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Rescuing Comparative Law and Economics?
Exploring Successes and Failures of an Interdisciplinary Experiment

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THE MULTIFACETED METHOD OF COMPARATIVE LAW AND ECONOMICS

Francesco Parisi

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As initially conceived of in the Eighties, Comparative Law and Economics provided legal scholars a neutral language for the exploration of similarities and differences across legal systems. Its value added is the theoretical rigour of its models and the possibility to engage in a scientific dialogue not hampered by jurisdiction-specific features. At a later stage, comparative approaches became fully embedded in economic research and its empirical methods. Possible synergies with comparative legal research abound, but the organization of academic structures has so far prevented to fully exploit them.

I. INTRODUCTION

Much has been written about comparative law and economics, its history, mission, methodological challenges, and academic accomplishments[1]. As I had occasion to tell in a recent autobiography, unlike the academic career of many of the scholars involved in this discipline[2], my encounter with comparative law and economics happened by pure happenstance. I was pursuing my J.S.D. degree at U.C. Berkeley. My dissertation was far from this field: the historical evolution of the legal notion of negligence. I had just returned from Italy after winter break. I was running 15 minutes late for class and entered in the wrong classroom—there had been a room reassignment. I felt too embarrassed to leave

[1] U. Mattei, *Comparative Law and Economics* (Ann Arbor, MI: Michigan University Press, 1997); U. Mattei, F. Cafaggi, *Comparative Law and Economics*, in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. 1 (London: Palgrave Macmillan, 1998), 346–52; U. Mattei *et al.*, *Comparative Law and Economics*, in B. Bouckaert, G. de Geest (eds.), *Encyclopedia of Law and Economics: The History and Methodology of Law and Economics*, vol. 1 (Cheltenham: Elgar Publishing, 2000), 505–38; U. Mattei, A. Monti, *Comparative Law & Economics: Borrowing and Resistance*, in 1(2) Global Jurist Frontiers art 5 (2001); N. Garoupa, *Doing Comparative Law and Economics: Why the Future is Micro and not Macro*, in M. Faure, F. Stephen (eds.), *Essays in the Law and Economics of Regulation: in Honour of Anthony Ogus* (Antwerpen: Intersentia, 2008), 63–71; G. de Geest (ed.), *Economics of Comparative Law* (Cheltenham: Elgar Publishing, 2009); R. Michaels, *The Second Wave of Comparative Law and Economics?*, in 59 U. Toronto L.J. 197–213 (2009); R. Caterina, *Comparative Law and Economics*, in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law,* 2nd ed. (Cheltenham: Elgar Publishing, 2012), 191–207; F. Parisi, B. Luppi, *Quantitative Methods in Comparative Law*, in P.G. Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Elgar Publishing, 2012), 306-317; F. Wagner-von Papp, *Comparative Law & Economics and the "Egg-Laying Wool-Milk Sow"*, in N.H.D. Foster *et al.* (eds.), *Interdisciplinary Study and Comparative Law* (London: Wildy, Simmons & Hill Publishing, 2016), 209–45; F. Faust, *Comparative Law and Economic Analysis of Law*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* 2nd ed. (Oxfod: Oxford University Press, 2019), 826-51; N. Garoupa, T.S. Ulen, *Comparative Law and Economics: Aspirations and Hard Realities*, forthcoming in 70 Am. J. Comp. L. (2022).

[2] F. Parisi, *Law and Economics as We Grow Younger*, in 16 Rev. L. and Econ. 1-20 (2020).

and sat quietly in the class for the remainder of the hour. The class was a law and economics class co-taught by Daniel Rubinfeld and Steve Sugarman. I had never seen mathematics used to explain the functioning and effect of legal rules. I was intrigued by that class and enrolled in that course.

The exposure I had to law and economics during that seminar changed my way of looking at legal problems. It was hard to go back to discuss legal problems with the traditional dogmatic or case-driven method of legal analysis. Robert Cooter offered advise on the academic steps to take to deepen my knowledge of the field. Cooter encouraged me to meet with an Italian Fulbright scholar, Ugo Mattei, who was pursuing an LL.M. degree at Berkeley during those years. I had met Ugo Mattei on campus before, but never shared my academic aspirations in great depth with him.

