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

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INTRODUCTION:
COMPARATIVE LAW AND INTERDISCIPLINARY BRIDGES

*Giuseppe Bellantuono**

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This Special Issue digs into contemporary debates about the roles of comparative and interdisciplinary research. The field of economics is the main reference point, but the Special Issue reflects more broadly on the relationships with non-legal disciplines. A host of theoretical and practical hurdles need to be tackled before the benefits of a sustained cross-disciplinary dialogue become visible. This introduction connects debates on Comparative Law and Economics to broader methodological debates taking place in the legal and social sciences. It advances the argument that Comparative Law and Economics needs to address the demands of methodological pluralism. A distinction between a weak and a strong version of pluralism lays the ground for the identification of research strategies to be pursued.

I. THE MANY AGENDAS OF COMPARATIVE LAW

'[I]n comparative law discourse, controversies of comparative law—and there are many—are synchronic, never ending, never totally re-solved, ever multiplying. This was the case in earlier years and is still the case today.'[1]

This quote from a well—known comparative legal scholar sets the context for this Special Issue, devoted to Comparative Law and Economics (CLE). As suggested by the title of the Special Issue, CLE might be in need of rescue. About thirty years ago, early proponents of CLE made bold statements: a research program that puts together the sophisticated theoretical apparatus of economic theory and the deep understanding of institutional contexts supplied by comparative law would place itself at the centre of the most relevant academic and policy debates. CLE would unite the strengths of the two disciplines and produce original insights each discipline working alone would be unable to gain[2]. Things

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[1] E. Örücü, *Comparative Motley: Offerings from a Comparative Lawyer*, in 8(2) Critical Analysis of Law 9-26, 12 (2021).

[2] See, e.g., U. Mattei, *Comparative Law and Economics* (Ann Arbor, MI: University of Michigan Press, 1997) (using efficiency to compare real-world alternatives); G. de Geest, R. Van den Bergh, *Introduction*, in G. de

unfolded differently. The dialogue between comparative approaches and economic theory did take place, but in many cases took directions CLE founders did not foresee. Moreover, CLE position in the methodological debates within both comparative law and economic theory is far from uncontroversial. It seems CLE became entangled in the never-ending controversies Örücü refers to.

The group of senior and junior scholars who contribute to this Special Issue deals with a variety of topics and applies different methods. The question of whether the CLE research program, broadly understood, has a bright future is unanimously answered in the affirmative. At the same time, the contributions confirm two general trends which have increasingly become visible in the last thirty years. First, the CLE label has not taken on a single meaning. It is loosely associated with a host of different literatures and involves much more than the dialogue between the two original disciplines. Searching in the main databases for CLE contributions shows that many articles do mention or use it. But it is likely that a much higher number of contributions focuses on a comparative and interdisciplinary approach without using the CLE label[3]. Second, the distinctiveness of the CLE approach is difficult to grasp. It has mainly followed the developments taking place inside the two disciplines. Only rarely it was the driving force behind such debates.

It would be wrong to conclude that the CLE approach has been unsuccessful. It was born in a period when interdisciplinary approaches had a limited audience. Thirty years later, the trend is almost reversed: interdisciplinarity cannot be ignored anymore in any scientific field[4]. Programs for global and transnational legal studies in several continents stress the comparative and interdisciplinary dimensions[5]. Whatever its merits in fostering such developments, today it is difficult to present CLE as the main interdisciplinary approach.

Geest, R. Van den Bergh (eds.), *Comparative Law and Economics* (Cheltenham: Elgar Publishing, 2004), ix-xxi (CLE enriches both comparative law and comparative economics). Also see the personal recollections of F. Parisi, *The Multifaceted Method of Comparative Law and Economics*, in this Issue.

[3] Or the comparative law label: see M. Siems, *New Directions in Comparative Law*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* 2nd ed. (Oxford: Oxford University Press, 2019), 852-874, 873 ('(o)ther labels for legal research beyond domestic law have become increasingly common, such as global and transnational law').

[4] Which is not to say that interdisciplinarity plays the same role everywhere: see M.D. Dubber, *Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law*, in M.D. Dubber, C. Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), at 101-112, for the observation of two opposite trends: in the US, doctrinal scholarship opposes several decades of interdisciplinarity generated by the Legal Realist critique; in Europe, interdisciplinarity is proposed as an antidote to the dominant doctrinal approach.

[5] B. Garth, G. Shaffer (eds.), *The Globalization of Legal Education: A Critical Perspective* (Oxford: Oxford University Press, 2022). This volume highlights the riddle of social and institutional factors pushing toward comparative and interdisciplinary approaches, as well as affecting the meanings such approaches are given in each country.

Interactions among disciplines take place in multiple ways. The main question, then, is whether the CLE label can be considered a broad and comfortable umbrella hosting a disparate set of research programs. Such an encompassing view faces two problems: on one hand, it hides the harsh debates about the goals of comparative research, the role of empirical studies, the links between theory, policy and practice, as well as the more general goals of interdisciplinarity; on the other hand, it does not provide any signposts on the soundness of methodological choices and research designs when both a comparative and an interdisciplinary approach are employed.

Amidst the current explosion of alternative approaches to interdisciplinary dialogues, one could conclude that each methodological choice is equally acceptable, provided it is internally coherent and useful for the chosen purposes. The problem with this approach is that it does not make any effort to connect different perspectives. The argument made here is that CLE could still play a useful role in catalysing and organising the ongoing debates about the relationships between legal and non-legal comparative research programs. While the original CLE aimed at blending two established methodologies, the future CLE should be concerned with the discussion of strategies which help deal with methodological pluralism. The goal should not be to search for a (probably impossible) general consensus about methods. Some cleavages are too deep. Any attempt at building a common ground would leave behind much of what different perspectives have to offer. Rather, methodological pluralism could foster awareness of the theoretical premises underpinning each comparative approach, how it relates to empirical studies, which idea of normativity it supports. Such an awareness is not meant to produce a convergence toward shared methods. Its main benefit would be to provide sound reference points for scholars wishing to undertake comparative and interdisciplinary research. By granting each perspective equal status, methodological pluralism should be able to supply a common understanding of the different phases of the research design, as well as of the requirements for the production of knowledge. Biased conceptions of more or less 'scientific' approaches should be discarded. Different perspectives on comparison should not be a matter of concern, but a fertile ground for the exploration of new approaches. CLE could foster a methodological pluralism which goes beyond empirical methods and extends to new ways of blending concepts, classification systems, causation theories and levels of inquiry[6].

[6] A pluralist approach aligns with the observation that today the variety of cross-disciplinary interactions makes it difficult to define interdisciplinarity. Though, such variety does not mean that relationships cannot

Admittedly, the rosy scenario in which CLE prompts an interesting interdisciplinary debate could be displaced by a much gloomier one. It has been pointed out that all attempts to connect comparative law with the humanities and the social sciences face many hurdles. For several reasons, dialogues only take place in limited domains[7]. And Law and Economics scholars complain that comparative legal scholars are not that receptive to new methods[8]. Still, methodological pluralism could at least partly assuage such anxieties. It accepts diversity and acknowledges that interdisciplinary dialogue takes place on multiple planes. The question is not whether a specific method has to be embraced, but what the added value of each perspective is for comparative studies. A pluralist point of view rejects the idea that each research question can only be answered with a single method. Rather, it starts from the premise that the soundness of methodological choices can be judged from the comparative assessment of several perspectives. As discussed below, the outcome of such an assessment could still be the selection of a specific comparative method. But methodological pluralism should increase the probability of blending different methods.

To be sure, methodological pluralism could turn CLE into a misnomer. Interdisciplinary Comparative Law (ICL) or Comparative and Interdisciplinary Legal Studies (CILS) better reflect the idea of opening up multiple lines of dialogue with several disciplines. For the purposes of this Special Issue, I stick to the CLE label and maintain the focus on the dialogue with economic theory. The latter should not be granted a privileged status, but provides a suitable starting point for the development of a research program centred on methodological pluralism.

Section II reviews the main types of CLE literature through a taxonomy of interdisciplinary exchanges proposed by the philosophy of science. The review also helps locate the contributions in this Special Issue in the wider context of debates about interdisciplinarity. Section III proposes a distinction between weak and strong methodological pluralism. Each of these versions raises new issues for a CLE research agenda. Section IV summarizes the arguments.

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be sorted out and discussed. See J.T. Klein, *Beyond Interdisciplinarity: Boundary Work, Communication, and Collaboration* (Oxford: Oxford University Press, 2021), 1.

[7] J. Husa, *Interdisciplinary Comparative Law* (Cheltenham: Elgar Publishing, 2022), at 227f. (comparative legal scholars are 'not-enough-lawyer' for other legal scholars and 'too-much-lawyer' for non-legal scholars). Also see G. Samuel, *Comparing Comparisons*, in S. Glanert *et al.*, *Rethinking Comparative Law* (Cheltenham: Elgar Publishing, 2021), 137-60, for a discussion of the epistemological frameworks employed by comparative approaches in politics, history and literature, suggesting that their adoption in comparative legal studies would entail significant transformations.

[8] N. Garoupa, T. Ulen, *Comparative Law and Economics: Aspirations and Hard Realities*, in 70 Am. J. Comp. L. 1 (2022), 664-688.

II. MAPPING CLE INTERACTIONS

The variety of sports metaphors employed to describe the interplay between law and economics shows that multiple avenues of interdisciplinary exchange are possible[9]. Francesco Parisi adds another sports metaphor to suggest missing or limited exchanges[10]. This is not an unusual situation. Interdisciplinary encounters take on a multiplicity of meanings. To begin exploring them, a good starting point is the taxonomy of interdisciplinary exchanges proposed by philosophers of science[11]. It was already applied to Law and Economics[12]. Other descriptions of interdisciplinary exchanges were proposed[13], but the present one more neatly captures the direction and contents of possible combinations. Three factors structure the taxonomy: first, who engages in the interdisciplinary exchange; second, which tools (concepts, models, methods, theories) are exchanged; third, the problems of which discipline are addressed. Table 1 adapts the taxonomy to the CLE literature and locates the contributions in this Special Issue.

Interdisciplinary exchange	Meaning	Examples	This issue
1. From economics to comparative law	Exportation from economics to address a problem relevant to comparative law	Law affects growth	
2. From economics to economics	Importing concepts or methods from comparative law to address problems within economics	Using comparative legal information as instrumental variable	Garoupa

[9] See e.g. B.A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, in Duke L. J. 929, 943f. (1986) (using hockey sticks to play basketball); S.G. Medema, *Scientific Imperialism or Merely Boundary Crossing? Economists, Lawyers, and the Coase Theorem at the Dawn of Economic Analysis of Law*, in U. Mäki *et al.* (eds.), *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity* (London and New York, NY: Routledge, 2018), 111 (lawyers choosing the playground, economists bringing the ball); R. Cooter, *Maturing into Normal Science: The Effect of Empirical Legal Studies on Law and Economics*, in Ill. L. Rev. 1575, 1480 (2011) ('L&E has many polo players and few teamsters, but empirical legal studies may change this fact').

[10] Parisi, *supra* note 2, 32. ('(i)nvesting in cross-disciplinary research is thus like preparing for a race in a sport that is not recognized as an Olympic discipline').

[11] T. Grüne-Yanoff, U. Mäki, *Introduction: Interdisciplinary Model Exchanges*, in 48 Stud. Hist. Phil. Sci. 52-59, 55-57 (2014).

[12] P. Cserne, *Knowledge Claims in Law and Economics: Gaps and Bridges Between Theoretical and Practical Rationality*, in P. Cserne, M. Malecka (eds.), *Law and Economics as Interdisciplinary Exchange: Philosophical, Methodological and Historical Perspectives* (London and New York, NY: Routledge, 2020), 22-27 (eight modes of Law and Economics); G. Bellantuono, *Riflessioni sul metodo di Pietro Trimarchi*, in G. Bellantuono, U. Izzo (eds.), *Il contributo di Pietro Trimarchi all'analisi economica del diritto* (Napoli: Editoriale Scientifica, 2022), 25-32 (adapted taxonomy for Italian Law and Economics literature).

[13] See e.g. M. Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert*, in 7(1) J. Commonwealth L. and Legal Ed. 5 (2009) (four-fold taxonomy based on types of questions and methods); B. van Klink, S. Taekema, *On the Border: Limits and Possibilities of Interdisciplinary Research*, in B. van Klink, S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (Tübingen: Mohr Siebeck, 2011), 7-32 (five types of interdisciplinarity, with and without integration).

3. From comparative law to economics	Exportation from comparative law to address a problem relevant to economics	Indicators of institutional quality	Della Giustina/de Gioia Carabellese Arai
4. From comparative law to comparative law	Importing concepts or methods from economics to address problems within comparative law	Using the concepts of transaction costs and efficiency to measure differences and similarities	Parisi Villanueva Callewaert/Kovac Versaci Davola/Querci Leucci Mauro Riganti
5. Transfer collaboration	Economists and comparative lawyers working together, but only employing the tools of one discipline to address problems in one discipline	Using empirical methods to classify legal families Using empirical methods to analyse judicial behaviour	
6. Genuine collaboration	Economists and comparative lawyers using the tools of both disciplines to address problems in one discipline	Integrating legal concepts in empirical analysis	
7. New field generation	Economists and comparative lawyers using the tools of both disciplines to address new problems		
8. Parallel development	Economists and comparative lawyers independently using the same concepts or methods from a third discipline to pursue different goals	Using the concept of culture from sociology Using experimental evidence from cognitive sciences	

Table 1. Interdisciplinary exchanges in CLE.

The first four interdisciplinary exchanges follow the logic of unilateral transfers. Each discipline picks up from other disciplines what it needs. Who starts the exchange tends to determine how the tools from the other discipline are employed[14]. For example, economists may argue that different parts of legal systems, from constitutions to civil codes to intellectual property law to independent regulators, contribute to economic development (exchange no. 1). This theoretical framework is employed to compare and assess legal developments in different jurisdictions[15]. It modifies how comparative legal research is carried out. Alternatively, economists may pick up concepts or information from comparative law to undertake empirical analysis and test economic theories (exchange no. 2). The literature on Legal Origins is the most famous example: it picked

[14] Grüne-Yanoff, Mäki, *supra* note 11, at 55.
[15] See e.g. R. Cooter, *The Strategic Constitution* (Princeton: Princeton University Press, 2000); M. Faure, J. Smits (eds.), *Does Law Matter? On Law and Economic Growth* (Cambridge: Intersentia, 2011); D. Acemoglu *et al.*, *The Consequences of Radical Reform: The French Revolution*, in 101 Am. Econ. Rev. 3286-3307 (2011).

up the concepts of legal families and legal transplants to find exogenous factors which could support long-term causal claims about economic performance[16]. Many comparative lawyers pointed out the distorted use of legal concepts and challenged the causal claims. Criticisms also came from within the CLE field[17]. In this Issue, Nuno Garoupa shows that legal origins are not a factor political science relies upon to explain the links between political regimes and institutional structures[18]. The Legal Origins literature represents an aspect of a broader revolution in economic history. Starting from the 2000s, Persistence Studies looked for the historical origins of current economic outcomes and employed a variety of instrumental variables to establish causation[19]. Even though legal origins are not one of the main variables, empirical studies adopting a long-term perspective explicitly rely on the same idea of historical events directly affecting contemporary economic outcomes. It can be doubted whether a single stream of causal mechanisms can really be isolated and its interactions with many other biogeographical, social and technological changes be side-lined[20]. A more general issue is that the role played by historical analysis in Persistence Studies has little to do with the debates about the relationship between comparative law and history[21].

Transfers started by comparative lawyers are the type of interdisciplinary exchange CLE thrived on. The initial proposals assumed that economic theory could provide the analytic tools for comparative legal research. The importation mode (exchange no. 4) is widespread and is adopted by the majority of the contributions in this Special Issue. Though, there are several variants. Sometimes empirical methods are invoked to test claims about similarities and differences. The whole comparative research framework is shaped by inferential

16 See, most recently, R. La Porta *et al.*, *Legal Origins*, in S. Michalopoulos, E. Papaioannou (eds.), *The Long Economic and Political Shadow of History. A Global View*, vol. I (London: CEPR Press, 2017), 89-97, 92 (arguing that the 'quantitative evidence is broadly consistent with the broad perspective of comparative law').

17 N. Garoupa *et al.*, *Legal Origins and the Efficiency Dilemma* (London: Routledge, 2017).

18 N. Garoupa, *The Influence of Legal Origins' Theory in Comparative Politics: Are Common Law Countries More Democratic?*, in this Issue.

19 M. Cioni *et al.*, *The Two Revolutions in Economic History*, in A. Bisin, G. Federico (eds.), *The Handbook of Historical Economics* (Amsterdam: Elsevier, 2021), 17-40.

20 E. Frankema, *Why Africa is not* That *Poor*, in A. Bisin, G. Federico (eds.), *The Handbook of Historical Economics* (Amsterdam: Elsevier, 2021), 557-584. For other critical contributions see e.g. T. Dennison, *Context is Everything: The Problem of History in Quantitative Social Science*, in 1(1) J. Hist. Pol. Econ'y 105 (2021); L Arroyo Abad, N. Maurer, *History Never Really Says Goodbye: A Critical Review of the Persistence Literature*, in 1(1) J. Hist. Pol. Econ'y 31 (2021); C. Dippel, B. Leonard, *Not-So-Natural Experiments in History*, in 1(1) J. Hist. Pol. Econ'y 1 (2021).

21 See e.g. T. Duve, *Preface: Symposium Legal History and Comparative Law: A Dialogue in Times of the Transnationalization of Law and Legal Scholarship*, in 66 Am. J. Comp. L. 727 (2018); M. Brutti, A. Somma (eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Frankfurt am Main: Max Planck Institute for European Legal History); O. Moréteau *et al.* (eds.), *Comparative Legal History* (Cheltenham: Elgar Publishing, 2019).

reasoning[22]. In other cases, economic theory provides models to compare solutions adopted in different legal systems[23] or to identify the relevant institutions and their impact[24]. Comparative legal studies can also explain which economic theory best fits the contents and goals of a legal regime[25]. The literature on Roman Law and Economics belongs to the importation type: economic theory provides the general framework in which historical contexts are compared to contemporary legal systems[26].

Exporting from comparative law to economics (exchange no. 3) was supposed to take place on a regular basis, but it mainly focuses on the legal domains traditionally influenced by economic reasoning. This type of exchange can be used to point out misalignments between the structure of markets and regulatory choices[27] or to identify institutional reasons leading to select different economic theories in specific jurisdictions[28]. Comparative lawyers can also contribute to data collection for indicators of institutional quality. But this is another area in which a CLE approach faces deep disagreements. The discontinuation of the World Bank Doing Business indicators in 2021, whose design was inspired by the Legal Origins literature, shows how significant the risk of manipulation is[29]. Plans for new indicators on the Business Enabling Environment suggest that such risk does not stop international institutions from adopting quantitative approaches[30].

Exchanges no. 5 and 6 move from unilateral transfers to collaborations. Teaming researchers from different disciplines is usually recommended to fully exploit the specializations in each sector. Though, successful interdisciplinary groups require demanding conditions[31]. Moreover, the two types of exchanges suggest that in some cases

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22 V. Villanueva Collao, *Empirical Methods in Comparative Law: Data Talks*, in this Issue.
23 G. Versaci, *The Law of Penalty Clauses: 'New' Comparative and Economic* Remarks, in this Issue; F. Leucci, *Comparing the Efficiency of Remedies for Environmental Harm: US v. EU*, in this Issue.
24 N. Mauro, *Clean Innovation to Climate Rescue: A Comparative Law & Economics Analysis of Green Patents Regulation*, in this Issue.
25 A. Davola, I. Querci, *Relational Disclosure as a Means for Data Subjects' Informed Consent*, in this Issue; F. Riganti, *The Key Role of Comparative Law and Economics in the Study of ESG*, in this Issue.
26 M. Callewaert, M. Kovač, *Does Cicero's Decision Stand the Test of Time? Famine at Rhodes and Comparative Law and Economics Approach*, in this Issue. Roman Law and Economics remedies the a-historical bias of Law and Economics (R. Harris, *The History and Historical Stance of Law and Economics*, in Dubber, Tomlins, *supra* note 4, at 35-37).
27 C. Della Giustina, P. de Gioia Carabellese, *Brexit and a Banking Regulation for Small Banks and Building Societies: A New Means of Re-Kindling the Comparative (and Economic) Analysis of Law?!*, in this Issue.
28 K. Arai, *Comparative Law and Economics in the Field of Competition Law*, in this Issue.
29 R.C. Machen *et al.*, *Investigation of Data Irregularities in Doing Business 2018 and Doing Business 2020*, WilmerHale, September 15, 2021 (pressures from World Bank senior management to revise the rankings of China, Saudi Arabia and Azerbaijan).
30 World Bank, *Business Enabling Environment*, Pre-Concept Note, February 4, 2022.
31 See e.g. M. O'Rourke *et al.* (eds.), *Enhancing Communication & Collaboration in Interdisciplinary Research* (Thousand Oaks, CA: Sage Publications, 2014); K.L. Hall *et al.* (eds.), *Strategies for Team Science Success* (Cham: Springer, 2019); J.T. Klein, *supra* note 5, 83-91.

only the methods of one discipline are employed. Consider the following two examples. First, an unsupervised machine-learning method is applied to code 108 property doctrines in 129 jurisdictions, classify the latter according to the homogeneity of their private law and measure their relative distance[32]. Second, comparative studies of judicial behaviour empirically assess the relative weight of external factors and institutional factors on judicial decisions[33]. Are these instances of transfer collaboration or genuine collaboration? The former type would be the most appropriate classification if the empirical design of the research led to only include legal information amenable to quantification. Should this be the case, the requirements of the empirical method take priority over a more comprehensive legal analysis and cast doubt on the relevance of the results for comparative lawyers. Genuine collaboration requires the analytic tools to be shared. For example, the identification of the institutional components to be empirically assessed could be carried out with data collection procedures comparative lawyers find acceptable[34]. That genuine collaborations are rare confirms the general observations made in section I about the barriers to the interdisciplinary dialogue between comparative law and non-legal disciplines. Attempts at fostering such dialogue may even prompt adverse reactions from within the legal field, toward economic theory or empirical studies at large. Should the barriers persist, the last two types of interdisciplinary exchanges could become dominant. A new field could emerge in which only empirical arguments are accepted and research questions significantly diverge from traditional comparative law (exchange no. 7). Alternatively, interdisciplinary dialogues could follow parallel tracks and produce literatures which do not engage with each other (exchange no. 8). Two examples of the latter development can be suggested. First, several research programs in law, social sciences and the humanities acknowledge the relevance of cultural factors, but CLE, and Law and Economics more generally, are often criticized because of their streamlined

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[32] Y. Chang *et al.*, *Drawing the Legal Family Tree: An Empirical Comparative Study of 170 Dimensions of Property Law in 129 Jurisdictions*, in 12 J. Legal Analysis 231 (2021). Also see A. Badawi, G. Dari-Mattiacci, *Reference Networks and Civil Codes*, in M.A. Livermore, D.N. Rockmore (eds.), *Law As Data: Computation, Text, & the Future of Legal Analysis* (Santa Fe, CA: Santa Fe Institute Press, 2019), 339-365 (using machine reading to identify the network structure of civil codes and classify legal systems according to the similarity of such structures).

[33] See e.g. N. Garoupa *et al.* (eds.), *High Courts in Global Perspective: Evidence, Methodologies, and Findings* (Charlottesville, VA and London: U. Virginia Press, 2021); L. Epstein *et al.*, *The Role of Comparative Law in the Analysis of Judicial Behavior*, forthcoming in 70 Am. J. Comp. L. (2022); L. Epstein *et al.* (eds.), *The Oxford Handbook of Comparative Judicial Behavior* (Oxford: Oxford University Press, forthcoming 2022).

[34] The type and quality of legal information for empirical analysis is a recurrent issue: see e.g. H. Dagan *et al.*, *Legal Theory for Legal Empiricists*, in 43(2) L. & Soc. Inqu. 292 (2018) (arguing empirical analysis should be guided by legal theory); J. Barnes, *The Pitfalls and Promises of a New Legal Realism Rooted in Political Science*, in S. Talesh *et al.* (eds.), *Research Handbook on Modern Legal Realism* (Elgar, 2021), 432f. (the empirical approach forces scholars to adopt a positivist perspective of legal rules and eschew other types of factors).

understanding of such factors[35]. Second, experimental evidence from behavioural sciences can be relied upon to propose a radical transformation of legal education and legal processes[36]. But different streams of behavioural studies could be deemed more or less relevant[37], or different roles of experimental evidence in legislative, regulatory and judicial decision-making processes could be deemed legitimate[38].

This mapping exercise reveals several unresolved tensions. In most types of interdisciplinary exchanges, comparative law is asked to provide detailed legal information, but its contributions in terms of concept definition, legal translation, and theory development are usually discarded. Empirical methods are claimed to improve the quality of comparative research, but the discussion about the need to adapt such methods to the specificities of legal contexts is wide open[39]. Normative issues are another Pandora box for interdisciplinarity: on one hand, comparative lawyers are sharply divided about the possibility to use comparative research to identify the 'best' legal solution; on the other hand, moving from empirical results to normative statements is no less challenging. Should the different types of exchange remain separated, each of them could provide its own answers to these tensions, or simply put them aside. There is a better course of action: to make a more sustained effort in clarifying the meanings that methodological pluralism could take in interdisciplinary research. Many tensions discussed above can be dealt with if the goal of interdisciplinary research is not 'integration' of disciplines and methods or 'convergence' toward a unified theoretical framework, but the exploration of interactions among perspectives. The next section proposes some preliminary thoughts on the strategies of methodological pluralism.

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[35] See e.g. A. Mercescu, *Quantifying law? The Case of 'Legal Origins'*, in Glanert *et al.*, *supra* note 7, 262-266 (reductionist view of culture and legal rules in quantitative studies).

[36] See e.g. B. Van Rooij, A. Fine, *The Behavioral Code: The Hidden Ways the Law Makes Us Better … or Worse* (Boston, MA: Beacon Press, 2021) (calling for a behavioral jurisprudence which turns empirical questions about the effectiveness of law into critical legal questions).

[37] See e.g. S. Frerichs, *What is the 'Social' in Behavioural Economics? The Methodological Underpinnings of Governance by Nudges*, in H.-W. Micklitz *et al.* (eds.), *Research Methods in Consumer Law: A Handbook* (Cheltenham: Elgar Publishing, 2018), 399-440 (arguing for a social understanding of decision-making).

[38] See e.g. A. van Aaken, *Constitutional Limits to Regulation-by-Nudging*, in H. Strassheim, S. Beck (eds.), *Handbook of Behavioral Change and Public Policy* (Cheltenham: Elgar Publishing, 2019), 304-318; R. Lepenies, M. Malecka, *Behaviour Change: Extralegal, Apolitic, Scientistic?*, *ibid.*, 344-360.

[39] See e.g. S. Levmore, *The Eventual Decline of Empirical Law and Economics*, in 38 Yale J. Reg. 612 (2021); N. Pietersen, K. Chatziathanasiou, *Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?*, in 19(5) I-CON 1810 (2021); C. Engel, *Challenges in the Interdisciplinary Use of Comparative Law*, in 70 Am. J. Comp. L. 1 (2022) 777-797.

III. INTERDISCIPLINARY METHODOLOGICAL PLURALISM

Both the fields of economics and comparative law can be said to be plural in many ways. Differences track familiar distinctions between nomothetic and idiographic approaches, quantitative and qualitative analysis, social scientific and humanistic perspectives. These binary contrasts should not be overemphasized. Although different research cultures do matter, examples of mixed approaches are by no means rare. The interesting question is how such plurality can be put at work. In the case of CLE, methodological pluralism could reduce exchange types based on unilateral transfers and foster genuine collaborations. For this goal to become feasible, two aspects deserve attention: first, how methodological pluralism should be defined; second, which version(s) of methodological pluralism could fit the CLE agenda.

As far as the meanings of methodological pluralism are concerned, several misunderstandings have already been clarified. To begin with, pluralism should not only be tolerated, it should be explicitly supported. Simply stating that there is a plurality of points of view does not help. What matters is the reconstruction of the influences among those points of view[40]. Second, pluralism cannot be confined to the variety of research topics. It should extend to central components of analysis like criteria for scientific explanation, research methods, assumed properties of reality, questions and problems considered worthy of inquiry, theories. Of course, there is no need to simultaneously embrace every dimension of pluralism[41]. Third, fears that pluralism prevents the identification of commonly agreed criteria on the quality of research are unfounded. Even without a widely shared consensus on methods or theories, the confrontation among communities of scholars should lead to discard those approaches which cannot be defended on epistemological, pragmatical or ethical grounds[42]. Fourth, pluralism is compatible with the choice of a single approach, but only if such choice is justified by a full-fledged review of competing approaches. Moreover, the choice of a specific approach is always provisional and cannot be taken to mean that other approaches are wrong[43]. For instance, in the field of comparative law, a functionalist has to justify why she uses a functional approach and discards other approaches.

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[40] S.C. Dow, *Geoff Hodgson on Pluralism and Historical Specificity*, in F. Gagliardi, D. Gindis (eds.), *Institutions and Evolution of Capitalism: Essays in Honour of Geoffrey M. Hodgson* (Cheltenham: Elgar Publishing, 2019), 14-28.
[41] C. Gräbner, B. Strunk, *Pluralism in Economics: Its Critiques and their Lessons*, in 27(4) J. Econ. Methodol. 311 (2020).
[42] Gräbner, Strunk, *supra* note 42, at 317f..
[43] Dow, *supra* note 41.

The second aspect to consider is how to implement a pluralist approach. A distinction between weak and strong methodological pluralism is proposed here (Table 2). The former assumes a more limited reciprocal influence among the disciplines involved. It also assumes that a plurality of perspectives is only considered in the early stages of the research process. The latter entails deeper influences along the whole research process. Admittedly, the dichotomy between weak and strong methodological pluralism is rather crude. More elaborated taxonomies are possible[44]. For the purposes of this preliminary analysis, the dichotomy helps point out some examples of the two versions.

Table 2. Weak and Strong Methodological Pluralism.

Type of methodological pluralism	Explanations	Examples
Weak pluralism	Plurality of perspectives assessed in the early stages of the research process Pluralism with filters	Scarciglia (2021), Samuel (2014), Grundmann *et al.* (2021), Mercescu (2021)
Strong pluralism	Each discipline influenced by other disciplines Plurality of perspectives considered throughout the research process	Oderkerk (2015), Adams/Van Hoecke (2021), New Legal Realism

The category of weak methodological pluralism includes all the approaches which put on the same level all methods and suggest selecting the most appropriate one (or a combination of methods) according to research goals[45]. For CLE, this approach could mean that an explicit justification is provided at the outset on why a specific economic theory, a specific comparative method and a specific empirical method are selected. A justification would also be required for combinations of methods or the selection of disciplines different from economics. A version of weak pluralism proposes to use interdisciplinarity not to reconcile disciplines, but to expose their conflicts[46]. Clearly, this

[44] See e.g. W. Veit, *Model Pluralism*, in 50 (2) Phil. Soc. Sci. 91 (2020) (distinguishing between weak, weakly moderate, moderate and strong pluralism).
[45] See, for comparative methods, G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford and Portland, OR: Hart Publishing, 2014), 178f.; R. Scarciglia, *Metodi e comparazione giuridica* 3rd ed. (Milano: Wolters Kluwer, 2021), 129-131, 176-80. B. Fekete, *Paradigms in Modern European Comparative Law: A History* (Oxford *et al.*: Hart Publishing, 2021), 139-160, points out that since the 1990s tolerance for methodological pluralism has been increasing in European comparative law. The examples he discusses would qualify as weak pluralism in my classification. With specific reference to CLE, it has been observed that its true innovation is the ability to investigate a single research object through the simultaneous use of complementary methods (G.B. Ramello, *The Past, Present and Future of Comparative Law and Economics*, in T. Eisenberg, G.B. Ramello (eds.), *Comparative Law and Economics* (Cheltenham: Elgar Publishing, 2016), 14). This definition, too, qualifies as weak pluralism.
[46] A. Mercescu, *Comparisons Otherwise: The Merits of Interdisciplinarity*, in Glanert *et al.*, at 125.

perspective is radically different from proposals for 'empirical jurisprudence' [47], 'behavioural jurisprudence'[48] or 'law is politics'[49]. The latter risk verging toward disciplinary monism (there is just one 'right approach') and fostering only unilateral transfers[50].

I would also include in the category of weak methodological pluralism the approaches which apply some 'filters' to the selection of relevant disciplines. Stefan Grundmann, Hans Micklitz and Moritz Renner proposed a 'pluralistic New Private Law Theory' which takes 'into account the findings of different disciplines in order to develop an adequate description of society' [51]. When addressing the issue of selecting interdisciplinary contributions, the authors propose to use a) a theoretical relevance filter, which tells the researcher whether the theory drawn upon addresses problems relevant to legal scholarship and legal practice or which can be governed by law, and b) a contextual relevance filter, which tells the researcher whether the assumptions of a theory are close enough to the reality to be regulated[52]. I classify their proposal in this category because the two filters leave much discretion to researchers on how to assess theoretical and contextual relevance. Indeed, broad discretion might be intended: in this version of pluralism, unitary theoretical frameworks are assumed to prevent a full consideration of the variety of contexts to be regulated[53].

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[47] A. Dyevre *et al.*, *The Future of European Legal Scholarship: Empirical Jurisprudence*, in 26(3) Maastricht J. Eur. Comp. L. 348 (2019).

[48] Van Rooij, Fine, *supra* note 37.

[49] L. Brashear Tiede, *The Role of Comparative Law in Political Science*, in 70 Am J. Comp. L. (2022) 720-747 (comparative law should recognize differences based in political processes and the composition of political bodies).

