictions and courts accommodate more liberal choice-of-law rules or principles of mutual recognition, the monopolistic grip of national legal cultures is bound to loosen.[84] Ogus predicts that "as the volume of international transactions relative to purely domestic transactions increases, so also will the benefits of adapting the [legal culture's] specifications sets, since adaptation will become (relatively) cheaper. As a consequence, the monopolistic characteristics of the domestic legal culture will be threatened."[85]

---

[82] Id.

[83] This is a testable proposition. Our model in the following part makes a formal connection between a competitive market for legal services and innovation in legal scholarship.

[84] See Ogus, supra n. ___ at 420 and 421.

[85] Id at 431-32.

## *J. Informational and Reputational Cascades*

In a recent article Professor Cass Sunstein has brought some of the insights of behavioral law and economics to the study of scholarly innovations.[86] He hypothesizes that the appearance, spread, and disappearance or success of legal scholarly fads and fashions might be profitably explained by the phenomena of informational and reputational cascades[87] and group polarization.[88]

Suppose that a young scholar joins the faculty at the University of Wisconsin School of Law. In defining what positions she will take on controversial issues in the law and what scholarship she will pursue, she naturally looks around her to take guidance from those nearest to her and from those who strike her as learned in the field.[89] If a large number of her colleagues seem to find textual interpretation of the U.S. Constitution a viable method of deciding contested issues in constitutional law, she may adopt that style of interpretation. If she makes decisions about whether to follow a law-and-society or law-and-economics method of scholarly investigation and relies on the reputation of the older scholars whom she admires and who will be evaluating her scholarly progress for the purposes of tenure and promotion, she may be inclined, at Wisconsin at least, to tilt toward the law-and-society method.[90] If most young scholars behave in that fashion, then institutions and entire professions, Sunstein argues, could gravitate toward particular points of view.

The thrust of this hypothesis is that educational institutions these informational and reputational cascades will drive an increasing percentage of a faculty toward particular points of view so that particular points of view—there is no need that only one prevails—are dominant at that school.

---

[86] Cass R. Sunstein, "Foreword: On Academic Fads and Fashions," 99 *Mich. L. Rev.* 1251 (2001).

[87] On the economics of informational cascades, see Sushil Bakchandani, David Hirshleifer, & Ivo Welch, "A Theory of Fads, Fashion, Custom, and Cultural Change as Information Cascades," 100 *J. Pol. Econ.* 992 (1992) and Sushil Bakchandani et al., "Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades," 12 *J. Econ. Persp.* 151 (1998).

[88] Sunstein, "Deliberative Trouble: Why Groups Go to Extremes," 110 *Yale L.J.* 71 (2000).

[89] One might also hypothesize that young scholars have sorted themselves out among competing offers in the sense that they have accepted a teaching position at a school at which they feel more comfortable and that they feel more comfortable at a school at which there are faculty who share their way of viewing the legal world.

[90] An example Sunstein gives is this, "In many places, feminism appears to have succeeded through a kind of informational cascade, as people who would otherwise be skeptical or unsure came to think that feminist approaches had something to offer—not (in many cases) because they carefully investigated the underlying claims and believed that they were illuminating or right, but because the beliefs of others seemed hard to resist for those lacking a great deal of confidence in their own (skeptical) judgments. If so many people seemed to think feminist approaches to law were valuable, mustn't they be right?" See Sunstein, n. ___ at ____.

In addition, Sunstein invokes the phenomenon of "group polarization" as a further explanation for scholarly fads. When a group with similar beliefs meets—say, a group of people who hold conservative political beliefs—to discuss politics, they tend to gravitate toward the most extreme views within that group.[91] This force exacerbates the force of an informational or reputational cascade so that once such a cascade has begun and enough of a group has coalesced around a new custom or fashion, the polarization that occurs within groups will inevitably push the group to the most extreme views within the group.