II. ECONOMICS AS A LANGUAGE FOR COMPARATIVE LAW

It was the year 1989. Ugo Mattei and I met at Café Roma, across from the U.C. Berkeley's Boalt Hall. Ugo was very generous with his time: he offered to read drafts of my papers and gave me very valuable advice. Mattei was in the process of conceiving one of the core ideas of what later became his book "Comparative Law and Economics." The idea had already struck Cooter as very creative. The idea he shared with me, was simple, yet ingenious. Legal systems face similar legal problems and address them with seemingly different legal solutions. The differences that meet the eye are at times the result of different substantive or remedial solutions, but often they are just the result of different legal or dogmatic constructs, or different ways to present similar solutions. Recasting legal rules in terms of economics—looking at the economic consequences of a legal remedy and/or the individual incentives created by a legal instrument—could provide a common, neutral language to facilitate legal comparisons. The use of economics as a system-neutral, descriptive language could highlight similarities among legal systems, showing that the observed differences between rules are only apparent, caused by different legal constructs. Alternatively, economics as a common language could unveil differences that were previously hidden under the veil of a misleading common legal terminology.

In my view—I have never asked Mattei if this similarity was coincidental or purposefully conceived—this pillar of the Comparative Law and Economics method bears a great

similarity with the research techniques of the subsequent "*Common Core Project*"[3]. In the Common Core Project, ordinary language (as opposed to the rhetorical jargon of municipal lawyers) replaced economics as the neutral language of comparison, in the important search for common "solutions" to legal problems across European legal systems. Building on this premise, comparativists unveiled legal solutions that shared a common logic (and often a common economic rationale) that was hidden behind the wording of what appeared to be different legal rules. Similarly, the common core exercise revealed differences across rules that appeared to have similar black letter formulations[4].

The experience of Ugo Mattei laid the path for a (then) young generation of scholars. They were mostly comparative law (and some civil law) scholars, who followed Ugo's successful example, coming to the U.S. for an LL.M. degree or as Visiting Fellows at top law schools. They attended courses in law and economics, learning enough to become conversant in the discipline, but rarely acquiring the technical skills to become active players in the field. In some of their works, their comparative approach to legal analysis betrayed the comparative law and economics method set out by Mattei. Some of their studies carried out a comparative analysis of alternative economic approaches to law. Economic analysis became the "object" of the comparison and their scholarship often turned into a critique of one or the other approaches to economic analysis, at times juxtaposing the wisdom of justice to the possible unfairness of efficiency. The Calabresi-style law and economics was presented as radically different in methodology from the Posner-style law and economics. The emphasis on those differences overlooked the common foundations of the various schools and the fundamental common goal of economic analysis of law. This provided a problematic first impression of the methodology of comparative law and economics to legal academics. The resulting scholarship proved incapable of attracting the interest of law and economics scholars and left other comparativists on the spectator line "because comparative studies of legal methodology had long been an established part of the discipline"[5].

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[3] For the manifesto and mission statement of the Common Core Project, see M. Bussani, U. Mattei, The Common Core Approach to European Private Law.
http://www.jus.unitn.it/cardozo/Common.core/Insearch.html .

[4] For examples of comparative law and economic analyses carried out during the Common Core Project, see F. Parisi, *Recovery for Pure Financial Loss: Economic Foundations of a Legal Doctrine*, in M. Bussani, V. Palmer (eds.), *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), 75-93; E. Melato, F. Parisi, *A Law and Economics Perspective on Precontractual Liability*, in J. Cartwright, M. Hesselink (eds.), *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2009), 431-448; M. Cenini *et al.*, *The Comparative Law and Economics of Frustration in Contracts*, in E. Hondius, H.C. Grigoleit (eds.), *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press, 2011), 33-52.

[5] F. Faust, *Comparative Law and Economic Analysis of Law*, *supra* note 1, at 843.

In the early 1990s, a small group of legal scholars led by Bob Cooter, Dan Rubinfeld, Tom Ulen, and others brought comparative law and economics back to the original methodological vision. The group met periodically to discuss how to use economics to examine the differences among legal systems that were brought about by comparative legal scholars. The group was called "*Comparative Law and Economics Forum*" (CLEF)[6]. One of the aspirations of the CLEF group was to provide a general jurisprudential framework that could cut across differences among legal systems. As Garoupa and Ulen recently wrote, at the founding meetings of CLEF, Cooter noted that legal theory was the only area of academic law in which there were the same standards of universality as in other natural and social sciences. He suggested that law and economics might serve a similar purpose in legal academia: "[scientists] can read each other's work and understand exactly what the other person has written and can evaluate its originality and importance using the same general considerations of excellence. … The scientific fields are similar across the globe because the subject matter that each of them studies is the same. … There is the same general universality around the globe for the social and behavioral sciences, but with an important distinction. … The academic study of law is largely jurisdiction-specific and tilted heavily toward being a practical education as opposed to a theory-driven and measurement-based discipline. The field of academic law does not enjoy the same universality as do other academic disciplines and thereby stands in stark contrast to them. … the law-and-economics tools could be especially useful in seeking to understand differences among legal substance, practices, and institutions, just as a single microeconomics could help to explain the differences in the actual economies of the world"[7].

