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VERY PRELIMINARY VERSION**

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

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Introduction

Our subject in this paper is legal innovations, specifically innovations in the legal academy, in how scholars think 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

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and Canada, law and economics has been extremely 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 shoulder 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 20th 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 their 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 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.

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.⁶

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 (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

⁶ 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.

innovations in US legal education and so few in other nations' legal education systems.⁷

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.⁸ Legal formalism, taken to be a focus on the logical coherence among doctrines and across fields of law, might be another.⁹ The use of literary techniques of analysis and textual deconstruction to examine law might be another.¹⁰ Feminist jurisprudence,¹¹ law and philosophy,¹² law and psychology,¹³ critical legal studies,¹⁴ public choice theory,¹⁵ critical race theory,¹⁶ law and economics, and empirical legal studies¹⁷ are further examples.¹⁸

⁷ 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.

⁸ Citation to Duxbury and others on legal realism.

⁹ Citation to legal formalism symposium at U of C.

¹⁰ Citation to articles using this technique. See also RICHARD A. POSNER, *LAW AND LITERATURE* (rev. & updated ed., 1998).

¹¹ Citation to feminist jurisprudence.

¹² Citation to law and philosophy.

¹³ Citation to law and psychology or behavioral law and economics.

¹⁴ Citation to Kelman and others.

¹⁵ See, for example, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

¹⁶ Citation to critical race theory.

¹⁷ For examples, see issues of the new *Journal of Empirical Legal Studies*.

¹⁸ 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 STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1994). (An example of Kuhnian paradigm shift is that in astronomy from a Ptolemaic—or Earth-centered—notation of our solar system to a Copernican—

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 it. 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.¹⁹ This suggests that our focus is on broad techniques or styles of analysis and not on narrow claims. So, we 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 recognize (or event to foster) an emerging area of the law and to collect the hold-

or heliocentric—notation. 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.

¹⁹ 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.

ings and commentaries in that area into a coherent body that others can use to instruct themselves and others.

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 jurisprudential 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 to more desirable. But we want to avoid that question by simply recognizing both tasks as, for our purposes, legal innovations.

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.

Having taken on the very general topic of what might constitute a legal innovation,²⁰ we can 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 competition law, regulated industries, and taxation. But it would include the economic analysis of contract law, 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.

²⁰ When we 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.”

II. Differences Between the US 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.²¹ 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.²² Nor do any of the 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.

For the moment, we simply assert, without substantiation, that law and economics is an important presence in North American law schools. 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. 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.²³ There is not a single chair in law and economics in Germany.²⁴ There is a *European Review of Law and Economics*, but it is not

²¹ It is significant that the Program is cooperative and not centered in a single law school. What is significant is that there are not independent competing master's programs. 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.

²² 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, and Latin American and the Caribbean.

²³ 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.

²⁴ 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 US. In US parlance a "chair" is a par-

sponsored and staffed (as are US 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 US 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 US 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 US 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.²⁵

Another anecdotal but significant indication that law and economics has not influenced UK legal scholarship can be seen in the recent *Oxford Handbook of Legal Studies*. 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 US would not contain literally hundreds of law-and-economics insights.

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.²⁶ 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.

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.

²⁵ We elaborate on this distinction in Part V below.

²⁶ See Wikely, “The Welfare State,” *Oxford Handbook of Legal Studies* 397 – 412 (2003).

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 US. Legal academics seek to publish in US law journals, and many of the brightest young talents in Israeli law schools have taken temporary or permanent positions on US law school faculties.

A final point that bears making is that the difference we note between Europe and the US with respect to legal innovations, particularly law and economics, does not seem to be a general problem in the sense that it attends all other disciplines within the academy. European and US 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 US 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 receptivity to innovative scholarship in European and US business schools. Nor is there an obvious difference between US and Europe with respect to innovations in the pure (that is, non-professional) disciplines, such as anthropology, economics, physics, psychology, political science, and the like. If there is a difference in receptivity to innovation between the European and US 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 US and Europe is accurate and is representative of the differences in receptivity in the US 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 US 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 US in receptivity to scholarly innovations has A recurrent argument is the transplant effect of legal innovation that puts law and economics as essentially an American product.²⁷ At the same time, the difference between Europe and the U.S. in their receptivity to law and economics has to do with prevailing political ideology. Law and economics is thought to be politically conservative (in U.S. terms) or classically liberal (in European terms). 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 many problems with this possible explanation. First, U.S. law schools tend not to be politically conservative but to be left-of-center.²⁸ 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 adopt law and economics. But that is simply not true. 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.