There are several problems with these two factors as an explanation of scholarly innovations. First and most troubling, this explanation does not distinguish between successful and unsuccessful innovations. Sunstein implies that all legal scholarly innovations in the U.S. of the last half-century have been the result of information and reputational cascades. And yet some of those cascades have resulted in seemingly lasting innovations, such as law and economics, and others have virtually disappeared, such as critical legal studies.[92] If they all began in the same manner, why did some succeed and others fail? Sunstein reports that when he served as a visiting professor at Harvard Law School in 1987, critical legal studies was on everyone's lips, both faculty and students.[93] And yet he also reports that by 1989 the field had disappeared (although some practitioners remain).[94]

What could have happened so forcefully in those two years to kill what seemed to be a popular innovation? Even granting that there are informational and reputational cascades, there is still an important question as to which cascades peter out and which gather strength and become more than mere fads. Sunstein's suggestion that external shocks are a central factor, while no doubt important, inappropriately, in our opinion, ignores the institutional constraints that protect scholarly disciplines from wild swings. Among the institutions that serve that function are promotion and tenure decisions, peer reviewing, competition among scholars for influence and prestige, student evaluations, scholarly conferences, and the general oversight that the university administration provides of its constituent units.

---

[91] See Sunstein, n. 45.

[92] The first sentence of Sunstein's *Michigan Law Review* article is "Why did critical legal studies disappear?" Id. at 1251.

[93] We are thankful to Daria Roithmayr for pointing out to us that Sunstein is not suggesting that critical legal studies prospered only from 1987 to 1989. She (and others far more familiar with the CLS literature than are we) date the beginning of CLS from 1977.

[94] See Robert Ellickson, "Trends in Legal Scholarship: A Statistical Study," 29 *J. Legal Stud.* 517 (2000), for empirical evidence on the relative health of various scholarly innovations in law.

Second, we believe that Sunstein pushes the "group polarization" button too hard. Recall that that phenomenon suggests that within a group of like-minded people, the group tends to drift toward the most far-reaching of the opinions within the group. There is ample evidence in favor of that view in the experimental psychology literature.[95] We do not question that. But we are skeptical of its applicability to the fiercely independent faculty with whom we are familiar on law school faculties. We have already stressed the fact that law schools rarely tip entirely or nearly entirely to extremes on any dimension. Diversity of viewpoint and opinion is an independent value widely shared on law school faculties. Even within groups of specialists on a faculty there is rarely unanimity of opinion. One of the most attractive aspects of scholarly conferences, even among specialists, is the civil but vigorous manner in which parties sharing the same general point of view can disagree. Those conferences are not, as the group-polarization view might seem to suggest, groupthink reinforcement sessions.

Third, Sunstein's explanation for scholarly innovations may apply to law (with the caveats of the previous paragraphs), but it does not strike us as a general theory applicable to other disciplines within the academy. We have an old-fashioned faith in the steady and cumulative progress of science, and that faith, while it does have room for informational and reputational cascades, suggests that it is descriptive, explanatory, and predictive power that ultimately rule in a competitive academy. We have, indeed, argued that the same factors apply to the law, which leads us to believe that if Sunstein is correct, it is only in a few rare examples within subfields of the law and for relatively brief periods of time, as his account of critical legal studies suggests.

### *K. Summary and Conclusions*

In this section we have canvassed a large number of factors that might explain the widespread perception that the U.S. legal academy is much more open to scholarly legal innovations generally and law and economics particularly than are other legal academies around the world. One might have attributed different degrees of plausibility to many or most of these factors. But our examination of them suggests that there is really only one factor that appears to be crucial—having a competitive market in legal education particularly and in higher education generally. Other factors that might seem to play a determinative role, such as the level of compensation of law professors relative to compensation of attorneys and the presence of a prior legal realist revolution, are, ultimately, derivative of whether the legal academy is competitive.

---

[95] See Sunstein, supra n. 93 at ___.

## IV. A Model of the Market for Legal Innovation

[This model has yet to be formalized. What follows is the bare bones of the argument.]

The economic theory of technological innovation teaches us that the production and adoption of an innovation depends on a conjunction of factors.[96] Generally speaking we can identify three determinants:

**Demand determinants**, including the benefits received by the user, the costs of adoption, the availability of complementary skills and inputs, the strength of the innovative firm with respect to potential consumers, and network effects. Network effects are more substantial with a general purpose technology due to wider availability of complementary goods.

An important point of the economic literature of diffusion is that the decision taken by consumers is not between adopting and not adopting, but rather adopting now or defer for later. Furthermore, adoption is usually an absorbing state since usually new is not replaced by abandoned technologies.

**Supply determinants**, in particular, return of innovation, the potential invention of new uses for the technology, the development of complementary inputs such as user skills (courses training users) and other capital goods. At the same time, it is possible that a new innovation will induce improvements in older competing technologies in retarding the shift to newer technologies.

**Market structure determinants**, with special reference to market power.[97] Environmental and institutional factors, including regulation of output market and of technological standards, are also important.