III. COMPARATIVE LAW AS AN OBJECT OF ECONOMIC ANALYSIS

Much of the good work in comparative law and economics reveals that law and economics is by its own nature comparative[8]. First-best solutions to legal problems are very rarely obtainable. Absent a first-best, perfect rule, economic analysis—both theoretical and

[6] In 2018, the CLEF group held its 25th and last annual meeting.
[7] Garoupa, Ulen, *Comparative Law and Economics*, *supra* note 1.
[8] For a reference collection of articles in comparative law and economics, see G. de Geest, R. van den Bergh (eds.), *Comparative Law and Economics*, 3 vols (Cheltenham: Elgar Publishing, 2004); T. Eisenberg, G.B. Ramello (eds.), *Comparative Law and Economics* (Cheltenham: Elgar Publishing, 2016).

empirical—compares second-best, imperfect alternatives. Most of the tools of economic analysis are instrumental for such comparative analysis.

I always tell my PhD students in economics that comparative law provides a very fertile ground for the economist in search for interesting issues to analyze. When comparative legal analysis shows that legal systems choose different solutions to solve similar legal problems, that fact suggests that there is no single best rule to solve the legal issue in question. Legal systems adopt different rules, and legal rules evolve overtime. In situations like these, economics provides valuable techniques for assessing the comparative advantages and effects of alternative legal rules, applying the theoretical apparatus of economics and the empirical econometric methods to evaluate the observed legal solutions.

As standard in economic analysis, this comparative evaluation can lead to descriptive, prescriptive, or functional results[9]. Positive approaches to comparative legal and economic analysis generate descriptive statements of the incentive effects of the observed legal rules. These descriptive statements can lead to testable predictions on the effects of alternative rules on behavior and aggregate outcomes. Employing similar tools to the positive approaches, normative approaches take the analysis one step further and provide prescriptive statements to formulate propositions on what the law ought to be like and to identify "better laws," given the choice of policy goals. Within the normative approach we find important methodological differences amongst scholars. In the normative approaches, laws are viewed as instrument for correcting market or social failures. Since normative analysis is concerned with identifying and comparing laws based on their desirability, those who argue that efficiency could never be the ultimate end of a legal system justify the pursuit of justice and fairness at the possible expense of efficiency. This unavoidably opens the doors to value judgments, questioning the proper scope of the comparative law and economics analysis. The functional approach to law and economics is informed by an explicit recognition that whatever social reality we seek to explain at the aggregate level needs to be understood as the aggregate effect of the choices of individual human beings. Humans pursue their goals with an independent understanding of the reality and the social incentive structure that surrounds them[10]. In this respect, scholars that follow the functional approach in their comparative law and economics research are

[9] F. Parisi, *Positive, Normative and Functional Schools in Law and Economics*, in 18 Eur. J. L. Econ. 259-272 (2004); R.A. Posner, F. Parisi, *Scuole e tendenze nella analisi economica del diritto*, in 33 Bib. libertà 3-19 (1998).
[10] V.J. Vanberg, *Rules and choice in economics* (London: Routledge, 1994).

less interested in identifying rules that maximize aggregate wealth or utility, but instead attempt to identify processes of law formation that are best capable of capturing the true preferences of the subjects of the law, fostering choice of legal schemes or procedures that will lead to the selection of legal rules that reflect individual preferences of the parties and that shield outcomes from strategic behavior and other transactional impediments[11].

IV. EMPIRICAL COMPARATIVE LAW: TESTING THEORIES

Empirical legal analysis aims at testing theoretical models with real-world data, to evaluate the ability of those models to predict real-world phenomena. The availability and quality of data is one of the main problems affecting empirical legal analysis. Empirical legal scholars need data to test theoretical hypotheses and they select methods for gathering data that best fits their testing needs. Data can be either collected at an aggregate level (such as country or regional level) or at an individual level (such as individuals or firms). Data is crucial to measure the effects of changes in law on the behavior of economic agents. For example, it can be used to estimate the effect of a change in liability rules on individual choices, such as the level of care of a prospective tortfeasor. However, such data on these individual effects are difficult to collect and are more vulnerable to measurement errors. This is where comparative legal scholars could refocus their scope of research to become useful players in the field of comparative law and economics.