[50] Critical on Empirical Legal Studies because of their exclusive focus on quantitative methods and disregard of social theory research questions T. Pavone, J. Mayoral, *Statistics as if Legality Mattered: The Two-Front Politics of Empirical Legal* Studies, in M. Bartl, J.C. Lawrence (eds.), *The Politics of European Legal Research: Behind the Method* (Cheltenham: Elgar Publishing, 2022), 78-93. The risk of disciplinary monism can also be detected on the legal side, for example in the arguments that emphasize the differences between the hermeneutic approach to contextual analysis and the social science methods (U. Kischel, *Comparative Law* (Oxford: Oxford University Press, 2019), 153-162, 174 ('contextual comparative law should be expressly understood as a hermeneutical method')). The interpretative approaches in the social sciences show that a pluralist stance does not preclude a reference to hermeneutics. See e.g. J. Boswell *et al.*, *The Art and Craft of Comparison* (Cambridge: Cambridge University Press, 2019).

[51] S. Grundmann *et al.*, *New Private Law Theory: A Pluralist Approach* (Cambridge: Cambridge University Press, 2021), 1.

[52] Grundmann *et al.*, *supra* note 52, 19. Also see S. Grundmann, P. Hacker, *Theories of Choice and the Law – An Introduction*, in S. Grundmann, P. Hacker (eds.), *Theories of Choice* (Oxford: Oxford University Press, 2021), 5-8 (three pragmatic guidelines for theory selection: proximity of conditions of applicability, degree of theory development, novelty of perspectives).

[53] M.W. Hesselink, *Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law Multi-Pluralism*, in 23 German L.J. 891 (2022) argues that Grundmann *et al.* propose a radical methodological pluralism without any hierarchy among methods. Such a radical approach would preclude the theory from taking on a normative meaning and excluding disciplinary contributions which should not be accepted in private law. I argue instead that the lack of hierarchy is not a flaw, but a feature of the theory. G. Resta, *Is Law Like Social Sciences? On 'New Private Law Theory' and the Call for Disciplinary Pluralism*, in German L J. 826 (2022), too, criticises Grundmann *et al.*'s 'weak normative pluralism'. Though, which normative

Strong methodological pluralism includes those approaches which require a tighter relationship among disciplines for new knowledge to be produced. The relationship itself brings to light new ideas, solutions or research avenues. Several reasons for this version of pluralism have been proposed. With regard to economic theory, strong pluralism is said to reflect the role played by sets of models in actual modelling practice. Acknowledging the history and scientific contexts of these models is required to understand their contribution[54]. Alternatively, strong pluralism could be grounded in the epistemology of perspectivism. According to this view, scientific perspectives are the actual scientific practices of each scientific community. While each community could subscribe to different justificatory principles to decide which knowledge is reliable, the interplay of different scientific perspectives is what ultimately moves science forward. Note that perspectivism does not assume convergence toward some scientific truth. Each perspective is necessarily partial, but each provides additional information about the possibilities for further exploration[55]. Furthermore, perspectivism eases the absorption of non-traditional and non-Western knowledge, thus contributing to the decolonization and de-Westernization of comparative law[56]. Strong methodological pluralism is compatible with the comparative law reflections which rely on hermeneutics and philosophy of science to challenge the dominant discourse on comparative methods. The argument that comparatists should assume responsibility for their methodological decisions goes in the direction of accepting to engage with a plurality of partial viewpoints[57]. It is also possible to connect strong pluralism to legal epistemology. It has been observed that legal knowledge emerges from the complex stratification of meanings different legal doctrines develop over time. From this perspective, legal knowledge depends on the appraisal of the plurality of meanings

grounds to accept should depend on how pluralism is managed, not on picking up one's own preferred normative perspective. As argued above, such a stance risks ending up with disciplinary monism.

[54] Veit, *supra* note 45, at 105-109.

[55] See M. Massimi, *Perspectival Realism* (Oxford: Oxford University Press, 2022), as well as the contributions in M. Massimi, C.D. McCoy (eds.), *Understanding Perspectivism: Scientific Challenges and Methodological Prospects* (London and New York, NY: Routledge, 2020).

[56] Massimi, *supra* note 56, at 332ff. (perspectivism subscribes to a scientific cosmopolitanism which avoids epistemic injustices). On decolonization see L. Salaymeh, R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in 86 RabelsZ 166 (2022).

[57] See S. Glanert, *Method as Deception*, in S. Glanert *et al.*, *supra* note 7, 92-114. Paul Feyerabend, whose ideas on method Glanert approvingly refers to, could plausibly be qualified as a strong pluralist: see e.g. E.A. Lloyd, *Feyerabend, Mill, and Pluralism*, in J. Preston *et al.* (eds.), *The Worst Enemy of Science? Essays in Memory of Paul Feyerabend* (Oxford: Oxford University Press, 2000), 115-124; E. Oberheim, *Feyrabend's Philosophy* (Berlin and New York, NY: De Gruyter, 2006), 206ff.. Of course, Feyerabend's can be understood to be one among many possible versions of strong pluralism.

and their interactions[58]. Transposed to the field of interdisciplinary exchanges, such perspective provides an additional justification for the positions which reject convergence to unitary frameworks and try to foster the widest possible types of interactions.

A good example of strong methodological pluralism is New Legal Realism. It proposes to adopt a variety of social sciences concepts and methods, translate them for the legal domain and rely on these scientific outcomes for legal reform. Its two signature aspects are the attention paid to legal theory and practice and the recourse to empirical approaches not limited to quantification[59]. Although a comparative approach is not explicitly endorsed, much attention has been paid to the application of new legal realist methods in non-Western legal systems[60].

Closer to the field of comparative law, strong methodological pluralism can be identified in those proposals which explore the possibility of introducing different approaches in each phase of the research process. One example are Marieke Oderkerk's guidelines on the use of different comparative methods to choose the goals and the contents of the analysis, to describe the legal dimensions, to assess and evaluate similarities and differences[61]. Even more explicitly, a 'comparative research design' is proposed by Maurice Adams and Mark Van Hoecke[62]. In this framework, interdisciplinary approaches are selected so as to match the overall research design. Another version of strong methodological pluralism is the proposal to link the comparative analysis to each stage of the policy process. From setting the policy agenda to formulating the policy to implementation and evaluation, each stage calls for policy tasks which can be supported with comparative legal knowledge. With a pluralist approach, different methods can be

[58] C. Atias, *Théorie contre arbitraire* (Paris: Presses Universitaires de France, 1987), tr. it. *Teoria contro arbitrio*, a cura di S. Ferreri (Milano: Giuffré, 1990), 171-190. Atias explicitly draws on theories of scientific discovery, thus acknowledging at least a partial similarity with the production of legal knowledge.

[59] S. Talesh *et al.*, *Introduction to the* Research Handbook on New Legal Realism, in S. Talesh *et al.* (eds.), *Research Handbook on New Legal Realism* (Cheltenham: Elgar Publishing, 2021), 1-19. The US literature on New Private Law also proposes to align the internal and external points of view on legal matters (A.S. Gold *et al.* (eds.), *The Oxford Handbook of New Private Law* (Oxford: Oxford University Press, 2020)). Though, it starts from theoretical premises, most importantly the coherent structure of private law, which exclude alternative visions, including legal realism and Law and Economics. Therefore, I do not regard it as an example of methodological pluralism.

[60] H. Klug, S.E. Merry (eds.), *The New Legal Realism: Studying Law Globally* (Cambridge: Cambridge University Press, 2016); A. Huneeus, H. Klug, *Lessons for New Legal Realism from Africa and Latin America*, in Talesh *et al.*, *supra* note 60, 82-97.

[61] M. Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of 'Methodological Pluralism'* in Comparative Law, in 79 RabelsZ 589 (2015).

[62] M. Adams, M. Van Hoecke, *Conclusion: Challenges of Comparison*, in M. Adams, M. Van Hoecke (eds.), *Comparative Methods in Law, Humanities and Social Sciences* (Cheltenham: Elgar Publishing, 2021), 246-263.

used at each stage. Furthermore, the interaction between comparative law and non-legal disciplines can be designed differently at each stage[63].

Both weak and strong methodological pluralism face two challenges: first, how incompatible methods and approaches can be managed; second, which normative prescriptions they support. Both challenges have not received final answers. This is not a good reason to discard pluralism. Addressing these challenges could be one of the most relevant goals for future CLE studies. Moreover, the lack of final answers does not mean a complete lack of useful suggestions. With regard to incompatible methods, it is possible to combine elements of different theories with analytic eclecticism[64], search for a shared structure among mutually inconsistent models[65], identify complementarities among schools of thought[66], jointly refine a plurality of perspectives without unifying them[67], or follow perspectivism in understanding each method as an 'inferential blueprint' which provides instructions on the object under study to different scientific communities[68].

The normative dimension of CLE was discussed since its inception[69]. Recipes to derive prescriptions from empirical studies abound[70]. The debate on evidence-based policy has highlighted the many institutional dimensions the interplay between data and normative choices calls into question[71]. In this case, too, advocating methodological pluralism means

63 For some preliminary thoughts in this direction see G. Bellantuono, *Comparative Legal Diagnostics*, Working Paper 7 February 2012, available at www.ssrn.com . A more extended approach is proposed in G. Bellantuono, *Comparative Energy Law and Policy* (Cambridge: Cambridge University Press, forthcoming 2024).

64 R. Sil, P.J. Katzenstein, *Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms Across Research Traditions*, in 8(2) Persp. Pol. 411 (2010); R. Sil, P.J. Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (London and New York, NY: Palgrave Macmillan, 2010). Also see the contributions collected in the forum edited by F. Chernoff et al., *Analytic Eclecticism and International Relations: Promises and Pitfalls*, in 75(3) Int. J. 383 (2020).

65 C. Lisciandra, J. Korbmacher, *Multiple Models, One Explanation*, in 28(2) J. Econ. Methodol. 186 (2021).

66 T. Lari, *When Does Complementarity Support Pluralism About Schools of Economic Thought?*, in 28(3) J. Econ. Methodol. 322 (2021).

67 S.D. Mitchell, *Perspectives, Representation, and Integration*, in Massimi, McCoy, *supra* note 56, 178-193.

68 Massimi, *supra* note 56, at 141-147, 146 ('Perspectival models act as inferential blueprints in making it possible for different epistemic communities to come together, revise, and refine the reliability of each other's claims and advance scientific knowledge over time'). With specific reference to interdisciplinarity, also see M.B. Fagan, *Explanation, Interdisciplinarity, and Perspectives*, in Massimi, McCoy, *supra* note 56, 28-48, 43 ('users of a model in one specialized perspective can see how their model connects with the models of other specializations in interdisciplinary research').

69 See e.g. Mattei, *supra* note 2, at 3-11.

70 See e.g. J.B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, in 162 U. Penn. L. Rev. 117 (2013); I. Giesen, *The Use and Incorporation of Extralegal Insights in Legal Reasoning*, in 11(1) Utrecht L. Rev. 1 (2015); F.L. Leeuw, H. Schmeet, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Cheltenham: Elgar Publishing, 2016), 220-235; E. Zamir, D. Teichman, *Behavioral Law and Economics* (Oxford: Oxford University Press, 2018), 157-186; P. van Lochem, R. van Gestel, *Evidence-Based Regulation and the Translation from Empirical Data to Normative Choices: A Proportionality Test*, in Erasmus L. Rev. 120 (2018).

71 See e.g. N. Cartwright, J. Hardie, *Evidence-Based Policy: A Practical Guide to Doing It Better* (Oxford: Oxford University Press, 2012); P. Cairney, *The Politics of Evidence-Based Policy Making* (London: Palgrave Macmillan, 2016); H. Strassheim, *Trends Toward Evidence-Based Policy Formulation*, in M. Howlett, I. Mukherjee (eds.),

to reduce the risk of a biased selection of evaluation tools. From the perspective of CLE, a rich research agenda opens up on how to identify the role of empirical evidence in different institutional contexts.

The question raised in this section is whether the future of CLE might lie in promoting (some version of) pluralism. This would mean shifting from a debate internal to economics or comparative law to a discussion focused on the identification of selection criteria that support interdisciplinary exchanges. To put it differently, while Table 1 maps all possible types of interdisciplinary exchanges, Table 2 puts aside purely unilateral and parallel types (no. 1-5 and 8) and only considers the exchanges which foster genuine collaboration. Weak methodological pluralism only promotes research strategies which consider a plurality of approaches in the early stages of the research process. Strong methodological pluralism promotes research strategies which try to offer a larger number of perspectives on the same topic. Both strategies are legitimate ways to promote interdisciplinarity.

IV. CONCLUSIONS

Interdisciplinary failures are by no means rare and can be due to a host of causes. However, defining failures is tricky[72]. In the case of the CLE approach, the factor most directly influencing its development is the dependency from academic and non-academic dynamics related to the local relevance of comparative law, economic theory and interdisciplinary studies. CLE has to manage relationships with many scientific communities, as well as with policymakers. For this reason alone, it is not surprising that in the last thirty years the CLE approach has taken on a multiplicity of meanings. Both the goals to be pursued and the types of interdisciplinary exchanges are too multifarious for a single approach to become dominant. Mapping such types suggests that CLE has prevalently fostered unilateral transfers. There is nothing wrong with them. Though, for exchanges to become bilateral, genuine collaborations are required. Methodological pluralism could support such collaborations. It starts from the premise that each discipline can only offer a partial view of the object under study. It then tries to establish relationships among these partial views. In its weak version, methodological pluralism only

Handbook of Policy Formulation (Cheltenham: Elgar Publishing, 2017), 504-521; H.-W. Micklitz, *The Measuring of the Law Through EU Politics*, in Bartl, Lawrence, *supra* note 51, 223-238.

72 See D. Fam, M. O'Rourke (eds.), *Interdisciplinary and Transdisciplinary Failures: Lessons Learned from Cautionary Tales* (London/New York, NY: Routledge, 2021); Klein, *supra* note 6, at 119-125.

requires a justification for methodological choices. In its strong version, methodological pluralism eschews unification or convergence, but requires moving beyond partial views. The field of interdisciplinary studies is today so large that CLE will struggle to find its niche. What this Special Issue aims to show is that an interesting niche does indeed exist. Exploring it means to deal with all the phases of the comparative research process, from problem framing to description to explanation to prescription. However partial a CLE perspective could be on each of these issues, the contributions in this Special Issue offer readers plenty of examples for the design of future interdisciplinary interactions.

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.

THE INFLUENCE OF LEGAL ORIGINS' THEORY IN COMPARATIVE POLITICS: ARE COMMON LAW COUNTRIES MORE DEMOCRATIC?

Nuno Garoupa•

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The legal origins theory has impacted and changed comparative law and economics. In this article, I consider the neglected relationship between the legal origins theory, comparative law, and comparative politics. One of the alleged theoretical foundations of the legal origins theory is the more democratic nature of the common law and the more authoritarian nature of the civil law. This article offers indication that there is very little quantitative evidence to support the thesis that common law jurisdictions are more democratic than civil law jurisdictions. The tentative conclusion is that both legal traditions can be easily molded to democratic or authoritarian governments as a function of political determinants.

I. INTRODUCTION

Economists have suggested that legal institutions that countries developed or imported (voluntarily or involuntarily) have profound long-run effects on a range of economic outcomes. This approach is called the "legal origins" theory. Under this theory, legal origins explain a great deal of the variation in economic performance among countries. The general message is that common-law legal systems (that is, legal systems inspired by English law) are statistically associated with more secure property rights, greater levels of judicial independence, superior financial development, and sustainable growth than civil-law legal systems (that is, legal systems inspired by French, German, or Scandinavian codifications movements in the 18th and 19th centuries).

The legal origins theory has generated intense debate. The original wave (the so-called LLSV[1] project) was not received well by comparative law scholars though it became immensely popular with economists[2].

• Antonin Scalia Law School, George Mason University. ngaroup@gmu.edu. The author is grateful to Madeline Conn for excellent research assistance and to one anonymous referee, Jo-Marie Burt, and Laurie Schintler for helpful feedback on different parts of the article. The usual disclaimers apply.

[1] This literature arose from the scholarly work of four economists known under the acronym LLSV – Rafael La Porta, Florencio López-de-Silanes, Andre Shleifer, and Robert Vishny: see R. La Porta *et al.*, *The Economic Consequences of Legal Origins*, in 46 J. Econ. Lit. 285-332 (2008).

[2] Although the legal origins theory has influenced policy design by international organizations such as the World Bank (the famous *Doing Business* project) or the OECD, there has been plenty of criticism to LLSV's work. These critiques raise questions about the classification of legal families (N. Garoupa, M. Pargendler, *A Law and Economics Perspective on Legal Families*, in 7 *Eur. J. Legal Stud.* 33-55 (2014)), the economic implications (K. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Chicago, IL: Brookings Institution

Comparativists, in general, found the use of the common law/civil law distinction by LLSV inexcusably simplistic. Taken together, the lack of interest for detailed legal analysis, the neglect of enforcement problems and the over-simplistic view of the feasibility of legal transplants made the conclusion about the efficiency of the common law hard to digest for comparative lawyers[3]. Also, in the specific case of corporate law, comparativists pointed out that the studies by LLSV took US law as a benchmark for judging the efficiency of corporate law. In this way, they used a "one-size-fits-all" approach and neglected that different solutions may work better under different circumstances, depending on the characteristics of the financial markets under investigation. Finally, the legal origins thesis is methodologically difficult to make, since the empirical work cannot capture every single aspect of corporate law that matters for economic growth. The cross-sectional research designs used by LLSV suffered from omitted variables biases and, therefore, could not establish a causal relationship (and not merely statistical correlations) between legal rules and economic growth. Not only legal protection of shareholders but also other features of corporate law matter for economic development and may matter even more in a civil law context.

This mixed reaction had two practical consequences. Within comparative law and economics, a second wave of the legal origins theory moved away from general statements (such as the common-law being more conducive of economic growth than the civil-law) and focused on narrower questions (for example, assessing the comparative efficiency of specific doctrines in common-law and civil-law jurisdictions or developing specific case studies on a particularly relevant aspect of law). However, within comparative economics, the common-law/civil-law distinction has become standard in any cross-country regression analysis. In fact, the intense empirical critique of this distinction has yet to influence the discipline of economics.

Press, 2006)), the asymmetric impact of the 2008 global crisis (D. Oto-Peralías, D. Romero-Ávila, *The Distribution of Legal Traditions around the World: A Contribution to the Legal Origins Theory*, in 57 J. L. and Econ. 561-628 (2014); D. Oto-Peralías, D. Romero-Ávila, *Legal Traditions, Legal Reforms and Economic Performance: Theory and Evidence* (Cham, Switzerland: Springer International Publishing, 2017)), the inability to address colonization patterns (D. Klerman *et al.*, *Legal Origin or Colonial History?*, in 3 J. Legal Analysis 379-409 (2011)), and many other considerations (N. Garoupa *et al.*, *Legal Origins and the Efficiency Dilemma* (London, UK: Routledge, 2017)).

[3] See general discussion by N. Garoupa, T.S. Ulen, *Comparative Law and Economics: Aspirations and Hard Realities*, in 69 Am. J. Comp. L. 664- 688 (2021).

In this article, the focus is more specifically on the argument suggested by Paul Mahoney[4]. In his famous work, the author proposed a controversial Hayekian thesis: Common-law systems are more democratic in nature (because law is produced by a bottom-up approach where judicial lawmaking and precedents prevail over statutes) while civil-law systems are more autocratic in nature (because law is codified and imposed top-down on courts and individuals)[5]. The underlying idea is that institutions are designed to minimize both private and state expropriations. Accordingly, common-law legal institutions are designed to mitigate state power while civil-law legal institutions are focused on eliminating private disordering.

I propose to assess the political regime implications of the legal origins theory. More specifically, I investigate the thesis that common-law systems are more democratic in nature than civil-law systems[6].

The project has three components. First, in section 2, I provide an initial empirical assessment where I make use of the recent data made available by V-Dem for 179 countries[7]. I establish that the correlations between different measures of democracy presented in V-Dem (electoral democracy, liberal democracy, or egalitarian democracy, for example) and legal families are statistically weak. At the same time, I investigate correlations considering the rule of law and judicial politics (proxied by judicial constraints imposed on the executive, judicial independence, judicial corruption, legal transparency, and judicial accountability). They are relevant, but also largely independent of legal families.

I further pursue regression analysis to study linear association between liberal democracy and legal families in Africa. This is a continent where the presence of both legal families is largely exogenous to local institutions and almost entirely determined by military and colonial occupation by European powers in the age of imperialism.

In section 3, it is explained that the role of judicial politics in African countries is a better explanation to the quality of democracy in this continent[8]. Specifically, I argue that

[4] P.G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, in 30 J. Legal Stud. 503-525 (2001).

[5] LLSV (with different co-authors) explore this argument in later work to propose that common-law is closer to a market solution while civil-law is the equivalent of a central planning economy in the context of social regulation. See A. Shleifer, *The Failure of Judges and the Rise of Regulators* (Cambridge, MA: MIT Press, 2012).

[6] There is extensive literature on LLSV economic and financial implications, but it is tangential, if not oblivious, to political regimes.

[7] https://www.v-dem.net/en/

[8] C.C. Gibson, *Of Waves and Ripples: Democracy and Political Change in Africa in the 1990s*, in 5 *Annual Rev. Pol. Sci.* 201-221 (2002); B.L. Bartels, E. Kramon, *Does Public Support for Judicial Power Depend on Who is in Political Power?*, in 114 Am. Pol. Sci. Rev. 144-163 (2020).

common-law and civil-law distinctions are not a good proxy for strong democracy and strong judicial independence in this area of the world.

Finally, in section 4, I offer some ideas about why legal origins has not captured the interest of political scientists as a possible explanation for democratic and authoritarian regime types. My perception is that the different interests in legal origins reflect the distinct role played by rule of law and democratization in both disciplines.

Section 5 concludes the article with additional remarks.

II. Empirical Analysis

a. General Results

My empirical goal is to illustrate that democracy, rule of law and judicial politics, and legal families have a more complex pattern than suggested by economists. Using the recent V-Dem project for 179 countries, I report the correlations across the variables that measure democracy, rule of law and judicial politics, and legal families in Table 1 and Table 2.

V-Dem has five indicators for democracy reflecting different approaches in comparative politics – electoral, liberal, participatory, deliberative, and egalitarian. Unsurprisingly, all these five indicators have extremely high correlation (but they are not all the same since correlation is between 94% and 97%). There is no sign of correlation with common-law legal family.

TABLE 1 - CORRELATIONS BETWEEN DEMOCRACY AND COMMON-LAW (V-DEM, 2019)

A) WORLD (179 countries)

	E-DEM	L-DEM	P-DEM	D-DEM	E-DEM	COMMON LAW
ELECTORAL DEMOCRACY	1					
LIBERAL DEMOCRACY	0.973	1				
PARTICIPATORY DEMOCRACY	0.966	0.956	1			
DELIBERATIVE DEMOCRACY	0.964	0.972	0.946	1		
EGALITARIAN DEMOCRACY	0.943	0.969	0.936	0.957	1	

COMMON LAW	*0.035*	*0.048*	*-0.015*	*0.022*	*-0.001*	*1*

B) AFRICA (56 countries)

	E-DEM	L-DEM	P-DEM	D-DEM	E-DEM	COMMON LAW
ELECTORAL DEMOCRACY	1					
LIBERAL DEMOCRACY	0.959	1				
PARTICIPATORY DEMOCRACY	0.925	0.903	1			
DELIBERATIVE DEMOCRACY	0.949	0.951	0.918	1		
EGALITARIAN DEMOCRACY	0.933	0.948	0.88	0.938	1	
COMMON LAW	*0.180*	*0.249*	*0.167*	*0.138*	*0.134*	*1*

Consider now the variables measuring rule of law and judicial politics reported in Table 2: judicial ability to constrain the executive, judicial independence, judicial accountability, judicial corruption (higher indicator means less corruption), compliance with judicial decisions, and transparency of law. These six indicators are positively correlated, but not in the magnitude of the different democracy indicators (it varies now from 51% to 91%). The correlation to common-law legal family is positive but weak (from 10% to 19%).

TABLE 2 - CORRELATIONS BETWEEN JUDICIAL POLITICS AND COMMON-LAW (V-DEM, 2019)

A) WORLD (179 countries)

	JUD CE	JUD I	JUD A	JUD C	C JUD	T of L	COMMON LAW
JUDICIARY CONSTRAINS EXECUTIVE	1						
JUDICIAL INDEPENDENCE	0.921	1					
JUDICIAL ACOUNTABILITY	0.556	0.512	1				
JUDICIAL CORRUPTION	0.702	0.616	0.744	1			
COMPLIANCE WITH JUDICIARY	0.912	0.794	0.567	0.678	1		
TRANSPARENCY OF LAW	0.774	0.702	0.642	0.696	0.709	1	
COMMON LAW	*0.194*	*0.152*	*0.169*	*0.127*	*0.157*	*0.101*	*1*

B) AFRICA (56 countries)

	JUD CE	JUD I	JUD A	JUD C	C JUD	T of L	COMMON LAW
JUDICIARY CONSTRAINS EXECUTIVE	1						
JUDICIAL INDEPENDENCE	0.891	1					
JUDICIAL ACOUNTABILITY	0.548	0.488	1				
JUDICIAL CORRUPTION	0.634	0.482	0.613	1			
COMPLIANCE WITH JUDICIARY	0.911	0.744	0.440	0.543	1		
TRANSPARENCY OF LAW	0.691	0.553	0.623	0.517	0.638	1	
COMMON LAW	*0.334*	*0.307*	*0.253*	*0.281*	*0.28*	*0.184*	*1*

There seems to be more diversity with rule of law and judicial politics indicators than with democracy measurements. At best, common-law legal family is orthogonal to democracy and weakly correlated with variables measuring rule of law and the quality of the judiciary. On Table 3, I report additional findings that show that the relationship between judicial variables and democracy is not different across common-law and civil-law legal families. Correlations across democracy, rule of law and judicial politics, and legal families are consistent to both legal families.

TABLE 3 – CORRELATIONS ACROSS DEMOCRACY, JUDICIAL POLITICS, AND LEGAL FAMILIES (V-DEM, 2019)

A) COMMON-LAW (56 countries)

	L-DEM	E-DEM	JUD I	JUD A	T of L
LIBERAL DEMOCRACY	1				
EGALITARIAN DEMOCRACY	0.97	1			
JUDICIAL INDEPENDENCE	0.819	0.749	1		
JUDICIAL ACCOUNTABILITY	0.612	0.594	0.502	1	
TRANSPARENCY OF LAW	0.836	0.805	0.69	0.65	1

B) CIVIL-LAW (123 countries)

	L-DEM	E-DEM	JUD I	JUD A	T of L
LIBERAL DEMOCRACY	1				
EGALITARIAN DEMOCRACY	0.970	1			
JUDICIAL INDEPENDENCE	0.840	0.772	1		
JUDICIAL ACCOUNTABILITY	0.553	0.594	0.499	1	
TRANSPARENCY OF LAW	0.820	0.820	0.700	0.633	1

Thus, in conclusion, there is little statistical evidence (within the V-Dem dataset) to support the thesis that legal families reflect revealed preferences over political regime types.

b. Limitations To General Results – Why Africa

It is important to emphasize why these findings (or lack of findings) require additional consideration. Economists tend to agree that it is very unlikely that legal families play any significant role in developed economies where democracy and judicial independence largely prevail anyway. Therefore, the alleged source of the controversial linkage should be observed in developing economies.

In Table 4, I summarize the observability problem – developing economies in America (mostly Latin America and a few Caribbean islands) and developing economies in Europe (Russia and a few neighboring countries) do not exhibit enough variance in legal families (any inference is biased by the lack of an acceptable counter-factual). Therefore, only Africa and Asia are promising cases to test the relationship between democracy, rule of law and judicial politics, and legal families. I have decided to focus on Africa due to its diversity and institutional challenges. Also, unlike Asia, Africa is a continent where the presence of both legal families is largely exogenous to local institutions and almost entirely determined by military occupation and colonial expansion.

TABLE 4 – JURISDICTIONS AROUND THE WORLD

	COMMON LAW	CIVIL LAW	TOTAL COUNTRIES
DEVELOPED ECONOMIES	11	28	39
DEVELOPING AMERICA	4	21	25
DEVELOPING EUROPE	0	14	14
DEVELOPING ASIA AND PACIFIC	17	28	45
DEVELOPING	24	32	56

AFRICA			
TOTAL	56	123	179

Source: Developed economies: EU member-states except Bulgaria and Romania (total 26), plus Australia, Hong-Kong, Iceland, Israel, Japan, New Zealand, Norway, Singapore, South Korea, Switzerland, Taiwan, UK, USA.

c. Results About Africa

If we restrict our attention to African countries (there were 56 African countries in the V-Dem dataset in 2019), the results concerning political regime and legal family are not very different than worldwide. All five indicators of democracy have high correlation (between 89% and 96%). As to correlation with common-law legal family, admittedly, it is more significant than worldwide (from 13% to 25% in Africa against 0% when all 179 countries are included). Still, it is a modest correlation from a statistical viewpoint.

The findings concerning judicial politics and legal family follow the same pattern as before. Correlation with common-law legal family is, nevertheless, more significant in Africa than worldwide (from 18% to 33% in Africa).

These statistics are reported in the second part of Tables 1 and 2. The rule of law and judicial variables, rather than political regime, are more related to common-law legal families. This result is stronger in Africa than worldwide.

d. Additional Evidence about Africa

One needs to recognize the intrinsic relation between legal families and colonization patterns in Africa. Suppose that, for a moment, one could argue that British former colonies are more democratic in nature. The complication would be to disentangle the common-law system imposed by the British (reflected in post-colonial legal institutions) from other significant colonial policies that can explain democratization (such as education, health, infrastructures, or quality of colonial administration). This would not be easy because there is no obvious counter-factual jurisdiction. Using South Africa as an example of British and Dutch influence or Namibia as an example of British and German influence to distinguish pure common-law (for example, in Kenya or Zimbabwe) from common-law mixed with other possible colonial transplants (as in South Africa or Namibia) is a possibility but subject to difficult metrics.

These complications, however, are detrimental if one cannot find any sort of indication that British former colonies are more democratic in nature. In the previous subsection, I suggested that much based on the V-Dem dataset. With a different approach, Bartels and Kramon (2020) provide a similar conclusion: colonial patterns do not seem to explain variations in public perceptions about judicial power. I have rearranged their characterizations (liberal democracies, electoral democracies, electoral autocracies, and closed autocracies) according to legal families in Table 5. One can observe that they explore more common-law than civil-law countries in their study about judicial power in Africa. However, when it comes to democracies versus authoritarianisms, the relative proportion of African common-law countries versus African civil-law countries is reasonably stable across classifications.

TABLE 5 - CORRELATIONS INSPIRED BY BARTELS AND KRAMON (2020: 159)

	LIBERAL DEMOCRACIES	ELECTORAL DEMOCRACIES	ELECTORAL AUTOCRACIES	CLOSED AUTOCRACIES	TOTAL
COMMON LAW	5 (56%)	9 (60%)	9 (50%)	1 (100%)	24 (56%)
CIVIL LAW	4 (44%)	6 (40%)	9 (50%)	0	19 (44%)
TOTAL	9	15	18	1	43

The correlations presented in this section suggest that democracy is not pre-determined by legal families in Africa, thus rejecting the basic formulation of the legal origins theory. Furthermore, the rule of law and judicial variables are fundamentally related to the nature of regime type and not to legal families (largely imposed by colonial powers a long time ago).

e. Further Empirical Investigation

By combining different information about African countries[9], I pursue a regression analysis to investigate any possible linear association between democracy and common-law. The dependent variable is liberal democracy (as measured by V-Dem). The independent variables or controls include the rule of law (an indicator collected by the World Bank measuring the quality of the legal system), the human development indicator (as indicator

[9] In this section, we narrow the statistical population to 54 jurisdictions since there is missing data for Zanzibar and Somaliland concerning some indicators.

collected by the UNDP), geographical location in the African continent, geographical characteristics (island and landlock), and monarchy.

In order to capture change through time, the dataset includes six years (1995, 2000, 2005, 2010, 2015, and 2020). Since not all indicators are calculated yearly, this approach allows us to operate with panel data, thus reflecting evolution in the last two decades. Some observations for 1995 had to be extrapolated from available data (namely HDI indicator). Given 54 countries and six years, the total of observations is 324.

Legal family is measured in three ways:

(Model 1) pure common-law and pure civil-law jurisdictions, thus excluding mixed jurisdictions (hence, the results should be interpreted against mixed jurisdictions).

(Model 2) common-law (including mixed jurisdictions), civil-law (including mixed jurisdictions), and sharia law (these variables are not mutually exclusive).

(Model 3) colonial background (these dummy variables are also not mutually exclusive given the losses of Germany and the Ottoman Empire after WWI and Italy after WWII).

The panel regression estimation results for liberal democracy are presented in Table 6. I start with standard panel regression estimation, with random effects and robust standard errors, and time trend. There is some indication of multicollinearity (most importantly, between northern Africa and former part of the Ottoman Empire) and significant evidence of serial autocorrelation. Therefore, I have opted for including first-differences panel regression (which reduces the number of observations to 270) and average cross-country regression (with 54 observations).

There is, at best, weak indication that common-law fosters democracy. In fact, two control variables are statistically significant across all nine specifications – rule of law (better quality of the legal system is associated with more liberal democracy) and Western Africa (also a positive association). However, in relation to legal families, the findings are not entirely consistent across all specifications.

(Model 1) Pure common-law has a statistically significant positive coefficient in the first-differences panel regression, but no other legal family variable is statistically significant (recall that in this model the coefficient must be interpreted in relation to mixed jurisdictions).

(Model 2) Both common and civil-law have a statistically significant positive coefficient while sharia law has a statistically significant negative coefficient in the ordinary panel regression. These results are not valid for the first differences panel regression (where civil-

law has a statistically significant negative coefficient) and the average cross-country regression.