We use the economic theory of technological innovation to assess the success of innovations in the market for legal innovation, of which Law and Economics is undoubtedly a good example.

1. Demand determinants of legal innovation

---

[96] See Bronwyn Hall, Innovation and Diffusion, 2005, *Handbook on Innovation*, Fagerberg, J., D. Mowery, and R. R. Nelson (eds.), Oxford University Press.

[97] Does monopoly encourage or discourage the innovation process? On one hand, it is surely true that monopolies will be able to appropriate more effectively the return and reduce the potential risk. However, monopolies may lack the incentive to innovate generated by effective or potential competition, and usually have many resources and human capital sunk in the old technology.

The direct consumers of innovations in legal theory are those who produce or practice law, including lawyers, judges and legislators.[98] Although business and general consumers are indirect consumers of innovation in legal theory, they have a marginal role in the choice of adopting a new legal technology.

(a) Lawyers are an important group of consumers of innovations in legal theory, but their priority is for innovations that have implications for practice and hence increase the profitability of legal services. The market for legal services is much more regulated in Europe than in the United States, although one should not minimize the influence of the ABA.[99] Furthermore, the legal profession in Europe has consistently opposed the so-called commercialization of lawyers.[100] Many European law societies explicitly criticize deregulation of legal services because they do not want to become more similar to the United States, which is suppose to be a bad model for the legal profession.[101] Innovation in legal practice in Europe has been clearly driven by outside competition and the increasing complexity of the world, rather than intra-jurisdiction competition.[102]

(b) Judges are a fundamental group of consumers for two reasons. On one hand, innovation in legal theory is important for judges to have a comprehensive view of the law and help them to solve new cases. On the other hand, the adoption of a legal innovation by judges will push other participants in the legal system (lawyers, prosecutors, and even legislators by a feedback effect) to use identical technology. In a sense judges are a pivot consumer that generates network effects.[103]

It is well documented that U.S. judges are certainly much less restricted in judging than European counterparts (in their multiple jurisdictions, civil or criminal, administrative and constitutional) due not only the differences between common and civil law, but more fundamentally the less fluid organization of the judicial profession in Europe as a hierarchical bureaucracy with strict professional and behavioral norms, and more dependent of the political process and therefore

---

[98] Another group of consumers is prosecutors. In Europe, they have similar incentives as judges to adoption of innovation given the way the profession is organized.

[99] See Nuno Garoupa, 2004, Regulation of Professions in the U.S. and Europe: A Comparative Analysis, American Law and Economics Association Annual Meetings.

[100] See Nuno Garoupa, 2004, op. cit., page 17 and references therein.

[101] See Nuno Garoupa, 2004, op. cit, page 25 and references therein.

[102] See Nuno Garoupa, 2004, op. cit., pages 15, 18, 20 and 21, and references therein.

[103] See Anthony Ogus, "The Economic Basis of Legal Culture: Networks and Monopolization," 22 *Oxford J. of Legal Stud.* 419-34 (2002).

weaker. The situation in England and Wales is more complicated, although Posner (1995) suggests that in practice they are more similar to continental Europe than U.S.[104]

(c) Legislators are a consumer of innovation in legal theory inasmuch as it helps them to produce new legislation within a coherent body of law. The influence of law professors in the drafting of the law plays an important positive role in the legislator's decision to adopt an innovation. Where the production and evaluation of legislation relies on law professors and legal experts, legislators will tend to adopt legal innovations suggested by these intermediaries, but not by third parties. Therefore, law professors and legal experts in a sense can exert some control and tend to close the market for legal innovation. Such effect will be more important if legislators are the main producers of law, which is the case in continental Europe, but not traditionally in common law jurisdictions.

Generally speaking, the demand for legal innovation is more homogeneous and less competitive in continental Europe than in the U.S. Private returns for adoption of legal innovations are relatively lower in Europe because there is a lack of network effect due to a more rigid and hierarchical organization of consumers. Consequently, innovative consumers are weaker and rationally should tend to defer adoption.

