The Rise and Fall of Law and Economics. An Essay for Judge Guido Calabresi

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1. Introduction. In this paper I use Law and Economics and efficiency reasoning in the law, as a proxy in attempting some predictions on the fate of U.S. intellectual leadership in the law. I argue that Law and Economics has significantly contributed to the reaching of hegemony by U.S. legal scholarship world-wide, mostly thanks to the early work of Guido Calabresi. I claim that later aspects of the style and politics of law and economics, have consumed much of its early capital of prestige, and that the declining phase of the economic approach in legal reasoning is well on its way. I further argue that the fall of Law and Economics, due to over-formalism, parochialism, and western-centrism, allows a more general prediction on the beginning of a declining phase of U.S. legal scholarship in the global scenario.

2. The United States as a Context of Reception. In a couple of previous papers, I have outlined the fundamental structure of what I called “the rule of professional law” and the historical reasons for current American intellectual leadership in the world’s legal landscape. The fundamental structure of American law has unfolded to become a politically legitimized system in which the straight political power of the government is counterbalanced by a double set of professional (counter-majoritarian) checks. A judicial check and an academic check. Such a system is the resultant of imports from Europe digested and made spectacular by way of expansion in the United States.

By the early part of the last century, US law had already received from Europe, and digested in a genuinely original way, the fundamental components of its legal structure. The English common
law tradition has transmitted to the former colony the ideal of judges as oracles of the law and of a strong, independent judiciary as the institutional framework in which judges can perform their role of guardians of individual rights. American law has developed this legacy and expanded it to the point of “inventing” constitutional adjudication, an achievement that was not accomplished even by the great Sir Edward Coke. Judges not only are the oracles of the law and the leaders of the professional legal system. They have also the power to declare, in the process of adjudication, political decision making as unconstitutional. Because of such outstanding extension of judicial power within American law, the belief, already noticed by Tocqueville, that any political problem can be, sooner or later, adjudicated by a Court of law, has been carried to its symbolic extreme in the Nuremberg Trial, and possibly to its very limit, in *Bush v. Gore*. Most importantly, the United States have invented a legal tool, constitutional adjudication, that is now part of the global legal consciousness.

The civil law tradition has also transmitted to the United States some fundamental modes of thought that US law has been busy expanding. Through the nineteenth and twentieth century, France, has conveyed to the United States the idea of universal individual rights. These “negative” rights of first generation, have been enshrined in the US constitution, influential as they were on the majority of the founding fathers. Not only the universalistic ideal has been carried to the extreme, as witnessed among other things by notions of universal jurisdiction of US courts in the vindication of such rights, but negative rights, in the absence of thick notions of sovereignty and statehood, as developed by the Jacobeans, became a genuine limit to the re-distributive activity of the American government. Notions of freedom from government intrusion were by no means limited to judicial law-making in the Lochner era. A strong limit to any proactive role of government, (excepts in areas such as military and defense where massive transfers of wealth routinely happen) can thus be traced back to French-inspired notions of (economic) rights.

Also Germany has transmitted to the US one of its fundamental present days characteristics: the presence of strong, independent academic institutions as another circuit of professional check on the political process. It was only because the law was considered a science, that it was natural to argue for its teaching in University contexts. Otherwise, it could well have remained a practical business, as it continued to be in England until well after the Victorian age. American Law Schools, (professional schools staffed with faculty that regard themselves as academic scholars) are the only ones in the world that offer basic legal education at the graduate school level. Consequently, and paradoxically for a system based on a “professional school”, the average American lawyer is

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4. I use legal consciousness in the sense of D. Kennedy, Two Globalizazions of Law, in Suffolk L. R. 2003
5. For a recent, fascinating discussion of their credo and ideology, see Ellis Joseph J., Founding Brothers, Vintage (2002).
6. See the discussion, infra.
exposed to more years of academic training that any other colleague in the world. Moreover, because of this further “expansion” as compared to academic undergraduate legal education in Europe, American academia can well be seen today as the global lawyer’s graduate school in the sense that ambitious lawyers worldwide do complete in the US their undergraduate legal education\(^7\). This is another powerful tool of worldwide diffusion of U.S. law.

U.S. law has not only imported from Europe in its early phase. Other fundamental characteristics of its structure can be seen as original reactions against European models. Among such, one should at least mention the written Constitution, a reaction against the arbitrary nature of unwritten law, and especially for my purposes, the high degree of decentralization, another reaction against the strongly centralized nature of the English system of government. Decentralization is possibly the most original aspect of the fundamental structure of US law. No other legal system in the world has developed a full fledged federal judicial system as complete and complex as the U.S. did. The co-existence of a large number of Federal and State Courts, made issues of jurisdiction and choice of law the primary concern of the American legal profession from its very beginning. Moreover it makes it only natural to approach legal problem in the light of a fundamental question: which one, between the many possible legal answers competing between themselves, is actually better? These issues not only make it just natural to compare the legal solutions from an efficiency perspective,\(^8\) they are the very same issues on the table of any lawyer approaching a legal problem of international relevance. Thus, at the down of economic globalization American lawyers already enjoy a legal culture and a political discourse that is broader than jurisdictional limits, so that they are comparatively better equipped than their foreign colleagues to approach the problems posed by the globalization of the economy. In this scenario, the “annexing” of one more jurisdiction, wherever located, does not particularly change the US lawyer’s way of reasoning\(^9\).