(Model 3) The dummies for Portugal, the Netherlands, Italy, and the Ottoman Empire are statistically significant in the ordinary panel regression (positive coefficient for Portugal and the Netherlands, and negative coefficient for Italy and the Ottoman Empire). Some colonial powers (France, Spain, Portugal, and Germany) have a statistically significant negative coefficient in the first-differences panel regression. The dummy for Britain is never statistically significant.

Although I have used three models and three specifications for each model, with a total of nine regressions, I could not find a strong linear association between liberal democracy (as measured by V-Dem) and legal family in the context of Africa.

TABLE 6 – REGRESSION ANALYSIS; LIBERAL DEMOCRACY IN AFRICAN COUNTRIES (1995-2020)

	PANEL (I)	PANEL (II)	PANEL (III)	FIRST DIF (I)	FIRST DIF (II)	FIRST DIF (III)	AVG (I)	AVG (II)	AVG (III)
PURE COMMON LAW	0.061			0.024***			0.045		
PURE CIVIL LAW	0.013			-0.008			0.010		
COMMON LAW		0.144**			-0.005			0.112	
CIVIL LAW		0.106*			-0.03*			0.077	
SHARIA LAW		-0.078**			0.006			-0.056	
BRITAIN			0.050			-0.011			0.023
FRANCE			0.022			-0.033***			0.007
SPAIN			-0.032			-0.038***			-0.052
PORTUGAL			0.111*			-0.026**			0.101
GERMANY			-0.011			-0.016***			-0.024
ITALY			-0.105***			-0.002			-0.073
BELGIUM			-0.041			-0.015			-0.030
NETHERLANDS			0.124***			-0.009			0.081
OTTOMAN			-0.283**			0.018			-0.211
NORTHERN	0.055	0.113*	0.276**	0.024	0.018	0.025	0.001	0.042	0.154
MIDDLE	0.033	0.043	0.004	0.015*	0.011	0.010	0.054	0.061	0.013
WESTERN	0.116***	0.139***	0.097*	0.023***	0.022***	0.024***	0.097**	0.118***	0.085**
SOUTHERN	0.267***	0.179**	0.240***	-0.002	0.003	-0.009	0.164**	0.099	0.152*
ISLANDS	0.182***	0.188***	0.121**	0.001	-0.0002	0.004	0.089	0.097*	0.043
LANDLOCK	-0.020	0.015	0.013	-0.015**	-0.016**	-0.014**	-0.021	0.008	0.011
MONARCHY	-0.211**	-0.153*	-0.278***	0.013	0.013	0.036*	-0.193**	-0.148**	-0.231**
RULE OF LAW	0.399***	0.391***	0.361***	0.231***	0.231***	0.232***	0.669***	0.634***	0.557***
HDI	-0.332**	-0.307**	-0.305**	-0.183	-0.191	-0.203	-0.252	-0.199	-0.107
YEAR	0.022***	0.022***	0.021***	-0.005*	-0.005*	-0.005*			
CONSTANT	0.168***	0.054	0.174**	0.018	0.045**	0.047***	0.139	0.041	0.116

N OBSERV	324	324	324	270	270	270	54	54	54
ADJ R2							0.69	0.71	0.70
OVERALL R2	0.63	0.65	0.68	0.12	0.11	0.12			
VAR INF FACTOR (VIF)	4.80	6.27	7.06	1.90	2.46	4.20	2.31	3.18	4.60

* 10% significance level, ** 5% significance level, *** 1% significance level

Panel and First Differences – random effects, robust standard deviations.

III. The Case of Africa

The political science literature on political regimes in Africa does not mention legal families as a co-determinant, even less as an explanation, for democratization[10]. In his review, Gibson (2002) discussed the different theories on democratization in African countries. Legal origin is not considered or mentioned, unlike economic or political factors. A similar observation applies to the recent survey of the judicial independence and rule of law literature by Heyl[11].

In a broader reading, however, one could argue that legal origin is implicit in other explanations proposed by Gibson (2002). First, following the thesis defended by Mahoney (2001), maybe legal origin is implicit to economic growth policies. Gibson recognized different approaches (such as economic transformation, liberalization, urbanization, and industrialization), but they do not seem to reflect a distinction between Francophone and Anglophone countries. Second, most obviously, legal origin is related to colonization patterns. Inevitably common-law prevails in former British colonies and civil-law prevails in former French, Portuguese, Spanish, Belgian, Italian, and German colonies. There are no civil-law former British colonies and no common-law former non-British colonies (with the potential caveat of Liberia). Indeed, Gibson related colonization patterns to political institutions (for example, modern bureaucracies, management of clientelism, village decentralization, and local oligarchies).

In the same vein, one could argue that the theories explored by Heyl (2019) are related to legal origins in some way. In using terms relating to formal and informal institutions, one

[10] Although, for example, in his seminal article, S.M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in 53 Am. Pol. Sci. Rev. 69-105 (1959) divides countries between English-speaking nations and other (European and Latin American) nations.

[11] C. Heyl, *The Judiciary and the Rule of Law in Africa*, in W.R. Thompson (ed.), *Oxford Research Encyclopedia of Politics* (Oxford, UK: Oxford University Press, 2019), https://doi.org/10.1093/acrefore/9780190228637.013.1352 .

finds references to the weak explanatory power of electoral competition, patterns of colonization, and post-colonization democratization.

Yet both authors never mentioned legal families or legal institutions as a source of conditions to successful or unsuccessful democratization. At a quick reading, scholars in political science disagree on the causes and measurements of democratic success in Africa, but legal families are never offered as an explanation.

As to the role of judicial politics in Africa, political scientists have explored the influence of legal families for the reason that judicial institutions tend to follow transplants from colonial powers. Anglophone countries have courts of law that follow structures and procedures like the English tradition, whereas Francophone countries have adopted arrangements from France, Portugal, Spain, or Belgium[12].

One example is the role of a separate (mostly centralized) constitutional court in new democracies. Unsurprisingly, these institutions exist in most of Francophone Africa. However, Stroh and Heyl[13] showed that its diffusion and success vary. While some countries have an independent and effective constitutional court (such as Guinea, Niger, or Benin), others have a weak and politically ineffective constitutional court (such as Burkina Faso, Mali, Senegal, or Mauritania). The authors suggested that where presidential and legislative elections are highly competitive, one observes strong constitutional review. The opposite result holds for countries with low electoral competitiveness. Their methodology is debatable (there could be some concerns about endogeneity), but in the context of my research question, their finding is relevant – there is plenty of variance concerning judicial variables within the civil-law legal family. These African countries are not overwhelmingly authoritarian with failed constitutional review. There is a significant variety of experiences concerning regime types.

A notable exception in the Anglophone world is South Africa. A separate constitutional court was created in 1994 as part of the arrangements for the peaceful transition out of apartheid. This is an important example of a common-law jurisdiction creating a non-common-law legal institution to deal with counter-majoritarian pressures in a new democracy. Still, the optimistic view of the role of the South African constitutional court has changed since 1994. By the early 2000s, political scientists were documenting that the

[12] For a recent survey of empirical evidence, see D. H. Lewis, *Empirical Studies of African High Courts: An Overview*, in N. Garoupa, R. D. Gill, and L. Tiede (eds.), *High Courts in Global Perspective: Evidence, Methodologies, and Findings* (Charlottesville, VA: University of Virginia Press, 2021).

[13] A. Stroh, C. Heyl, *Institutional Diffusion, Strategic Insurance, and the Creation of West African Constitutional Courts*, in 47 *Comp. Pol.* 169-187 (2015).

court failed to act as an important "veto player" and did not contribute to democratic consolidation[14]. The general assessment was that the institution was not able to be above social and racial cleavages. It also had a difficult time in establishing independence in a context of political hegemony of a dominant party. A later review by Gibson was less negative. A few landmark decisions in the 2000s enhanced the court's political independence and reputation. However, Gibson still detected a shortfall of institutional legitimacy that begs for a bolder court[15].

Looking at former British colonies, one also finds a plethora of experiences. For example, Widner reviewed the cases of Tanzania, Uganda, and Botswana. She observed that the role of courts as a restraint to executive power is not analogous across jurisdictions. Furthermore, she identified a "capacity building" limitation reflecting practical substantive and procedural aspects (such as lack of resources, administrative delay, absence of law reports, and inability to enforce court orders)[16]. These challenges are common in Commonwealth Africa. In fact, an earlier report edited by Brody and MacDermot presents a grim description of rule of law in former British colonies in Africa[17].

A later article by Ellett went further and recognized the failure of courts in shaping statehood and democracy in former British colonies in Africa[18]. She argued that formal institutions were transplanted from the common-law tradition, but local realities shaped their developments. For example, colonial British law was distorted to safeguard a principle of executive supremacy in ruling the colonies, "protecting both property rights and the rights of the government to control its citizens"[19]. After independence, these distortions in the common-law tradition were easily consistent with authoritarian governments[20]. Specifically, nondemocratic constitutionalism in Tanzania, Uganda, and Malawi made extensive use of the common-law tradition to justify oppressive legislation and limitations

[14] J.L. Gibson, G.A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, in 65 *J. Pol.* 1–30 (2003).
[15] J.L. Gibson, *Reassessing the Institutional Legitimacy of the South African Constitutional Court: New Evidence, Revised Theory*, in 43 *Politikon* 53–77 (2016).
[16] J. Widner, *The Courts as a Restraint: The Experience of Tanzania, Uganda, and Botswana*, in P. Collier (ed.), *Investment and Risk in Africa* (London: Macmillan, 1999).
[17] R. Brody, N. MacDermot (eds.), *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa*, International Commission of Jurists (1987).
[18] R. Ellett, *Courts and the Emergence of Statehood in post-Colonial Africa*, in 63 Northern Ireland Legal Q. 343–363 (2012).
[19] Ellet, cit., 343.
[20] Ellet, cit., 344.

to individual rights[21]. Doctrines of precedent were used to control rather than enhance judicial independence[22]. Ellet concluded that when these countries moved to multiparty systems in the 1990s, with few exceptions (such as an assertive supreme court in Tanzania for a short period before 1994), courts were weak, cautious, and unwilling to challenge the executive power.

In a related work, VonDoepp and Ellett examined how courts have limited executive power in new democracies in Commonwealth Africa (Namibia, Tanzania, Malawi, Zambia, and Uganda)[23]. Their finding was that challenges to the executive were not frequent and reflected only occasional disagreements. Although there were different executive reactions to these defiant judicial decisions, the authors suggested that patronage and personal linkages to the ruling elite played an important role. However, government interference with the judiciary varied somehow from low interference in democratic Tanzania (1995-2005) to high and persistent interference in democratic Uganda (1997-2007) and democratic Malawi (1994-2012).

IV. THE BIGGER QUESTION: WHY IS LEGAL ORIGINS THEORY IGNORED BY POLITICAL SCIENTISTS?

While the theory of legal origins has played an important role in comparative economics in the last two decades (inevitably subject to methodological and conceptual controversies as I have emphasized), it has failed to get the attention of comparative political scientists. Given the emphasis of comparative politics on the rule of law (and related notions about comparative judicial politics), this is somewhat surprising. However, I suggest this can be explained by the way economists and political scientists refer to the rule of law in their research agenda.

Economists look at democracy and the rule of law primarily as control variables to explain economic dependent variables – GDP growth, inequality, macroeconomic stability, unemployment, inflation, and so on[24]. Political scientists use democracy and the rule of law essentially as dependent variables to be explained by a set of structural and institutional

[21] Ellet, cit., 352-353.
[22] Ellet, cit., 355.
[23] P. VonDoepp, R. Ellett, *Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies*, in 43 *Comp. Pol.* 47–165 (2011).
[24] For example, D. Acemoglu *et al.*, *Democracy does Cause Growth*, in 127 J. Pol. Econ. 47-100 (2019).

factors, depending on the different theories. Taking democracy and rule of law to be control or dependent variable leads to varying, if not opposing, concerns and priorities.

Let us start with comparative economics. Statistical endogeneity has been the underlying concern since the 1990s. Democracy and the rule of law cause economic growth, but economic growth could also cause democracy and the rule of law. Nobody disputes the existing strong correlation (easily documented in Table 3). It is the direction of causation that is subject to intense debate. Do we need democracy and the rule of law to foster growth? Or do we need to reach a certain level of economic growth to produce institutions conducive of democracy and the rule of law? The answer to these questions begs for a variable that is exogenous to both contemporary growth and institutions. Such a variable could be thought of as reflecting underlying social preferences or political inclinations that are exogenous to growth and institutions, but in turn, determine growth and institutions. Economists argue that legal origins from two hundred years ago are these exogenous social preferences or political inclinations that determine growth and institutions (including democracy and the rule of law) two hundred years later[25]. Broadly speaking, economists see democracy and the rule of law resulting from immutable social preferences and political inclinations (as well as structural factors, but there is no disagreement with political scientists in this regard), and legal origins reflect these underlying, stable, and exogenous attributes.

Comparative politics aims at explaining the combination of factors that result in democracy and the rule of law (or lack of both). Agency theories and institutional explanations are less concerned about measuring exogenous social preferences or historical political inclinations. First, they are more interested in the behavior of individuals, agents, parties, elites, and social movements in reaction to specific contexts. Second, social preferences about regime types are likely to be endogenous and respond to time and context. Therefore, legal origin is not helpful to this viewpoint. In fact, if democratization or strong rule of law is a mere consequence of immutable social preferences and political inclinations as determined two hundred years ago, there is little scope for elite-driven theories. Moreover, focusing on a specific country, it is difficult to envisage some underlying and immutable social preferences

[25] This theory has been widely criticized as I pointed out in note 2. For example, LLSV presupposed that the distribution of legal families around the world is exogenous to economic variables. This is historically problematic since the expansion of the British empire (after defeating all other competing European empires in the 18th century) is notoriously economically driven.

from two hundred years ago, and at the same time, explain many regime type changes within these same two hundred years.

I have reviewed in this article the academic discussion about the relationship between courts and judiciary, that is, the rule of law and democracy in Africa. Prevailing academic discussions contain no mention of legal origin because, implicitly, political scientists do not seem to think that there is a valid distinction between Francophone and Anglophone Africa when it comes to predominating political regime types in the last thirty years. My own position goes in similar lines. I do not think economists can be very successful in explaining Africa's patterns of economic growth (or lack thereof) by insisting on legal origin. Moreover, given the patterns of colonization in Africa, it is very unlikely that legal origins reflect local social preferences anyway.

How about Latin America? There is plenty of discussion focused on the role of the rule of law[26], including the controversy about the alleged failure of rule of law reforms[27]. Still, the most immediate remark is that almost all Latin American countries are civil-law jurisdictions[28]. Legal origin can only be part of a counter-factual reasoning. Making the argument that Pinochet should be understood as a product of civil-law immutable social preferences while an English-speaking Chile would be saved from an English-speaking Pinochet could be an exciting intellectual exercise, but is unlikely to advance our understanding of Chile's former (authoritarian) and current (democratic) political regimes.

It can be puzzling that comparative political science research on courts and regime type has not responded to comparative economics. Nevertheless, it seems to me that legal origins have not been ignored due to any sort of negligence or overlook – quite the contrary. I take the view that legal origin is simply not a useful concept when explaining regime type within a certain geographical area.

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[26] See, for example, G.A. O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America*, in J.E. Méndez *et al.*, *The (Un)rule of Law and the Underprivileged in Latin America* (Notre Dame, Ind.: Notre Dame University Press, 1999); P.S. Pinheiro, *Democratic Governance, Violence, and the (Un)Rule of Law*, in 129 Daedalus 119-143 (2000).

[27] L. Hammergren, *Latin American Experience with Rule of Law Reforms and Applicability of Nation Building Reforms*, in 38 *Case Western Res. J. Int'l L.* 63-93 (2006); J.L. Esquirol, *The Failed Law of Latin America*, in 56 Am. J. Comp. L. 75-124 (2008).

[28] For example, P. Paterson, *The Rule of Law in Latin America: A Selected Annotated Bibliography*, William J. Perry Center for Hemispheric Defense Studies (1997) lists more than one hundred references on the study of the rule of law in Latin America without a single mention to legal origins.

V. FINAL REMARKS

Economists have proposed that the common-law tradition is more democratic, and the civil-law tradition is more authoritarian in their ideology. I started by showing that there is little linear correlation between political regimes and legal families. I suggested that we should focus on Africa rather than other parts of the world because these two legal traditions coexist in a continent experiencing post-colonial realities with comparable social and economic challenges. Statistically, one still finds very weak indication that there is some sort of linear correlation between democracy and common-law tradition.

It is difficult to find support in the political science scholarship to the view that democracy in Africa is related to the common-law versus civil-law tradition. There is evidence that colonization patterns explain, at least partially, success or failure in democratization, but legal family does not seem to be part of the bundle of important colonization factors. Furthermore, it is not possible to confirm that judicial institutions originated by common-law transplants are more conducive of democracy than those originated by civil-law transplants. In both Anglophone and Francophone Africa, we find that these institutions adjust to local realities, including political regimes. European-style constitutional courts and English-style supreme courts are consistent with democracy and authoritarianism. Even in multiparty systems, we do not find strong counter-majoritarian courts.

South Africa provides a good example to illustrate the limitations of the legal origins theory. It is a common-law country (although influenced by Dutch law). It is an established democracy, with an important constitutional court, an institution alien to the common-law tradition. Yet, the court has been slow to establish its legitimacy within the democratic political system. Dealing with the hegemony of one single political party since 1994 has not been easy. Scholars are somewhat optimistic about recent developments (but disappointed that the court failed expectations in the 1990s). However, such evolution does not reflect any democratic nature of the common-law, but merely complicated interactions in the political system, public opinion, business interests, and judicial inclinations.

I am not arguing that legal traditions are irrelevant. My tentative conclusion is that these traditions simply do not have an intrinsically democratic nature. They can be easily appropriated by democracy as well by authoritarianism. These traditions are adjustable to political regimes. In fact, experiences show that they did adjust to varying degrees of political competitiveness, social pressure, or economic factors in the post-colonial African world.

Legal families do not predetermine, and probably do not even influence, democratization. Moreover, since they were imposed by colonization, legal families do not reflect preferences for or against democracy in African societies.

APPENDIX

TABLE A1 – DESCRIPTIVE STATISTICS (179 COUNTRIES, 2019)

Variable	Mean	Standard Dev	Min	Max
ELECTORAL DEMOCRACY	0.52	0.25	0.02	0.9
LIBERAL DEMOCRACY	0.40	0.25	0.01	0.86
PARTICIPATORY DEMOCRACY	0.33	0.19	0.02	0.78
DELIBERATIVE DEMOCRACY	0.40	0.24	0.01	0.85
EGALITARIAN DEMOCRACY	0.39	0.23	0.04	0.84
JUDICIARY CONSTRAINS EXECUTIVE	0.58	0.30	0.01	0.98
JUDICIAL INDEPENDENCE	0.33	1.42	-2.82	2.84
JUDICIAL ACOUNTABILITY	0.68	1.32	-2.64	3.61
JUDICIAL CORRUPTION	0.13	1.50	-3.15	3.31
COMPLIANCE WITH JUDICIARY	0.44	1.34	-3.21	2.84
TRANSPARENCY OF LAW	0.57	1.32	-2.41	3.51
COMMON LAW	0.29	0.46	0	1

Source: V-Dem (2019); Common Law from Klerman et al (2011).

TABLE A2 – DESCRIPTIVE STATISTICS (54 AFRICAN COUNTRIES)

	Definition	Source	Mean	St Dev	Min	Max
LIBERAL DEMOCRACY	LIBERAL DEMOCRACY INDEX (1995-2020)	VDEM	0.27	0.19	0.006	0.705
PURE COMMON LAW	PURE COMMON-LAW COUNTRIES	Standard legal classification	0.30	0.46	0	1
PURE CIVIL LAW	PURE CIVIL-LAW COUNTRIES	Standard legal classification	0.41	0.49	0	1
COMMON LAW	COMMON-LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.39	0.49	0	1
CIVIL LAW	CIVIL-LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.69	0.47	0	1
SHARIA LAW	SHARIA LAW COUNTRIES INCLUDING MIXED JURISDICTIONS	Standard legal classification	0.26	0.44	0	1

BRITAIN	FORMER BRITISH COLONY	Wikipedia	0.43	0.50	0	1
FRANCE	FORMER FRENCH COLONY	Wikipedia	0.41	0.49	0	1
SPAIN	FORMER SPANISH COLONY	Wikipedia	0.04	0.19	0	1
PORTUGAL	FORMER PORTUGUESE COLONY	Wikipedia	0.09	0.29	0	1
GERMANY	FORMER GERMAN COLONY	Wikipedia	0.09	0.29	0	1
ITALY	FORMER ITALIAN COLONY	Wikipedia	0.07	0.26	0	1
NETHERLANDS	FORMER DUTCH COLONY	Wikipedia	0.04	0.19	0	1
BELGIUM	FORMER BELGIAN COLONY	Wikipedia	0.06	0.23	0	1
OTTOMAN	FORMER OTTOMAN EMPIRE	Wikipedia	0.09	0.29	0	1
NORTHERN	COUNTRY LOCATED IN NORTHERN AFRICA		0.11	0.31	0	1
MIDDLE	COUNTRY LOCATED IN CENTER AFRICA		0.17	0.37	0	1
WESTERN	COUNTRY LOCATED IN WESTERN AFRICA		0.28	0.45	0	1
SOUTHERN	COUNTRY LOCATED IN SOUTHERN AFRICA		0.09	0.29	0	1
EASTERN	COUNTRY LOCATED IN EASTERN AFRICA		0.35	0.48	0	1
ISLANDS	COUNTRY LOCATED IN AN ISLAND		0.11	0.32	0	1
LANDLOCK	LANDLOCK COUNTRY		0.30	0.46	0	1
MONARCHY	POLITICAL REGIME IS MONARCHY	Wikipedia	0.06	0.23	0	1
YEAR	TIME TREND = 0,1,2,3,4,5		2.5	1.71	0	5
RULE OF LAW	RULE OF LAW INDICATOR (1995-2020)	World Bank	0.29	0.21	0	0.8325
HDI	HUMAN DEVELOPMENT INDICATOR (1995-2020)	UNDP (United Nations Development Program)	0.49	0.13	0.18	0.804

Source: Standard legal classification based on Klerman et al (2011).

EMPIRICAL METHODS IN COMPARATIVE LAW: DATA TALKS

*Vanessa Villanueva Collao**

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Why does a comparativist need empirical legal studies? Isn't it better to leave the numerical operations to a statistician? Comparative law has been a customary tool for generations of legal scholars, with a perspective focused not only on the study of the law but also on the history, social events, language, and culture of the system under study. However, this holistic comparative approach refrains from using empirical methodology in a refined functionalist fashion.

This article illustrates how comparative law would benefit from the scientific method to bolster its reliability when comparing legal systems. The scientific method is extrinsic to the legal field but can be used to gain a better understanding of the law. To attain this result, the use of empirical methods in law requires a jurist who can handle these methodologies—someone who can harmoniously interpret the data according to legal theory.

The question is no longer: Why compare? Or What should we compare? But How to compare? This article provides an excursus of the different movements in the U.S. legal scenario that influenced the development of empirical legal studies. Empirical legal methodology's departure from Law and Economics traces how these extrinsic methods are widely applied in social sciences (and increasingly in law) but scarcely advanced in comparative law.

Finally, the paper focuses on different types of quantitative empirical legal research and methods used in legal studies and how they can be connected to comparative law. It concludes by identifying the limitations of this methodology as applied to comparative law and previewing a future of combined methods.

I. INTRODUCTION

The evolution of comparative law has enriched the field by expanding the object of comparison, including new units that are not precisely rules or institutions but informal

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solutions to legal problems[1]. From a functionalist perspective, the goal of analyzing unconventional units (or re-imagining old units) is to establish their relation to society[2]. This connection or interaction requires that the comparativist investigates the appropriateness of the methods or tools for new units and topics in law. In short, a method is suitable for a unit of analysis when it "speaks" its language.

However, the emergence of new units of comparison has not mirrored the methods used in comparative law. One reason for the relatively narrow number of methods comes from the role of law and economics as an extrinsic method for legal analysis. The assumptions introduced by law and economics have been largely rejected in comparative law. This rejection has overlooked other extrinsic, namely non-legal, methodologies.

On the other side, comparative law has not solved its methodological flaws. When comparing different systems, the interrelationship between legal and non-legal solutions sheds light on the *prima facie* equivalent responses to legal problems. However, functional equivalence does not, by itself, ensure comparability. Therefore, I propose to approach the study of new units in comparative law with the help of extrinsic and less-frequently used fields of research, such as quantitative or statistical methods, to substantiate the choice between comparative functionalism or differentialism, to add context to the claims that flow from this analysis, and to promote academic interaction among fields and scholars.

Quantitative methods have been slowly adopted in the legal field but remain underutilized in comparative law. More than 20 years ago, econometrics was the only inferential statistics used in corporate law[3]. This mathematical analysis, congenial to quantitative research pointing to a definite numerical result, has been unpopular among legal scholars, especially among comparativists, because it leaves inconclusive answers to other questions pertaining to law, such as policy. In fact, pure quantitative methods would be unhelpful when answering noncausal questions, such as normative questions, or when categorizing legal rules, or even harmonizing laws.

Comparative law has frequently been more descriptive by using the historical method, by deconstructing legal systems, and by interpreting them based on observation[4]. Other times, the normativism of comparative scholars' work has contrasted with what practitioners

[1] M. Siems, *The Power of Comparative Law: What Type of Units Can Comparative Law Compare?*, in 67 *Am. J. Comp. L.* 861–889 (2020).

[2] R. Michaels, *The functional method of Comparative Law*, in M. Reimann, R. Zimmermann (eds.), *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 2nd ed. (Oxford: Oxford University Press, , 2019), 345–389.

[3] R.M. Lawless *et al.*, *EMPIRICAL METHODS IN LAW* 2ND ED. (New York: Aspen Publishing, 2016), 3. For a prominent work on econometrics in corporate law, see M.C. Jensen, W.H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, in 3 J. FIN. ECON. 305 (1976).

[4] A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1st. ed. Charlottesville, VA: University of Virgina Press, 1974; 2nd ed. Athens, GA.: Georgia University press, 1993).

(lawyers, judges, etc.) in the legal field do, i.e., reaching some form of legal closure instead of pure abstraction[5]. Likewise, empirical scholars, mainly from law and economics—with notable exceptions[6]—have not devoted their efforts to combining their methods (or tools) or to enriching their approach to legal problems guided by comparative law[7].

Empiricism is not new to comparative law. The techniques employed by comparativists are often borrowed from the social sciences, opening the field to ethnographic and anthropological studies that frequently use surveys, interviews, etc. Nevertheless, quantitative or statistical methods are largely neglected by comparativists[8].

Empirical comparative studies emerge as a subsection of empirical legal studies, with cross-country data as the main feature[9]. I refer to data as formal materials, such as judgments[10], as well as actors, such as people, judges, jurors, etc.

The design of empirical methods in comparative law facilitates the functionalist approach[11]. Functionalism—the study of the social function of rules, norms, or institutions as a response to legal problems instead of a bare comparison of formal rules—relies on neutrality and objectivity to establish a functional equivalence between units of comparison. This functional equivalence is driven by the primary assumption of functionalism—the belief that all of humanity shares the same problems[12]. However, by implying neutrality, the presumption of

[5] L.M. Friedman, *The Law and Society Movement*, in 38 *Stan. L. Rev.* 763 (1986).

[6] An early believer of this hybrid field has been Ugo Mattei. U. Mattei, *COMPARATIVE LAW AND ECONOMICS* (Ann Arbour, MI: University of Michigan Press, 1997); U. Mattei, A. Monti, *Comparative Law and Economics: Borrowing and Resistance*, in 5 *Glob. Jurist Front.* Art. 5 (2001); U. Mattei *et al.*, *Comparative Law and Economics*, in B. Bouckaert, G. de Geest (eds.), *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (Cheltenham: Elgar Publishing, 2000), 505–538.

[7] Comparativists acknowledge the relevance of law and economics in the comparative field, rarely applying it. G.B. Ramello, *The past, present and future of comparative law and economics*, in T. Eisenberg, G.B. Ramello (eds.), *COMPARATIVE LAW AND ECONOMICS* (Cheltenham: Elgar Publishing, 2016), 3–22; F. Faust, *Comparative Law and Economic Analysis of Law*, in Reinmann, Zimmermann, *supra* note 2, 827–851.

[8] There are some exceptions in comparative corporate law that take advantage of quantitative methods. *See e.g.*, D. Cabrelli, M. Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, in 63 *Am. J. Comp. L.* (2015),109–153.

[9] H. Spamann, *Empirical Comparative Law*, in 11 *Annu. Rev. Law Soc. Sci.* 131–153 (2015).

[10] Judgments and court documents have been used to study the relationship among European Supreme Courts when cross-citing foreign caselaw. *See Id.* at 137 (citing M. Gelter, M. Siems, *Citations to foreign courts—illegitimate and superfluous, or unavoidable? Evidence from Europe*, in 62 *Am. J. Comp. L.* 35 (2014).

[11] Legal comparativists largely accept the use of the word method interchangeably as to tools and research instruments and materials, instead of methodology as a theoretical paradigm that informs the choice of methods. J. De Coninck, *The Functional Method of Comparative Law: "Quo Vadis"?*, in 74 *Rabel J. Comp. Int. Priv. L.* 318, 321 (2010). I will not delve into the dichotomic distinctions in this paper, but I will merely refer to method as an all-inclusive category.

[12] This view is in straight opposition with the one from differentialists, summarized in this way: if problems are a social construct in every legal system, then problems are associated with the system's history, culture, language, and so on, making them highly dependent on the context and culture. Therefore, differentialists emphasize the diversity of problems instead of their commonality and comparability.

problems' universality ignores the legal systems distinctions based on the contingencies of the solutions adopted[13].

Likewise, the presumption of universality poses an issue of how problems are framed[14]. This framing depends on the comparativist's scholarly or practitioner's influences, affecting how problems are stated and, eventually, the comparison's outcome.

The functional approach is helpful as an interpretative first step rather than a final step, where it merely offers a description of how societies work. Therefore, it is better to think about functionalism as a proposal (the hypothesis) of how a legal system (or a unit of comparison) should be understood[15]. Thus, empirical methods can then be used to test functional relations and theorizations in law using quantitative or statistical methods.

The advantage of quantitative empirical methods in law is that their reverse-engineering thought process produces a sophisticated result by challenging assumptions rather than merely relying on speculation (in most cases, pure intuition)[16]. In this sense, quantitative empirical methods serve as a bridge between the positive sciences (descriptive of a specific reality) and the normative sciences, such as the law.

These methods are tools for understanding legal problems from empirical reality and are subject to more than one interpretation (so-called refined functionalism, when the premises are functional relations). The focus does not lie in comparing the solution to legal problems but on the procedures and techniques used to identify either a problem or its solution[17].

Theory informs the empirical design, with a hypothesis capable of confirming or conferring validity to the comparative act[18]. The purpose of the hypothesis testing meets the refined functionalism's goal: to resort to external methods for comparative law by abstracting, isolating, and extracting functional concepts from national legal concepts[19]. As Ralf Michaels once said, empirical fields such as law and economics are essentially a refined functional method of comparative law, "one that measures legal rules not by their doctrinal consistency but by their ability to fulfill societal needs"[20]. If the law is like technology and helps to fulfill

[13] Indeed, the presumption around similarities should be the research starting point and treated as a hypothesis, confirming or refuting its validity. De Coninck, *supra* note 11, at 331.

[14] In this regard, comparativists regularly frame issues and make comparisons in a Eurocentric fashion. How problems are comparable to other legal problems usually stems from Eurocentric legal (cultural and social) reasoning.

[15] Michaels, *supra* note 2.

[16] Spamann, *supra* note 9.

[17] De Coninck, *supra* note 11, at 336.

[18] *Id.* at 331.

[19] In this way, numerical, statistical, or quantitative methods embrace the refined functionalism. A.V. Tkachenko, *Functionalism and the Development of Comparative Law Cognition*, in 5 *J. Comp. L.* 71, 73 (2011).

[20] R. Michaels, *The second wave of comparative law and economics?*, in 59 *Univ. Tor. L. J.* 197–213 (2009).

societal needs, then this tool (the law), without an empirical foundation, is subject to arbitrariness.

Empirical (quantitative) methods in comparative law have been used to transform legal rules into numerical values, focusing on the black letter of the law. However, quantitative methods that stem from empirical research also can be used to "code"—to transform data and values into numbers—other types of norms or social behavior in human societies, namely, culture. Therefore, comparativists can test their preferences of comparing differences over similarities, or vice versa, and the influence of culture. Eventually, empirical methods can provide a different dimension to comparative law by defining and measuring the relevance of cultural background when comparing legal systems[21].

In this sense, it is possible to code and test the assumption that societies' needs are somewhat similar and that institutions are built around those similarities. Following a school of thought[22], when the findings point to non-convergence between systems, or no similar needs, comparativists would be prone to rethink, rearrange, and replay a new comparison until that similarity is found. Quantitative empirical methods redress this presumption around similarities (*praesumptio similitudinis*) by falsifying the original assumption. The first part of this article traces the emergence of interdisciplinary studies in comparative law and the movements related to the United States' philosophical school of thought, legal realism, that aided in consolidating empirical legal studies as a tool in legal scholarship. The second part of the article provides an account of the types of quantitative empirical work in multiple areas of the law. Despite the lack of comparative design, the results of those studies still supply material for comparison by replicating the same study in a different system or region and implementing existing models in support of comparative law. These methods fulfill the *tertium comparationist* function of uncovering latent aspects, actors, needs, and problems in law with a (testable) standard of comparison.