The European Union can be regarded as a positive external shock on the demand for legal innovation by consumers. First, the opening of the market for legal services to competition has put pressure on lawyers and law firms to adopt more efficient technology in terms of legal innovation. European lawyers are increasingly working in international contracts, and business-related litigation is making more use of EU law and EU legal institutions and bodies.[105] We should notice however that areas of facilitative role for economic transactions within the EU are more demanding for legal innovation (business and financial law, corporate law, contract law) than areas less touched by economic integration factors (procedural or criminal law).[106]

---

[104] See Richard Posner, 1996, *Law and Legal Theory in the UK and US*. Kenneth G. Dau-Schmidt and Carmen Brun, 2004, Lost in Translation: The Economic Analysis of Law in the United States and Europe, argue a similar thesis on the basis of U.K. has no written constitution and the doctrine of Parliamentary sovereignty. Both facilitate a strong legislature at the expense of a weak judiciary with limited role in the interpretation of the law.

[105] See Paul Craig and Grainne De Burca, 2003, *EU Law*, 3rd edition, Oxford University Press on how the jurisprudence of the ECJ is business-biased because most preliminary rulings relate to business-related litigation.

[106] See Anthony Ogus and Nuno Garoupa, 2004, A Strategic Interpretation of Legal Transplants, CEPR Working-Paper and Anthony Ogus, 2002, op. cit., on these points.

The private returns to innovation in the judicial profession have increased as national courts become partners in the production of EU law.[107] National prevailing doctrines cannot easily accommodate EU and national law in a comprehensive setup.[108]

EU membership also had a positive impact on the demand for legal innovation by legislators. On one hand, EU legislation and ECJ jurisprudence has constrained the production of law by national legislators, in the formal sense by recognition of direct effect and supremacy of EU law; in the practical sense by requiring regulatory impact assessment or environmental impact analysis in many contexts. On the other hand, the pressure for control of public expenditure, which has pushed governments to consider reforms of the judicial and legal systems. This effect has been coupled with the recognition of the legal system and rule of law as a major determinant of investment and economic competitiveness.[109]

With respect for the demand of innovation in legal theory, the EU has certainly represented a shift in "legal technology transfer" by decreasing the cost of adoption and increasing the private return.[110] However, a move into unification or harmonization of several areas of the law, rather than a prevailing "competitive federalism" could reproduce the problems we have identified for individual countries in continental Europe at EU level.

## 2. Supply determinants of legal innovation

The producers of innovations in theory are primarily law professors. There are striking differences between legal professorship in the US, United Kingdom and continental Europe.

The first aspect to consider is the career and promotion of law professors and its effect on the entrenchment of legal academic status quo. In the United

---

[107] See Paul Craig and Grainne De Burca, 2004, op. cit., on the willingness of English judges to review Parliamentary legislation (against the so-called "doctrine of Parliamentary sovereignty") by overturning it (technically not applying it) when it is inconsistent with ECJ jurisprudence. Apparently, it took more time for French and German judges to indulge in such behavior, which is not surprising given the organization of the judicial profession in civil law countries. For a more general discussion of U.S. strong-form judicial review and the new European weak-form judicial review, see Mark Tushnet, 2003, Judicial Review of Legislation, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 164-182.

[108] Not surprisingly, EU law is still an elective course in most undergraduate curriculum.

[109] See Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer and Robert Vishny, 1998, Law and Finance, 106 *Journal of Political Economy* 1113-1155.

[110] There is plenty of evidence of opposition by the incumbents to entrants confirming that "legal technology transfer" is important. See Anthony Ogus, 2002, op. cit.

Kingdom and in continental Europe, it is traditionally much more dependent on hierarchical relationships due to a substantial lack of academic mobility and the management of faculty-edited law reviews and books published in the native language. In the US, the academic job market for law schools is extremely dynamic and the production of innovation in legal theory is primarily published in student-edited law reviews which are less prone to capture by cartels.[111] Neither follows the standard approach to academic periodicals used in hard sciences and Economics, lacking the disciplinary effect of revise and resubmit articles.[112]

The mobility of law professors within European countries, with the possible exception of the United Kingdom, is also not stimulated by the combination of in-breading in many countries and the fact that university professor is essentially a civil servant or a legal equivalent to working for public administration. Under this conditions, there are all the usual incentive problems to compensate excellent academic performance, aggravated by tenure reviews based on unitary processes, in some cases, at national level, that do not introduce substantial differences between academic institutions (tenure is quite homogeneous and a secondary market is almost non-existent).

Also in the U.S. there has been a dramatic increase in the number of law professors that puts pressure for adoption of new legal technologies as a way to get a distinct reputation within the profession.[113] It is in clear contrast with the UK, where England has had no similar pattern of development of chairs in law in 1870-1960s and traditionally there were very few law schools. The expansion is quite late in the 1980s.[114]

A second important and related observation concerns the profile of law professors in the US, where law is a professional degree, and in Europe (including the UK), where law is undergraduate. In the US, law professors have a bachelor's degree in arts or sciences, but not law, thus they are exposed to different method-

---

[111] See Dau-Schmidt and Brun, 2004, on this point.