In this scenario, marked by the globalization of the economy and by the global demise of the activist state proper of the neo-liberal project, one finds the context for the rise of Law and Economics as the most influential global mode of thought in the law in the aftermath of the Cold War. More generally, local American scholarly evolutions made the prestige of US law felt by legal professionals worldwide, so that the intellectual leadership of American law appears now as an undisputable fact. Is this leadership going to last? In this paper, following the parable of law and economics, I argue that the rising phase is over, and that the declining phase is started.

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\(^8\) See Roberta Romano, Genius.

\(^9\) The very structure of the American judicial process, moreover, privatizes power and activity though significantly reducing the “public domain” aspects of litigation. A large variety of activities within litigation such as service of process, discovery, or questioning of witnesses, which are labeled “official” in European legal systems, are already private matters in American law.

While the roots for the “naturalization” of the American way of reasoning in the global era are early established, the parable of law and economics begins only in the hard of the cold war and unfolds in the present era of global neo-liberalism. Generally speaking, its fundamental challenge to the hierarchical relationship between the legal system and market activity has been boosted by the globalization of the economy, because the boundaries of the markets are less and less limited by those of the State. Nevertheless, is prestige in the global arena of legal thinking is not only the resultant of economic factors. It is a story that should be also understood in its own terms of an academic development of new modes of thought.

American legal hegemony can much better be seen (and is much more important) as a change in legal consciousness than as a pattern of transplantation of legal rules. Legal reception is a highly creative activity, and legal transplants would be severely misunderstood in their nature if they were approached only as a mechanic import-export exercise. It is thus important to approach the impact of Law and Economics, as “invented” in the United States by Guido Calabresi and diffused in Posner’s simplified form, in the broader historical and transnational context of legal scholarship.

The institutional background of U.S. law was the highly original context in which the Legal Process, the first genuinely original paradigm of American legal scholarship, developed its analysis in the nineteenth fifties. Before the Legal Process, scholarly movements in the U.S. were mere reproductions of European modes of thought, such as German dogmatic thinking (known in the U.S. as Formalism) or Sociological Jurisprudence (known in the U.S. as Legal Realism). Because the U.S. is the only fully federalized judicial system in the world, U.S. law has to cope with a unique number of potential conflicts between institutional actors, something that naturally makes lawyers develop a tremendously sophisticated consciousness on the practical importance, in litigation, of who decides what.

10. See E. Grande, Imitazione e diritto, ipotesi sulla circolazione dei modelli, cit; P.G. Monateri- F. Chiaves, The weak law. In Jeffrey Lena & U. Mattei (Eds) Introduction to Italian Law, Cluwer, (2002); The literature on legal transplants is now very extensive.


12. See, for a discussion of changes in current private law thinking, M. W. Hesselink, The New European Legal Culture, Deventer, (2001); See also for a more nuanced position M. Reimann, Positive Law and Legal Culture, cit. supra note 127.


Within U.S. legal culture, the unprecedented degree of anti-formalist reasoning due to forty years of legal realism called for some reaction. In Germany and France, the two leading experiences of the civil law tradition, sociological jurisprudence (anti-formalism) has never succeeded to get beyond the status of a critical current of legal thought, only marginally influential outside of legal scholarship. On the contrary in the United States, legal realism was able to seize the leading posture among legal approaches in Academia but also, not marginally, in the judiciary and the administrative state. When lawyers too candidly perform their role of “hidden law givers” they necessarily experience a loss of legitimacy. Consequently the weaken their professional project.

The attempt to restructure legitimacy and the professional project of lawyers was the Legal Process school in public law (remember Wechshler’s “Neutral Principles”?) and Law and Economics in private law. They had no models to be inspired from and they were consequently genuinely “inventions” of U.S. legal scholarship.

If seen in the domestic perspective of US law, both the Legal Process and Law and Economics share an ambiguous relationship with formalism and realism. There are however important structural differences between the two. It would be difficult to imagine the birth of the Legal Process outside of the very peculiar US federal system, while, because of the nature of economic reasoning, the economic analysis of law tends to be a universalistic paradigm. As a consequence of this different degree of local specificity, only law and economics has been able to become a world wide hegemonic form of legal consciousness.

4. The Rise of Efficiency Reasoning in the U.S.

“Get off the libraries!” used to say Herman Oliphant, a leading realist, creating a successful motto of dominant legal realism in the United States. The law library, and the legal materials therein contained, have long been the entire universe of the Western lawyer. To the textual tradition dominant in the Continent at least since the age of the glossators, only a very limited correction has been posed by the Common Law tradition, despite its self portrait as “non written” law. Langdell used to say that appellate opinions, themselves a literary form, are the *row materials* in the laboratory of the lawyer-scientist. Consequently, getting off the libraries was indeed a revolutionary program in the thirties of last century because lawyers have never really dwelled outside of them.