The third part of this article discusses the role of methodology, the research question in an empirical study, and the issues with coding law. The fourth part illustrates how to apply the empirical method in comparative law using an example of regression analysis. The regression

[21] Cognitive sciences have been used to disprove the relativism of differentialists' assumptions of the influence of culture over a particular legal system, finding that there is a baseline (or common ground) between humankind's behavior. At the same time, cognitive sciences can improve functionalism by taking an experimental approach to cultural diversity. R. Caterina, *Un approcio cognitivo alla diversità culturale*, in R. Caterina (ed.), *I fondamenti cognitivi del diritto. Percezioni, rappresentazioni, comportamenti* (Milano: ESBMO, 2008), 205, 218.

[22] K. Zweigert, *Die «praesumptio similitudinis» als Grundsatzvermutung rechtsvergleichender Methode*, in M. Rotondi (ed.), 2 *AIMS & METHODS OF COMPARATIVE LAW* (Padova: CEDAM, 1973), 375; *See also* K. ZWEIGERT, H. KÖTZ, 1 *AN INTRODUCTION TO COMPARATIVE LAW* 2nd ed. (Oxford: Clarendon Press, 1987), 40.

analysis examines two units of comparison, a legal phenomenon and a social, or non-legal, phenomenon, at the intersection between business law and law and technology.

Finally, this article concludes with an overview of all the processes, reflecting on the future of combined methods and data preservation. Quantitative empirical methods allow the expansion of legal theories with implications that naturally flow from the data. Even if certain conditions do not allow quantitative research in law, there are conditions in which this type of research is needed and sheds light on further empirical, non-empirical, descriptive, and normative studies. The power of these methods is to broaden the scope of comparative law from quantitative methods to other methodologies already used in social research.

II. THE RISE OF EMPIRICAL METHODS IN LAW

This overview highlights comparativists' rejection of the law and economics model of understanding human activity without using an empirical approach. In the U.S., legal empiricism arose from the experience of the law and society movement, expanding knowledge in law with methods that came from a wide array of disciplines such as anthropology, sociology, and psychology. Law and society scholars apply methods from beyond the social sciences and "conventional" authorities separating the normative or prescriptive issues from the descriptive ones[23]. The movement mainly identifies the law as a human construct that changes and varies according to the "conditions of the culture in which it is embedded"[24]. In this sense, the law is not merely pragmatic, rational, or instrumental because people do not regularly think about legal concepts when thinking about the law but tend to merge the law with values[25].

Similar to law and society studies, comparative studies have shown the constant connection between law and culture[26]. The legal transplants proposed a non-functionalist and detached analysis from the cultural values inherent in law, resulting in the objective study of the behavior of a specific group (the legal élite)[27]. Among some scholars, there was a common understanding that this type of analysis aimed to avoid sociology's trivialization of the legal

[23] Friedman, *supra* note 5, at 764.
[24] *Id.*
[25] "'[P]ublic opinion" in the broadest sense, or those values, opinions, attitudes, and expectations that make up the legal culture, constitute fundamental building blocks of law.' *Id.* at 771.
[26] This connection is especially true in the case of legal transplants by showing how foreign rules were accessible to a specific legal culture determining its incorporation in a different legal system. WATSON, *supra* note 4, at 108–118.
[27] *See id. passim.*

tradition[28]. However, legal transplants theorists rejected this view, emphasizing that this analysis aims to uncover patterns and divergences in law and in society[29]. This observation of the legal élite was powerful in explaining a simple statement: we can understand the law using non-legal methods.

The use of non-legal methods in understanding the law advanced with the rise of law and economics. The two strands of law and economics, positive and normative, created a heated debate (and grounds for rejection) among legal scholars[30]. Rational Choice Theory's unrealistic characterization of an individual moved by a constant desire to maximize[31] utility to make choices triggered comparative legal scholars' skepticism towards law and economics[32]. Indeed, Rational Choice Theory showed its inability to mirror concrete scenarios, but without an approach separated from legal analysis, critiques from comparativists were unsuccessful and eventually surrendered to its use in law.

Legal comparativists' refusal to explore the tools law and economics offered revealed a bias against the methodology. For comparativists, efficiency is neither a compatible way to measure the law nor a remote function of it since, for the field, laws are adopted not necessarily for efficiency but to pursue the interests of justice[33]. As a result of the missing empirical approach, comparativists lost the opportunity to refine law and economics analysis and advance dialogue between legal scholars and economists.

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[28] According to this view, the legal tradition is seen as a monolithic institution that confers historical force to literal or originalist interpretations of the law. In other words, this (Eurocentric) conception of the law promotes cultural identity preservation. *See* B. Grossfeld, *The Strength and Weakness of Comparative Law* (Oxford: Clarendon Press, 1990), 43–45.

[29] Watson, *supra* note 4, at 107.

[30] For one strand, positive law and economics, legal rules have a predictive value—namely, their function centers on influencing future behavior—while the other strand, normative law and economics, focuses on minimizing resource waste by promoting efficiency, adopting rules that maximize wealth. It was also proposed to divide Normative Law and Economics between the Normative Coase Theorem, where the law should remove obstacles to private agreements, and the Normative Hobbes Theorem, where the efficiency feature is centered on the "allocation of property rights to the party who values them the most." R.D. Cooter, T.S. Ulen, *LAW & ECONOMICS* 6th ed. (Boston, Mass.: Person Education, 2012), 92–93.

[31] Maximization and efficiency are fundamental concepts to explain economic behavior. The third fundamental concept is equilibrium, "a pattern of interaction that persists unless disturbed by outside forces" to which maximization is strongly connected. Therefore, human interaction seeking maximization of utility tends to be in equilibrium. *Id.*

[32] [hereinafter RCT]. *See* T. S. Ulen, *Behavioral Law and Economics*, in T.S. Ulen (ed.), 10 *ENCYCLOPEDIA OF LAW AND ECONOMICS:METHODOLOGIES OF LAW AND ECONOMICS* 2nd ed., (Cheltenham: Elgar Publishing, 2017), 203.

[33] Some law and economics proponents were aware that the market responds to complex questions on human interaction almost automatically, in a *deus ex machina* fashion. Thus, the analysis should enlighten where corrections are needed through government regulation for the sake of wealth maximization. R.A. Posner, *THE ECONOMICS OF JUSTICE* (CAMBRIDGE, MASS.: HARVARD UNIVERSITY PRESS, 1982). However, law and economics analysis is not merely centered on the grounds of efficiency as the sole premise. T.S. Ulen, N. Garoupa, *Comparative Law and Economics: Aspirations and Hard Realities*, forthcoming in 69 *Am. J. Comp. L.* (2021) 664.

Only through significant critiques arising from psychology and cognitive studies [34], was it possible to understand how people made choices that were far from what RCT indicated[35]. Moreover, whereas these cognitive studies were derived from laboratory experiments, law and economics studies were not[36]. Law and economics was extraneous to any rigorous study requiring a control group or device because it was merely blind to culture and context[37].

The expanded evidence of the importance of context makes empirical methods relevant, which is fundamental in comparative analysis [38]. For example, in behavioral law and economics, the study of transaction costs using the endowment effect[39] demonstrated that the initial allocation of entitlements[40] affects the bargaining process[41] and the final allocation of resources[42]. These results contradict what law and economics predicted as a function of lower transaction costs: the parties would bargain regardless of the property rule. For comparativists, the endowment effect might explain why some systems privilege possessory interests over ownership interests.

Further experiments showed that professional traders' or dealers' market experience also attenuates the endowment effect (a broader manifestation of the loss aversion) affecting the bargaining process because they adjust to buyer-seller relationships, stepping back to the neoclassical prediction[43]. However, for comparativists, market experience is not the only way

[34] In particular, the seminal work of Kahneman and Tversky. D. Kahneman, A. Tversky, *Prospect Theory: An analysis of decision under risk*, 47 *Econometrica* 263 (1978).

[35] Economists are taught to make assumptions in analyzing how people make choices, but sometimes assumptions of some social context might be false or inaccurate. Moreover, the law and economics method seemed to disregard that choices are part of human behavior, which is not chaotic or given by chance but is predictable. Ulen, *supra* note 32, at 206.

[36] Cognitive studies allow a better understanding of human behavior. By understanding that behavior we can reach better predictions, or at least more accurate ones. Unfortunately, the scholarly production based on law and economics as a method suffered a relevant setback, compared to the 1990s, primarily due to the development of behavioral law and economics.

[37] Ulen, *supra* note 32.

[38] At the same time, the functional approach, or better-said approaches, seek interdisciplinarity to reveal aspects of society that can explain responses to the law. *See* Michaels, *supra* note 2, at 346.

[39] The endowment effect is explained as the tendency for a person who is assigned or owns something to care for and value that thing more than a person who does not own or is entitled to the thing at issue. *See* R. Thaler, *Toward a positive theory of consumer choice*, in 1 *J. Econ. Behav. Organ.* 39, 44 (1980). *See also* D. Kahneman *et al.*, *Experimental Tests of the Endowment Effect and the Coase Theorem*, in 98 *J. Polit. Econ.* 1325 (1990). D. Kahneman *et al.*, *The endowment effect, Loss Aversion, and Status Quo Bias*, in 5 *J. Econ. Perspect.* 193 (1991).

[40] The Coase Theorem established that when transaction costs are low, parties will bargain regardless of the property rule and with proper internalization of the externalities. R. Coase, *The Problem of Social Cost*, in 3 *J. L. Econ.* 1–44 (1960).

[41] In the bargaining process, property rules are irrelevant only if transaction costs are zero. Thus, the minimization of transaction costs would be the goal of the legal rules. However, this type of approach eradicates the role of the law and culture in negotiations. Faust, *supra* note 7, at 829.

[42] C. Jolls *et al.*, *A Behavioral Approach to Law and Economics*, in 50 *Stan. L. Rev.* 1471–1550 (1998), *passim*. For a criticism of this study, see R.A. Posner, *Rational choice, behavioral economics, and the law*, in 50 *Stan. L. Rev.* 1551 (1998).

[43] *See* J.A. List, *Does Market Experience Eliminate Market Anomalies?*, in 118 *Q. J. Econ.* 41 (2003). Although, subsequent studies showed a different pattern when the experiment was run between students and market professionals, with the latter developing loss aversion behavior. M.S. Haig, J.A. List, *Do Professional Trader Exhibit Myopic Loss Aversion?: An Experimental Analysis*, in 60 *J. Fin.* 523 (2005).

to measure loss aversion. Instead, it is one of many variables building up professional and environmental culture to influence bargaining[44].

These experiments explain that the so-called *homo oeconomicus* does not mirror a selfish or unbounded individual desperately searching for utility maximization, but an individual who ponders choices according to the surrounding circumstances, such as fairness, culture, or law, namely acts within *bounded self-interest*[45]. In other words, the extent to which willpower is bound depends on the cultural phenomena that influence the understanding of the surrounding circumstances.

Furthermore, the behavioral approach to law and economics purports to enhance the three functions of the law, i.e., positive (or descriptive), prescriptive, and normative[46]—the positive being the one that both economists and comparativists commonly use. For this reason, if culture is important for comparative law, then the behavioral approach can support the contextual specifications on which comparative claims are based[47].

Despite the promise of the behavioral approach to fields concerned with context, there is a great indifference in comparative law regarding the use of empirical studies,[48] sometimes preventing the field from advancing and maturing as a discipline[49]. In this sense, behavioral law and economics has been employed as a tool for analyzing domestic law and for forcing

[44] Likewise, the bargaining process can be affected by overconfidence bias and how different actors across cultures process their emotions, which more broadly, explains the choice of paternalistic rules as opposed to liberal ones. Caterina, *supra* note 21.

[45] Jolls *et al.*, *supra* note 42, at 1479. Therefore, it would make sense to observe why people might take actions against their maximization of utility (in the long term) but are capable enough to acknowledge that they have bounded willpower. This acknowledgment allows people to circumscribe or mitigate the effects of conflicting choices, an issue that law and economics had more trouble debunking. One should assume that individuals have multiple rational personalities or selves to be consistent with RCT. But still, it does not explain why we act in this conflicting way and how we can predict such conflicting behavior. Ulen, *supra* note 32, at 233. Some law and economics scholars suggested that there might be an explanation based on evolutionary studies for why certain types of (selfish) behavior are punished in the community and other (altruistic) ones are even encouraged. *See* Posner, *supra* note 33, at 1561.

[46] Jolls *et al.*, *supra* note 42, at 1474 (1998) (citing D.E. Bell *et al.*, *Descriptive, Normative, and Prescriptive Interactions in Decision Making*, in D.E. Bell *et al.* (eds.), *DECISION MAKING* (Cambridge: Cambridge University Press, 1988), 9.

[47] To this end, applying evolutionary studies to comparative law provides powerful insights regarding the identification of the cultural traits that are common to a variety of countries/contexts—the functionalist approach of homogeneity between individuals—and the diversity in cultural traits between two or more countries, or contexts—the difference theory. *Cf.* J. De Coninck, *Reinvigorating comparative law through behavioral economics? A cautiously optimistic view*, in 7 *Rev. L. Econ.* 711–736 (2011).

[48] There are few attempts to introduce behavioral analysis into comparative law, with particular regard to consumer law. G. Rühl, *Behavioural Analysis and Comparative Law, Improving the empirical foundation for comparative legal research*, in H-W. Micklitz, A. Sibony, F. Esposito (eds.) *RESEARCH METHODS IN CONSUMER LAW. A HANDBOOK* (UK: Elgar Publishing, 2018). The importance of cross-cultural consumer behavior is fundamental for the development of sound and updated legislation, even more crucial in terms of harmonization of consumer protections in the digital world.

[49] M. Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, in 50 *Am. J. Comp. L.* 685 (2002).

the comparative approach by merely applying an "exotic" technique[50]. In the same vein, when law and economics is used in comparative law, comparativists highlight its benefits without any concrete application[51].

The proposed quantitative tools differ from the law and economics approach in not having efficiency as a premise for analyzing legal problems—although, admittedly, efficiency is not the sole goal of economics. Nevertheless, the bias against efficiency as a final goal or as an (alleged) premise for analysis demonstrates the limited knowledge of economic tools, such as game theory, and the depreciation of the value of these tools in comparative law.

III. QUANTITATIVE TECHNIQUES IN LAW

This section provides a non-exhaustive account of current quantitative empirical techniques in law. The following studies explore questions not investigated with a comparative mindset but supply results that can be the basis of comparison.

The lack of real-world data is not an exclusive comparativist issue. When the field of law and economics began, there was also apathy toward using real-world data to support their theories[52]. Nowadays, empirical law and economics has been used in criminal law[53] to test Becker's[54] theorization of the rational agent committing a crime if the expected benefits exceed the expected costs—assuming that the agent internalizes the law before committing a crime[55]. For example, a study conducted between the U.S. and Canada tested the deterrence of the death penalty and showed no impact on homicide rates. With fifty years of no

[50] Some scholarship has used the behavioral approach, inquiring on consumer behavior to assess EU consumer law's impact on domestic consumer behavior and rarely using behavioral economics applied to comparative consumer law. De Coninck, *supra* note 47. Instead, the law and economics normative approach could be useful in evaluations of alternative rules determined by efficiency at a supranational level, for example, in the Principles of European Contract Law. Faust, *supra* note 7, at 835.

[51] A recent work advocating for both normative and positive law and economics applied to comparative law, *see* Faust, *supra* note 7, at 837.

[52] Very few studies have used data to prove that tort law's function is to reduce or minimize the social costs of accidents. T.S. Ulen, *Empirical Law and Economics*, in Ulen, *supra* note 32, 244 (citing G.T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, in 42 *UCLA L. Rev.* 377 (1994), and D. DEWEES *ET AL.*, *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996). Although, both studies ought to be reviewed due to the enormous amount of legislation and caselaw on accidents in the last 20 years. With real-world data, scholars furnish evidence in support of the theory rather than settling with a coherent hypothesis-framing as argumentation. Ulen, *supra* note 32, at 212. A recent study of the tort law literature showed the trends in assessing deterrent effects. However, those studies' scope had revealed limited if the hypothesis tested is not subject to more powerful empirical methods such as experiments, interviews or surveys. B. v. Rooij & M. Brownlee, *Does Tort Deter? Inconclusive Empirical Evidence about the effect of Liability in Preventing Harmful Behaviour*, in B. v. Rooij & D. D. Sokol (eds.) *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* 311 (Cambridge University Press, 2021).

[53] J.J. Donohue III, J. Wolfers, *Uses and abuses of empirical evidence in the death penalty debate*, in 58 *Stan. L. Rev.* 791, 798 (2005).

[54] G.S. Becker, *Crime and Punishment: An Economic Analysis*, in 76 *J. Pol. Econ***.** 169 (1969).

[55] Ulen, *supra* note 32, at 244.

executions, Canada's homicide rates were roughly one-third of those in the U.S.,[56] and both countries' homicide rates moved in lockstep[57].

However, the study did not consider other specific factors that could have lowered the homicide rates in Canada, such as confidence in the police, or elements that might inform a more problematic pattern, such as the demographics of the victims[58]. It was not established whether the death penalty was a functionally equivalent rule in both systems or, more broadly, whether the legal foundations (functions) of criminal law in the U.S. and Canada pursue the same goals. Comparative law could incorporate those contextualizations and analyses.

Other techniques, such as Randomized Controlled Trials, are better equipped to implement contextualization in a study. Randomized Controlled Trials is the empirical technique that employs control groups—the so-called gold standard of empirical research[59] field. Borrowed from the medical field, randomly assign cases, judges, or units to different conditions. Observing these groups reveals whether the experimental group (the one receiving treatment) reacts differently from the control group (the one not receiving treatment), in other words, controlling for that added variable in the opposing group. Measuring and comparing both randomly assigned groups would make it feasible to see if their differences are tied to the desired outcome or an alternative explanation[60].

The application of Randomized Control Trials has been useful in understanding how decision-makers (judges and jurors) resolve issues according to risk assessment,[61] jury instructions,[62] jurors questioning witnesses,[63] etc. In addition, comparative law could highlight other differences in civil law trials. For example, scholars assume that the jurors have no impact in civil law trials, either because of the trial's lack of juries or the jurors'

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[56] Donohue, Wolfers, *supra* note 53, at 799.
[57] *Id.*
[58] Marginalized groups emerge as the target of severe crimes in Canada. The 2016 Canadian criminal justice system report assessed that indigenous populations were victims of homicides at a disproportionate rate compared to other groups. Canada Department of Justice, *The Canadian Criminal Justice System: Overall Trends and Key Pressure Points* (2016), https://www.justice.gc.ca/eng/rp-pr/jr/press/.
[59] This type of technique focuses on research questions that deal with cause and effect. *Id. See also*, LAWLESS *ET AL.*, *supra* note 3, at 80.
[60] In the medical field, these experiments use placebos to ensure that the actual difference stems from the treatment and not from taking a sugar pill. *Id.* at 81.
[61] D.J. Greiner, *The new legal empiricism & its application to access-to-justice inquiries*, in 148 *Daedalus, J. Am. Acad. Arts Sci. 64–74 (2019)*. Risk assessment is a scoring system or algorithm that gives information about an individual, such as recidivism rates before release decisions or the application of alternative detention measures. Unfortunately, judges use risk assessment also in hard cases, when scores are not available, subject to misleading outcomes. Randomized Controlled Trials allow judges to avoid this misrepresentation. *Id.* at 69.
[62] Lawless *et al.*, *supra* note 3, at 81.
[63] *Id.* (citing L. Heuer, S.D. Penrod, *Juror Notetaking and Question asking During Trial: A National Field Experiment*, in 18 *L. & Hum. Behav.* 121 (1994).

irrelevance in the verdict. Measuring and comparing studies in common law countries with civil law countries could uncover whether those assumptions are valid.

Similarly, experiments are the core concept of law and psychology, a prominent empirical technique in tort law analysis. One of the issues that tort law faces resides in the assessment of counterfactual reasoning. Ascertaining but-for causation is complicated because of the frailties of human memory. During recollection, people are likely to modify events, unusual conditions, and actions[64]. Thus, the risk of witnesses misrepresenting facts is latent.

Likewise, issues in tort law emerge in sufficient concurrent causes of accidents. Even if each concurrent cause is considered the factual cause of the harm, law and psychology studies found that the probability of finding liability is higher if one of the concurrent acts is morally blameworthy, for example, driving under the influence of alcohol as opposed to distracted driving[65]. These studies might make us rethink the admissibility of evidence that could be prejudicial and make us explore how these tort standards differ across jurisdictions.

Moreover, law and psychology studies have demonstrated how fact-finder decisions in tort compensation are affected by heuristics[66] since people tend to feel discomfort when dealing with all-or-nothing situations. For example, one study reviewed ten thousand negligence lawsuits[67] purported to test comparative negligence in its two variations, pure and partial or modified,[68] offering a twisted mechanism by which fact-finders awarded plaintiff recovery[69]. The results found *pure* comparative negligence as a more appropriate standard in tort law—where there is a reduction of recovery consistent with the plaintiff's percentage of responsibility. Under this standard, fact-finders assigned the plaintiff's negligence above the 50% threshold in a higher number of cases, reducing the plaintiff's recovery accordingly[70].

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[64] J.K. Robbennolt, V.P. Hans, *The Psychology of Tort Law*, in M.K Miller, B.H. Bornstein (eds.), 1 *Advances in Psychology and Law* (Cham: Springer, 2016), 249.

[65] *Id.* at 252. The original experiment focused on drivers speeding. One driver speeded with the intent to hide drugs, while the other hid an anniversary present. Participants in the treatment group finally concluded that the plaintiff's injuries were caused by the driver engaging in concomitant illegal activity (citing M.D. Alicke, *Culpable Causation*, in 63 *J. Personality & Soc. Psychol.* 368 (1992) and J. Nadler, M.-H. McDonnell, *Moral Character, Motive, and the Psychology of Blame*, in 97 *Cornell L. Rev.* 255 (2012)).

[66] Heuristics attribute cognitive biases to limitations in the available data and the human information processing capacity. As a result, people typically feel quite confident about their decisions and judgments, even when evidence is scarce and when they are aware of cognitive inclinations. *J. Baron, Judgment, in Encyclopedia of Cognitive Science* 654–657 (2006).

[67] Robbennolt, Hans, *supra* note 64, at 257 (citing E. Kahn Best, J.J. Donohue, *Jury Nullification in Modified Comparative Negligence*, in 79 *U. Chi. L. Rev.* 945 (2012)).

[68] In the U.S., states have gradually abandoned the rule of contributory negligence—this rule provides a complete bar on recovery if a plaintiff shares any amount of negligence in the event at issue—for comparative negligence.

[69] *See*, Kahn Best, Donohue, *supra* note 67.

[70] Under the rule of pure comparative negligence, any amount of liability reduces monetary recovery, but that recovery will never be barred. According to this study, fact-finders determined plaintiff's liability above the 50% threshold (thus, barring recovery) in 22% of cases (a small percentage). *Id.*

On the contrary, in states following *partial* or *modified* comparative negligence—where a pre-established threshold of plaintiff's liability will bar recovery—fact-finders assessed the plaintiff's responsibility above the 50% barring threshold in a limited number of cases. The results also showed cases where fact-finders assigned unusual percentages, such as 49%, which hinders juries' motivations (and sympathy) towards the plaintiff, allowing recovery by not reaching the threshold[71]. Thus, fact-finders presumably granted (otherwise barred) recovery by overcompensating the victim based on moral judgments (fairness).

Comparativists can use law and psychology studies to bring forth issues concerning rules and standards in different legal systems. For instance, we can understand how standards differ in a system that employs a jury as the fact-finder instead of the judge, acting as the fact-finder and decision-maker, or whether the same standards can have other effects besides overcompensation–as shown in the case above.

Network analysis is another technique used to illustrate small-scale interactions between individuals and the influence of their information and community development[72]. The emphasis is not centered on individuals' strong relationships or connections in well-defined/primary groups but on weak relationships in secondary groups to understand how these weak connections interact in each social structure[73]. In short, this technique assesses the quality of micro-level interactions. The results from network analysis help understand social mobility, social cohesion,[74] diffusion of information for enforcement purposes, and crime report, among others, showing that the network structure affects behavior[75].

One of its applications in law is in the study of the firm. Rather than analyzing a firm's legal characteristics, network analysis can assess its organizational structure to better understand

[71] The study assessed that awarding 49% of responsibility corresponds to an unusual number because people tend to think in rounded quantities (20, 30, 40, etc.). Robbennolt, Hans, *supra* note 64, at 257.

[72] M.S. Granovetter, *The Strength of Weak Ties*, in 78 *Am. J. Sociol.* 1360 (1973). Sociometry is one of those marginalized techniques in sociology (predecessor of network analysis) whose application was part of social psychology. *Id.* at 1360.

[73] Those studies use the sociological methodology to identify interactions between *i. actors* (nodes or vertices): people, judges, or things such as documents or other information, their connection with *ii. ties* (links/edges), such as friendships, working relationships, exchange relationships, and *iii. the network* (all actors and ties in population) *Id.* at 1361. The strength of a relationship is defined as the intracorrelation of (amount of) time, emotional intensity, intimacy, and reciprocal services which characterize the tie.

[74] One of the final roles of weak ties is promoting social cohesion since it is because of those weak ties that a person steps out from one network to another, blending them or establishing a link between them. *Id.* at 1372.

[75] *Id.* at 1370. The central idea is that those to whom our relationship is weak (the weak ties) evolve in different contexts (since people alike tend to aggregate between themselves), having access to different, more varied, and useful information. Therefore, the quality of the information received from a person in weak ties has been revealed to be crucial information.

its interactions. For example, some studies highlighted whether a firm under investigation is an integrated network in its connection between lawyers and lawyers and clients[76].

This kind of analysis extends to agencies and their network interactions in advancing enforcement. These studies help at a preventative level, enhancing enforcement by implementing its task force and revealing the path to enforcement and the actors involved in that process. For example, one study[77] examined Securities and Exchange Commission (SEC) gratitude acknowledgments in press releases (addressed to the target of regulation)[78] and the types of cooperation in investigations. Through those gratitude disclosures, the study confirmed the SEC's cooperation with formal institutions and self-regulatory organizations but also uncovered the prominent role of U.S. postal inspectors in securities enforcement, an unexpected actor[79].

A few scholars had advanced network analysis in systemology, exploring the consistency of the legal families' classification by identifying community structures,[80] not merely by describing the taxonomy of the world's legal systems but by stating normative implications. For instance, the attribution of European countries to different legal traditions is commonly seen as a potential barrier to E.U. harmonization[81]. However, through the interaction of a single country with one of the five clusters previously classified,[82] network analysis showed that the traditional legal systems' taxonomy is outdated, highlighting different paths that encourage the harmonization of legal norms. Furthermore, this study is not the ultimate, but the intermediate goal that can help test other empirical studies, such as court cross-citations across different countries and their interaction with the cluster[83].

This brief account suggests that comparative law can benefit from empirical quantitative methods[84]. Rather than merely offering neutrality, quantitative empirical tools help choose and substantiate the functionalist or differentiative comparative approaches[85] with a methodological choice according to the goals of comparative research.

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[76] A.J. Kluegel, *The Firm As a Nexus of Organizational Theories: Sociological Perspectives on the Modern Law Firm*, in 12 *Annu. Rev. L. Soc. Sci.* 459 (2016).

[77] V. Winship, *Enforcement Networks*, in 37 *Yale J. Regul.* 274 (2020).

[78] How these disclosures are externalized might accomplish a deterrent effect. *Id.* at 326.

[79] Many scholars analyze enforcement at the federal level (between repeat-players) but overlook the relevance of unusual actors and one-shotters collaboration at the state level. *Id.*

[80] The study chose three main categories distributed in five variables relating to the commonalities between groups of countries, five code attributes related to legal infrastructures, and five variables addressing specific areas of the law. M. Siems, *Comparative Law* 2nd ed. (Cambridge: Cambridge University Press, 2018), 180–228.

[81] *Id.* at 207.

[82] An early study presented data of legal systems divided into four clusters: European Legal Culture, Mixed Legal Systems, the Rule by Law, and the Weak Law in Transition. M. Siems, *Varieties of legal systems: Towards a new global taxonomy*, in 12 *J. Institutional Econ.* 579–602 (2016).

[83] Siems, *supra* note 80.

[84] V. Zeno-Zencovich, *Comparing Comparative Law*, in G. Resta *et al.* (eds.), *COMPARARE. UNA RIFLESSIONE TRA LE DISCIPLINE* (SESTO SAN GIOVANNI: MIMESIS, 2020).

[85] De Coninck, *supra* note 47.

IV. METHODOLOGY

Observation is the starting point of the scientific method, and so it is also the starting point of comparative research[86]. However, mere observation is not enough to make comparative law a science. Some authors contend that, unlike law, natural sciences tend to progress because they are cumulative—without necessarily implying that they move forward. In contrast, in law, sometimes knowledge is circular, and theories tend to repeat infinitely[87]. I do not share such a drastic position[88]. However, I agree that making progress in the legal field is possible by drawing inferences about the law with real-world evidence and achieving systematicity in the observation[89].

Here, I anticipate the comparativists' question: what can one do with these methods? One caveat is that the things comparativists can understand from the world using empirical methods are limited. For example, comparativists can answer composition questions (such as the formants[90] of a particular legal system), questions about the relationships between legal institutions, and descriptive and causal questions.

The inferences that flow from descriptive questions are congenial to comparative studies by explaining things we do not know from other systems and uncovering aspects of the law through observation. However, empirical research can also answer causal questions, which delve into relationships of causation between two or more variables—namely that one is the other's effect.

Causative studies are the next step in empirical analysis by answering why some events happen[91] and which factors are relevant for that event to occur. In other words, what occurs before or after a change in the law takes place—such as enacting regulation, case law, etc. Thus, through causal questions, it would be possible to understand the effects of a legal

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[86] Friedman, *supra* note 5, at 766.
[87] *Id.*
[88] In the early 2000s, it was argued that the law could be a science, albeit empirical methods and systematicity were missing. Nowadays, empirical methods in law might promote the legal field not merely as a social science but as a hard science. T.S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical work, and the Scientific Method in the Study of Law*, in Univ. Ill. L. Rev. 875, 893 (2002).
[89] L. Epstein, G. King, *The Rules of Inference*, in 69 *U. Chi. L. Rev.* 517 (2002).
[90] Sacco's theory of legal formants is developed around the elements of living law that do not stop at national rules but extend to the doctrine or formulations of legal scholars and the decisions of judges. R. Sacco, *Legal formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in 39 *Am. J. Comp. L.* 1, 22 (1991). The deconstructed vision of the law offered by Sacco's legal formants, far from being a holistic approach, helps the jurist to identify the legal elements of a specific legal system when there is no positive law in appearance. Thus, it is possible to have conflicting "formants" within a given legal system. *Id.*
[91] Lawless *et al.*, *supra* note 3, at 23.

device or institution in its legal system and the consequences in the country or system of reception.[92]

A comparative empirical topic hinges on a cross-country area embracing unsolved questions of law followed by a literature review, which differs from non-empirical research. Besides helping to identify the undeveloped gaps or areas in the law,[93] the literature review in empirical research supports the research design, justifying the variables grounded in theory and invoking those that tend to produce observable implications. Only then would it be possible to elaborate on a plan of how to observe those implications[94]. Therefore, the empirical design must reflect the comparative scope through the research question by defining with extreme accuracy the terms (or variables) employed while considering the complexity of a legal system[95].

The role of the research question (or better-said hypothesis) is to invite theorizations or speculations about its answer[96]. Thus, the type of question will drive the choice of empirical methodology. In that sense, empirical quantitative method hypothesis using focuses on the comparability of legal solutions across systems. Comparability is based on the assumption of an alleged similarity (regardless of whether the units of comparison are functionally equivalent or not). As such, this assumption must be falsified. The falsification of the research question starts by establishing a null hypothesis, namely, a non-association between the variables to be tested.

The questions that can be answered through empirical quantitative design do not point in a single direction. They could involve an innovative question or a unique approach to an old question, but they can also address previous questions (or studies) that delivered conflicting responses. Empirically, it can update a study by introducing new data, taking advantage of technological developments, and using sophisticated tools that were not previously available[97].

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[92] Epstein, King, *supra* note 89, at 36. The causal inference is explained as the difference in two descriptive inferences (what we want to describe as an effect) translated in the average values of the dependent variables when a treatment is applied (the introduction of a regulation, a judgment, a filing, etc.) and the average values when that treatment is lifted or, better said, when the averaged values are controlled. By this operation, we would be able to observe the causal effect. *Id.*

[93] Lawless *et al.*, *supra* note 3.

[94] Epstein, King, *supra* note 89, at 65. In some instances, the implications we gather from mere observation are guided by intuition, which is not necessarily bad at first but it is likely incomplete or misleading. LAWLESS *ET AL.*, *supra* note 3, at 19.

[95] Friedman, *supra* note 5.

[96] Epstein, King, *supra* note 89, at 61. The speculation involved will help us theorize by giving a precise and reasoned answer flowing from the observable implication, i.e., what we expect to see in the real world. *Id.* (citing *J.E.B. v. Alabama*, 511 U.S. 127, 162 (1994) (Scalia, J., dissenting on a matter of jury peremptory challenges based on gender).

[97] *Id.*

When transforming the elements grounded in empirical comparative legal design, the legal values are converted into numerical/statistical values, synthesized in an equation. The equation is composed of independent or explanatory variables (those outcomes, events, or predictions) and dependent variables (the content of the outcome we try to explain in our research)[98]. Identifying those variables allows the comparison of the object of study with a standard, also known as the measurement process[99].

How do we measure or compare the object of a study with a standard? The measurement consists in finding the same meaning for the units of comparison. In pure quantitative empirical research, the measurement is done by obtaining (extracting) numerical values, while in qualitative empirical research, it involves a category. In the social sciences, quantitative and qualitative measurement methods usually merge.

The precision in defining the values assigned supports the empirical study's reliability and validity. Both reliability and validity are connected with the issues in coding law. As in any social science, numeric values attributed to the law face the problem of choosing a category transformed into two numbers: 1 and 0. For example, a positive reply to a legal question (e.g., Is this a comparative negligence jurisdiction?) is usually coded as 1, while a negative reply is coded as 0.