[112] See Richard Posner, 2004, Against the Law Reviews, *Legal Affairs*, (http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.html) against student-edited law reviews. Also note here role of Law and Economics as well as "Law and -" peer-reviewed journals.

[113] A point explained by Richard Posner, 2002, Legal Scholarship Today, 115 *Harvard Law Review* 1314, and Thomas S. Ulen, 2004, A Crowded House: Socioeconomics ( and Other) Additions to the Law School and Law and Economics Curricula, 41 *San Diego Law Review* 35-54.

[114] The first professorship of English law may have been established at Oxford in 1758, and two centuries later there were around 200 teachers of law in the U.K. (membership of the U.K. SPTL, the equivalent of U.S. AALS). See Neil Duxbury, A Century of Legal Studies, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 951-974.

ologies and are more heterogeneous in terms of scientific background. Many law professors combine a JD degree with a PhD in a social science such as Economics or Political Science or in liberal arts such as History or Literature. In Europe, law professors have a bachelor's degree in law, hence much more homogeneous in scientific background. Typically post-graduate studies in law (LLM or PhD) are not combined with other degrees.

Most law professors do clerking or practice in a law firm before embracing a career at a law school. In Europe it is typically the other way around. The time devoted to research and to the production of innovations in legal theory is more constrained by outside options in Europe than in the U.S.[115]

The typical profile of law professors in the U.S. explains why law schools are more heterogeneous and more open to the influence of other scholarly fields, including economics. Conversely, the more homogeneous profile of law professors in Europe (including the United Kingdom), closes law schools to outside fields.

Also notice why economic departments in the U.S. export specialized economists to professional schools (law, medical, business, public policy) where they get better salaries, but not in Europe, where salaries are less competitive and traditionally fixed across departments in public universities. With particular reference to economics, we should not forget that in some continental European countries, departments of economics were splits from law schools; chairs in political economy or public finance were in law schools in the early 1900s.

An important aspect to have in mind is the organization of law schools as a response to the market for legal education. In the US, law schools do not enjoy local or spatial monopoly, they aim at attracting the brightest candidates who will practice in different jurisdictions. In the U.K. and continental Europe, law schools compete to same degree for quality of students, but they produce lawyers for a national jurisdiction.[116] Therefore the approach to legal education is more jurisdiction practitioner-oriented, whereas in the U.S. the top schools promote a legal education that is more friendly to legal theory and general principles of law.

---

[115] The U.K. is an exception in Europe because of the national Research Assessment Exercises (RAE) that have dominated in the last twenty areas. These exercises necessarily improve performance, but also support entrenchment. Moreover, the Law panel, contrary to the panel in Economics, has recognized case notes, loose leaf works, and books written as being able to exhibit significant scholarly material inasmuch refereed journals, and other indicators closer to hard sciences. See William Twining, Ward Farnsworth, Stefan Vogenauer, and Fernando Teson, The Role of Academics in the Legal System, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 920-949 (925).

[116] Not exactly true for the UK, since England & Wales is different from Scotland and Northern Ireland, but England & Wales has a preponderant weight over the other two jurisdictions.

We can easily argue that the return on innovation in legal theory is higher in the U.S. Furthermore, the lack of a prevailing doctrine certainly increases the possibility of new uses for the technology and the development of complementary inputs (such as spill-over into other areas of the law). At the same time, it is possible that a new innovation will not induce much improvement in older competing technologies because there is no obvious prevailing old technology.

Law and Social Sciences, particularly Economics, in addition offers the possibility of complementary inputs due to development of Social Sciences in the last century, in particular the approaches to nonmarket goods and services in Economics.[117]

At European level, we can observe two important external shocks on the supply of innovations in legal theory. One important factor is the integration of higher education market in Europe (the so-called Bologna agreement), however at this point it is not clear if it will generate a race to the bottom or a race to the top; certainly if the outcome is further cartelization of higher education, the results will not be promising for the supply of innovation in legal theory. A second important factor to have in mind is the increasingly widespread of English as scientific language, even in law. European law reviews are published in English, although most law reviews still are in national languages.[118]

## 3. Market structure determinants

The market structure for legal innovation is determined by the bargaining power of demand and supply, but also by government intervention by means of regulation of the legal and judicial professions, the organization of law schools, and the allocation of resources for research in legal theory. In Europe research funds are primarily public and are principally allocated in a relatively fixed manner across disciplines and departments (except in the UK).