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17. See A. Gambaro, Il Successo del giurista, Foro Itlaiano, 1983
18. In the sense of sociologist Magali Sarfatti Larson, The Rise of professionalism
19. Explanation in Mattei, Why the Wind Changed, cit.
In order to get off the library, lawyers needed guides. Karl Llewellyn, another leading legal realist, knocked at the door of anthropologist Hoebel to explore forms of “legal life” outside of libraries. And many other realists too felt that non lawyers were needed in the law faculties in order to develop non textual paradigms of thought. Among such non lawyers appointed in law faculties we find many of the founding fathers of “law and economics”, leading Chicago economists such as Aaron Director or Ronald Coase.

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

Lawyers, to be sure, did not limit themselves to use their guides for an intellectual journey outside of textual reasoning. Not all of them were looking for critical approaches, aimed at challenging the status quo of the law, seeking with the tool of economics better approaches to look into “dark places”. Many lawyers, particularly those located on the more conservative side of the political spectrum, felt that decades of dominant legal realism required a restructuring of the lawyer’s legitimacy and professional project. That law, as a fundamentally conservative construct, needed to be refurbished, claiming back some objectivity if legal scholars and judges were to keep successfully claiming their role as “hidden law givers”. Considering the law as the fiat of the last decision maker, like realists did, exposes the legal profession to a fundamental challenge: if law is as biased as the political preferences of the decision maker, why should the decision maker be a professional lawyer rather than a politician, a doctor or a car dealer?

In western jurisprudence, science has traditionally served the purpose to assert the special role of lawyers as decision makers, despite their lack of political legitimacy. If the metaphor of biology and geometry, much cherished by Langdell and his formalistic followers no longer could serve the purpose, “social science” could do the trick. And between social sciences the queen, to be sure, was economics. Richard Posner is the name to be linked to this fundamental contribution, saving, the lawyer’s profession from the legitimacy consequences of being too much “candid”.

Hence economics could, at the same time, offer a good guide outside of the black letters, and a new strong source of legitimacy. After all, economists were focusing on incentives, and incentives meant focusing on the behavior of the recipients of legal precepts. Something happening after and beyond the text. Economists moreover, while working on public choices, where themselves focusing on

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20 See Laura Nader, The Life of the Law
21 See Grant Gilmore, The Ages of American Law
22 “As a scholar it is my job to look into dark places and describe as precisely as I can what I see” G. Calabresi, A common law for the age of statutes (1982).
23 See A. Gambaro, cit.
24 See R. Cooter, Law and the Imperialism of Economics, UCLA L.R. 1982
something outside of the text. Their worry was on the production of norms, on law in the making, the processes and the forces determining its content (e.g. rent seeking)\textsuperscript{25}. While traditionally the lawyer, including American legal realists as fundamentally positivistic lawyers, were focusing on the legal norm and precepts \textit{as they are}, (or as they should be) economists were claiming that the focus should be turned on what is before (public choices) and after (incentive-reactive behavior) the legal precept. The focus should be on \textit{the process} (public choice theory here was teaching the same lesson of the Harvard Legal Process) and on the social consequences of the outcome of such process.

As to legitimacy, economics handbooks were full of rhetoric grounded in science and objectivity\textsuperscript{26}. The early success of efficiency reasoning in the law can thus be justified by at least two factors: a) once the focus is on the process, then anybody would accept that the process should be efficient. b) efficiency was claiming objectivity, something essential in a strategy of legitimization. While justice is the domain of subjective feelings, efficiency is the domain of objectivity offering only a couple of clearly spelled out criteria\textsuperscript{27}.

Economists had their agenda too, so Law and Economics not only was serving the needs and the curiosity of lawyers but that of economists too. And the agenda, also on the economist’s side, was common to conservatives and progressives. The more open minded between economists, such as the early Ronald Coase, were feeling that the disciplinary segregation between the two disciplines was absurd. After all, at an earlier stage, law and economics were not even separate disciplines, as witnessed by the fact that the founding father of modern economics, Adam Smith, was a professor of Jurisprudence. It was only positivism, an approach that by the late nineteenth century had conquered both disciplines, that almost paradoxically created the cultural impossibility to communicate between them. For economists, positivism meant the full separation between facts and values, between the is and the ought, between positive and normative discourses\textsuperscript{28}. They simply could not any more communicate with lawyers, given the constant confusion between these levels of discourse that characterizes lawyers talk about justice. The few economists, such as Veblen or Commons, that attempted to overtake the logic of economic positivism by maintaining a dialogue with lawyers and institutions, themselves focusing on issues of distributions, naturally falling between the two domains, were accused of socialism and marginalized by the economic orthodoxy. For lawyers, to the contrary, positivism meant full separation of the domain of law from that of morality, politics, society and whatever is “outside” of what the authority \textit{poses} as law. Positivism

\textsuperscript{25} See Buchanan-Tullock,
\textsuperscript{26} see Deirdre N. Mc Closkey, The Rhetoric of Economics 2d ed (1998)
\textsuperscript{27} I develop this in Ugo Mattei, Comparative Law and Economics (1997)
\textsuperscript{28} See Katz,
meant, in Kelsenian terms, a *pure theory* of the law. In this perspective, economists were tainted by their constant policy discourses, something beyond the pure idea of the legal system. This separation has extracted a high toll that became very visible when the oil crisis of the seventies compelled to rethink some priorities. On the lawyer’s side, the welfare state has been constructed with very little attention to the economic impact of its regulations, so that by the time of the oil crisis, its sustainability started being questioned, more and more successfully, particularly in England and the United States. On the economist’s side, Keynesian policy, so crucial in recovering from the crisis of the thirties, was developed without considering the legal structure of its implementation, in particular the autonomy and strengths of the legal and bureaucratic structure, capable of defeating, by complex patterns of resistance, any macro-reform.