Social scientists frequently accept the idea that between 1 and 0, there are other "nuances" that we cannot observe[100]. In statistics, the probit model of regression analysis describes these nuances in quantitative empirical design and treats these responses as continuous and non-unidimensional variables. These characteristics assist the comparativist in drawing implications concerning the unobserved categories and, in some instances, formulating alternative explanations not initially considered in the design[101].

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[98] *Id.* at 65. Lawless *et al.*, *supra* note 3, at 21.

[99] Epstein, King, *supra* note 89, at 80.

[100] The definition of categorical variables as inherently discrete was proposed by George Udny Yule in 1912, employing a transformational approach by converting in 1 all the responses that were equal to a particular value in his studies on smallpox. This proposed characterization of variables started a debate between Yule and Pearson. Karl Pearson, Yule's former instructor, instead proposed the latent variable approach (known as the probit model), specifying that variables are continuous but unobserved. Notwithstanding, it is possible to categorize these latent variables because there is an underlying propensity to pertain to one category or another. J. Ekström, *The Phi-coefficient, the Tetrachoric Correlation Coefficient, and the Pearson-Yule Debate*, UCLA Department of Statistics Papers (2011). This model, the latent variable, better suits social research, especially when the observations are not extreme but can be less or equal to the expected value, as it is with respect to the elastic standards in the legal field.

[101] Since the legal field would be more inclined to use qualitative types of variables, it is wise to opt for a model that suits this type of analysis instead of opting for interval variables. Some authors deal with qualitative variables by including interval variables between 0 and 1 (0.1, 0.2, 0.3, etc.) when there is reason to believe that there is meaningful information in those intervals. *See* Siems, *supra* note 82. However, this approach forgets that even by slicing the variables into small pieces, the results will be the same as using the transformational approach, comparing exact values for 1 or 0, losing valuable information for legal implications.

How do we gather the information? Managing databases can entail alienating tasks. However, data science developments make the collection of information more accessible to legal scholars and favor the exploration of tools to answer the proposed question. While in some studies, the systematic collection of information is grounded on archival data; others have obtained study material by actively administering surveys.

Here is where the qualitative work merges with the quantitative since the product of those surveys is encoded into numbers. The social sciences and behavioral studies expertise allow the correct development of surveys, which require detail-oriented work. However, the responses and choices of participants can be affected by the framing effect[102] –how information is presented. Accordingly, the questions must be standardized to obtain participants' comparable information[103]. The standardization of questions for a survey poses an added hurdle in comparative law, dealing with multilingual, cross-country participants since the standardization of questions necessitates a standardization of language that goes beyond mere translation.

A recurrent technique in quantitative empirical legal studies is regression analysis. This type of analysis, borrowed from economics and statistics, involves correlation. Many are familiar with this word due to its use in daily parlance as indicating a comparison, but correlation involves much more than that.

This overview of quantitative empirical methodology illustrates how empirical design can add context to multiple areas of the law. Comparativists can take advantage of these methods and expand their scope by including culture in their analysis. Finally, comparativists can test when resorting to functional equivalences over differences (and vice versa) is appropriate in analyzing units of comparison.

V. REGRESSION ANALYSIS: AN EXAMPLE

In order to provide an example of the steps of empirical research, this section explores a preliminary study conducted on cryptoassets sales known as Initial Coin Offerings (ICOs)[104].

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[102] Ulen, *supra* note 32, at 207 (citing the studies of Kahneman, Tversky, *supra* note 34).

[103] Lawless *et al.*, *supra* note 3, at 62.

[104] Initial Coin Offerings or ICOs are vehicles for funding startups that use smart-contracts. Those vehicles try to mirror the Initial Public Offerings (IPOs) of regulated capital markets. P. DE FILIPPI, A. WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE* (2018). There are different derivations of crypto asset sales process, such as Initial Exchange Offerings (IEO), Security Token Offerings (STO), Initial Token Offerings (ITO), etc. For the purposes of this section, ICOs encompass all these categories. J. Chod, E. Lyandres, *A Theory of ICOs: Diversification, Agency, and Information Asymmetry*, in 67 Mgmt.. Sci. 5969 (2021). The classification of crypto assets, in general, is still an open debate. See Y. Guseva, *A Conceptual Framework for Digital-Asset Securities: Tokens and Coins as Debt and Equity*, in 80 *Md. L. Rev.* 166 (2021).

ICOs are vehicles blockchain startups use to fund their enterprises at a low cost by creating cryptoassets—digital assets—and evading investor protection from securities regulations[105]. Over time, the issuance of cryptoassets through ICOs went from attracting coders as investors to potentially attracting anyone who has access to the internet by connecting directly to promoters that advertise these enterprises as high-return investments in a trustless environment[106]. ICOs' resemblance to Initial Public Offerings (IPOs) is not a coincidence. Both IPOs and ICOs offer a funding mechanism where companies issue shares (intangible assets) to the public, but only IPOs are adequately regulated. Furthermore, regulation around IPOs involves not only companies but also centralized institutions.

Those centralized institutions, such as banks, play a fundamental role in protecting investors and the market against money laundering. However, in the new world of cryptoassets sales,[107] centralized actors are less appealing since decentralization and disintermediation are desired features.

The predominance of these features set the stage for theories on decentralization, such as whether decentralization translates into structureless companies, and on disintermediation, such as how (the lack of) intermediaries affect capital in ICOs. Some studies focused on the functional equivalences of ICOs compared to IPOs[108]. However, before assuming that both virtual and non-virtual funding mechanisms are comparable, thus delving into a functionalist analysis, it is necessary to unravel the principal components of the new funding mechanism (a new unit of comparison)—which marks the beginning of Decentralized Finance (DeFi)[109]. Provided that cryptoassets' sales are cross-border transactions, the primary assumption arises from identifying a common aspect across jurisdictions in real-world finance that also exists in cryptoasset sales. The element in traditional finance that all jurisdictions have in common is anti-money laundering practices.

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[105] Usually, cryptoassets are called tokens or coins. There is no specific national regulation in the U.S. against ICO frauds, but the Securities and Exchange Commission continues to police ICO schemes that fall within its catch-all category of "investment contract." *SEC v Howey*, 328 US 293 (1946).

[106] See DE FILIPPI, WRIGHT, *supra* note 104.

[107] Besides seeing control as state-backed monetary systems, the Cypherpunk movement sees control as state-backed monetary systems, acknowledging the risk of money laundering under this new virtual world but never dealing with it. T.C. May, *The Crypto Anarchist Manifesto* (1992), https://www.activism.net/cypherpunk/crypto-anarchy.html .

[108] *See* M. Offir, I. Sadeh, *ICO v IPO: Empirical Findings, Information Asymmetry and the Appropriate Regulatory Framework*, in 53 *Vand. J. Transnat'l L.* 526 (2020); R. Amsden, D. Schweizer, *Are Blockchain Crowdsales the New 'Gold Rush'? Success Determinants of Initial Coin Offerings* (April 16, 2018)(unpublished Working Paper).

[109] DeFi is a non-centralized technological distribution of financial services covering multiple jurisdictions. D.A. Zetzsche *et al.*, *Decentralized Finance*, in 6 *J. Financ. Regul.* 172 (2020).

Hence, I conducted a study focused on anti-money laundering practices, particularly Know Your Customer (KYC)[110] or investors' collection of information,[111] during the cryptoassets' sales. To see how these socio-legal relations reflect the data,[112] I draw the following hypothesis: whether KYC practices are associated with or affect the ICOs' success?

The process starts by defining the variables. On the one hand, the independent variable or outcome is the ICO's success, which I defined as the amount of money required by cryptopromoters to finance their enterprises. On the other hand, the dependent variables are divided into three strands. The first strand is composed by variables specific to the cryptoassets context, such as the platform used for the project. In the second strand, I identified the variables used in IPO studies, such as the type of industry, the use of virtual exchanges,[113] the KYC requirement to buy cryptoassets,[114] and the country of issuance.[115] Finally, I identified regulatory compliance variables, such as the minimum investment requirement,[116] the tax regulations, and the regulations imposing KYC[117].

Following data collection, I began to look for comparisons through the descriptive statistics summarizing the data[118]. Showing raw percentages is helpful because our scope is to look for patterns. However, it will be reductive to end our understanding of this mechanism by merely

[110] Know Your Customer practices (hereinafter KYC) are due diligence procedures applied to financial institutions, business entities, or market participants (such as brokers, dealers). These procedures require that institutions know the identity of the client to deter "criminals, kleptocrats, and others looking to hide ill-gotten proceeds to access the financial system anonymously." *See* Customer Due Diligence Requirements for Financial Institutions, 31 CFR parts 1010, 1020, 1023, 1024, and 1026.

[111] When companies resort to public capital, underwriters, an intermediary, use KYCs to avoid leaving money on the table (underpricing the shares on sale). Considering how the Cypherpunk movement emerged, it is unrealistic to think that underpricing is the goal that ICO promoters envisioned when exacting investors' information.

[112] Siems, *supra* note 1, at 879.

[113] Recurring to exchanges is not feared by promoters who prefer to incur sunk costs to achieve a solid audience of investors. In this scenario, exchanges act as clearinghouses providing the match between offer and demand.

[114] The difference between the variable's regulation assessing KYC (RegKYC) and KYC is that the latter is voluntary or self-imposed by the startups, not being subject to any jurisdiction that compels them to obtain this information from investors.

[115] The selection of the variable country, as self-reported, determines whether the original assumption of a global virtual market can be supported. The study further suggested no correlation between the variable country and a successful ICO.

[116] Whether ICO promoters require a minimum amount to buy a token (cryptoasset) might explain the promoter's willingness to reduce the number of buyers and exempt the enterprise from securities regulations. In the U.S., a company selling securities requires registration if the holder of registry has more than 500 unaccredited investors. Securities and Exchange Act, Pub. L. 73–291, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a et seq.).

[117] The hypothesis can be explained through an equation, $ICOSuccess = \alpha + \beta_1 KYC + \beta_2 Exch + \beta_3 Industry + \beta_5 Platf + \beta_6 MinInv + \beta_7 Country + \beta_8 RegTax + \beta_9 RegKYC + \varepsilon$. The equation presents ICO success as the independent variable and the remainder as dependent variables, plus the constant and the error margin.

[118] Mainly by observing frequent values and their distribution, i.e., examining the mean, median, mode, etc. Ulen, *supra* note 32, at 206.

observing rates[119]. Accordingly, the analysis followed the application of inferential statistics and the non-linear regression model[120].

In inferential statistics, statistical significance is a concept that explains the probability of the null hypothesis, namely, the non-correlation between KYC and successful cryptoassets' sales. A variable that reaches statistical significance[121] determines the rejection of the null hypothesis because it has been falsified, leading to an inference of an actual variable relationship. In other words, the alternative hypothesis shows a correlation between successful cryptoassets' sales through ICOs and KYC practices[122].

Even if the hypothesis-testing results showed an actual correlation,[123] testing the hypothesis is not enough since we need to analyze the effect's magnitude. Thus, it is necessary to use tools from complete logit analysis.

EMPIRICAL METHODS IN COMPARATIVE LAW: DATA TALKS

Table 1

Logit coefficients for variables of interest on total number of ICOs (N=1084)

	B	E^B	E^{Bx}	Z
Requires KYC to buy tokens?	**0.721*** **	**2.056**	**--**	**5.015**
Number of Tokens for sale	–0.001	1.000	0.898	–0.916
Minimum Investment Required	–0.0472	0.954	0.975	–0.399

[119] Merely looking at raw data without further analysis amounts to "playing with numbers." It is possible to make some inferences from looking at raw data, but the risk of pursuing the wrong inferences is high. LAWLESS *ET AL.*, *supra* note 3.

[120] The legal field's complex questions make some of these models (primarily linear regression models) inadequate in answering empirical legal questions. To this end, categorical variables are a better fit because they capture "the quality of the observation under study." *Id.* at 145.

[121] Statistical significance or probability is explained through an arbitrary threshold of 5%, which, if met, indicates the percentage of risk of concluding that a correlation exists when there is no actual correlation. However, statistical significance does not mean that the variable in question is statistically important or material. For example, in the U.S. securities law, materiality of information disclosed by corporations is given by the probability (the statistical significance) and the magnitude of the event. *Basic, Inc. v. Levinson*, 485 US 224, 238 (1988) (reaffirming the principle expressed in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (1968)).

[122] Lawless *et al.*, *supra* note 3, at 192. Conversely, the lack of statistical significance is not the same as lack of evidence. It just means that we fail to reject the null hypothesis and that there might be some alternative explanation and a path for further study.

[123] We can reject the hypothesis that all coefficients except the intercept are zero at the 0.001 level ($LRX^2(8) = 59.37, p < .001$).

Used an Exchange?	**1.193****	**3.298**	**--**	**3.098**
Type of Industry	0.002	1.002	1.016	0.246
Type of Platform used	0.007	1.007	1.011	0.169
Country (self-reported)	–0.015	0.985	0.941	–0.898
Regulation on transfer of tokens?	**–0.439*****	**0.645**	**--**	**–3.342**
Regulation imposing KYC?	–0.278	0.758	--	–1.194
Intercept	–0.412	--	--	--

Note: **p< 0.05,
***p<0.001

The table[124] shows that all else being equal, ICO promoters that employ KYC practices have the odds of achieving the soft-cap ($500,000) and finance their projects as 2.06 higher or 105% more[125] than those who do not use KYC procedures. Moreover, promoters who opted for the Initial Exchange Offering increased the odds of successful funding by 3.30, holding other variables constant, or are more likely to fund their enterprises by 229.8%[126]. In contrast, taxation over the transfer of tokens harms the ICO success (cryptoassets' sales through ICO), decreasing the odds of reaching the soft-cap by a factor of .65 or 35%[127].

The reported information also explains the occurrence of the event in a successful ICO[128]. A startup running an ICO that requires KYC to buy cryptoassets has higher probabilities of reaching the minimum amount necessary to finance its operations (the soft-cap) than a startup that does not require it[129]. Simultaneously, the results showed that using an intermediary (virtual exchange) also has higher probabilities of successfully attracting capital than without it[130]. Contrarily, the regulation regarding taxation between cryptoasset holders

[124] The odds ratio interpretation might be a hard task for those not acquainted with the technique. For purposes of this section, it is sufficient to know that we are dealing with a multiplicative coefficient, where the positive effects are always greater than one (in our example KYC= 2.056 and IEO=3.30) and the negative effects are between 0 and 1 (Tax Regulation is 0.65, indicates a negative magnitude).

[125] $(z = 5.02, p < 0.001)$, holding all other variables constant.

[126] Holding all other variables constant $(z = 3.09, p < 0.05)$.

[127] $(z = -3.34, p < 0.001)$, holding all other variables constant.

[128] All the results hold other variables at their mean.

[129] Precisely .17 higher probabilities. This difference is significant (95% CI: 0.11, 0.23).

[130] Higher probabilities of reaching the soft-cap by .29. Significance of the difference (95% CI: 0.12, 0.45).

has a negative impact on raising capital compared to a jurisdiction where the transfer between holders is not affected by taxes[131].

Measures of information[132] allow for an assessment of the model and how well the selected variables' design indicates success[133]. These variables give input for contextualization and help us understand other aspects of cryptoassets' sales through ICOs. Applying empirical methods and their interpretation is more than a thought experiment because it unravels a set of patterns that we see in every successful ICO[134].

Accounting for (the Cypherpunk) culture emphasizes different implications. Essentially, the lack of intermediaries in ICOs has a downside. Startups still need to signal[135] the quality[136] and reliability[137] of the project. Without reputational renters, the only way of signaling market integrity and transparency is by giving the impression of a filter among potential cryptoassets holders. This filter (KYC) can eradicate any fraudulent scheme thoughts between investors when entering the enterprise.

There are, however, unanswered questions from these results. Further information about KYC in this context is needed to rebut the original presumption around similarities. Since KYC is self-reported by startups, it is unknown whether KYC achieves different purposes and solves specific problems in regulated capital markets different from (and comparable to) unregulated ones. The data regarding KYC relies on a label that comes from IPOs. Although, when it comes to cryptoassets sales, there is a *mute* legal stratum (and ordering) even when,

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131 Lower probabilities by .10. Significance at 95% (CI: –0.17, –0.04). Further analysis shows that there are significant effects of the use of an exchange and tax regulation over tokens transfer (secondary markets) on the overall success of the ICO. The effect of these two variables was tested using different regression techniques, such as the Wald or the Likelihood Ratio Test, significance at the 0.001 level. J. SCOTT LONG, *Regression Models for Categorical and Limited Dependent Variables*, in 7 *Advanced Quantitative Techniques in the Social Sciences Series* 112 (1997).

132 The information criteria are grounded in notions of fit (how well is the model presented) and complexity (the numbers of observations and the parameters employed). Information measures are an approach to scalar measures of fit that stem from information theory and are essentially divided into two types in social research Akaike's information criterion (AIC) and Bayesian information criterion (BIC). AIC is a well-known measure in statistics that suffers a penalty in its computation. This penalty shows the preference for parsimony (less complexity) in explaining a model. Contrarily, the BIC or Bayesian information criterion is an updated type of measure whose popularity is due to the less complexity of the model. A.E. Raftery, *Bayesian Model Selection in Social Research*, in 25 *Socio. Method.* 111 (1995).

133 For example, in the logit model proposed, the original specification of the variables is the following: ICOSuccess, KYC, MinInvest, IEO, Industry, Platform, Country, Tokensfsale, RegTax. Then, after dropping some variables and comparing the model with the following: ICOSuccess, KYC, MinInvest, IEO, Tokensfsale, and RegTax, the results pointed out that the latter model is a better fit and provides *very strong support*. Raftery, *supra* note 132, at 134. The BIC measure also shows the strength of the evidence based on the value of the difference between the models. In our description, the Raftery BIC computation strongly favored the second model with a difference of 26.571. LONG, *supra* note 131.

134 Siems, *supra* note 1, at 871.

135 B.L. Connelly *et al.*, *Signaling Theory: A Review and Assessment*, in 37 *J. Mgmt.* 39 (2011).

136 T. Certo, *Influencing Initial Public Offering Investors with Prestige: Signaling with Board Structures*, in 28 Acad. Mgmt. Rev. 432 (2003).

137 D.M. Kreps, R. Wilson, *Reputation and Imperfect Information*, in 27 *J. Econ. Theory* 253 (1982).

apparently, there is no positive law[138]. Promoters' request for KYC in ICOs pertains to that unwritten law guided by cultural rules different from the ones we see in IPOs.

This example describes how empirical methods supplement our understanding of units of comparison, specifically, how these units of comparison should be understood, not merely how they work[139]. Moreover, empirical studies can show convergence (looking at patterns) and divergence (when there is no correlation between variables). For comparativists, empirical studies' most important outcome is that the method does not force comparability by establishing a presumption around similarities. The law and legal orders reflect society, not only in the formal sense but also as a reaction to legal problems with non-legal solutions—as in this case with technological solutions.

VI. LIMITATIONS AND A FUTURE OF COMBINED METHODS

Empirical methods propose a standard of comparison to show, uncover, or challenging legal problems. At the same time, these methods help the comparativist construct evidence-based theories and explain practices that serve no function by using combined methods.

The law and society movement has attracted non-legal scholars for a long time because lawyers solve problems and deliver solutions contingent on time. Conversely, empirical studies do not provide a definite answer, but they are cumulative in their work—hard, grubby work outside of the realm of law and theory[140].

Some of these methodologies are potent tools for answering specific legal questions. However, they might not assist in answering all of them. One such example is applying behavioral law and economics to deter criminal activity[141] or reduce specific social costs of accidents[142]. Behavioral law and economics fail to predict these instances (a positive application) because we are unable to predict happiness[143] or well-being in the long term[144].

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138 The literature on ICOs plays too much emphasis on positive law (comparing them to IPOs). This emphasis collides with the "unspoken acts and mute sources" that are part of the social structure of blockchain and Cypherpunks. R. Sacco, *Mute Law*, in 43 *Am. J. Comp. L.* 455, 460 (1995).

139 Michaels, *supra* note 2, at 370.

140 Friedman, *supra* note 5, at 780.

141 A study revealed that the reaction to imprisonment factors, such as duration and certainty, play no role in deterrence. Thus, deterrence does not depend on criminal law black letter, as law and economics affirmed, but is related to the choice of the criminal system. Ulen, *supra* note 32, at 223–24 (citing Paul Robinson & John Darley studies).

142 Ulen, *supra* note 32. However, other empirical techniques might provide better results.

143 Better known as affective forecasting in hedonic studies. S.R. Bagenstos, M. Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, in 60 *Vand. L. Rev.* 745–97 (2007).

144 Affective forecasting sheds light on overcompensation in tort liability because people (judges and juries) overlook the victim's adjustment capability, giving a higher weight to the victim's current situation. *Id.*

Furthermore, it is a good habit not to immediately draw inferences from lab-experiment results when dealing with experiments because those results can have other explanations not initially considered[145]. The unobserved alternative explanation may arrive from comparative law. The efforts in searching for cross-citations among countries in Europe is such an example. While citing foreign legislation might indicate a constant dialogue between courts and an implicit transplant, the goal of using the citation (to show knowledge, or based on the court's reputation, the linguistic proximity) and its role in the final decision must be considered[146].

Unlike empirical studies that offer a description of the world, empirical causative studies face an issue of certainty, namely, providing evidence by reverting the facts under study[147]. The empirical analysis is more accurately framed in terms of association, relationship, or correlation between variables[148]. Even Randomized Controlled Trials, which purport to assess causation (to some degree of certainty), would not answer why or how some factors produce that result. To better show causation, the comparativist must equip the research with further qualitative or quantitative techniques that deliver information on the relevant factor and adopt a solid theoretical comparative framework[149].

The theoretical framework is vital to avoiding errors in coding law. For example, one of the first approaches to using empirical methods and cross-country data was a study that aimed to explain the strength of shareholders' and creditors' protections, focusing on the differences between common law and civil law countries—known as LLSV[150].

In this study, coding rules lacked any systemological approach and families classification when merging and coding divergent areas based on their origins in company laws (or commercial codes). As a result, some countries were indicated and counted as French-origin countries, such as Italy, Indonesia, and Peru. Setting aside Indonesia (an Islamic system with

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145 Ulen, *supra* note 32, at 231 (citing real-world experiments that are compatible with behavioral results and predictions, *See* C.F. Camerer, *Prospect theory in the wild: Evidence from the field*, in D. Kahneman, A. Tversky (eds.), *CHOICE, VALUES, AND FRAMES* (Cambrige: Cambridge University Press, 2000), 288; S. DellaVigna*, Psychology and Economics: Evidence from the field*, in 47 *J. Econ. Lit.* 315 (2009)). Rival explanations must be considered to rule out the error of omitted variable bias—not accounting for a variable that clearly affected the outcome—and so leaving the causal inference biased. Epstein & King, *supra* note 89, at 78.

146 Siems, *supra* note 82, at 186 (citing some empirical studies that showed inferences of transplantation due to cross-citations concluding that language is the main proxy in cross-citations, more than the legal system where the citation comes from).

147 To revert an event, or consider it the cause or effect of another, the empirical technique needs to control for all the possible variables that might affect the outcome, with the possibility of giving also counterfactual proof of the inverse process. It is simply impossible. C. Engel, *Empirical Methods for the Law*, in 174 *J. Inst. Theor. Econ.* 5 (2018).

148 Epstein, King, *supra* note 89, at 37.

149 Greiner, *supra* note 61, at 69.

150 R. La Porta *et al.*, *Law and Finance*, in 106 *J. Polit. Econ.* 1113–1155 (1998).

a strong Dutch legal influence), Italy and Peru might have a common root and share the exact copy of the code[151] but are quite different in the values they pursue and their interpretation. Thus, the LLSV study and its positivistic or formalistic approach centered on the law-on-the-books (black-letter of the law), reverting into an uninformed or bare comparison[152].

The central issue around this study was the complete disregard for the law, at least from the view of a legal scholar that interprets and connects it to society. In the LLSV study, the law is merely a variable unrelated to its *legal origins*, but to the degree of deregulation[153]. Economic cross-country studies, such as LLSV and Legal Origins,[154] exacerbated a conflicted relationship between economists and comparativists. A rebuttal from comparativists replicating the results using the same quantitative analysis coupled with the comparative methodology would have been effective[155]. However, the comparative field merely considered it unsuitable without further explanation[156]. Some years passed before comparativists partially replicated this quantitative analysis according to the functionalist view in comparative law[157].

Nevertheless, the impact of the Legal Origins literature is widely used in empirical studies on economic growth. What is essential to consider in these studies is that they try to address a non-comparative law question[158]. Here, the comparativist failed to see that the empirical question speaks a corporate and economic language, rendering it more accessible to a non-comparative audience—its initial target[159]. Thus, it would be advisable to separate cross-country studies from comparative law studies and further from empirical comparative law studies.

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151 Peruvian scholars had transplanted a quite realistic copy of the Italian Civil Code, which is also a commercial code.

152 De Coninck, *supra* note 47. Moreover, the research design highlights the outdated bi-partition between civil and common law countries, once part of early comparative studies in private law. V. Zeno-Zencovich, *COMPARATIVE LEGAL SYSTEMS. A SHORT INTRODUCTION* (Roma: RomaTre Press, 2018), 92.

153 Michaels, *supra* note 20.

154 R. La Porta *et al.*, *The Economic Consequences of Legal Origins*, in 46 *J. Econ. Lit.* 285–332 (2008).

155 Meanwhile, other reviewers arising from business law introduced different tools to analyze and challenge the Legal Origins study. See, for instance, H. Spamann, *The Antidirector Rights Index Revisited*, in 23 *Rev. Fin. St.* 467 (2009).

156 Ulen, Garoupa, *supra* note 33.

157 Cabrelli, Siems, *supra* note 8. For a recent study, challenging the Legal origins work focusing on property law see Y.-C. Chang *et al.*, *Drawing the Legal Family Tree: An Empirical Comparative Study of 170 Dimensions of Property Law in 129 Jurisdictions*, in 13 *J. Leg. Anal.* 231 (2021).

158 For example, the Legal Origins study addresses a question on corporate law (efficient shareholder legal protections—connected to a degree of deregulation) from an economic standpoint, rather than a comparative law question from a business law perspective (measurement of shareholders protections observed in legal systems).

159 The idea of having U.S. regulation on shareholder protections as a standard for comparison appalled European comparativists. However, comparative law has been extremely Eurocentric for such a long time. Only recently, comparative law has considered other systems. Still, there are few studies on informal legal structures such as community Andean regions (derecho comunitario andino) and their decision-making process. To the best of my knowledge, none of them are empirical.

The outcome of employing empirical methods is that they can facilitate communication between legal scholars from different systems and branches, something less problematic for countries from the European tradition but highly challenging for countries that rely heavily on case law[160].

The results from empirical studies are descriptive,[161] which is a strength. From that point, a comparativist can merge descriptive results with the systems' cultural baggage and, eventually, implement the descriptive part with a normative claim[162].

The candor of a study is achieved through replication, where a dataset with an intelligible explanation of the variables is of paramount importance[163]. Legal scholars consider replication less prestigious and less favored than resorting to theory or models[164]. However, replication also enhances theoretical transparency. One can only generalize a concept or refute its generalization through replication, even if it can lead to unpopular conclusions[165].

Moreover, empirical research entails a great cost for scholars who do not have prior empirical training. In fact, it would be productive to start collaborations between comparativists and scholars in other fields. Nabokov's aspiration to pursue research in an ivory tower is not a good fit in modern research, where different perspectives can encourage discussion and an influx of ideas.

Furthermore, technological advancements such as Amazon Mechanical Turk (MTurk), a software that gives access to a vast audience of online participants to complete a research survey, have lowered the costs of research without diminishing its value[166]. However, few legally oriented datasets are ready to use, burdening comparativists. In the U.S., some governmental data is available,[167] as well as open databases such as the ICPSR[168]. Those can

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[160] Ulen, *supra* note 88, at 894. The development of the European Union facilitated both the insertion of comparative law courses in the law curriculum as well as the dialogue between European countries for purposes of harmonization. On the contrary, in the U.S., comparative law has not received the same attention, thwarting students' understanding and connection with foreign rules. For example, consider the overreaching scope of the General Data Protection Regulation, a new job source in the legal field whose correct understanding requires a massive dose of European and comparative regulation.

[161] The legal field has not structured a common core in the study of law and has not developed methods to communicate between nations as it happens in hard sciences. The use of empirical methods might be such. Ulen, *supra* note 88, 899.

[162] Siems, *supra* note 82, at 599.

[163] As well as to avoid infamous circumstances such as fraudsters in academia. Ulen, *supra* note 52, at 25.

[164] Ulen, *supra* note 88, at 899.

[165] Greiner, *supra* note 61, at 70.

[166] K. Irvine *et al.*, *Law and Psychology Grows Up, Goes Online, and Replicates*, in 15 *J. Empir. Leg. Stud.* 320 (2018).

[167] Such as the United States Courts, Statistics & Reports, available at https://www.uscourts.gov/statistics-reports (last visited Jan. 18, 2022).

[168] Inter-University Consortium for Political and Social Research (ICPSR), held by the University of Michigan, maintains and updates an impressive number of datasets arising from previous studies from scholars and U.S. governmental institutions. At the moment, ten countries use this portal for empirical research. ICPSR, Find & Analyze Data, https://www.icpsr.umich.edu/web/pages/ICPSR/index.html (last visited Jan. 18, 2022).

reduce empirical research costs but have not diminished comparative legal research costs[169]. Therefore, raising awareness about legal data storage and availability for these studies is essential.

VII. CONCLUSION

Why does comparative law need empirical methods? To explore this initial question, I described how a comparativist could measure different units of comparison with quantitative tools. In addition, using these methods enhances communication between scholars from different fields and jurisdictions and provides comparativists to engage in the empirical debate. Unfortunately, in the last few decades, the interest in comparative law has diminished, especially in the U.S. One of the reasons for this disinterest in comparative legal research is free online access to legal materials and their translation into English[170].

Empirical comparative law provides a different type of research with the added effort of using empirical or statistical tools. This characterization is consistent with comparative law's perspective as "part of the general development and consolidation of branches of human knowledge."[171] These branches are also scientific.[172] The added value is the methodological knowledge of comparative research that can inform hypothesis-based questions using combined methods.

The significance of experiments lies in their ability to provide evidence capable of correcting a false understanding of a substantive area of the law with methods retrieved outside of the law. After abandoning the realm of the law, the most difficult part is to preserve legal analysis even when using interdisciplinary studies. Interdisciplinarity is a two-way path. While other disciplines might help answer comparative law questions, comparative law might support other disciplines, informing questions from other social sciences.

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[169] In Italy, the distinguished comparativist Maurizio Lupoi started the project *Archivio Mondiale dei Trust*, a multilingual open-source legal database with case law, agency rulings, and legislation regarding Trust law. Once held by the Consorzio Interuniversitario per l'Aggiornamento Professionale in Campo Giuridico UNIFORMA, it was updated until 2014, https://www.trusts.it/ (last visited Jan. 18, 2022). The new version of this archival repository is being held by the *Associazione Il trust in Italia* with further Italian legislation, case law, and rulings devoted to Trust law, https://www.il-trust-in-italia.it/index.php?mod=area&mid=70 (last visited Jan. 18, 2022).

[170] The internet has reduced the distance between legal scholars and legal systems because of online resource availability. Google translate offers an instant translation of any webpage or document with great accuracy.

[171] Zeno-Zencovich, *supra* note 84, at 230.

[172] Ulen, *supra* note 88.

The increasing interest in empirical legal studies has incentivized many law schools[173] to equip their students with an understanding of these tools and, most importantly, make them informed readers from a consumer perspective. Thus, future generations of lawyers, judges, and legal scholars will communicate, to various audiences, the relevance of expert testimony, policy choices, and engagement in empirical debate making the product of an empirical legal study understandable.

Finally, the main point to acknowledge is that these methods are used in a probabilistic non-deterministic manner. Thus, one should skeptically confront the results, especially when they confirm our predictions in law that might point to a functionalist or differentialist analysis and continue to develop a better holistic analysis for the alternative explanations since the law is, first of all, a social product[174].

[173] To mention some of the pioneers in teaching empirical methodology in U.S. Law Schools—currently, a rising course offered in the law school curricula—John J. Donohue III, *Statistical Inference in Law* at Stanford Law School, https://law.stanford.edu/courses/statistical-inference-in-law/; Richard H. Sander, *Empirical Reasoning in Law* at UCLA School of Law, https://law.ucla.edu/faculty/faculty-profiles/richard-h-sander/law-165/; Michael Heise at Cornell Law School, *Empirical Methods for Lawyers* https://www.lawschool.cornell.edu/faculty/bio_michael_heise.cfm; and Robert M. Lawless & Jennifer K. Robbennolt at the University of Illinois at Urbana-Champaign, *Empirical Methods in Law* https://law.illinois.edu/academics/courses/empirical-methods-in-law/.

[174] Zeno-Zencovich, *supra* note 152.

DOES CICERO'S DECISION STAND THE TEST OF TIME? FAMINE AT RHODES AND COMPARATIVE LAW AND ECONOMICS APPROACH

Margot Callewaert and Mitja Kovac[1]

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The question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. Does the party have the right to remain silent and profit from her secret knowledge? These questions have fascinated scholars in philosophy, law and history from ancient times and have produced an impressive amount of literature, decisions and comments. Most recently, it has also gained extensive attention in many prominent laws and among economics scholars. In addition, the pre-contractual duty to disclose information is, among many comparative legal scholars, widely used as an illustration of the current deep, sharp common/civil law division. This paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly the famous Cicero decision on the famine at Rhodes.