When constructing a data set, researchers may face the problem of a scarcity of data and may encounter difficulties finding variables that correctly measure the phenomenon under consideration. Comparative law scholars could provide cross-country comparisons to validate theoretical law and economic predictions with an empirical testing and to calibrate economic analysis to measure, for example, the responsiveness of accident rates or litigation rates to exogenous changes in tort law. As an example, prominent researchers have constructed cross-country data sets to test the efficiency hypothesis of common law, since they can compare common law and civil law countries. To estimate the role of legal families on the effectiveness of the financial systems, La Porta and his co-authors constructed a unique measure, classifying each country based on the origin of the legal system, distinguishing between civil law and common law countries. Their analysis was criticized by comparative law scholar for an ad hoc classification of legal systems within legal families. These criticisms and potential weaknesses in their analyses could have been

[11] F. Parisi, J. Klick, *Functional Law and Economics*, in M.D. White (ed.) *Theoretical Foundations of Law and Economics* (Cambridge: Cambridge University Press, 2009), 41-54.

avoided through a collaboration of comparative law and law and economics scholars in their early exploratory research[12].

More generally, the research data available to comparative law scholars could help measure changes across jurisdictions and over time, isolating the effect of legal changes on individual and aggregate outcomes. For instance, if the same legal change happened in two jurisdictions during the same period, and common effects were observed, the panel data provided by the comparative lawyer could be used to test the theoretical prediction of the economic model. If the legal change took place in jurisdictions with substantially different levels of fee shifting arrangements or different average duration of legal proceedings, and different effects were observed, the analysis could suggest that those variables possibly had a skewing effect on the impact of the legal change. The interaction between the comparative law information and the econometric data could have very important synergies.

There are many ways in which comparative law scholars can collaborate with economists and law and economics scholars. To increase these opportunities of collaboration and maximize the synergies between these disciplines, there must be a change at the institutional academic level and a reshaping of the career incentives to engage in cross-disciplinary research. The organization of a symposium issue like this is a good example of the efforts needed to lower the institutional roadblocks that have thus far delayed desirable cross-disciplinary fertilization. In 2020, the *American Society of Comparative Law* held a Conference hosted by the University of Chicago on "The Role of Comparative Law in the Social Sciences." All the speakers were social scientists (sociologists, political scientists, economists, etc.) with no direct involvement with comparative law. The goal of the conference was to have each of the invited contributors—top scholars in their respective fields of research—offer their perspective on how comparative law could contribute to their discipline. The goal was to allow comparative law academics to become aware of the different research methods, methodological needs, and core questions of other social sciences. This would in turn allow future comparative law researchers

[12] As discussed by Parisi, Luppi, *Quantitative Methods*, cit.. R. La Porta *et al.*, *Legal Determinants of External Finance*, in 52(3) J. Finance 1131-50 (1997) and R. La Porta *et al.*, *Law and Finance*, in 106(6) J. Pol. Econ. 1113-55 (1998) proposed the first empirical analysis of the efficiency of common law hypothesis. They examined the role of the origin of a country's law on the effectiveness of its financial systems, focusing on a subset of specific rules, such as investor protections against expropriation by insiders and the quality of legal enforcement. To address this issue, the authors constructed a cross-country data set, collecting data from 49 countries on equity finance, debt finance, the origin of the legal system and measures of the protection of legal rights.

understand how their research methods could be improved and enriched, fostering greater use and citations of comparative law research in other disciplines, and promoting greater engagement of comparative law scholars in interdisciplinary research. The *American Journal of Comparative Law* will soon be publishing a Special Issue on this topic, bringing the voice of leading scholars from outside of comparative law to the forefront of the comparative law community[13]. The contributors that presented at the conference shared a common awareness: it is difficult to be involved in scholarly work outside of one's specialized field. Institutional and academic reforms are necessary to enable scholars to collaborate across disciplines. Some participants pointed to logistical difficulties: institutions should provide a way for scholars to connect with others on research projects of mutual interest. Other participants pointed to the mismatching research standards of different disciplines: scholars who engage in innovative cross-disciplinary collaboration have a hard time meeting the research standards and demands of their differing departments. A top-5 journal in one discipline may be totally ignored or looked down at in a different discipline. In many academic systems, rankings of journals are formally or informally based on the impact of the journal in that discipline. This creates struggles between co-authors in the choice of publication targets and on the format and writing style. Yet other participants pointed out that the major roadblock in some academic systems is in the recruitment process of new professors. Senior professors within a discipline serve on national committees for the selection of new professors. The fields for competition are pre-established and new cross-disciplinary fields cannot be created. Investing in cross-disciplinary research is thus like preparing for a race in a sport that is not recognized as an Olympic discipline.

I hope that symposia like this one and like the one organized in Chicago will serve as the beginning of a call to action and collaboration among comparative law scholars and law and economics scholars (and scholars in the social and behavioral sciences in general) to overcome these institutional barriers and to capitalize on each other's expertise.

[13] F. Parisi, T. Ginsburg, *The Role of Comparative Law in the Social Sciences: An Introduction*, in 70 Am. J. Comp. L. 1 (2022) 627-635.