Consequently, while some economists were eager to better understand the legal picture, hence overcoming the costs of decades of incommunicability, others putting Keynesian policy under attack, were looking into the legal structure of property rights, and into the political process within a public choice model, to claim back to micro-economics what Keynesianism had transferred, arguably unsuccessfully, at the macro-policy level. Public choice theorists, monitoring the distortions of the political process (in particular of legislation and regulation) were finding in the early work of apologists of the common law tradition such as Richard Posner their natural allies. An alliance in the name of efficiency and objectivity, where issues of distribution and of justice, so crucial in the analysis of Guido Calabresi, and of the realist legacy of the New Deal, were simply left behind.

Law and economics, would not have conquered a global role, if it was not leveraged, beginning in the Reagan years, by a full fledged political agenda, a real industry, capable of flooding with cash any movement giving cultural prestige to deregulation and other reactionary politics of those years. It is sufficient to look at the early very lukewarm reception of the new movement in Europe to understand how much lawyers were willing to resist the ideal of efficiency in the name of justice and distribution. But the multiplication of chairs, endowed research facilities, fellowships etc. in a prestigious context as the United States academia (the global graduate school) was a certain recipe for global success.

To be sure, I do not wish to explain every social and political phenomenon as determined by economic forces and incentives. It is certainly true, nevertheless, that for the young American scholar graduating in the early eighties, it was a smart career move to get into Law and Economics rather than, say, in comparative law. Nevertheless there are other reasons too. In the comparative

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29 Hans Kelsen, *The Pure Theory*.
30 See Francesco Pulitini, Quante Analisi economiche del diritto?, in Mercato, Concorrenza e Regole, 2003
31 See the symposium on Law and Economics in Civil Law Countries published by the International Review of law and Economics (Cooter and Gordley eds) in 1991
literature, for example, it has been pointed out that the success of an academic paradigm in the law is connected to its apparently easy adaptability in different contexts, which is mostly due to more or less marked forms of universalism. Alan Watson, for example, has offered evidence of the diffusion of nutshells such as Gaius Institutes, or Blackstone’s Commentaries\(^{32}\). The same insights emerges from comparing the rate of diffusion of the very simple Napoleonic Code with the technically sophisticated and complex language of the German BGB. More generally, it has been observed that the less an approach to the law is positivistic and context specific the more it circulates\(^{33}\), and other esthetical characters of the law, such as self portraits of high advancement or general ambiguity have been pointed out as explaining the diffusion of legal ideas\(^{34}\). Many of such characters fit the economic reasoning in the law. Relative simplicity, political ambiguity, self-congratulatory mood, non-positivism (in the legal sense) and universalism are all characteristics of law and economics as exported world-wide by such Nutshells as Posner or Polinsky.

Historically, the way in which a new, politically powerful, paradigm of research is able to seize a leading position in a plurality of cultural contexts is mostly by making previous approaches look obsolete and primitive. That happened to the French exegetic methodology, considered obsolete by the much more elegant and scientific German- Pandectist approach. That was possibly the case of Franco-German inspired “social approach”, advertised as a step forward in civilization compared to the previous “Lochner-Era” individualism. This has certainly been the strategy by which Law and Economics has been able to seize a global role by offering an expansive universalistic model, that expresses itself in English, (the new lingua franca), that keeps a dialogue open with economics, (the queen of social sciences), and which claims to be the new natural legal order of the global age. The legal order thus proposed, short from being politically legitimized, receives its legitimacy and desirability by the intrinsic virtues of efficiency, the value alone capable of granting general access to the global capitalist market place.

The economic approach to the law, short from being a mode of governance in need of legitimacy as any other, has thus been able to become the technological backbone of the global market, something to be approached apolitically, to be described and modified only by technological practices. For the first time after the Cold War, funding became available for scholars who wish to be the technocrats and the engineers of this a-political system. Within these assumptions, any approach to the law that still considers it as a political institution that can not be understood and described in graphs and numbers, is disposed of as obsolete. Any approach that requires something other than a reactive minimal philosophy of governance is entirely out of

\(^{32}\) See A. Watson, The Important of Nutshells
\(^{33}\) See Mattei, Why the Wind Changed, cit
\(^{34}\) See Elisabetta Grande, Imitazione e diritto, Ipotesi sulla circolazione dei modelli (2000); A. Di Robilant, The Aesthetics of Law, in Global Jurist Advances 2002
fashion after the fall of the Berlin Wall. Law has to create incentives for market actors. The skilled lawyer and policy-maker is not appreciated if his suggestions require a proactive and expensive activist posture of governments, let alone if he argues for economic redistribution by taxation or other obsolete Keynesian measures. The legal scholar can only count on the natural existence of markets: his role is to produce a correct set of market incentives. The quintessential example of this attitude is the celebrated “self-sufficient” model of corporate reform produced by leading Columbia University scholar Bernard Black for the Russian Federation.35

5. Exporting Efficiency Reasoning. Europe as a Context of Reception. While it would be grossly exaggerated to claim that law and economics enjoys today the leading role as an approach to legal scholarship in European countries, we can nevertheless see that it is the main intellectual vehicle used by American legal consciousness to diffuse itself and to impose its hegemony in the center as well as in the periphery of the world.36 The expansionistic and universalistic blend of neoclassical economic analysis, together with the very thick layer of ideological assumptions that are imbedded in economic reasoning, are all behind the intellectual success of this approach to the law.37 A very clear bias in favor of the efficiency of the common law adjudication process, promotes the courts of law as the most important actors of the legal system. Privatizations and structural reforms, sustained by the international institutions of global governance, make law and economics one of the most important cultural currents that diffuse tacit assumptions of US based legal consciousness.