I. INTRODUCTION

The question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains represents one of the most puzzling and extensively debated legal issues. Does the party have the right to remain silent and profit from her secret knowledge? These questions have fascinated scholars in philosophy, law and history from ancient times and has produced an impressive amount of literature, decisions and comments. Most recently, it has also gained extensive attention among prominent economics scholars investigating the legal and economic system of ancient Rome. For example, recent law and economics studies illustrate a fruitful potential of legal-economic theory for shedding light on the institutions of the ancient world, and in particular for enhancing our understanding of the legal and economic arrangements found in the Roman Empire[2]. Moreover, Abatino and Dari-Mattiacci argue that non-disclosure remedies

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[2] G. Parsons Miller, *Rome and the Economics of Ancient Law II*, in G. Dari-Mattiacci, D.P. Kehoe (eds.), *Roman Law and Economics*, Vol. II (Oxford: Oxford University Press, 2020), 1.

provided by Roman law were efficient in their sphere of application[3]. In addition, the pre-contractual duty to disclose information is, among many comparative legal scholars, widely used as an illustration of the current deep, sharp common/civil law division, which origins could be traced back to ancient Roman law.

This paper joints this critical debate and employs law and economics theory and methodology to explore the disclosure duties in the contract law of ancient Rome. More particularly, while focusing on the famous Cicero decision on the famine at Rhodes case, the paper overcomes an old legal and moral crux and critically examines the legal obligations of parties to disclose private information to their counterparties in contract for sale of ancient Roman law. Moreover, this paper resonates on this ancient Cicero decision and provides its modern applications, reflections for the comparative law and economics scholarship of pre-contractual disclosure duties.

This paper complements our earlier work on the "disclosure duties" in four noteworthy respects[4]. First, this paper overcomes an old legal and moral crux and critically examines the disclosure duties of ancient Roman law and in particularly the famous Cicero decision on the famine at Rhodes. Second, this paper explores whether the same outcome as in the famine at Rhodes case could still be envisaged today while applying law & economics concepts and whether his decision actually corresponds with the economically inspired optimal rule. Third, this paper provides the comparative law and economics analysis of pre-contractual disclosure duties in the ancient Roman, English, US and Belgian law of contracts. Fourth, this paper critically evaluates the impact of the Roman law and Cicero's law-making on the development and economic logic of contemporary legal systems.

In this article, the analysis is as positive as it is normative. The analytical approach employs an inter-disciplinary dynamic[5] investigation and enriches it with the concepts used in the economic analysis of law[6]. Moreover, the employed law and economics methodology follows the classical comparative law and economics approach[7]. This classical comparative law and economics approach serves as a bridge between facts and normative conclusions, between

[3] B. Abatino, G. Dari-Mattiaci, *The Dual Origin of the Duty to Disclose in Roman Law*, in Dari-Mattiacci, Kehoe, *supra* note 1, 401-427.

[4] G. de Geest, M. Kovač, *Formation of Contracts in the Draft Common Frame of Reference*, in 17 Eur. Rev. Private L. 113-132 (2009); M. Kovač, *Comparative Contract Law and Economics* (Cheltenham: Elgar Publishing, 2011).

[5] The dynamic part of the analysis employs recent behavioural insights that offer a novel assessment of how parties will react in their daily behaviour upon different set of rules and norms.

[6] For a synthesis of law and economics scholarship, see G. de Geest (ed.), *Contract Law and Economics – Encyclopaedia of Law and Economics*, Vol. 6, 2nd ed. (Cheltenham: Elgar Publishing, 2011). Also see R.A. Posner, *Economic Analysis of Law* 8th ed. (New York, NY: Wolters Kluwer Law Publishers, 2011).

[7] R. van den Bergh, *The Roundabouts of European Law and Economics* (Den Hague: Eleven International Publishing, 2018), 21-28.

economic theory and policy proposals for an improved legal system[8]. Due to the limited scope of this paper, we merely employ economic methodology which seeks to complement other legal disciplines by uncovering the underlying economic logic and social effects of assessed legal institutions[9]. In looking for transparency in the law, the employed approach connects to what "the best traditional legal scholarship aims to do: clarifying the underlying order of law as it is; offering tools for fashioning law to cope with novel situations"[10].

However, several caveats should be stated. Namely, the aim of the paper is not to impose a final word on the matter, but to undertake an exploratory analysis of the relationship between the development of contract law and its economic effects. Moreover, there are further factors and issues that might drive the observed results (and that call for further investigation) as for example issues of (i) political biases of courts, (ii) political neutrality of economic approaches, (iii) underlying sociological and psychological phenomena, and (iv) fairness qualities.

This paper is structured as follows. The first part offers economically inspired conceptual framework and literature review for the categorization of the duty to disclose information. The second part examines the duty to disclose in Roman law, introduces an ancient "famine at Rhodes" case and presents Cicero's reasoning and his reflections on the concepts of justice and fairness. The fourth part synthesizes main law and economics principles and provides a law and economics treatment of Cicero's case. Finally, some brief conclusions are presented.

II. CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW

One of the most extensively debated questions is under what circumstances an individual has a duty to disclose relevant, valuable information unknown to the person with whom she bargains[11]. What follows is a survey of prior legal and economics literature on the pre-

[8] *Ibid.* See also U. Mattei, *Comparative Law and Economics* (Ann Arbor, MI: The University of Michigan Press, 1997).

[9] Employed methodology complements traditional legal disciplines by bringing to light a logic which decision-makers follow without necessarily expressing it in their reasons for judgement, yet which constraints the results they can arrive at. It also seeks to make this logic transparent to outside observers. See A. Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (London: Hart Publishing, 2006), 11-16. See also G. Calabresi, *The Future of Law & Economics* (New Haven, CT: Yale University Press, 2016); and R.A. Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge, Mass: Harvard University Press, 2016).

[10] E. Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham: Elgar Publishing, 2013), 6.

[11] Obviously, we are referring here to the common's law concept of unilateral mistake with its civil counterpart. Since the most important doctrinal distinction in the law of mistake is the one drawn between 'unilateral' and 'mutual' mistakes, the focus of our discussion is on the unilateral one.

contractual duties of disclosure, summarizing the major conclusions drawn from the literature[12].

In his seminal article, Anthony Kronman discusses the problem of unilateral mistake and offers an economic justification for the rule that a unilaterally mistaken promisor is excused when his error is known or should be known to the other party[13]. Kronman's analysis, based on a distinction of how the informational asymmetry arose, introduces a basic distinction between two kinds of information – information which is the result of a deliberate search and information which has been casually acquired. He defines deliberately acquired information as socially useful information[14] whose acquisition entails costs which would not have incurred but for the likelihood that the information in question would actually be produced[15]. If the costs incurred in acquiring information would have incurred in any case, the information may be said to have been casually acquired[16]. Thus, if information has been deliberately acquired, non-disclosure should be permitted, since this is the only effective way of providing an incentive to invest in the production of such knowledge. Conversely, if information was casually acquired, then disclosure should be required. However, as Kronman argues, if the information of this sort is socially useful as well, a disclosure requirement will not cause a sharp reduction in the amount of such information actually produced[17]. He argues further that a rule permitting non-disclosure[18] corresponds to an arrangement which parties themselves would have been likely to adopt. In the case of such a gap, reducing transaction costs demands providing a legal rule, which parties would agree to if they had deliberately addressed the problem. This consideration, coupled with a reduction in the production of socially useful information, according to Kronman, suggests that allocative efficiency is best served by permitting one who possesses deliberately acquired information to enter and enforce favorable bargains without disclosing what he knows. A legal privilege of non-disclosure is, in effect, a property right and shows that where special knowledge or

[12] For a synthesis see de Geest, Kovač, *supra* note 3; H. B. Schäefer, C. Ott, *The Economic Analysis of Civil Law* (Cheltenham: Elgar Publishing, 2004); G. de Geest, *Economische analyse van het contracten- en quasi-contractenrecht* (Antwerpen: Maklu, 1994).

[13] A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, in 7 J. Legal Stud. 11 (1978).

[14] From a social point of view, it is desirable, thus promoting allocative efficiency, that information which reveals a change in circumstances affecting the relative value of commodities reaches the market as soon as possible (this information is supplied by individuals either directly, by being publicized, or indirectly, when it is signaled by an individual's market behavior).

[15] These costs may include not only direct search costs but also the costs of developing an initial expertise – for example the costs of attending business school. Kronman, *supra* note 12, at 13.

[16] Kronman, s*upra* note 12, at 13.

[17] 'Casually acquired information represents the ideal limit of a continuum – the case in which the change in magnitude that results from eliminating one of the benefits of possessing certain information is zero. The decline in the production of a certain kind of information which is caused by denying its possessor the right to appropriate the information for his own benefit is small, it is likely to be more than offset by the corresponding social gain that results from avoidance of mistakes;' Kronman, *supra* note 12, at 14.

[18] This has the effect of imposing the risk of a mistake on the mistaken party.

information is the fruit of a deliberate search the assignment of a property right is required in order to ensure production of the information at a socially desirable level.

Assuming that courts can easily discriminate between those who have acquired information casually or deliberately, Kronman, upon economic justification, proposes imposing a duty to disclose on a case-by-case basis. However, as he also recognizes, a rule which calls for a case-by-case application of disclosure requirement is likely to involve factual issues that will be difficult and prohibitively expensive to resolve. Thus, he proposes a uniformly applied blanket rule across each class of cases involving the same sort of information[19].

Kronman's analysis was subsequently picked up, supplemented and modified by many authors. According to Posner, imposing a general duty of disclosure across the board would be inefficient; it would discourage the acquisition of information and often impose the duty of care on the wrong party[20]. In line with Kronman's reasoning, Posner argues that liability for non-disclosure should depend on which of the parties to the transaction, the seller or buyer, can produce, convey or obtain the pertinent information at a lower cost. If the relevant product characteristic is one which the buyer can determine by casual inspection or handling at the time of purchase, then it would be redundant to require the seller to disclose it[21]. Thus, the least cost information gatherer/provider principle should apply. In Posner's view, the case for requiring disclosure is strongest when a product characteristic is not ascertainable by the consumer at low cost. However, government intervention to require sellers to make disclosures may not be necessary either. Competitive pressure may make sellers offer warranties of particular characteristics of a product - a guarantee of results, making the disclosure of information unnecessary[22].

Cooter and Ulen distinguish between productive information and redistributive information[23]. Productive information can be used to produce more wealth, by allocating resources more efficiently. According to them, efficiency demands giving people strong incentives to discover productive facts; in contrast, redistributive information creates a bargaining advantage that can be used to redistribute wealth in favor of the informed party. Investment in discovering redistributive information wastes resources and induces defensive

[19] For example, information about the market conditions or about the defects in property held for sale. Kronman, *supra* note 12, at 17.
[20] Posner, s*upra* note 5, 128-130.
[21] This would be the case when for example determining a product's characteristic requires actual use rather than just presale inspection or handling.
[22] Posner, s*upra* note 5, at 113.
[23] R. Cooter, T. Ulen, *Law and Economics*, 6th ed. (Boston, Mass.: Person Education, 2012).

expenditures among people trying not to lose their wealth to better-informed people[24]. Legislators should create incentives to discover productive information, and should discourage investment in discovering redistributive information. They argue that contracts based on one party's knowledge of productive information should be enforced, whereas contracts based on one party's knowledge of purely redistributive information should not be enforced[25].

Trebilcock states that sellers would generally have to disclose information they possess about material facts to buyers, whether the information is casually or deliberately acquired, unless disclosure is likely to discourage its acquisition[26]. Material facts might be understood to refer to those facts the ignorance of which is likely to substantially impair the expected value of the transaction to the buyer[27]. In contrast, he argues, buyers would generally be under no duty of disclosure, however they acquired superior information, and because we want them not just to acquire the information but to utilize it in transactions, if resources are to be moved from less to more productive users[28].

Wonnell offers the basic structure for a general theory of non-disclosure, and argues that the law in the non-disclosure area makes many economically justifiable distinctions[29]. He discusses the trade-off between exchange-based and promise-based policies in contract law, and offers four additional factors for the calculus affecting buyer's non-disclosure and the non-disclosure of extrinsic facts[30].

Others, while discussing mutual mistake, argue that the existing rights[31] assignment under mutual mistake does not result in either over- or under-production of information[32]. Smith and Smith argue that the possibility that a contract may be avoided (when parties share a mistaken assumption) works like a warranty does in reducing information asymmetries[33]. Both institutions (warranty and mutual mistake) provide incentives to represent accurately

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[24] Defensive expenditures thus prevent redistribution, rather than produce something. It thus wastes resources directly and indirectly. Cooter, Ulen, s*upra* note 22, at 273.

[25] Cooter, Ulen, s*upra* note 22, at 273.

[26] J.M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass: Harvard University Press, 1993).

[27] Trebilcock, s*upra* note 25, at 114.

[28] This bias favoring buyers over sellers in the material non-disclosure rules can be, according to Trebilcock, supported also on other grounds; see *supra* note 25, at 114.

[29] T.C. Wonnell, *The Structure of a General Theory of Non-disclosure*, in 41 Case W. Res. L. Rev. 329 (1991).

[30] Those factors which should be taken into account are the efficiency gains from merging information and resources, internalizing the external benefits of entrepreneurial activities, providing advanced pricing signals of impending changes in supply or demand, and avoiding the opportunistic or extortionate use of disclosed information; Wonnnel, *supra* note 28.

[31] The legal remedy for mutual mistake is a voidable contract.

[32] J.K. Smith, R.L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, in 19 J. Legal Stud. 467 – 488 (1990). See also E. Rasmusen, I. Ayres, *Mutual and Unilateral Mistake in Contract Law*, in 22 J. Legal Stud. 309-345 (1993).

[33] If a product under warranty proves defective, the seller must replace the product or compensate the buyer; *supra* note 19, at 488.

the product and to provide information when information may not be symmetrically distributed. The doctrine of mutual mistake is thus an important facilitator of bargains when self-protective measures and certification are not likely to be supplied[34]. Further, Birmingham emphasizes the inefficiency of over-investment in the search for information[35].

Grossman[36] and Milgrom[37] focus on how much information (which is already at their disposal) would be voluntarily disclosed by sellers. Employing game theory, they find that complete voluntary disclosure of information results because a buyer's negative inference from a seller's silence would lead to an unraveling of any situation in which the seller is silent. Matthews and Postlewaite examine a model with free acquisition of information and disclosure and found that sellers would acquire information and voluntarily disclose it (if they cannot prove that they are ignorant)[38]. However, this complete unraveling does not occur – and some sellers keep silent in equilibrium – under a variety of alternative assumptions. Jovanovic concludes that whether information is of purely private value or not, more than the socially optimal amount of disclosure takes place[39]. He continues that the optimal policy is for the government to subsidize sales without disclosure[40]. Farrell argues that information is costly for sellers to acquire,[41] while Fishman and Hagerty argue that under certain circumstances, rules that limit the discretion in information disclosure increase informational quality and thus improve economic decisions[42]. Okuno-Fujiwara, Postlewaite, and Suzumara provide a fairly general analysis of conditions under which voluntary disclosure leads to complete disclosure of information[43]. They show that incomplete information about whether some information is known or not known by other agents is typically not certifiable, and this may well lead to less than full revealing of private information. Also, if the information structure becomes complex, agents may prefer to reveal nothing to revealing all they know, if those are the alternatives[44]. However, these contributions just discuss how much already

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[34] Smith, Smith, s*upra* note 31, at 488.
[35] L.R. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma: Laidlaw v. Organ*, in 29 WM. & Mary L. Rev. 249 (1988).
[36] J.S. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, in 24 J. L. and Econ. 461-489 (1981).
[37] R.P. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, in 12 Bell J. Econ. 380-391 (1981).
[38] S. Matthews, A. Postlewaite, *Quality Testing and Disclosure*, in 16 RAND J. Econ. 328-340 (1985).
[39] B. Jovanovic, *Truthful Disclosure of Information*, in 13 Bell J. Econ. 36-44 (1982).
[40] *Ibid.*
[41] J. Farrell, *Voluntary Disclosure: Robustness of the Unraveling Result, and Comments on Its Importance*, in R. Grieson (ed.), *Antitrust and Regulation* (Lanham, MD: Lexington books, 1986).
[42] J.M. Fishman, M.K. Hagerty, *The Optimal Amount of Discretion to Allow in Disclosure*, in 105 Q. J. Econ. 427-444 (1990).
[43] M. Okuno-Fujiwara *et al.*, *Strategic Information Revelation*, 57 Rev. Econ. Stud. 25-47 (1990).
[44] *Ibid.*, at 40.

available information would be eventually disclosed, but are not concerned with the actual acquisition (production) of information.

Still, Shavell[45] builds on the work of Farrell and Sobel,[46] who first investigated costly acquisition of information prior to disclosure. He furthers their model and Kronman's analysis by allowing information to have social value and for buyers to be the parties who acquire information. Shavell's main conclusions[47] are: first, if information is socially valuable[48] because it can be used to raise value, then its disclosure by a seller to a buyer is clearly desirable; second, if information is not socially valuable, then the effort to acquire it represents pure social waste. In this case a disclosure obligation is socially desirable because it would reduce the incentive to acquire such information. Third, if information is socially valuable, then the effort to acquire it is socially desirable if its costs are lower than its expected value. In such a case, for buyers to have an incentive to acquire information, they must have the right not to disclose it. Yet, if they have this right, their incentive to acquire information would be excessive. Thus, as Shavell proposes, it may, or may not be socially desirable for buyers to be free from a disclosure obligation, depending on the particulars of the transaction[49].

Also, Kötz argues that such consideration seems to be not only perfectly legitimate, but also helpful and productive[50]. Gordley, too, supports the imposition of a duty to disclosure and agrees that there should be an exception if one of the parties has expended money or effort to acquire the information[51].

Finally, Grosskopf and Medina reassessed the conventional economic analysis of disclosure, offering additional competition-based argumentation to the aforementioned literature[52]. They argue that parties invest resources in acquiring information not only to strengthen their bargaining position *vis-à-vis* their counterpart (for example the seller) but also to achieve an

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[45] S. Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. Econ. 20-36 (1994).

[46] Farrell, Joseph and Joel Sobel, 'Voluntary Disclosure of Information,' unpublished paper, 1983.

[47] Shavell (*supra* note 44, at 20) examines the model of the acquisition of information and its disclosure, emphasizing two distinctions: whether it is sellers or buyers who decide to acquire information; and whether information is mere foreknowledge or instead is socially beneficial because it can lead to an increase in value.

[48] Shavell (*supra* note 44, at 21) defines socially valuable information as one which allows an action to be taken that raises the value of the good to the party who possesses it.

[49] *Supra* note 38, at 21.

[50] H. Kötz, *Precontractual Duties of Disclosure: A Comparative and Economic Perspective*, in 9 Eur. J. L. and Econ. 5-19 (2000).

[51] J. Gordley, *Mistake in Contract Formation*, in 52 Am. J. Comp. L. 433-68 (2004).

[52] O. Grosskopf, B. Medina, *Why do we know what we know? Reevaluating the Economic Case against Pre-contractual Disclosure Duties and for Break-up Fees*, Bepress, 2006, available at: http://works.bepress.com/barak_medina/2 . Although one should note, in line with Kronman's and Shavell's foundations. See also R.E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, The Duty to Disclose, and Fraud*, in 15 Harv. J.L. & Pub. Pol'y 783 (1992); and A. Kull, *Unilateral Mistake: The Baseball Card Case*, in 70 Wash. U L.Q. 57 (1992).

advantage *vis-à-vis* their competitors (for example other potential purchasers of the same asset), endeavoring to increase the investing party's likelihood of forming a contract.

III. THE DUTY TO DISCLOSE IN ROMAN LAW

Consensual contracts in Roman law break into two groups, sale, hire and *societas* which are perfectly bilateral and have in each case a *quid pro quo*, consideration contracts, and mandate which is only imperfectly bilateral and is gratuitous. Contracts for sale of goods gave rise to *bona fidei*, *iudicia*, *actio empti* for the buyer, *venditi* for the vendor[53]. The binding force of Roman contracts can hardly be overstated, and the formation of contracts rested on consent[54]. However, consent being necessary the circumstances of fraud (*dolus*), violence or threats (*metus*) and mistake might make consent unreal[55].

In cases of *dolus* a consent obtained by such fraud was none the less consent and the transaction was prima facie valid[56]. Yet in *stricti iuris* transactions, if there was a serious fraud, and this point was expressly invoked in the action (*exceptio doli*) the action was lost[57]. Buckland suggest that in *bona fidei* transactions to order payment only of what was due *ex fide bona*, the point of *dolus* could always be raised by the defence without any express *exceptio*, and the condemnation reduced, or the action dismissed, as the case might require[58]. If the exchange has been completed, then in the absence of any other remedy, the *actio doli* could be invoked to recover the loss caused by the fraud[59].

In instances of mistakes Roman law regarded such contracts void. In *bona fidei* exchanges (sales) the rule was that fundamental mistake avoided contract[60]. On the other hand, error in *substantia* must have been such that contract would certainly not have been made in knowledge of the facts[61].

Moreover, there have been two different sets of officials, the *aediles curules* (having jurisdiction over regulated cattle and slave markets) and the *praetor* (having general civilian jurisdiction over contracts) that actually developed remedies for mistakes, fraud, error and other

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53 W.W. Buckland, *A Manual of Roman Private Law* (Cambridge: Cambridge University Press, 1953), at 278.
54 In most cases also on some other formal requirement; *ibid.* at 251.
55 *Ibid.* at 252.
56 *Ibid.*
57 G. 4.117.
58 Buckland, *supra* note 52, at 252.
59 However, if the aggrieved party transferred property then there was generally an action (condictio) for the recovery of what had been handed over or its value; *ibid.* at 252.
60 Yet, Roman law does not offer any definition on what is fundamental; *ibid.* at 253.
61 Yet, as Buckland suggests Roman texts do not lend themselves to any clear-cut-rule and sometimes even laid down the rule that misdescription in an important point avoided the agreement, while if it was a minor point, there was a claim for compensation; *ibid.* at 254.

nonconformity in sales contracts[62]. The praetor had the power of *iurisdictio* to resolve disputes between litigants and of *ius edicendi* to issue an edict listing the remedies available to litigants[63]. This paper focuses on praetor's jurisprudence which provided a single on-the-contract remedy (*actio ex empto*), affirming the contract but allowing the buyer to claim damages[64]. Those damages had to be calculated according to the buyer's negative interest and were meant to make the buyer whole with the respect to his position prior to the contract[65].

However, in the Augustan period, a convergence of different remedies could be detected and the praetor also introduced an off-the-contract remedy (*actio ex empto ad redhibendum*) which also included the possibility of obtaining restitution[66]. With such action the buyer returned the good and asked for the restitution of the price paid[67]. In addition, Donadio suggests that a buyer in a market sale could undertake an action either with aediles and choose between restitution (*actio redhibitoria*) and price reduction (*actio quanti minoris*) or could resort to general jurisdiction of praetor initiating an action employing *actio ex empto*[68].

III.1 FAMINE AT RHODES CASE

Cicero's *De Officiis* (On Duties) contains a discussion on honest business dealings. He states that people want to be honest but that it might not always be obvious what an honest person should do in certain business situations[69]. It is not always clear what we should do when we are confronted with an opportunity where we can personally gain by refraining from saying or doing something[70].

To this end, Cicero introduces a case that was first developed in the second century B.C. by the Stoic philosopher Diogenes of Babylon, and his pupil Antipater of Tarsus[71]. Cicero analyses this case from an ethical point of view. What should we do when what is right and what is profitable conflict with each other? He states that personal advantage gained at the

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62 Abatino, Dari-Mattiacci, *supra* note 2, at 401. See also V. Arangio-Ruiz, *La compravendita in diritto romano* (Napoli: Jovene, 1956), 237-239; and M. Talamanca, *Istituzioni di diritto romano* (Milano: Giuffre, 1990), 657-8.

63 See e.g. L. de Ligt, *Fairs and Markets in the Roman Empire: Economic and Social Aspects of Periodic Trade in Pre-Industrial Society* (Amsterdam: Gieben, 1993); and Buckland, *supra* note 52.

64 Abatino and Dari-Mattiacci (*supra* note 2, at p. 401) suggest that these kinds of damages (*damnum emergens*) could be regarded as very similar to the modern reliance damages.

65 Abatino, Dari-Mattiacci, *supra* note 2, at 408. See also Talamanca, *supra* note 61 at 591.

66 See e.g. A. Watson, *Seller's liability for defects: aedicilian edict and praetorian law*, in 37 Iura 167-175 (1987); and N. Donadio, *La tutela del compratore tra actiones aediliciae e action empty* (Milano: Giuffre, 2004), 37-38.

67 D. 21.1.23.7; D. 21.1.60.

68 Donadio, supra note 65, at p. 34. See also N. Donadio, *Promissio Auctionatoris*, in 39 Index 524-57 (2011).

69 R. Richards, *Cicero and the Ethics of Honest Business Dealings*, Online Journal of Ethics, 1995-1997.

70 *Ibid.*

71 *Ibid.*

expense of others affords us no real advantage[72]. As we live in a social environment requiring mutual cooperation, actions undermining our society harm us in the long run, even though we might think that we are gaining in the short run[73].

In the case, there is food-shortage and famine at Rhodes, resulting in an extremely high price of corn there[74]. An honest merchant has brought a large stock of corn all the way from Alexandria to the island Rhodes. On his way to Rhodes, he noticed that other merchants were also on their way with grain for the Rhodians[75]. Should this merchant share this information with the Rhodians? Or should he keep it to himself in order to sell his corn at a higher price? If the Rhodians know there will be an increase in supply soon, this will likely drive down the price of the grain that the merchant can get[76]. Cicero asks if it is honest of the merchant to benefit from withholding this knowledge from his customers[77].

III.2 CICERO'S ETHICAL REASONING

In setting up the argument and the counterargument, Cicero explains both Diogenes's and Antipater's reasoning. On the one hand, Antipater argues that the seller should disclose everything to the purchaser as the purchaser must be as informed as the seller about the good[78]. This refers to the conditions for a free market exchange, where both seller and buyer are equally, fully and completely knowledgeable about what they are buying and selling[79]. In this case, the invisible hand enforces a fair price in the market[80]. Antipater states that it is one's duty to take the interests of others into account as well as to serve society[81]. However, Cicero also mentions Diogenes's counterargument, stating that as long as the seller is not breaking the law by not declaring the specific defects that he is obliged to declare, and by not

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[72] Cicero, Marcus Tullius, *De Officiis. With an English Translation* (W. Miller, transl.) (Cambridge, Mass: Harvard University Press, 1913).
[73] Richards, *supra* note 68.
[74] Cicero, *supra* note 71.
[75] *Ibid.*
[76] Richards, *supra* note 68, at 358-366; B. Koehler, *Thomas Aquinas on the conduct of sales*, in 40 Economic Affairs 358-366 (2020); and Aquinas, *Summa theologiae*, The Logic Museum (https://www.logicmuseum.com/wiki/Authors/Thomas_Aquinas/Summa_Theologiae), II-IIae q. 77 a. 3 s. c.
[77] Cicero, *supra* note 71. See also D. Kimel, *Remedial rights and substantive rights in contract law*, in 8 Legal Theory 313-338 (2002) for a present-day discussion on legal rights and moral rights, and P. Jaffey, *Duties and liabilities in private law*, in 12 Legal Theory 137-156 (2006) for a discussion on private law claims arising from not only breaches of duty or wrongs, but also from acts that the actor is justified in doing.
[78] Cicero, *supra* note 71; Richards, *supra* note 68; and Koehler, *supra* note 75.
[79] Richards, *supra* note 68.
[80] A. Smith, Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations (London: W. Strahan and T. Cadell, 1776). See also de Geest, Kovac, *supra* note 3.
[81] Cicero, *supra* note 71.

committing misrepresentation, he is not obliged to reveal the information[82]. Diogenes continues that the merchant may try to sell his goods at the best possible price by withholding the information to his advantage as he has no duty to tell the Rhodians everything that might be in their interest to know[83].

Moreover, Diogenes attacks Antipater's standpoint by arguing that private property does not really exist if people always have to consider everyone else's and society's interests in this way[84]. He continues that nothing should be sold in this case, but everything should be given away for free instead[85]. Both arguments are acknowledging that the action of keeping the information to himself is to the merchant's advantage[86]. However, Antipater labels this as wrong, whereas Diogenes does not.

Cicero concludes that the merchant should tell the Rhodians that other ships are on their way without making clear why he should do so[87]. He refers to the father of Cato who established the principle of good faith, entailing that any defect known to the seller should be notified to the buyer as well[88]. Cicero emphasizes the extensive scope of good faith, and then continues that if the decision of Cato's father was right, the merchant should have shared the information with the Rhodians[89].

However, the grain itself was not defective in any way[90]. As Aquinas pointed out later, a defect reduces the present value of a good, however, in this case the grain is expected to reduce in value at a future time when the other ships – that the Rhodians are unaware of – arrive on the island[91]. Hence, the disclosure relates to a price risk, which occurs due to a change in market conditions[92]. In any case, Cicero seems to agree with Antipater's argument that the purchaser should not be uninformed about any detail, hence, he or she should be as informed as the seller[93]. Hereby, Cicero states that honesty requires the seller to be morally obliged to tell the buyer everything, as not revealing information could be considered concealment[94]. Furthermore, by stating that concealment entails "…trying for your own profit to keep others from finding out something that you know, when it is for their interest to know it"[95], Cicero

82 Cicero, *supra* note 71; Richards, *supra* note 68; and Koehler, *supra* note 75.
83 Cicero, *supra* note 71.
84 *Ibid.* See also Koehler, *supra* note 75, at 361.
85 Cicero, *supra* note 71.
86 Richards, *supra* note 68.
87 *Ibid.* See also Koehler, *supra* note 75; and Cicero, *supra* note 71, at III, 72.
88 Cicero, *supra* note 71; and Richards, *supra* note 68.
89 Cicero, *supra* note 71.
90 Richards, *supra* note 68.
91 Koehler, *supra* note 75, at 359.
92 *Ibid.*, at 358-366.
93 Cicero, *supra* note 71; and Richards, *supra* note 68.
94 Richards, *supra* note 68.
95 Cicero, *supra* note 71.

implies that if the buyer would find the information useful in making the decision whether or not to buy the good, then an honest seller is required to share that information[96].

IV. Comparative contract law and economics on duty to disclose information and famine at Rhodes

This section discusses the general principles of comparative contract law and economics relating specifically to asymmetric information problems and applies these to the famine at Rhodes case. It compares and contrasts them to Cicero's ethical reasoning and derives a number of suggestions for the economic assessment of Roman law on the duty to disclose information.

IV.1 Asymmetric Information Problems

Akerlof's pioneering work on the asymmetric information problem brought informational issues to the forefront of economic analysis[97]. Information asymmetries are one of the main sources of market failures and inefficiency (i.e. adverse selection, moral hazard and misallocation of resources). In other words, the daily state of affairs in contracting is not a nirvana ideal of perfect markets but the one of asymmetric information and resulting market failures where contractual parties may lack essential information about the bargain. An asymmetric information problem occurs when one party has information that the other party does not, and uses this to her advantage[98]. The situation of the merchant and the Rhodians entails a classic asymmetric information problem as the merchant knows other ships with grain are on their way to the island but the Rhodians do not, and the merchant is withholding this information in order to get a higher price for his grain.

The available information to each of the parties affects the contract terms they agree to when there is no mandatory disclosure[99]. Asymmetric information causes market failures, such as adverse selection and the market for lemons[100]. In order to avoid these market failures,

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96 Richards, *supra* note 68.
97 G.A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488-500 (1970).
98 *Ibid.* See also Cooter, Ulen, *supra* note 22.
99 I. Ayres, R. Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, in 99 Yale L. J. 87-130 (1989); L. Bebchuck, S. Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley V. Baxendale*, in 7 J. L. Econ. & Org. 284-312 (1991); K.E. Spier, *Incomplete Contracts and Signalling*, in 23 RAND Journal of Economics 432-443 (1992).
100 Akerlof, *supra* note 96.

contract law can impose sanctions on opportunism to induce information disclosure and to deter and reduce the asymmetric information problems and resulting market failures at the contract formation stage as well as the contract enforcement stage[101]. To some extent, all contract systems impose a duty to disclose relevant private information at the time of contract formation[102]. This duty is especially imposed on professional sellers relating to defects in their goods[103]. If the seller violates this obligation, he will be liable to pay damages. Disclosure duties are used as mandatory regulation of content and performance of consumer contracts. They entail regulatory intervention ex ante. However, contracts are incomplete as parties are boundedly rational. People are just not able to foresee everything or draft extremely complex contracts. Hence, perfectly complete contracts do not exist due to asymmetric information, transaction costs and ex post verifiability and enforceability issues[104]. This presents then also an argument for an ex post intervention in instances of market failures that is activated by litigation as courts reinterpret or even override imperfect contractual terms[105].

IV.2 BEHAVIORAL ECONOMICS INSIGHTS ON EFFICIENCY

Before addressing the optimal doctrine to disclose information and applying it to the famine at Rhodes case F (*infra* IV.4.), one should also note several behavioral insights relevant for comparative contract law and economics analysis.

Namely, efficiency arguments such as rational choice theory sometimes result in the reasoning that consumer contract law should either be deregulated, as any legal intervention with voluntary contracts would not only make sellers but also consumers worse off, or it should focus solely on solving market failures, such as putting a duty to disclose information in place in order to reduce information asymmetries (*supra* IV.1.)[106].