²⁷ See, for example, Ugo Mattei and Roberto Pardolesi, "Law and Economics in Civil Law Countries: A Comparative Approach," 11 *Intern'l. Rev. L. and Econ.* 265 (1991).

²⁸ Citation to Lindgren's study. A recent article in the *New York Times* reported that a survey of university faculty in the US 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.

Second, we suspect that the political leanings of law school faculties in the U.S. and in Europe are reasonably close. 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, 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 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.

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?²⁹

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

²⁹ 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 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 US and Europe with respect to accessibility to private and public funds for research. We shall comment on the effect of those differences below.

mechanisms that this contention postulates and then evaluate whether this contention helps to explain recent patterns of legal innovations.³⁰

For our purposes here, 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 field 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.

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C. Common Law versus Civil Law

One possible explanation is that the difference has to do with the different underlying legal systems. The common law, it is sometimes argued,³¹ 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”³² 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.

This undertheorization of the common law process creates a significant demand for unifying theory.³³ 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

³⁰ 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.

³¹ 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.

³² Citation to Cass R. Sunstein, “Incompletely Theorized Arguments.”

³³ See n. 6, p. 12.

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 re-characterize the theory—it is already provided to them.

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 it is the home of the common law system, England and Wales have been, like continental Europe, conspicuously uninterested in law and economics.³⁴ If the connection between common law and law and economics was strong, then England ought to have a vigorous interest in law and economics.³⁵ 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 London—do not have a single scholar active in law and economics.³⁶ Only the 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 UK are in departments of economics in provincial universities.³⁷ There are, to our knowledge, no law profes-

³⁴ 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 economics originated and was nurtured in Scotland and England, and its current economics profession is one of the most distinguished in the world.

³⁵ Notwithstanding Posner 1996 argues that some features of the English legal system have a Continental character.

³⁶ Information concerning the ranking of law departments provided by the 2001 Research Assessment Exercise: <http://www.hero.ac.uk/rae/>

sors active in law and economics in Ireland and virtually none in Scotland and Wales.

[The example of England disproves another possible hypothesis that seems to me to originate in the work of Posner and that is the contention that law and economics stems from original work in a vibrant economics profession.³⁸ The suggestion seems to be that a necessary and perhaps sufficient condition for the development of interest in law and economics. For instance, one might argue that there has to be interest generally in non-market economics in order for interest to develop in law and economics. A variant of this argument is that an interest in the new institutional economics is a necessary and perhaps sufficient condition for developing an interest, *among economists*, in law and economics. This might explain why law and economics is so popular among economists in Europe.]

But there are also other examples that make the connection between common law and law and economics suspect. Australia and New Zealand have a very small number of law professors engaged in law and economics.

[We should look at the Australian and New Zealand Associations of Law and Economics to get more accurate information here. Probably email the president of each association to help us here.]

Canada presents yet another 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. Canada has been almost as receptive to law and economics as has been the U.S. The leading Canadian law school, the University of Toronto, has been central to the development of law and economics as a scholarly enterprise. It has hosted a vital 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 its president; and its current dean, Ron Daniels, was a finalist to be the Dean of Columbia Law School.

[What about India and South Africa?]

³⁷ Cambridge, Nottingham, Royal Holloway, Surrey, York, Edinburgh and Strathclyde in Scotland.

³⁸ Posner makes this argument in *The Problematics of Moral and Legal Theory* and elsewhere.

But there are also puzzles within the civilian legal systems.³⁹ Legal scholars in Israel constitute one of the most internationally active groups in law and economics. Their young scholars routinely come to the United States to get advanced degrees and more often than not, 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.

D. The Structure of Legal Education

Those seeking to explain the difference between the US 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 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 US. We shall elaborate below, but the gist of this contention is that every US law student comes to the study of law having already studied some other subject intensely. So, the argument goes, US law students, being both more mature and learned 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.

Israel as a counterexample.

Second, legal education in the US is part of a very highly competitive industry. Higher education in other countries is not nearly as competitive as it is in the US. As a result, in the US 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 in Europe, they do not yet have the same incentive to compete as vigorously as do the US colleges and universities. To the extent that competition includes, as it does, an incentive to adopt innovative scholarly methods, then this competitive spur to innovate may explain why US law schools have adopted law and economics (and other innovative methods of examining law) and European schools do not.