Law and economics started to be transplanted into European contexts, (and then, following its example to Latin America, Asia and elsewhere) by a systematic organizational structure, the European Association of Law and Economics, which began its operations as early as the late eighties. This society, mostly made by European scholars sometimes students in the United States, has obtained considerable success, and has generated a quite substantial network of European individuals and academic programs active in the field. The most significant evidence of the relevance of the economic approach in Europe does not only stem from the increasing number of specialized papers that appear in law journals. Much more important is the fact that European scholars non self-identified as law and economics acolytes, are more and more familiar with the general jargon and ideas and that efficiency reasoning, in somewhat a simplified forms, can be found even in plain legal scholarship.

Once transplanted outside of its context of production, law and economics displays the high level of ambiguity that allows it to flourish. Conservative scholars admire its intellectual elegance; more progressive and liberal scholars, see its potentials in subverting the highly formalistic and black letter flavor of local law and claim that the conservative political bias is something that can be left on the other side of the Ocean.\textsuperscript{38} Initial resistance by the mainstream legal scholarship has been successfully tackled. Like in the debates of the early eighties in the United States\textsuperscript{39}, also in Europe ten years later law and economics has been able to persuade a significant amount of the profession that issues of distribution were better tackled by taxation than by adjudication and that as a consequence efficiency should become the polar star of legal interpretation. Thus many European scholars became attracted to law and economics, and even when carefully limiting its use to relatively safe areas such as patrimonial private law, were nevertheless paving the way to a mode of thought subversive of the traditional relationship between the law and the market.

The distinctive American pedigree of law and economics leaves open a variety of fundamental questions, that should be approached within a broad historical context, in which present trends are not taken for granted and in which local specificities are fully appreciated in their political meaning. Such a critical exercise is even more needed if law and economics aims at establishing itself, as one of the fundamental methodologies of the new global legal order. Unfortunately, questions of legitimacy, of power and of hegemony are never posed by the European users of the economic reasoning in the law. There is no trace on that side of the ocean of the kind of fundamental discussions of the implications of economic reasoning in the law that in the early eighties (before law and economics was transformed into an industry) were posed in the United states by lawyers and philosophers, willing to confront the intellectual arrogance and simple-mindedness of so many economists. To the contrary, efficiency reasoning is accepted as a form of necessary realism in front of such daunting tasks on the agenda of the modern European legal scholar confronting the issue of private law integration.

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

\textsuperscript{38} See for a critical appraisal by an early Italian scholar in law and economics on the opportunity to consider Chicago-Style and other brands of Law and Economics as a movement sharing enough communalities to be approached within a unitary taxonomic scheme, see F. Pulitini, Appunti Sull’ Analisi Economica del Diritto, in Mercato Concorrenza e Regole, 2002 (forth.)

\textsuperscript{39} Symposia on efficiency and justice were hosted by the Hofstra Law Review and by the University of Chicago Law Review.
as balancing jurisprudence (including law and economics) has tremendously increased in the last ten years. The “new European legal culture,” mostly made by scholars belonging to such northern countries where the University system does not live in a state of disarray, and in which law professors are mostly full time scholars or (some of them) policymakers, is much more similar to U.S. legal culture than to the traditional European one. This new European legal culture, dominated by northern scholars able to express themselves in English, is the most influential in European private law drafting. The outcome of such Northern reception is a technological attitude towards the legal discourse, traditionally foreign to the European style, and very functional to the legitimizing strategy of non politically accountable techno-bureaucratic elites within the European Commission.

Nevertheless, legal Europe is not made only by northern, Anglophone elites. A variety of resisting attitudes can be shown too, particularly in southern Latin countries resenting their marginalized status in the exercise of building European law. Such Latin counter-cultures are occasionally originated simply by the cultural incapacity to participate in policy oriented discussions about the law, because leading lawyers in those countries are still the product of a highly formalistic interpretive culture. Sometimes, such resisting attitudes are due to the still notable strength of the “social mode of thought about the law”, looking at the Welfare State as a sign of social progress. This attitude more or less consciously leads to the belief that the neo-American model carries with it reactionary eighteenth century models of capitalism. Indeed the early resistance against law and economics in Northern European countries was politically motivated by the same belief. Such resistance has been eventually dismantled. One wonders if the Latin one will end up following the same path or whether it will be more skeptical towards the idea that taxation should do the job (particularly after two decades of tax reduction for the rich).