However, according to insights from behavioral economics, rational choice theory does not explain satisfactory well how markets work and how consumers behave in reality[107]. As consumers have biases relating to their willingness-to-pay as well as predictable

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101 Schäefer, Ott, *supra* note 11.
102 Kronman, *supra* note 12.
103 H. Beale *et al.*, *Cases, Materials and Text on Contract Law*, 2nd ed. (Oxford: Hart Publishing, 2019); W. Liao, *The Application of the Theory of Efficient Breach in Contract Law – A Comparative Law and Economics Perspective* (Cambridge: Intersentia, 2017).
104 S.J. Grossman, O.D. Hart, *The costs and benefits of ownership: A theory of vertical and lateral integration*, in 94 J. Pol. Econ. 691-719 (1986); O.D. Hart, J. Moore, *Foundations of Incomplete Contracts*, in Rev. Econ. Stud. 115-138 (1999); L. Kaplow, S. Shavell, *Fairness versus Welfare*, in 114 Harv. L. Rev. 961-1388 (2001), p. 968; S. Bag, *Economic Analysis of Contract Law – Incomplete Contracts and Asymmetric Information* (Basingstoke: Palgrave Macmillan, 2018).
105 Liao, *supra* note 102.
106 A.M. White, *Behavior and Contract*, in 27 Minn. J. L. & Inequality 135-179 (2009).
107 *Ibid.*

misperceptions, and sellers know this and exploit this, consumers do not have fixed prior preferences that they will (be able to) maximize at the lowest cost[108]. Instead, their choices are influenced by sellers and formed by consumer strategies. In reality, situational aspects determine consumer preferences and choice just as much, and probably even more, than their potentially predetermined preferences do as consumers are vulnerable to how the choices are framed to them and to the channels that sellers use to offer them these choices.[109] In addition, consumers take mental shortcuts as they are prone to information overload due to the complexity of products and services[110]. In other words, consumers are boundedly rational[111]. Consumer contracts include many non-salient but often harmful terms exploiting consumers. Hence, deregulation does not improve consumer welfare but actually increases consumer harm, exploitation, opportunism, moral hazard and rent-seeking behavior[112]. This behavioral approach also shows that market failures such as asymmetric information problems are the result of predictable market behavior[113]. Consumers' misperceptions and misunderstanding of contract information are not just the result of a lack of disclosure and literacy, they are also affected by systematic biases and seller strategies exploiting the information asymmetries[114]. Thus, optimal legal intervention should not be reduced to non-intervention in consumer contract law nor should it solely be used to fix market failures, because rational choice theory does not hold in the real world[115]. It is therefore important to introduce regulation relating to consumer contracts that aims to promote equity, productive behavior, cooperation and prevent all types of abusive, exploitative behavior[116]. This can for instance be done by introducing the optimal doctrine relating to the duty to disclose information, but should also focus on the ex ante exclusion of terms that no reasonable consumer would prefer[117].

IV.3 Optimal Doctrine on Duty to Disclose Information

Contract law and economics offers several instrumental principles that can serve as insightful

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[108] *Ibid.*
[109] G. Lakoff, *The All New Don't Think of an Elephant* (Chelsea: Green Publishing, 2014); White, *supra* note 105.
[110] H.A. Simon, *Theories and Decision-making in Economics and Behavioral Science*, in 49 Am. Econ. Rev. 253-283 (1959); A. Tversky, D. Kahneman, *Prospect Theory: An Analysis of Decision under Risk*, in 47 Econometrica 263-291 (1979); A.M. White, *supra* note 105.
[111] Grossman, Hart, supra note 103; Hart, Moore, *supra* note 105.
[112] White, *supra* note 105.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*
[117] de Geest, Kovač, *supra* note 3; White, supra note 105.

guidelines to law makers while drafting an optimal doctrine relating to the duty to disclose information. This section identifies several principles on the disclosure duty and applies them the merchant's situation in the famine at Rhodes case.

These principles can be, according to de Geest and Kovač[118], compressed into a single general doctrine on duty to disclose information cumulatively fulfills the following conditions:

A is the cheaper cost producer of this information;

The information is valuable to B (i.e., the value is higher than the information and communication costs);

It is unlikely that B possesses the information already;

The information is not entrepreneurial (entrepreneurial information is costly to produce and hard to be compensated for once it is revealed);

The information does not consist of mere opinions and other non-falsifiable statements.

Figure 1: The Optimal Doctrine on Duty to Disclose Information.

This doctrine can successfully deal with all asymmetric information problems, alongside a risk allocation doctrine for symmetrical information problems[119]. Therefore, there is no need for separate doctrines on mistake, fraud or misrepresentation, or even latent defects, as a duty to disclose information encompasses and solves all of these issues[120]. In the following sections, all five conditions will be applied to the famine at Rhodes case.

IV.4 LEAST COST INFORMATION GATHERER

The least cost information gatherer should be the one to produce and communicate the information as it is the party that can obtain the information at the lowest cost[121]. Hence, if the marginal cost of the information is much less for one contractual party than for the other, the information should be disclosed[122]. Obliging the cheaper cost producer to inform the other party is the cheapest way to make sure both parties have the information as it substantially reduces information costs[123]. Arguments that the mistaken party is the least-cost avoider, and should bear the responsibility for the mistake, do not hold in consumer

[118] de Geest, Kovač, *supra* note 3.
[119] *Ibid.*
[120] *Ibid.*
[121] de Geest, Kovač, *supra* note 3; Kronman, supra note 12.
[122] A.M. Johnson Jr., *An Economic Analysis of Duty to Disclose Information; Lessons Learned from the Caveat Emptor Doctrine*, 45 San Diego L. Rev. 79-132 (2008); K.L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (Chicago, IL: University of Chicago Press, 1988).
[123] de Geest, Kovač, *supra* note 3.

contracts[124]. After all, a contractual interaction between a seller and a buyer is not symmetrical as the seller has superior information and the buyer is imperfectly informed as well as imperfectly rational[125]. In addition, in most consumer contracts the seller knows the consumer's mistake, and is potentially even exploiting it[126]. Thus, when the non-mistaken party knows about the other party's mistake, it is the non-mistaken party that is the least-cost avoider[127]. These situations closely resemble situations where false or misleading information is given[128]. Therefore, they should be regulated when the total benefits of the regulation outweigh its total costs. Mandatory regulation should be tried before other, more interventionist forms of regulation[129].

When one employs the least cost information gatherer principle to the famine at Rhodes case, the available facts of the case show that indeed the merchant is the cheaper cost producer. After all, the merchant is making his way to Rhodes in any case and en route spotted other merchant ships that have been sailing in the same direction. Obviously, it would be much more expensive for the local Rhodians to sail away from their island and try to find out if other merchants are also on their way to supply them with grain. Analytically speaking the Rhodians are clearly not the least cost information gatherer/providers as they are stuck on the island suffering from famine. They have no easy access to a ship and would have to go out of their way at extensive costs to set sail looking for potential merchant ships with grain or even would have to sail to the mainland which might prove to be prohibitively expensive (i.e. their ships have been badly damaged by natural disaster).

IV.5 Information's Value is higher than Information and Communication Costs

The least cost information gatherer should only produce and communicate the information if the sum of the information production and communication costs is lower than the value of the information to the other party[130]. Taking into account both the information production costs and the communication costs seems fairer than the ethical principle of providing the information to the buyer for free[131]. After all, this would be unfair to the seller, as certain

124 O. Bar-Gill, *The Behavioral Economics of Consumer Contracts*, in 92 Minn. L. Rev. 749-802 (2008).
125 *Ibid.*
126 Bar-Gill, *supra* note 123; White, *supra* note 105.
127 *Ibid.*
128 Bar-Gill, *supra* note 123; R.A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, in 73 U. Chi. L. Rev. 111-132 (2006); Kronman, *supra* note 12.
129 Bar-Gill, Oren, *supra* note 123; Epstein, *supra* note 127.
130 de Geest, Kovač, *supra* note 3; Jovanovic, *supra* note 38.
131 Cicero, *supra* note 71.

costs to acquire the information might be involved[132]. Furthermore, it is important to take into account that imposing an obligation to disclose private information at time of contract formation is beneficial as the information may be desirable to the buyer but it also discourages parties from investing in the unnecessary (avoidable) acquisition of information[133].

In this case, the Rhodians must value the information more than it costs the merchant to collect and share the information. Obviously, this condition is fulfilled as the Rhodians highly value the information on an increase in corn supply during this food-shortage. Furthermore, it is not costly for the merchant to collect the information as he casually acquired them on route towards the island when he observed the other ships during his journey to the island[134]. Moreover, communicating to Rhodians that other ships with grain are on their way would not be costly either (or can be done at trivial costs).

IV.6 UNLIKELY THAT OTHER PARTY POSSESSES THE INFORMATION ALREADY

As transferring information might be costly, the information should not be communicated if the other party already has it or if he should have it[135]. This contrasts Antipater's and Cicero's reasoning that the seller should inform the buyer of any detail[136].

However, the Rhodians do not know that more supplies will arrive shortly, and should, economically speaking, not have known this, as it would involve a tremendous effort (transaction costs) for them in those days to figure this out by themselves. This would mean they have to leave their island and set sail for Alexandria. Only then they would be able to spot the incoming ships. A lack of information can lead to misallocations (misallocation of scarce resources) as it may result in either mutually beneficial exchanges not taking place or exchanges that are not mutually beneficial taking place. The available facts of the case suggests that the ignorance costs of the Rhodians are high.

IV.7 NON-ENTREPRENEURIAL INFORMATION

Parties should not be obliged to reveal entrepreneurial information[137]. This is information that is costly to produce and difficult to be compensated for once it is revealed[138]. After all, it

132 Richards, *supra* note 72.
133 Kronman, *supra* note 12.
134 *Ibid.*
135 de Geest, Kovač, *supra* note 3.
136 Cicero, *supra* note 71.
137 de Geest, Kovač, *supra* note 3.
138 The notion of entrepreneurial information is in line with Schumpeter and other members of Austrian School of Economics, who emphasize the importance of individuals who add productive information to the market

is not possible to protect this type of information through intellectual property rights[139]. In addition, entrepreneurial information is also valuable to other players in the market[140], meaning that free rider problems would discourage the production of such valuable/productive information if it cannot be kept secret[141].

According to Kronman, non-entrepreneurial information is information that was casually acquired[142]. In contrast, entrepreneurial information, which is acquired through a deliberate and costly search, should give the information gatherer the right not to share the information with others in order to encourage the search for socially useful information[143]. Without the right to keep such productive information secret free rider problems would discourage the production of the information[144]. By applying this criterion, efficient behavior is induced[145].

As the merchant casually, as a by-product, acquires the knowledge that other merchants are on their way to Rhodes by simply sailing past them, it cannot be considered as entrepreneurial and costly to produce. He simply came across this information. If the Rhodians had been where he was, they would also have acquired this information. Moreover, the Rhodians also do not lack the capacity to understand the consequences of the information as they realize what it means for the famine and grain prices that more ships are making their way to Rhodes[146]. Hence, the information in question is not an entrepreneurial one and the merchant does not have any deeper expert understanding relating to this information.

IV.8 NOT MERE OPINIONS OR NON-FALSIFIABLE STATEMENTS

The last condition entails that parties should not have a duty to share mere opinions or non-falsifiable statements[147]. They should be allowed to lie and conceal opinions and non-falsifiable statements as these types of information are inherently subjective or contain no

(dynamic efficiency). See e.g. J.A. Schumpeter, *Capitalism, Socialism and Democracy*, 2nd ed. [1942] (Floyd, VA: Impact Books, 2014).

139 Cooter, Ulen, *supra* note 22; de Geest, Kovač, *supra* note 3; Kötz, *supra* note 49; Kronman, *supra* note 12.

140 F.A. Hayek, *The Use of Knowledge in Society*, in 35 Am. Econ. Rev. 519-530 (1945).

141 Cooter, Ulen, *supra* note 22; de Geest, Kovač, *supra* note 3; Kötz, *supra* note 49; Kronman, *supra* note 12.

142 Johnson, *supra* note 121; Kronman, *supra* note 12.

143 Kronman, *supra* note 12.

144 de Geest, Kovač, *supra* note 3. See also Kronman, *supra* note 12; V.P. Goldberg *Note on the Price Information and Enforcement of the Expectation Interest*, in V.P. Goldberg (ed.), *Readings in Economics of Contract Law* (Cambridge, Cambridge University Press, 1989), 80-83; J. Gordley, *supra* note 50.

145 Cooter, Ulen, *supra* note 22; Johnson, *supra* note 121.

146 Richards, *supra* note 72.

147 de Geest, Kovač, *supra* note 3; G. de Geest *et al.*, *The Right to Lie: New Law and Economics versus Dutch Labor Law*, in G. de Geest *et al.* (eds.), *Law and Economics and the Labor Market* (Cheltenham: Elgar Publishing, 1999), 34-55.

generally accepted definitions[148].

Yet, the fact that extra grain supply will arrive at Rhodes shortly is a material fact. This information is not an opinion nor a non-falsifiable statement. Therefore, the merchant should according to the economic insights disclose this information to the Rhodians.

To sum up, performed analysis shows that all five economically inspired conditions are fulfilled cumulatively, suggesting that the merchant should disclose to the Rhodians the information that the other ships with grain are on their way as sharing this information is a more efficient way to deal with the asymmetric information problem reported in this ancient Roman case.

V. GENERAL LAW AND ECONOMICS REFLECTIONS ON CICERO'S REASONING

Comparative contract law and economics scholarship may also offer some general reflections on Cicero's reasoning. First, the difference between lying and concealing information does not matter, as telling nothing is always telling something[149]. Namely, when people do not get any information on the quality of a good, they will sometimes presume as it is of an average quality and in other markets they will presume the lowest quality[150]. Whichever presumption is made, the distention between explicitly lying and just concealing information is less relevant than lawyers tend to believe since both activities are intrinsically costly and wasteful[151]. After all, one party invests in misleading through words in case of lying, or that party invests in non-detection in case of concealing[152]. In addition, the other party invests in detection in both cases[153]. Hence, either lie costs or concealment costs, and verification costs are involved. Furthermore, both lying and not revealing information are wasteful as they lead to inefficient allocations due to the extra costs involved[154]. However, the social welfare consequences relating to acquiring information depend not only on whether the information is socially valuable but also on whether it is the buyer or the seller that acquires the information as well as whether it is based on inferences made from silence or not[155].

A second reflection relates to a duty to reveal everything. Contract law and economics follows the 'less is more' principle.[156] The unimportant information should not be shared, but should

148 *Ibid.*
149 de Geest, Kovač, *supra* note 3.
150 Akerlof, *supra* note 96; de Geest, Kovač, *supra* note 3.
151 de Geest, Kovač, *supra* note 3.
152 *Ibid.*
153 S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2004), p. 295.
154 de Geest, Kovač, *supra* note 3.
155 Fishman, *supra* note 41; Grossman, supra note 35; Shavell, *supra* note 44; Spier, *supra* note 98.
156 de Geest, Kovač, *supra* note 3.

instead be filtered away, as behavioral law and economics has shown that people will otherwise suffer from information overload[157]. People can have difficulty understanding contractual terms and can be unable to make effective decisions based on the contract when they are confronted with too many contractual terms or when these terms are too complex[158]. Moreover, the condition that the party would not have entered into the contract without the information is not necessary[159]. The underlying economic reasoning is the following: in a perfectly competitive market, any small difference will lead to another decision[160]. In addition, if there is less than perfect competition, there will always be some consumers at the margin that will change their decision based on the small difference[161]. Furthermore, even in a bilateral monopoly where the product will be bought in any case, the division of the surplus between the buyer and the seller is still unclear, hence, any small difference in knowledge might marginally change the negotiated price[162]. As parties always have more information available after concluding the contract than before, and on top of that they also suffer from hindsight bias, a lack of perfect information should not be a reason to avoid the contract[163]. Otherwise, contracts would never be binding[164].

In addition, Abatino and Dari-Mattiacci show that generally remedies applied by the praetor have had two positive effects: a) sellers had incentives to reveal more information than under the aedicilian remedies; and b) sellers were not liable for innocent misrepresentation[165]. This prateors remedies were analytically speaking designed to induce information exchange (which boost allocative efficiency) along the scope and subjective knowledge[166]. In cases of non-disclosure praetorian remedy was the so-called *actio ex empto* which allowed the buyer to receive damages equal to the difference between the price paid and the value of the good to him[167]. This remedy could be used for any undisclosed information and about any characteristic of the good. Of course, one has to note that the introduction of *actio empti ad redhibendum* also enabled aggrieved buyer to claim the restitution of the good.

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157 Simon, *supra* note 109; Tversky, Kahneman, *supra* note 109.
158 Tversky, Kahneman, *supra* note 109.
159 de Geest, Kovač, *supra* note 3.
160 *Ibid.*
161 *Ibid.*
162 *Ibid.*
163 de Geest, Kovač, *supra* note 3. See also B. Fischhoff, *Hindsight is not Equal to Foresight: The Effect of Outcome Knowledge on Judgement Uncertainty*, in 1 J. Exp. Psychol. 288-299 (1975); P. Slovic, B. Fischhoff, *On the Psychology of Experimental Surprises*, in 3 J. Exp. Psychol. 544-551 (1977).
164 de Geest, Kovač, *supra* note 3.
165 Abatino, Dari-Mattiacci, *supra* note 2, at 404.
166 Such information exchange induced a more efficient matching between goods and buyers: *ibid.*, at 416.
167 *Ibid.*

Third, one can also introduce a distinction between exogenous and endogenous asymmetric information. In the famine at Rhodes case, one can identify the information asymmetry as exogenous in nature, namely the other ships may or may not go to Rhodes, an event independent from both the merchant and the Rhodians[168]. Exogenous asymmetric information entails that even the information status of the possibly informed party, i.e. the merchant, is subject to information asymmetry[169]. In contrast, endogenous asymmetric information takes place when the party that invests in the information acquisition is always commonly known to be fully informed, even if the level of investments incurred remains hidden to the other party[170].

Namely, Schweizer shows that as investments in information are not contractible because they have to take place prior to contract negotiations, disclosure duties should be put in place instead[171]. These residual rights can affect the incentives to invest in and share information if they are anticipated[172]. Hence, mandatory disclosure is more efficient in terms of welfare as the outcome is efficient ex post compared to voluntary disclosure[173]. Moreover, mandatory rules are still necessary for the ones that does not follow them[174].

VI. CICERO AND THE DEBATE ON ECONOMICS VERSUS ETHICS

This brings us to the broader debate of "economics versus ethics". Scholarship has questioned both wealth maximization as a normative value as well as the importance of economic efficiency in maximizing wealth and human welfare[175]. In addition, critics of law and economics state that the pursuit of efficiency should not be the law's sole concern[176].

Legal scholars are often skeptical towards efficiency as a legal objective and argue that wealth maximization does not have a normative value independent of justice[177]. More precisely, it is

168 U. Schweizer, *Incentives to Acquire Information under Mandatory versus Voluntary Disclosure*, in 33 J. L. Econ. & Org. 173-192 (2021); Shavell, supra note 44; Farrell, *supra* note 40.
169 Schweizer, *supra* note 167.
170 *Ibid.*
171 *Ibid.*
172 *Ibid.*
173 *Ibid.* See also J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, in 2 Legal Theory 325-357 (1996).
174 de Geest, Kovač, *supra* note 3.
175 D.M. Driesen, R.P. Malloy, *Critiques of Law and Economics*, in F. Parisi (ed.), *Oxford Handbook of Law and Economics*, vol. I (Oxford: Oxford University Press, 2017), 300-317; A. Bernstein, *Whatever Happened to Law and Economics?*, in 64 MD. L. Rev. 303-336 (2005).
176 Driesen, Malloy, *supra* note 174.
177 Driesen, Malloy, *supra* note 174; R. Dworkin, *Is Wealth a Value?*, in 9 J. Legal Stud. 191-226 (1980); J. Coleman, *Efficiency, Utility and Wealth Maximization*, in 8 Hofstra L. Rev. 509-551 (1980); J. Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice (Book Review)*, 34 Stanford L. Rev. 1105-1132 (1982); A.T. Kronman, *Wealth Maximization as a Normative Principle*, in 9 J. Legal Stud. 227-242 (1980); E.J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, in 30 U. Toronto L. J. 307-332 (1980); N. Mercuro, T.P. Ryan, *Law, Economics and Public Policy* (Greenwich, CT: JAI Press, 1984); M.C.

stated that Pareto efficiency cannot govern legal decisions in general as they are based on disputes among people[178]. In addition, how does Pareto efficiency then relate to liberty in a situation where people act freely to their own detriment?[179] Furthermore, it is stated that you should not promote actual liberty in the real world by forcing transfers which might have freely been entered into in an ideal world[180]. Kaldor-Hicks efficiency is also not considered a proper normative value because compensation does not actually have to take place in practice, hence, theft or government takings without compensation may be rationalized[181].

In addition, as efficiency presupposes a distribution of resources, law and economics is attacked for, amongst others, neglecting distribution[182]. Hence, its critics consider law and economics utilitarianism[183].

Furthermore, it is argued that an individual's self-interested preferences may differ from what that individual actually believes that society should do, attacking the aggregation of self-interested preferences of individuals as a criterion for value choices in political decision-making[184]. Moreover, the link between allocative efficiency and wealth maximization is also criticized. Namely, some scholars argue that innovation, economic growth and systemic risk play bigger roles in wealth maximization than (in)efficiency does.[185] In addition, strong doubts are cast on the link between individual preference satisfaction and individual welfare because

Nussbaum, A. Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993); M.C. Nussbaum, *Women and Human development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); C.A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, in 35 UC Davis L. Rev. 705-778 (2002); J. Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, in 72 U. Chi. L. Rev. 1237-1298 (2005); M. Chon, *Intellectual Property and the Development Divide*, in 27 Cardozo L. Rev. 2821-2912 (2006); G. Alexander *et al.*, *A Statement of Progressive Property*, in 94 Cornell L. Rev. 743-745 (2009); A. Sen, *The Idea of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 2009); S.M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, in 114 W. Va. L. Rev. 49-107 (2011).

178 Driesen, Malloy, *supra* note 174; Dworkin, supra note 176; R. Dworkin, *Why Efficiency? A Response to Calabresi and Posner*, 8 Hofstra L. Rev. 563-589 (1980); G. Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, in 100 Yale L.J. 1211-1238 (1991); J. Coleman, *Markets, Morals, and the Law* (New York, NY: Cambridge University Press, 1988).

179 J. Waldron, *Criticizing the Economic Analysis of Law*, in 99 Yale L.J. 1441-1471 (1990).

180 *Ibid.*

181 Driesen, Malloy, *supra* note 174; Posner, supra note 5; Coleman, *supra* note 177; Kronman, *supra* note 176; Calabresi, *supra* note 177.

182 A. Sen, Development as Freedom (Oxford: Oxford University Press, 1999); Nussbaum, *supra* note 176; Waldron, *supra* note 178; Bernstein, *supra* note 174; J.M. Horwitz, *Law and Economics, Science or Politics?*, in 8 Hofstra L. Rev. 905 (1980).

183 Sen, *supra* note 181; Nussbaum, *supra* note 176; Waldron, *supra* note 178.

184 Driesen, Malloy, *supra* note 174; E. C. Baker, *The Ideology of the Economic Analysis of Law*, in 5 Philosophy & Public Affairs 1, 3–48 (1975); M. Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 1988); Sen, *supra* note 176.

185 Driesen, Malloy, *supra* note 174; D. M. Driesen, *The Economic Dynamics of Environmental Law* (Cambridge: Cambridge University Press, 2003); M. A. Carrier, *Innovation for the 21st Century* (Oxford: Oxford University Press, 2009); R. Cooter, and A. Edlin, *The Falcon's Gyre: Legal Foundations of Economic Innovation and Growth* (Berkeley: University of California Press, 2013); H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2003).

empirical studies show that increasing wealth does not increase happiness once a certain minimum income is reached[186]. Thus, economics and ethics are often portrayed as opposites, namely critics find that the concepts of "efficiency" and "justice" do not align with each other[187].

Kaldor-Hicks efficiency is, according to White, not a valid tool in assessing whether and how regulation should be implemented relating to consumer contracts, as it rather rapidly leads to focusing on wealth maximization and utilitarianism which are lacking as ethical norms[188]. This seems to be the case for Bentham's monistic utilitarianism, which is a kind of reductionism with normative implications[189]. It considers legal rules as irrational and bad law that need to be overcome when they do not pass the utilitarian test[190]. Namely, classic utilitarianism is based on what is good for people, but does not take into account what people would choose themselves or what they would think is good for them[191]. However, there are other forms of utilitarianism, such as Mill's liberal utilitarianism, that include other values than utility alone[192]. When a legal rule fails the utilitarian test in this case, it can still be justified as enhancing other values, such as fairness[193].

Moreover, Posner argues that in practice, a normative economics perspective is rarely rigorously utilitarian[194]. In order to measure utility, information about people's preferences and emotions is needed, which seems unobtainable[195]. Hence, modern law and economics focuses on risk attitudes and consequently severing the linkage between economics and utilitarianism all together[196].

In addition, Kaplow and Shavell aggregate the well-being of individuals, with well-being

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186 R. A. Easterlin, *Will Raising the Incomes of all Increase the Happiness of all*? in 27 Journal of Economic Behavior & Organization 1, 35-47 (1995); R. H. Frank, *Luxury Fever: Why Money Fails to Satisfy In An Era of Excess* (New York: Free Press, 1999); E. Diener, R. E. Lucas, and S. Oishi, S. (2002). Subjective Well-being: The Science of Happiness and Life Satisfaction, in C. R. Snyder, and S. J. Lopez (eds.), *Handbook of Positive Psychology* (Oxford: Oxford University Press, 2002), pp. 463-73; Baker, *supra* note 183; Sagoff, *supra* note 183; Sen, *supra* note 181; M. Adler, and E. A. Posner, *Happiness Research and Cost-Benefit Analysis*, in 37 The Journal of Legal Studies 2, 253-292 (2008); J. Bronsteen, C. Buccafusco, and J. S. Masuret, *Welfare as Happiness*, in 98 Georgetown Law Journal 1583 (2009-2010).

187 See amongst others: Driesen, Malloy, *supra* note 174; Bernstein, *supra* note 174; Waldron, *supra* note 178; R. Michaels, *The Second Wave of Comparative Law and Economics*, in 59 U. Toronto L. J. 197-213 (2009); J.M. Horwitz, *supra* note 181.

188 White, *supra* note 105.

189 G. Tuzet, *Calabresi and Mill – Bilateralism, Moral Externalities and Value Pluralism*, in Global Jurist 1-10, (2019).

190 J. Bentham, *An Introduction to the Principles of Morals and Legislation* [1789] (New York, NY: Hafner Publishing, 1823), pp. 156-158.

191 D.A. Farber, *Autonomy, Welfare, and the Pareto Principle*, in A. Hatzis, N. Mercuro (eds.), *Law and Economics: Philosophical Issues and fundamental questions* (London and New York, NY: Routledge, 2015), 159-182.

192 Tuzet, *supra* note 188.

193 J.S. Mill, *Utilitarianism*, in A.D. Lindsay (ed.), *Utilitarianism. Liberty. Representative Government* (London: Dent & Sons, 1962), 1-60.

194 R.A. Posner, *Norms and Values in the Economic Approach to Law*, in Hatzis, Mercuro, *supra* note 190, 1-15, 6-7.

195 *Ibid.*

196 *Ibid.*

different from pure utility, as individuals' utilities can be weighted to reflect value judgements. Hence, they do not limit their social welfare function to the utilitarian version, as the definition of individual welfare is not limited to utility alone[197]. They state that satisfying fairness is partially reconcilable with the social welfare concept, as preferences for a legal rule based on fairness should be taken into account when determining social welfare, just like any preference or taste should[198]. Introducing fairness concerns into economic welfare concepts this way, boils down to empirical questions about individual's tastes and preferences[199].

However, economic models are not neutral as everyone views the world through a mental picture frame, meaning that the way we formulate problems is influenced by our own background[200]. Economics is actually about choosing or developing an economic rational that best fits our purpose, meaning that it is reflecting our context, values and aims[201]. This also aligns with the concept of 'moral externalities'[202]. When a certain act or behavior morally offends society at large, legal rules will be put in place to prohibit this act or behavior, or at least render it more difficult to perform[203]. These are 'inalienability rules' which do not permit a transfer between a willing buyer and a willing seller[204]. The magnitude of these moral costs to third parties determines if they should be given normative weight, i.e., whether it is appropriate, both economically and legally, to protect people from such externalities[205]. These moral costs should be given normative weight if they are larger than the costs experienced by those suffering from the legal rule prohibiting the act or making it more difficult[206]. Hence,

197 Kaplow and Shavell, *supra* note 103, at 976-999; and Posner, *supra* note 193.
198 Farber, *supra* note 190; and Kaplow and Shavell, *supra note* 103, at 976.
199 L. Kaplow, S. Shavell, *Economic Analysis of Law*, in A. Auerbach, M. Feldstein (eds.), *Handbook of Public Economics*, Vol. 3 (Amsterdam: Elsevier, 2002), 1661-1784; R.A. Posner, *A Review of Steven Shavell's "Foundations of Economic Analysis of Law"*, in 44 J. Econ. Lit. 405-414 (2006).
200 E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harmondsworth: Penguin Books, 1974); K. Raworth, *Doughnut Economics – Seven Ways to Think Like a 21st-Century Economist* (London: Random House Business Books, 2017); L.M. Friedman, *Norms and Values in the Study of Law*, in Hatzis, Mercuro, *supra* note 190, 32-42; T. Ruskola, *Legal Orientalism*, in 101 Mich. L. Rev. 179, 190 (2002); Michaels, *supra* note ; Farber, *supra* note 190; R. B. Korobkin, T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in 88 Cal. L. Rev. 1051-1144 (2000).
201 Raworth, *supra* note 199.
202 G. Calabresi, *The Future of Law and Economics. Essays in Reform and Recollection* (New Haven, CT: Yale University Press, 2016); G. Calabresi, D.A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, in 85 Harv. L. Rev. 1089-1128 (1972); A. Hatzis, *Moral externalities: An Economic Approach to the Legal Enforcement of Morality*, in Hatzis, Mercuro, *supra* note 190, 226-244; S. Shavell, *Law versus Morality as Regulators of Conduct*, in 4 Am. L. & Econ. Rev. 255 (2002); R.A. Posner, *Should There Be Homosexual Marriage? And if So, Who Should Decide?*, in 95 Mich. L. Rev. 1595-1587 (1997); J. Gardner, S. Shute, *The Wrongness of Rape*, in J. Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 216; A. Sen, *The Impossibility of a Paretian Liberal*, in 78 J. Pol. Econ. 157 (1970); J.S. Mill, *On Liberty* (London: J.W. Parker and Son, 1859, 2nd ed.), I.9.
203 Calabresi, *supra* note 201; Hatzis, *supra* note 201.
204 Calabresi, Melamed, *supra* note 201.
205 Calabresi, *supra* note 201; Tuzet, *supra* note 188.
206 Calabresi, *supra* note 201.

in case of consumer contracts, when consumer manipulation and exploitation by sellers through harmful non-salient terms, for instance, offends society more than legal rules excluding these terms cost sellers, such rules should be implemented[207].

In line with Posner's efficiency hypothesis of law, most legal arguments and legal rules can be seen as ways of getting people to avoid waste or getting them to act efficiently[208]. Ethics looks at what we should do, which principles should guide our everyday behavior[209]. In Cicero's case, what we should do when what is right and what is advantageous or profitable conflict with each other[210]. Therefore, both the ethical and the law and economics perspective are useful to conduct a normative analysis of the law, to analyze how the law should look like. These two lenses to analyze the famine at Rhodes case, followed different reasonings, but they both resulted in the same outcome, i.e., they both concluded that the merchant should have disclosed information to the Rhodians that more ships with grain were on their way to the island. Therefore, this case can be seen as an example of de Geest's argument that a normative analysis based on Kaldor-Hicks efficiency and a normative analysis based on fairness maxims are not necessarily the polar opposites they are often portrayed to be[211].

Our argument does not follow Kaplow and Shavell's one in their focus on the Pareto principle, as it categorically gives priority to the status quo because the change would not be implemented even if only one person is worse off[212]. Therefore, it considers the interests of those who are made worse off more important than those who are made better off, regardless of whether those gains would be immensely larger than the losses[213]. Hence, the Pareto principle is a one-sided meta-norm as it only looks at one side, the disadvantages[214]. According to de Geest, Kaplow and Shavell actually look at Kaldor-Hicks efficiency in the narrow sense, not Pareto efficiency, as they assume a reciprocal setting in which individuals do not know yet whether the change will make them better or worse off, which dissolves the difference between Pareto and Kaldor-Hicks[215]. However, de Geest argues that this is incomplete as it does not take the optimal distribution of wealth and wealth preferences into account.[216] Therefore, we suggest that one might follow de Geest's reasoning related to Kaldor-Hicks efficiency in the broad sense.

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[207] Bar-gill, *supra* note 123.
[208] Posner, *supra* note 5.
[209] R.M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Oxford University Press, 1981).
[210] Richards, *supra* note 68.
[211] G. de Geest, *Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms*, in Hatzis, Mercuro, supra note 190, 183-202.
[212] Kaplow, Shavell, *supra* note 103, pp. 968-975; de Geest, *supra* note 210.
[213] de Geest, *supra* note 210.
[214] *Ibid.*
[215] Kaplow, Shavell, *supra* note 103, pp. 986-975; de Geest, *supra* note 210.
[216] de Geest, supra note 210.

Namely, according to de Geest, just like Pareto efficiency, fairness maxims also look at only one side of the problem as they emphasize how frustrating an outcome is for one of the parties, but do not take the conflicting (dis)advantage for the other party into account[217]. When applying this to the famine at Rhodes, it is frustrating for the Rhodians that the price they paid for grain would be a lot higher if the merchant did not share the information that other ships were on their way as well. Therefore, it is only fair that the merchant shares the information. Not sharing information can then always be seen as a bad thing. However, reasoning based on fairness maxims does not look at the other side of the problem[218]. The merchant, on the other side, might have incurred a lot of extra costs by investing in a speedy ship and a strong crew on board. In addition, the merchant has taken a longer, perhaps more perilous journey to Rhodes than if he had just sold his grain in Alexandria, resulting in higher opportunity costs. He probably did this all with the intention of selling his grain at a higher price in Rhodes than in Alexandria. He might incur huge losses, potentially even resulting in bankruptcy, bringing financial problems to his family if he is not able to get a higher price for his grain. This is then frustrating for the merchant.