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

³⁹ 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.

1. Law as a Graduate or Undergraduate Education

The bottom line of this argument is that law being taught at postgraduate level somehow has fostered a more integrated or multidisciplinary approach to the study of law, hence the growth of Law and Economics is just a consequence. Such explanation becomes short of providing an understanding for why Law and Economics has not flourished in post-graduate degrees in Law elsewhere (including LLM and PhD in Law) and disregards the fact that undergraduate degrees in Continental Europe are four to six year long, thus plenty of time to introduce Law and Economics and other Law and Social Sciences-related fields in the curriculum.

[Why is legal education in North America (and Japan) singularly a postgraduate education? In the rest of the world legal education is an undergraduate major. Could this have an impact on the receptivity of the legal educators and the legal system to law and economics specifically and other scholarly innovations more generally?

What about the reforms in legal education in Japan and South Korea? See www.kantei.go.jp/foreign/judiciary. And www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

A significant problem with the theory that there is a strong connection between postgraduate legal education and law and economics 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.

2. Competition in Higher and Legal Education

Another possible theory is that the relationship between the legal education systems and the practicing bar is determining the nation's receptivity to law and economics. This is actually a compound explanation with several distinct parts. First, there is the direct relationship between law schools and the practicing bar. As we will explain below, the practicing bar constitutes one of the most significant fractions of the demand for law-school graduates. (The other distinct elements are the organs of government and the law schools.) And law schools supply educated students to those who demand legal services.

Second, there is the relationship between the legal educators and other scholars in other disciplines within the university.

Third, there is the relationship among the various law schools within the country or region. If, for example, there are a number of law schools that compete vigorously among themselves for prestige and talent, then there may be competitive pressures for innovation. On the other hand, if there are only a few law schools or if there is no competition among them, then there is relatively little incentive to innovate in any way.

An important element in explaining the receptivity of law schools to legal innovations will, therefore, be the result of a complex process of forces within the university, across legal educators in the nation, and forces establishing the relationship between law schools and those who demand lawyers for the provision of legal services.

Something about the number of Nobel Prize winners, whether foreign or native North Americans, who are teaching at North American universities.

E. Utilitarianism versus Kantianism

TO BE WRITTEN

F. Legal Realism

Yet another factor worth considering is the impact of a legal realist revolution. The U.S. went through a legal realist revolution in the 1930s; Europe did not and never has. If one can argue that law and economics is a direct descendant of legal realism, then the absence of legal realism in Europe would fully explain the absence of law and economics. The problem with this explanation is that it doesn't really explain anything. It just pushes the question back to trying to explain why the U.S. had a legal realist revolution and Europe didn't.

G. 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. As we noted above, 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 astonishing range of his scholarly writings pushed economic analysis into almost 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. 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, "How come such champions have 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 selling commercial merchandise: one cannot make scholars adopt innovations through a glitzy marketing campaign or steep price discounts. Over the long run scholars rarely 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.⁴⁰

The import of this point is that if an innovation has commanded a widespread consensus as valuable in a competitive scholarly discipline, then it proba-

⁴⁰ 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).

bly—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. 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.

Our sense is that there is an inertia or conservatism about many scholarly disciplines, keeping them in well-established paths. It is, 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.⁴¹ The upshot of that view is that any scholarly innovation must overcome a strong presumption against it. If that is so, then those innovations that survive have done so by surmounting a formidable series of obstacles placed in its way. 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. That is 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, 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 field has grown far beyond the work of one remarkable scholar. 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.

⁴¹ 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.”

H. Legal Culture

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I. 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.⁴² 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 cascades⁴³ and group polarization.⁴⁴ Suppose that a young scholar joins the faculty at the University of Wisconsin School of Law and, 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. If a large number of her colleagues seem to find textual interpretation of the US 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.⁴⁵ If most young scholars behave in that fashion, then institutions and entire professions, Sunstein argues, could gravitate toward particular points of view.

In addition, he invokes the phenomenon of “group polarization” as an explanation for scholarly fads. When a group with similar beliefs meets—say, a

⁴² Cass R. Sunstein, “Foreword: On Academic Fads and Fashions,” 99 *Mich. L. Rev.* 1251 (2001).

⁴³ 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).

⁴⁴ Sunstein, “Deliberative Trouble: Why Groups Go to Extremes,” 110 *Yale L.J.* 71 (2000).