In Europe, both demand and supply are more homogeneous, thus creating a typical situation of bilateral oligopoly. In the United States, demand and supply are more competitively dispersed and heterogeneous. Consequently, in Europe there are prevailing doctrines that make strong incumbents (in fact, we have a bilateral oligopoly with a dominant firm) and weak challengers that struggle to sur-

[117] On this point, see Richard Posner, 2002, Legal Scholarship Today, 115 *Harvard Law Review* 1314, and Thomas S. Ulen, 2004, A Crowded House: Socioeconomics ( and Other) Additions to the Law School and Law and Economics Curricula, 41 *San Diego Law Review* 35-54.

[118] It could be that the pressure from the demand, more than a direct change of supply incentives, has made more difficult for legal scholarship to confine attention to just one jurisdiction, although we far from the observation that "We are all comparatists now." See William Twining, Ward Farnsworth, Stefan Vogenauer, and Fernando Teson, The Role of Academics in the Legal System, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 920-949.

vive. Producers provide fewer innovations and consumers delay adoption to later periods waiting for higher returns. In the US, formalism has existed but with no prevailing doctrine, there have been traditionally more innovations, including legal realism, law and economics, critical legal studies, and the different "law and" movements.

A particular striking characteristic of regulation of the market for innovation in legal theory is the use of national symbols (language, culture, history) to avoid entry, the need to devaluate comparative analysis or external influence (the criticism of transplants) together with path dependence (legal innovations must address the issues raised by the legal code constructed by a previous legal technology), altogether bordering on pure rent-seeking.[119]

4. Why and How Is Law Different from Economics and Hard Sciences?

The model we have developed is useful to suggest explanations on why the Economics and hard sciences have been so much influenced by American innovations, yet Law and liberal arts generally speaking not so much. On the demand side, because consumers are less homogeneous, more competitive (globalization has played a major role), and less hierarchical, therefore returns to immediate adoption are more substantial. On the supply side, the early recognition of American innovations as more profitable led scholars to change the nature of their production.[120] Finally, the market for innovations is less regulated by professional organizations, probably with the exception of Medicine.

## V. Prospects for the Reception of Law and Economics

[This section remains to be written.]

Another possibility that we need to discuss is that in Europe the direction of influence of law and economics will come through its impact on practical decisions. Dirk Heremans of KUL and Wolfgang Oehler of Bielefeld argued that there has been a profound impact of law and economics on competition policy on in the EU. Law and economics might also have a profound impact on corporation law in the EU. Apparently the European Commission is dominated by market-

[119] See H. Patrick Glenn, 2003, A Transnational Concept of Law, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 839-862, on the incremental effort to provide a denationalization of law, and the problems encountered by transitional approaches and legal tradition.

[120] Few people dispute American leadership in innovations in economics, finance or management theory, in particular after the collapse of communism, although see http://www.econ.tcu.edu/econ/icare/main.html for a different view. American leadership in legal innovations, even in facilitative areas of the law, is a matter of dispute to say the least.

oriented economists and law and economics is having an impact through those economists' impact on Commission policy recommendations. It could be that the impact of law and economics will come through law schools' trying to understand what the commission is up to.

## Conclusion

We began with the stark fact that there is a sharp difference between the receptivity to innovations in legal scholarship in the U.S. and the rest of the world. The U.S. legal academy generates scholarly innovations at an almost dizzying pace, while the legal academies of the rest of the world seem to be almost immune to innovation. We examined a large number of potential explanations for this difference—ideological biases among faculty, the ability of extracurricular money to purchase innovations, the differences between common and civil law systems, whether legal education is a graduate or undergraduate field of study, the competitive nature of legal and higher education, the level of compensation of the professoriate relative to their expected salaries in private practice, the impact of a commitment to utilitarianism or Kantianism as the default legal philosophy, the presence of a prior legal realist revolution, the role of information and reputational cascades and of group polarization, the influence of legal culture, and the influence of a great man or woman champion for an innovation—and found that the most important factor was the degree of competitiveness in legal education specifically and in higher education generally. If a nation's higher and legal educational sector is competitive within its borders and with similar sectors in other countries, then that sector is far more likely than not to view scholarly innovation as valuable and to create and enforce incentives that foster innovative scholarship.