6. Parochialism, re-invention of the wheel and the Decline of Law and Economics.

Recent scholarship in the United States has pointed out that law and economics has entered a post-modern, interpretive phase of development in which its nature of a grand discourse over the nature of law aiming at objectivity has yield to a local micro-strategy grounded in pragmatism. Using such strategy, legal scholarship pursues hegemony and influence over the other sources of

40. See M. Hesselink, cit. supra note 126. See also the previous discussion.
41. See A. Di Robilant, Globalization of the Social? An Italian Counter-Fire, in Eur Rev Priv Law, (Forth), Interestingly important “social achievements” of the European legal tradition such as the “social function” of property rights have been abandoned in the socially inspired European Charter of rights. See A. Manzella-P. Melograni-E Paciotti-S.Rodotà, Riscrivere i diritti in Europa, Bologna, Il Mulino, (2001).
42. For an account of the early reception of law and economics in Europe see Symposium, Law and Economics in Civil Law Countries, in International Rev Law and Economics 1991 (R.Cooter & J.Gordley special eds.)
US law by means of a radically neo-pragmatist attitude. Such critical development has been fostered by a general loss of faith in the objectivity of efficiency based discourses, the very same faith that in previous times have guaranteed to law and economics, (and to economics in general), its hegemony within post-realism approached to legal scholarship and within other social sciences.\textsuperscript{44} Such evolution can be seen in all its fundamental importance from the perspective of legitimacy of the legal discourse if one takes into consideration that the quest for objectivity had already been at the roots of the legal process school in the fifties.\textsuperscript{45} In the United States legal academia today, Law and Economics has been finally unseated from the throne of legal objectivity, so that its normative recipes need a new contingent and local legitimization in competition with those of a variety of opposite political strategies.

The traditional grand theory of law and economics, has been nevertheless successfully received and implemented by the new all powerful producers of global law, the international institutions of global governance both private and public (the WTO, the World Bank, the IMF, the mega-law firms etc.). In this institutional scenario,\textsuperscript{46} even lively scholarly debates happening in one place only (however hegemonic such as the U.S.) can not help to be parochial and ineffective particularly as far as the voices of intellectual resistance and critique are concerned. The emerged false opposition between a global dimension which is the domain of the market and of efficient institutions, and a local dimension as the location of solidarity and politics requires a genuine cosmopolitan legal culture to be exposed and challenged.

The a-critical reception of law and economics with its grand discursive strategy based on efficiency and objectivity then becomes the ideological apparatus of global authority. Once mainstream discourse about the law, legitimizing as scientific the ideological assumptions of dominating neo-liberalism, efficiency reasoning in the law loses any critical potential as a scholarly tool. Alternatively, when eventually (if at any point) the post-modern vein of present day U.S. law and economics gets understood, the reception remains embedded in postmodernism “the logic by which global capital operates”\textsuperscript{47}.

If one looks at the success of efficiency reasoning in the law as discussed in the previous sections, he will find at least three fundamental reasons of its success both in the context of production (the U.S.) and in that of reception (Europe): a) the capacity to provide a critical bite capable to deconstruct so many myths of the State centric perspective of the lawyer (who can forget the impact of Calabresi’s early observation that no values in society are preserved at any cost?) b)


\textsuperscript{45} See Herbert Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harvard LR 1, (1959)

\textsuperscript{46} See Hardt & Negri, cit. supra note 12. See also See Robinson, cit. supra note 36.

\textsuperscript{47} See Hardt & Negri, cit. supra note 12.
the capacity to provide a general framework to restructure the role and the legitimacy of the lawyer, weakened by the realist extreme “choice for candor”. c) a radically non positivistic intellectual attitude, capable to think about the law outside of local technicalities and therefore easily understandable and adaptable in a variety of different contexts.

Beginning in the nineties of the last century, when the relationship between the market and the law has been eventually subverted in U.S. legal theory, so that today it is the market governing the law and not the other way around, all of such traits have been transformed making law and economics much less appealing. As a consequence today efficiency reasoning in the law seems rather exported by means of more or less violent practices of imposition (e.g. conditional loans) rather than freely chosen as a prestigious model by lawyers world-wide.

Let us briefly discuss separately these three points.

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

The global diffusion of notions like competition between legal orders, soft law, default rules, social norms etc. indicate the weakness of the traditional state centric-perspective, so that what was once the most original contribution of Dr. Calabresi’s book, is today the accepted truth. As a consequence of this reversal of the relationship between the State and the market, also that between the law and the market has been subverted. Not only the law has been freed from the lethal hug with the State, but the idea that the law is produced by market forces is now accepted. While Public Choice economists were showing how regulation and legislation are captured, scholars in law and economics were working out all sorts of Darwinian evolutionary theories by which “investment” in litigation resources was seen as producing “returns” in terms of efficient rules\(^4\). In this subverted scenario reflecting its new dominating jurisprudential status, law and economics has very little critical insights to offer. On the one hand, its approach is self proclaimed “positive” rather than “normative” so that because of its scientific self portrait, the economic approach willingly declines

\(^4\) See Rubin, Priest,
the political confrontation. Secondly, law and economics easily walks the path of saying not only
that the law is up for sale, but also that this is “natural” and it should be so. Its discourses are
consequently located in the conservative mainstream, they keep restating the usual cynically
ideological platitudes, and as a consequence they are as unattractive and banal to inquisitive and
critical minds. What do you expect? The political process is captured and adjudication reflects
investments! To the contrary, what Calabresi was writing in the Costs of Accidents was a critique of
the accepted narrowly state-centric modes of thought, containing a strongly normative argument in
which justice and distribution on top of efficiency were claiming a role. This is why his approach
has been so attractive worldwide, suddenly giving to law and economics a reputation as a civilizing
movement, capable of criticizing by the use of efficiency but also of guiding choices in the name of
justice.