⁴⁵ 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 ____.

group of people who hold conservative political beliefs—to discuss politics, they tend to gravitate toward the most extreme views within that group.⁴⁶ 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 this explanation of scholarly innovations. First and most troubling, this explanation does not distinguish between successful and unsuccessful innovations. According to Sunstein, all legal scholarly innovations 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.⁴⁷ 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. And yet he also reports that by 1989 the field had disappeared (although some practitioners remain).⁴⁸ 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, inappropriate, 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.

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

Third, Sunstein's explanation for scholarly innovations may apply to law (with the caveats of the previous paragraph), 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 progress of science, and that faith, while it does have room

⁴⁶ See Sunstein, n. 45.

⁴⁷ The first sentence of Sunstein's *Michigan Law Review* article is "Why did critical legal studies disappear?" *Id.* at 1251.

⁴⁸ 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.

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 sub-fields of the law.

J. Summary and Conclusions

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IV. A Model of the Market for Legal Innovation

Economic theory of technological innovation teaches us that the production and adoption of an innovation depends on a conjunction of factors.⁴⁹ 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.⁵⁰ Environmental and institutional factors, including regulation of output market and of technological standards, are also important.

⁴⁹ See Bronwyn Hall, Innovation and Diffusion, 2005, *Handbook on Innovation*, Fagerberg, J., D. Mowery, and R. R. Nelson (eds.), Oxford University Press.

⁵⁰ 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.

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

The direct consumers of innovations in legal theory are those who produce or practice law, including lawyers, judges and legislators.⁵¹ 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.⁵² Furthermore, the legal profession in Europe has consistently opposed the so-called commercialization of lawyers.⁵³ 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 supposed to be a bad model for the legal profession.⁵⁴ 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.⁵⁵

(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.⁵⁶

⁵¹ 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.

⁵² See Nuno Garoupa, 2004, Regulation of Professions in the US and Europe: A Comparative Analysis, American Law and Economics Association Annual Meetings.

⁵³ See Nuno Garoupa, 2004, op. cit., page 17 and references therein.

⁵⁴ See Nuno Garoupa, 2004, op. cit., page 25 and references therein.

⁵⁵ See Nuno Garoupa, 2004, op. cit., pages 15, 18, 20 and 21, and references therein.

⁵⁶ See Anthony Ogus, "The Economic Basis of Legal Culture: Networks and Monopolization," 22 *Oxford J. of Legal Stud.* 419-34 (2002).

It is well documented that US 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 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 US.⁵⁷

(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 US. 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.⁵⁸ We should notice however that areas of facilitative role for economic transactions within the

⁵⁷ 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 UK 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.

⁵⁸ 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.

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).⁵⁹

The private returns to innovation in the judicial profession have increased as national courts become partners in the production of EU law.⁶⁰ National prevailing doctrines cannot easily accommodate EU and national law in a comprehensive setup.⁶¹

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.⁶²

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.⁶³ 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

⁵⁹ 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.

⁶⁰ 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 US 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.

⁶¹ Not surprisingly, EU law is still an elective course in most undergraduate curriculum.

⁶² See Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer and Robert Vishny, 1998, Law and Finance, 106 *Journal of Political Economy* 1113-1155.

⁶³ 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.

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 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.⁶⁴ Neither follows the standard approach to academic periodicals used in hard sciences and Economics, lacking the disciplinary effect of revise and resubmit articles.⁶⁵

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-breeding 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 US 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.⁶⁶ 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.⁶⁷

⁶⁴ See Dau-Schmidt and Brun, 2004, on this point.

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ 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 UK (membership of the UK SPTL, the equivalent of US AALS). See Neil Duxbury, A Century of Legal Studies, *Oxford Handbook of Legal Studies*, Oxford University Press, pages 951-974.

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 methodologies 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 US.⁶⁸

The typical profile of law professors in the US 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 US 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 UK and continental Europe, law schools compete to same degree for quality of students, but they produce lawyers for a

⁶⁸ The UK 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).

national jurisdiction.⁶⁹ Therefore the approach to legal education is more jurisdiction practitioner-oriented, whereas in the US the top schools promote a legal education that is more friendly to legal theory and general principles of law.

We can easily argue that the return on innovation in legal theory is higher in the US. 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.⁷⁰

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.⁷¹

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

⁶⁹ 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.

⁷⁰ 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.

⁷¹ 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.

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 survive. 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 devalue 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.⁷²

4. Why 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.⁷³ 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

⁷² 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.

⁷³ 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.

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.

Conclusion

TO BE CONCLUDED