As to the capacity to restore the lawyer’s claim of objectivity, we have observed how
pragmatism and micro-strategies have substituted early grand discourses. Once conquered the
mainstream status by marginalizing all openly normative and re-distributive arguments, law and
economics has transformed the choice for candor, typical of realist jurisprudence, in an even more
extreme choice for cynicism. Discourses on distribution and on values, that were never
marginalized in the early work of Calabresi, and that gave a “human face” to the movement, have
been abandoned. Whoever was writing about law and economics in the late eighties in Europe was
busy preaching that there was something else beyond the Chicago economic cynicism. The
transformation of U.S. law and economics into an organized industry has expelled any distributional
worry from the hard core of the discipline. People worried with values, with just distribution of
resources, with problems in accepting unconditionally the paradigm of the homo oeconomicus are
now depicted as some kind of bleeding-hart idealist, of naïve first year law students, simply
incapable of understanding the real logic that explains how things work. Of course, no much to gain
there is in terms of legitimacy for the legal profession, to cynically recognize that legal rules are up
for sale and that whoever can invest more in legal adjudication and law making (including hiring
more expensive lawyers and lobbyists) will “naturally” benefit from the returns of such investments
by winning the case or obtaining a business friendly legal environment. The loss of prestige for the
lawyer’s profession follows as much from the recognition of being determined by political biases
than by business interests.

As to non-positivism, universalism and adaptability to different contexts, we can only observe
here a dramatic involution into technicality, and parochialism. The early grand pictures and
theoretically ambitious reconstructions have been more and more substituted by incredibly boring
papers, endlessly discussing with unconsidered use of math and graphs, irrelevant details of
manager’s compensations schemes, improbable predictions of jury behaviors, or other similarly context specific, detail driven, and user’s unfriendly ideas. The cultural desolation of most of the papers presently circulating in the mainstream professional journals is evident to anyone that has approached the career of the legal scholar with a normal cultural endowment. There is a tiny clique of insiders, usually repeating more or less the same stuff in dozens of papers, constantly cited, in what is little more that an exercise of cut & paste accompanied by a display of trendy connections in Ivy league schools. I am not criticizing here the complete lack of attention to anything that does not happen in U.S. elite schools, as if these were the only places where scholarship was done. Even products of such elite places are simply ignored, if they come from people not recognized in the tiny mainstream mentioned before. Think about the absence of communication between “law and economics” and “neo-institutional economics”, each one barricaded in its own little niche of professionalism. Or think about the appalling ignorance of so much of the literature dealing with social norms, where fundamental contributions of legal anthropologist, I do not mean in the French literature, but also in the Anglo-American one are simply ignored in order to be re-discovered. The institutional characteristics of American law, very superficially known from the three years of law school (at best) or by second hand quick reading or hearsay conversation with lawyer’s colleagues, when non legally trained economists enter in the business, are themselves universalized and taken for granted. They become a sort of economist’s reflecting legal system, in which all the complexities and the power structures of the real life of the law are simply obliterated. This attitude ends up extracting a toll, because so many of the solutions that are presented as universally efficient are indeed (if they are) efficient only given the U.S. institutional environment, itself very much different from most others. It does not take long for the scholar abroad, capable of accessing the rich treasury of worldly legal scholarship, and perhaps even that of neighboring disciplines, to observe that, in importing mainstream law and economics, he might have imported a “defective product”. After its early grand promises (for which it was worth fighting) law and economics has evolved locally into a parochial tool of propaganda of an established anti-intellectual mainstream turning everything, even culture, into technological skills. When law is turned into an expensive technology it ends being a product of culture.

American legal scholars at the opening of the new millennium are themselves experiencing a decline in international prestige. Their ideology of the rule of law, marketed worldwide without attention to what is going on at home, is not rarely the product of a good faith attitude often motivated by justice (such as in the international human rights movement). Nevertheless, the simple mindedness following decades of intellectual leadership, the attitude of always talk and never listen,

[49] I develop this argument in Ugo Mattei, Comparative Law and Economics, (1997)
of always teach and never learn, in a word the high degree of technocratic parochialism, has began to extract its toll. U.S. models despite being leveraged by institutions such as WB IMF etc., fail to persuade the cutting edge of international academic thinking, because of their abstract technological nature, consequent cultural naiveté, and incapacity to account of local complexities and diversity. International scholars capable of first hand observations and not dependent on local biased accounts, today resent the decline of the role of legal academy as a powerful independent check on the political process in the U.S.. American legal scholars, have either abandoned the critical thinking following the remarkable degree of cosmopolitism in the early season of legal realism, or, when self perceived as critical, have lost every kind of political bite by being trapped in a variety of post-modernist attitudes. Suffice to think, to understand the lack of critical role in the legal academy, about the hundreds of pages devoted in American books on criminal procedure on the celebration of the procedural guarantees of due process at trial (mostly conquests of Warren Court years). Unfortunately, no attention is ever devoted to the fact that only a very tiny minority of defendant (less than 2%) will end up at trial and will therefore enjoy such guarantees. Most others, overwhelmed by the superior economic and political power of the prosecutor, enter plea bargaining.\textsuperscript{50}

Law and economics experts display even stronger aspects of loyalty to their own system, too often turning the academia from a critical check into the political process, into an agency of propaganda. A good example would be the dominating approach after the Enron scandal. A humble reflection on the conflict of interest as a pervading market failure, possibly as difficult to conceptualise and as devastating for free market ideology as externalities or monopolies would have been in order. To the contrary, some scholars have been busy criticizing the “Sarbanes Oxley Act” for having increased the criminal sanctions without considering the literature pointing out fines as the efficient remedy against white collar’s opportunism. Other papers have pointed out, the quick and effective reaction of the system in front of \textit{a state of exception}, claiming that the emergence of the scandal was proof that the market could cure itself.\textsuperscript{51} An approach attempting to benefit from the critical potentials of efficiency reasoning in the law would observe how the Sarbanes Oxley was completely captured by the interests it was supposed to control, and that its overall content was little more than a façade in front of the persisting under funding of the Security and Exchange Commission.\textsuperscript{52}

Lawyers, as a professional group, do not live in a world completely separated from their social context. It is therefore just natural that their professional perception is at least in part the product of

\textsuperscript{50} Grande
\textsuperscript{51} See Posner
the social perception in general. A loss of faith and a sense of betrayal from the “American model” of the rule of law is now more diffused even between cultivated European intellectual elites, of which lawyers are a constituent part. Scandals such as Enron, or Guantanamo, or the War on the Bill of Rights, or the hundreds of accused individuals, mostly black, sitting in death row because incapable of “investing” enough in defence, are quickly consuming the residual capital of the worldwide prestige of the American rule of law.

7. Conclusions.

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

Once upon a time in New Haven there was a young lawyer-economist, cosmopolitan in learning and critical in spirit. He has taught to lawyers worldwide that no values, not even human life, is protected at any price and that acknowledging this reality could help us clarify our priorities. This hindsight has produced the final collapse of legal positivism, and has open a daunting space for legal creativity to imagine a better, more fair and efficient, social organization. Lawyers and economists should work together for this common task, was Dr. Calabresi’s recommendation. Beginning in the eighties of the last century, the interdisciplinary work and the merger between legal and economic approaches became dominant in the United States. This happened when a political program, known as Reagan-Thatcherism, was pursuing the final effort to win the Cold War. Deregulation, privatization, downsizing, outsourcing, and dismantling of the welfare sector, were some of the strategies used to find the tremendous amount of money necessary to bring the military confrontation at a level impossible for the Soviet Union to face. This political program was friendly with what has been called the “Imperialism of Economics” and the economic aid it could offer made quickly prevail the ideological aspects of the economic approach (market conservatism) rather than the genuine tension to critical understanding. Law and economics has been transformed into an industry, dominated by politically conservative economists. The models produced by this movement have been exported worldwide by organizational efforts (within and outside U.S. academic institutions) and by its tremendous influence in the programs of the International financial institutions. This triumphant model, nevertheless, merges outdated aspects of both the legal and the
economic approach, possibly because cutting edge minds, both in the law and in economics, ended up abandoning the field tired of its ideological and simplistic blend (Calabresi’s intellectual history is very revealing from this point of view).

Law and economics has received from economists an ideology of individualism and of a of property rights that is too extreme and biased to reflect any kind of real life institutional structure. This idea, directly stemming from eighteenth century naturalistic conceptions of property as a zone of individual sovereignty insulated from public or private intrusion, can not account of opportunistic behavior, conflicts of interest, rent seeking and of the many other failures of markets and private institutions. Individualism can not explain the justice motive many times more important than the profit motive as an explanation of human behavior.

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

On the other hand, more sophisticated lawyers today are not stuck anymore in a monistic and static conception of the legal order. Since a long time lawyers have understood the complexity stemming from the plurality of legal orders, private and public that govern, in a polity, the relationship between individuals and social groups. They do not believe any more in abstract formulas, in science as legitimisation, too often just hiding with numbers and formulas platitudes having the only role of granting some legitimacy to decisions biased in favour of the stronger market actors. They are aware that many norms do not come from the public sector, but they also know, that economic relationships must be governed by an effective and authoritative public sector, actually granting equal opportunities and taking care of unbalances of power. They understand that most recipes coming from the dominant blend of law and economics and the structural reforms inspired by the efficiency reasoning in the law, will leave us with the ruins of such public sector when we will finally wake up from the neo-liberal booze.

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

Historically, when such a phenomenon happens, new movements and ideas seize a leading role, exposing the uncritical approaches as obsolete and not worth of admiration. It is impossible to predict where the new paradigms will come from and how long it will take for the old ones to be substituted. Leading paradigms never came with simplistic answers. We know that they emerged by
asking basic questions. Questions such as the relationship between efficiency and distribution, which Calabresi has posed more forty years ago. To this question law and economics, turned into an industry, has denied attention.