To solve problems with conflicting (dis)advantages to the other side, de Geest outlines four fundamental options[219]. He states that you can ignore the other disadvantages by, for instance, always only caring about the buyer and not the seller[220]. You can also acknowledge both sides, but decide on a fixed ranking order, for example, stating that the interest of the buyer is always more important than the interest of the seller[221]. Additionally, you can acknowledge both sides, but instead of choosing a fixed ranking order, you can decide based on "gut-feeling"[222]. However, the relevant option here is to acknowledge both sides, and then balance all these conflicting values using a certain measure[223]. This measure can constitute of monetary losses, happiness losses, or utility losses, for example[224]. This is what Kaldor-Hicks efficiency in the broad sense[225] does as it considers a change to be an improvement if those who benefit could theoretically compensate those who are worse off, and then still improve,

217 *Ibid.*
218 *Ibid.*
219 *Ibid.*
220 *Ibid.*
221 *Ibid.*
222 *Ibid.*
223 *Ibid.*
224 *Ibid.*
225 As opposed to Kaldor-Hicks efficiency in the narrow and original sense, which is only analyzed in monetary units (willingness-to-pay). However, willingness-to-pay depends on ability-to-pay, hence, taking the existing income distribution as given and ignoring the optimal redistribution issue (de Geest, *supra* note 210, at 184); and N. Kaldor, *Speculation and Economic Stability*, in 7 Review of Economic Studies 1, 1-17 (1939).

meaning that compensation does not actually have to take place[226]. Moreover, merchant's non-disclosure of information and resulted allocation of fortunes in the famine at Rhodes case is not, as one might argue, a mere economic re-distribution issue but an instance of deliberately caused information asymmetry which by definition results in market failures and inefficient allocation of scarce resources. Such market failures and inefficient allocation of scarce resources should be in order to boost economic growth and social wealth, addressed and deterred by legal rules and related duties to inform. Outstandingly, ancient Roman law and Cicero's decision in famine at Rhodes case provided exactly such a remedy.

Thus, the discussion is misleadingly framed as "ethics versus economics" or "fairness versus welfare" as economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it[227].

VII. CONCLUSION

From ancient times, legal scholars have been puzzled by the question of the circumstances under which an individual has a duty to disclose valuable information unknown to the person with whom she bargains. Even the great Marcus Tullius Cicero, as one of the most prominent ancient lawyers and remarkable thinkers, has dealt with this complicated puzzle and explored whether or not it is honest of the merchant to profit by withholding the information that more ships with grain will arrive at Rhodes soon, hence not sharing this with the Rhodians. In his classic, eternal writings he weighs Diogenes's and Antipater's reasoning against each other, concluding that the merchant should tell the Rhodians that more ships are on their way to be considered honest.

This more than two thousand years old case, while brilliantly addressing the ever-present issues of morality and ethical behavior, could be from the law and economics perspective regarded as the first, in human history, recorded example of an asymmetric information problem.

While employing the main findings of the law and economics literature on the duty to disclose information, several similarities as well as differences with Cicero's ethical arguments might be noticed. First, in this paper we have shown how the praetorian and in particular Cicero's decision in the Rhodes famine case efficiently addresses the problems created by

[226] Coleman, *supra* note 186; de Geest, *supra* note 210; Posner, *supra* note 193; Coleman, supra note 177, at 393; Kronman, *supra* note 176; Driesen, *supra* note 184.
[227] de Geest, *supra* note 210.

asymmetric information problem. Second, our investigation shows that lawmaking in ancient Rome produced remarkable legal solutions to omnipresent legal problems. Third, Cicero's decision in the Rhodes famine case stands the test of time and corresponds with the law and economics suggestions on how to address the asymmetric information problem in circumstances under which an individual has a valuable information unknown to the person with whom he transacts.

Namely, also law and economics analysis of Rhodes famine case suggest that the merchant should disclose the information to the Rhodians. After all, the merchant is the least cost information gatherer, the information is valuable to the Rhodians justifying the information and communication costs, it is unlikely that the Rhodians possess the information already, the information is not entrepreneurial as the merchant acquired it casually, and the other ships being on their way to Rhodes is not just an opinion or a non-falsifiable statement. Hence, all five cumulative conditions relating to this optimal doctrine to disclose information are fulfilled.

Although the ethical and economical perspectives on this case contain different reasonings, they both come to the same conclusion, i.e., the merchant should also from the law and economics perspective disclose to the Rhodians that more ships with grain are on their way. This posits the question whether fairness maxims (ethics) and efficiency (economics) are really as opposing as they are often portrayed to be. This assessment seems a good example of what de Geest argues relating to the "ethics versus economics" or "fairness versus welfare" debate. He states that economics looks at what is efficient, which is not necessarily conflicting with what is fair, but rather an interpretation or definition of fairness or ethics instead of a rejection of it. By applying the optimal doctrine of disclosure of information, one may argue that in this case, not revealing the information to the Rhodians is not only considered unfair but also inefficient. In other words, Cicero's decision spurs wealth maximization, since it induces an optimal disclosure of information, discourages opportunism and moral hazard, induces efficient reliance and allocates risk on the superior risk bearer. This also implies the reduction of the overall transaction costs and boosts allocative efficiency. In concluding so, we looked at both sides of the problem, i.e., the interests of the Rhodians as well as the interests of the merchant, and balanced them against each other.

THE LAW OF PENALTY CLAUSES: 'NEW' COMPARATIVE AND ECONOMIC REMARKS

Giuseppe Versaci

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Comparative legal scholarship has often focused on penalty clauses, in particular highlighting the macro-differences between civil law and common law. In 1995, an author also compared the efficient model on forfeited damage clauses with the real-world alternatives of different legal systems. At that time, it was possible on a general and abstract basis under the influence of mainstream law and economics. Indeed, even though there were different views how to achieve the maximation of social welfare, there was no doubt on the methodology to say what the law should be. Behavioral law and economics broke the curse and comparative analysis has no more a single reliable model to refer to. The enforcement of penalty clauses is generally considered efficient, but several cognitive biases should be assessed: overconfidence, unrealistic optimism, availability, etc. Despite the fragmentation of the efficient model, it may be still useful narrowing down the comparison on some specific aspects: for instance, the evaluation of the amount of the forfeited damage, where the efficiency depends on the criterion used by the judge. Embracing a comparative law and economics approach, the article aims to consider the last thirty years case law of different legal systems as well as the harmonization international projects concerning the law of penalty clauses.

I. INTRODUCTION

Penalty clauses have been the subject of several comparative law studies[1], as well as of numerous law and economics analyses[2]. Indeed, these clauses are age-old known[3], and the legal systems developed different doctrines about them, influenced by the remarkable

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[1] *Ex multis*, see P. Benjamin, *Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law*, in 9 Int. & Comp. L. Q. 600-627 (1960); J. Thilmany, *Fonctions et révisibilité des clauses pénales en droit compare*, in Rev. int. Dr. Comp. 17 (1980); M. Santaroni, *Spunti comparatistici in tema di clausola penale*, in P. Cendon (ed.), *Scritti in onore di Rodolfo Sacco*, Vol. I (Milano: Giuffrè, 1994), 1059 ff.; A. Russo, *Inadempimento e clausola penale tra* civil law *e* common law (Napoli: Jovene, 2012); I.M. García, *Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties*, in 6 Eur. J. Legal Stud. 83 (2013).

[2] *Ex multis*, see C.J. Goetz and R.E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, in 77 Colum. L. Rev. 554-594 (1977); P.R. Kaplan, *A Critique of the Penalty Limitation on Liquidated Damages*, in 50 South. Calif. L. Rev. 1055-1090 (1977); K.W. Clarkson, R.L. Miller and T.J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, in Wis. L. Rev. 351-390 (1978); P.H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, in 10 J. Leg. Stud. 237-247 (1981); S.A. Rea Jr., *Efficiency Implications of Penalties and Liquidated Damages*, in 13 J. Leg. Stud. 147-167 (1984); L.A. Stole, *The Economics of Liquidated Damage Clauses in Contractual Environments with Private Information*, in 8 J. Law Econ. Organ. 582-606 (1992); J. Thorpe, *Economists Divided - Different Perceptions of Contracts Penalty Doctrine*, in 6 Bond L. Rev. 189-209 (1994); L.A. Di Matteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, in 38 Am. Bus. L. J. 633-733 (2001); A.S. Edlin and A. Schwartz, *Optimal Penalties in Contract*, in 78 Chi.-Kent L. Rev. 33-54 (2003).

[3] M. Scognamiglio, *La clausola penale nell'esperienza giuridica romana*, in S. Cherti (ed.), *La pena convenzionale nel diritto europeo* (Napoli: Jovene, 2013), 1 ff.; S. Gialdroni, *La clausola penale tra finzione e realtà. Il caso limite di Shylock alla prova del diritto veneziano, del diritto comune e del* common law, *ibid.*, 19 ff.

implications on some milestones of the contract law theory, such as the parties' freedom, the contractual performance, the remedies against the breach of contract[4]. Thereby the private law comparatists' interest in this field is self-explanatory, but also the economic standpoint is easily understandable due to the effects the forfeited damage clauses may have on the efficient allocation of risks and resources[5].

In 1995, an influential scholar examined the different approach of common law and civil law on penalty clauses in contracts, with the aim of assessing which one is the least divergent from the model built on the efficiency standards. After an in-depth analysis, the conclusion was that, in this area, "civil law can be considered less inefficient than common law"[6]. Taking into account the arguments used by this author, the present work seeks to deal with two valuable questions.

First, it is worth wondering whether there have been changes influencing the efficient model and, if so, whether there is still a model which works as a uniform term of comparison for the real-world solutions of different legal systems. Secondly, changes might affect not only the premise, but also the conclusion: even though there were not significant legislative reforms on penalty clauses over the last years, it is well known that the case law is able to (at least, partially) alter the starting points giving rise to new convergences or divergences among the above-mentioned legal systems. Therefore, this article aims to assess whether civil law countries can still be considered less inefficient than common law legal systems and whether the efficiency goals have attracted more attention during the last decades than in the past.

The paper will be structured as follows. In the first part, I will introduce the earlier comparative law and economics analysis on penalty clauses. Then, I will examine what has changed thereafter: the rise of behavioral economics and the new case law as well as the harmonization European and international projects on this law field. With regard to the former, I will recognize that comparative law and economics is still useful despite the fragmentation of the efficient model. Due to the latter changes, I will conclude by arguing that civil law cannot be considered less inefficient than common law on penalty clauses anymore and the harmonization projects adopt an inadequate compromise solution.

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[4] A. Zoppini, *La pena contrattuale* (Milano: Giuffrè, 1991), 99 ff.; F.P. Patti, *La determinazione convenzionale del danno* (Napoli: Jovene, 2015), 101 ff.; L. Klesta Chabaud, *Pena ed esecuzione patrimoniale: la clausola penale nella riforma francese del diritto delle obbligazioni*, in Nuova giur. civ. comm. 1189 (2020).

[5] R. Pardolesi, *Analisi economica e diritto dei contratti*, in Pol. dir. 699, 723 ff. (1978); Patti, *supra* note 4, 78.

[6] U. Mattei, *The Comparative Law and Economics of Penalty Clauses in Contract*, in 43 Am. J. Comp. L. 427, 441 (1995). Along this line, with similar or new arguments, see also A.N. Hatzis, *Having the cake and eating it too: efficient penalty clauses in Common and Civil contract law*, in 22 Int. Rev. L. Econ. 381 (2003); L. Di Matteo, *Behavioural Case for Contractual Penalties under the Common Law*, in 23 Eur. Rev. Priv. L. 327 (2015).

II. THE PREVIOUS COMPARATIVE LAW AND ECONOMICS ANALYSIS ON PENALTY CLAUSES

The distinction between civil law and common law about a specific institution can turn out to be an over-simplification where the major differences lie beyond the national systems belonging to the two legal families. With regard to penalty clauses, however, it makes sense because the original approach is rather antithetic at a macro level[7].

In common law, penalty clauses are not enforceable, as opposed to liquidated damages clauses. The doctrine against penalties has its roots in the equitable jurisdiction; then, the concrete rules found their consolidation in many seminal cases[8] and, as to the United States, also in the Uniform Commercial Code (§ 2-718) and the Second Restatement of Contracts (§ 356). The core of this doctrine obviously concerns the tests by which penalties are distinguished from liquidated damages, so that the case law plays a crucial role. On the other hand, notwithstanding some differences, the civil law countries share the idea according to which penalty clauses are not invalid, but their amount can be reduced by the courts if they deem it grossly excessive[9]. Thus, the judicial power is also relevant in this legal area.

Both legal systems are assumed to be inefficient because of the unjustified barriers to contractual freedom[10]. Indeed, restrictions are needed if the parties' behaviors create externalities or there are other market failures that require regulation; where these circumstances do not occur, parties' agreement is presumed to be rational[11]. The exceptional cases of irrationality, due to the lack of genuineness of consent, should be handled by the normal contract law remedies, such as the doctrines of unconscionability, misrepresentation, duress, and mistake, or the fairness principle, depending on the legal system which is involved. To be honest, the conventional law and economics' view is not uniform on penalty

[7] Anyway, an author would rather distinguish four legal models on penalty clauses: the actual French model; the Napoleonic model; the Pandectist model; the common law model (Santaroni, *supra* note 1, 1060-1061). See also García, *supra* note 1, 90, who stresses the differences in rules governing contract penalties between civil law countries. Moreover, the Belgian system is closer to the common law model than to the (general) civil law approach: see Zoppini, *supra* note 4, at 77.

[8] In the English common law, the traditional leading case has so far been *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (1915) A.C. 79. In sec. VI, we will see how the Supreme Court of the United Kingdom partially changed the previous approach.

[9] In the majority of European civil law systems, the judicial modification of penalty clauses is based on the grounds of equity. Spanish law differs from this model, allowing the judge to moderate the penalty only if there has been partial performance by the debtor. See García, *supra* note 1, 86 ff.

[10] Mattei, *supra* note 6, 430, 435 ff.

[11] J.H. Barton, *The Economic Basis of Damages for Breach of Contract*, in 1 J. Leg. Stud. 277, 283 ff. (1972); R.A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, in 18 J. Leg. Stud. 105, 106 (1989).

clauses[12], but the majority of scholars argued in favor of enforcing them[13]. The efficient model used by Mattei was built on this background. In particular, the endorsement for penalty clauses is traditionally based on the following arguments.

According to a famous theory, a penalty clause works as the best insurance against the subjective consequences of breach within those contests where the idiosyncratic values are unlikely to be recovered. The promisor is the most efficient insurer because s/he is the subject who can manage the risk (avoiding the breach of contract) at the lowest cost[14]. Moreover, the penalty clause can function also as a signal for a promisor's reliability, and it is useful to reduce the transaction costs affecting the newcomers in the market who have not built up a reputation yet[15]. More generally, when parties enter into the contract without private information, stipulated damages may be used to communicate valuable information at the pre-contractual stage, serving a dual role of promoting efficient breach and increasing the likelihood of trade[16]. Further, some scholars have argued that penalty clauses should be enforced as contract termination options, that serve important risk management functions[17]. Although the concrete solutions adopted by common law and civil law are far from the efficient model, Mattei stated a preference for the latter one. The exceptional nature of the penalty reduction was invoked as the decisive argument. Indeed, because of that, litigation aimed at re-examining the possibility of introducing penalties is discouraged. Besides, if the penalty is grossly excessive, the court will not enter a judgement that merely obliges the promisor to pay the actual damages (i.e., one that merely forces him/her to internalize). This means that "[t]he promissor under penalty does not pass from penalty to internalization; s/he passes from a higher penalty to a reduced one. S/he therefore receives an incentive to invest in proper and timely performance, to the point at which the marginal cost of precaution equals the marginal benefit of alternative investments (e.g., on entertain another customer) minus the amount of penalty s/he will in any case incur. Within these limits, the civilian model allows penalties to perform their efficient purpose"[18].

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[12] Against enforcing penalty clauses, it was argued that they will deter parties from committing efficient breaches (R.A. Posner, *Economic Analysis of Law* (Frederick: Aspen Publishing, 2014), 141). Moreover, penalties could incentivize to attempt to induce a breach by the other party (Clarkson *et al.*, *supra* note 2, 661), leading to a larger number of disputes (Rubin, *supra* note 2, at 243f.).

[13] See M. Pressman, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, in 7 Va. L. & Bus. Rev. 651, 665 (2013); L.S. Marquard, *An Empirical Study of the Enforcement of Liquidated Damages Clauses in California and New York*, in 94 South. Calif. L. Rev. 637, 641 (2021).

[14] Goetz and Scott, *supra* note 2, 578 ss. About the importance of penalty clauses to compensate subjective costs, see also L. De Alessi and R.J. Staaf, *Subjective Value in Contract Law*, in 145 J. Institutional Theor. Econ. 561 (1989).

[15] Cf. R.A. Posner, *supra* note 12, at 142.

[16] Stole, *supra* note 2, 584 ff.

[17] R.E. Scott and G.G. Triantis, *Embedded Options in the Case Against Compensation in Contract Law*, in 104 Colum. L. Rev. 1428-1491 (2004).

[18] Mattei, *supra* note 6, 442f..

Under common law, conversely, a contract clause which imposes an amount disproportionate to the estimate of damages in the event of breach is not enforced at all. Consequently, the promisor will "invest in timely and efficient performance only to the point at which his marginal investment equals the probability that a Court will not recognize the penalty as such. He therefore receives a much greater incentive to perform poorly and to litigate in case of bad performance"[19].

III. Mainstream law and economics vs behavioral law and economics: the new insights on penalty clauses

The so far described efficient model is premised on the idea that contracting parties are rational decision makers. It is assumed that they follow their self-interest and achieve the maximation of joint profit and social welfare, absent transaction costs or other objective market constraints, such as externalities. Within this frame, penalty clauses should be basically enforced because parties know their interests and needs better than judges. In the last decades, however, these assumptions have been criticized: defining what self-interest means is problematic and many law and economics studies have been influenced by cognitive psychology[20]. The focus shifts on the contracting parties' bounded rationality in making decisions. Accordingly, legal analysis requires new insights that should give consideration to heuristics and subjective biases, such as overoptimism, overconfidence, availability, hindsight bias, ambiguity aversion, anchoring, framing, endowment effect, hyperbolic discount, etc.[21]. From this perspective, penalty clauses met new opponents advocating for a wider legal paternalism. In general terms, it was noted that "the inherent complexity of determining the application of a liquidated damages provision to every possible breach scenario is often likely to exceed actors' calculating capabilities"[22]. According to another scholar, the existing ban of penalty clauses is justified because contracting parties are usually overoptimistic about their ability to perform the contract[23]. However, as to the enforceability of these clauses, the status of the contracting parties is considered relevant to identify the debiasing mechanisms. An

[19] *Id.*, at 443.
[20] J.L. Harrison, *The Influence of Law and Economics Scholarship on Contract Law: Impressions Twenty-Five Years Later*, in 68 N.Y.U. Ann. Surv. Am. L. 1, 8 ff. (2012).
[21] *Ex multis*, see C.R. Sunstein, *Behavioral Analysis of Law*, in 64 U. Chi. L. Rev. 1175, 1182 ff. (1997); R.B. Korobkint and T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, in 88 Cal. L. Rev. 1051, 1084 ff. (2000); R.A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, in 73 U. Chi. L. Rev. 111 (2006).
[22] M.A. Einsenberg, *The Limits of Cognition and the Limits of Contract*, in 47 Stand. L. Rev. 211, 227 (1995).
[23] J.J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, in 85 Cornell L. Rev. 739, 763 (2000).

author highlights that the utmost account shall not be taken to the distinction between businesses and consumers, but between parties with hierarchical organization and those not organized in this fashion. Indeed, the pressure of accountability and the outside view of the problem favor judgments not affected by individual biases, such as overoptimism, overconfidence, and the illusion of control[24]. However, even workers can make a decision by adapting to the inside view of the problem of their superiors. To this end, it should be necessary to carry out evaluations on a case-by-case basis, avoiding any types of generalization but giving rise to grave uncertainty[25].

On the other hand, behavioral decision theory is also used to strongly support the enforcement of penalty clauses. It was argued that, when the negotiators have a relatively equal bargaining power, penalties serve as rational response to bargaining irrationality. Their negotiation is conceived as one device that parties use to deal with the uncertainty of timely performance and the behavioral biases stemming from past experiences involving this ever-present condition[26]. Moreover, an experimental study shows that stipulating the damages in the contract helps parties reconceptualize their obligations in such a way that they are willing to exploit efficient-breach opportunities as they are less likely to find the breach morally offensive[27]. Meanwhile, there is also experimental evidence that a forfeited damage clause providing a small amount can give rise to inefficient incentives[28].

Behavioral law and economics sheds light on some critical aspects of contract penalties' regulation[29]; however, as has been seen, its lessons are often conflicting, and its normative position is quite ambiguous[30]. Despite being the more immediate solution against bounded rationality, a wider paternalism should not be broadly generalized since cognitive limits do not affect every human agent in the same way and could require different regulatory strategies[31]. Besides, biases may also influence the judicial decisions[32].

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[24] E. Baffi, *Efficient Penalty Causes with Debiasing: Lessons from Cognitive Psychology*, in 47 Val. U. L. Rev. 993, 1005 ff. (2013).
[25] *Id.*, at 1016.
[26] L.A. Di Matteo, *Penalties as Rational Response to Bargaining Irrationality*, in Mich. St. L. Rev. 883 (2006).
[27] T. Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, in 108 Mich. L. Rev. 633 (2010).
[28] A. Gaviria, *El efecto de las cláusulas penales en las decisiones de incumplimiento. Un análisis bajo la economía conductual*, in Rev. de Derecho Priv. 59, 72 ff. (2018).
[29] For a detailed overview, see Patti, *supra* note 4, 85 ff.
[30] See R.A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, in 85 Cornell L. Rev. 717, 733 ff. (2000).
[31] About some criticisms against a regulatory model built only on the individual rationality, see F. Denozza, *Mercato, razionalità degli agenti e disciplina dei contratti*, in Oss. dir. civ. comm. 1, 5 ff. (2012).
[32] R.A. Hillman, *supra* note 30, 735 ff.

IV. THE FRAGMENTATION OF THE EFFICIENT MODEL: IS COMPARATIVE LAW AND ECONOMICS STILL USEFUL?

The previous section showed how much the identification of an efficient model on penalty clauses in contracts has become tricky. Cognitive psychology brought down the myth of the rational agent and put under pressure the assumptions of mainstream economic analysis of law. This paradigm shift should be examined within the frame of comparative law and economics. Indeed, it could be argued that the uncertainty about the efficient rules undermines the objective of the discipline: using efficiency to evaluate legal transplants[33]. This observation prompts the question whether the comparative law and economics works without a clear efficient model which reveals how the law should be.

To this end, it is worth bringing out the key features of the normative dimension of comparative law and economics, that suggests the appropriate legal transplants and how they should and can be made[34]. It means that absolute statements are not needed, unlike the economic analysis of law which aims to identify the rules which are ideal in terms of efficiency. Comparison, instead, implies a relative judgement. Among two or more legal rules, it is possible to state the rule which is less inefficient despite the lack of consensus about the most efficient one at all. For instance, a concrete legal solution can be both efficient, considering some features, and inefficient, looking at some others; on the contrary, another real-world rule can prove to be inefficient in any case. Indeed, "[i]n using the tools of law and economics together with those of comparative law, the notion of efficiency assumes itself a comparative meaning. […] Consequently, the notion of efficiency, as used in comparative law and economics, maintains a clearly dynamic meaning, strictly linked with the notion of legal change"[35]. Hence, the insights from behavioral sciences do not alter the function of comparative law and economics.

In this context, penalty clauses represent an interesting case study. According to Mattei, "[i]n the efficient model, penalty clauses should not be treated differently from any other clause. And this should also apply to standard contracts"[36]. Not enforcing the clauses in question is justified only "if their introduction is unconscionable: for example because they have been introduced surreptitiously, or if they have been accepted by a party unable to understand

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[33] About the objective of comparative law and economics, see U. Mattei *et al.*, *Comparative Law and Economics*, in B. Bouckaert and G. de Geest (eds.), *The Encyclopedia of Law and Economics Volume One: The History and Methodology of Law and Economics* (Cheltenham: Edward Elgar, 2000), 508.
[34] *Id.*, at 507.
[35] *Id.*, at 512 f.
[36] Mattei, *supra* note 6, at 431.

their significance"[37]. This scheme, enacted by the Napoleonic code[38], cannot be considered the perfect guide anymore. Behavioral economics teaches us that broad generalizations have shortcomings. A judicial reduction of the stipulated sum is not necessarily inefficient, as well as the non-enforcement could be effectively dissuasive against unfairness resulting from abuses of information asymmetry or cognitive biases, pursuing justice and efficiency at once[39]. The key point is how (i.e. according to which criteria) the judges exercise their power on penalty clauses. With regard to their reduction in civil law, three aspects are decisive: when a penalty clause is grossly excessive and so when it may be reduced[40]; the time reference for this evaluation (*ex ante* or *ex post* as to the time of contract conclusion); the benchmark for the (new) sum amount in making the reduction. Moreover, despite the inefficiency of common law penalty rule, there is no doubt that it will be less inefficient if the ban of penalties is interpreted restrictively. Therefore, analysing case law about these aspects is crucial to assess legal trends towards or away from economic arguments.

V. COMPARATIVE CASE LAW ON THE JUDICIAL REVIEW OF PENALTY CLAUSES: OPPOSITE TRENDS BETWEEN CIVIL LAW AND COMMON LAW

Among civil law jurisdictions, Italian case law was one of the most active about penalty clauses during the last decades. For this reason, utmost attention shall be paid to Italian court judgements. In particular, the Supreme Court overturned its decisions on two basic points.

In the absence of an explicit provision establishing that the judge may act on his own motion, before 1999 it was not disputed that a judge could reduce a grossly excessive penalty clause only upon the request of the non-breaching party. The first-time admission of an *ex officio* judicial intervention[41] was confirmed by the Grand Chamber of the Supreme Court in 2005[42]. This overruling was much criticized on the grounds of economic arguments[43]. Under an ever-present judicial reduction power, penalty clauses are not able to compensate subjective costs anymore. Indeed, parties are someway deprived of the freedom to assess their interests

[37] *Id.*, at 430 f.
[38] *Id.*, at 434.
[39] This is the rationale beyond the invalidity of unfair terms, including penalty clauses, in business-to-consumer contracts: see P. Iamiceli, *sub* Art. 1382, in E. Gabrielli (ed.) *Commentario del codice civile* (Torino: Utet, 2011), 960.
[40] To be honest, in most civil law countries penalty clauses may be also reduced if the main contract obligation has been performed. In this case, the judicial reduction is quite predictable and does neither change the parties' will nor affect economic efficiency. See A. Palmieri, *La riducibilità «ex officio» della penale e il mistero delle «liquidated damages clauses»*, in Foro it., I, 1930, 1935 (2000).
[41] Corte di Cassazione 24 September 1999, n. 10511, in Foro it., I, 1929 (2000).
[42] Corte di Cassazione, sezioni unite, 12 September 2005, n. 18128, in Foro it., I, 2985 (2005).
[43] A. Palmieri, *Supervisione sistematica delle clausole penali: riequilibrio (coatto ed unidirezionale) a scapito dell'efficienza?*, in Foro it., I, 106 (2006); *Id.*, *supra* note 38, 1930 ff.; A. Bitetto, *Riduzione ex officio della penale: equità a tutti i costi?*, in Foro it., I, 432 (2006).

because they are always subject to the judge's approval. It is worth noting that the *ex officio* judicial intervention is expressly recognized also by the French Civil Code (Article 1231-5, which replaced Articles 1152 and 1231 due to *Ordonnance* n° 2016-131 of 10 February 2016). However, the judge may on her own motion even increase the agreed penalty, where it is ridiculously low. This solution is slightly less inefficient than the Italian one due to the advantage of tackling liability-limiting clauses, which deprive the parties of all incentives to perform properly[44].

Another important decision of the Italian Supreme Court concerns the issue of the relevant point in time for the evaluation of the excessiveness of the penalty[45]. Article 1384 of the Italian Civile Code states that the judicial reduction of the penalty should take into account the interest that the creditor had in contract performance. Courts have often considered the conclusion of the contract as the relevant moment for the evaluation because of the presence of the verb in the past tense[46]. This interpretation was abandoned in 2012, since the Supreme Court decided to consider also what happens until the moment of judgement for assessing whether a penalty is excessive[47]. Even if the actual damage suffered by the creditor is not the only benchmark that matters[48], clearly this new approach emphasizes the compensatory function of the stipulated damages clauses in spite of the punitive dimension[49]. As the penalty agreements become more uncertain, efficiency is again disregarded[50]. The *ex post* evaluation of the penalty has side effects: it can induce the promisor to get extra money for the "insurance", that will not be enforced when the damages turn out to be lower than the sum due as penalty[51]. The French case law shares the same shortcomings; moreover, in this legal system the actual loss suffered by the non-breaching party is used by the case law as the yardstick for the judicial review[52]. Giving relevance to the actual loss, the penalty can be reduced up to zero, or little more (actually, the sum may not be reduced below the damages

44 Palmieri, *supra* note 43, 108. About the French regulation, see D. Mazeaud, *Clause pénale*, in D. Mazeaud, R Boffa and N. Blanc (eds.), *Dictionnaire du contrat* (Issy-les-Moulineaux: LGDJ, 2018).
45 Corte di Cassazione 6 December 2012, n. 21994, in Foro it., I, 1205 (2013).
46 See F.P. Patti, *Penalty Clauses in Italian Law*, in Eur. Priv. L. Rev., 321 (2015).
47 The overruling was confirmed in the following decision: Corte di Cassazione 19 June 2020, n. 11908, in Rep. Foro it., Contratto in genere, atto e negozio giuridico, n. 369 (2020).
48 *Ex multis*, see Corte di Cassazione 7 September 2015, n. 17731, in Rep. Foro it., Contratto in genere, atto e negozio giuridico, n. 372 (2015).
49 Patti, *supra* note 46, at 322.
50 A. Palmieri, *Art. 1384 c.c. e sopravvenienze: ulteriore arretramento della funzione sanzionatoria della clausola penale*, in Foro it., I, 1212 (2013).
51 A. Palmieri and R. Pardolesi, *Dalla parte di Shylock: vessatorietà della clausola penale nei contratti dei consumatori*, in Danno e responsabilità 272, 276 (1998). About the different economic impacts between *ex ante* and *ex post* assessment of penalties, see S.A. Rea, Jr., *Efficiency Implications of Penalties and Liquidated Damages*, in 13 J. Leg. Stud. 147-167 (1984).
52 Patti, *supra* note 4, at 429.

payable for failure to perform the obligation), when there is no evidence of damages[53]. Further, Italian case law takes into account only the financial creditor's interest[54], though penalty clauses should be efficient tools to safeguard idiosyncratic values[55].

As well as Italian and French case law, other civil law jurisdictions proved to achieve inefficient solutions. For example, the Dutch Supreme Court (the *Hoad Raad*) delivered two important decisions (*Monda/Hauer I* and *Monda/Hauer II*) about a "lump-sum penalty clause", which sanctions each and every breach of contract by the same penalty. Thus, it does not matter whether the debtor has committed a serious breach of contract or a minor one. The cases concerned a sales contract where for each violation of a contractual obligation, regardless of the sort of obligation, by either buyer or seller, an amount of 10% of the purchase price (fl. 90,000) had to be paid[56]. Despite the differences between the two judgements (the second one is less radical than the previous one), both undermined the principle whereby the judicial power to reduce a penalty should be applied reluctantly. With regard to lump-sum penalties, modification is now the starting point. Indeed, the burden of proof has shifted on the creditor who has to justify why the lump-sum penalty may not be reduced[57].

Whilst several civil law countries have become more suspicious about penalty clauses, the trend is opposite in some common law jurisdictions[58]. Special consideration shall be taken to the United Kingdom Supreme Court's decision of the joint appeals in *Cavendish v El Makdessi* ("Makdessi") and *ParkingEye v Beavis* ("ParkingEye"). It serves as a new landmark for the penalty rule in English law, moving away from *Dunlop*[59]. The latter was composed of four principles set out by Lord Dunedin, who outlined also four tests to assist a court in making its decision as to whether a sum stipulated is penalty (unenforceable) or liquidated damages (enforceable). Dunedin's second proposition has been relied upon the most by subsequent courts: "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage"[60]. In *Makdessi* and *ParkingEye* the UK Supreme Court dismissed the "genuine pre-estimate of loss" approach in favour of a test whereby a contractual provision may be a penalty if: it is a secondary obligation which imposes a detriment on the contract-breaker out

[53] Santaroni, *supra* note 1, at 1065 f.
[54] Corte di Cassazione 5 August 2002, n. 11710, in Contratti 336 (2003).
[55] The German civil code (§ 343, BGB) is more efficient on this point: In judging the appropriateness of the agreed sum, every legitimate interest of the obligee, not merely his financial interest, must be taken into account.
[56] See H. Schelhaas, *The judicial power to reduce a contractual penalty*, in 12 ZEuP 386 (2004).
[57] *Id.*, at 392.
[58] Along these lines, see E. Calzolaio, *Il nuovo volto della clausola penale nel diritto inglese*, in Contratti 817, 822 (2016).
[59] See *supra* note 8.
[60] See L.K.C. Leung, *The Penalty Rule: A Modern Interpretation*, in 29 Denning L. J. 41, 46 (2017).

of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. Thus, the key-element is the legitimate commercial interest of the non-breaching party in performance. It is worth highlighting that "the concepts of genuine pre-estimate of loss and deterrence that had once been at the heart of the rule are notably absent"[61]. Moreover, the Supreme Court stated that where both parties are of comparable bargaining power and are properly advised (by solicitors), there is a strong initial presumption that the parties themselves are the best judges of what is legitimate in provisions dealing with the consequences of breach[62]. Although the Supreme Court did not abandon the penalty rule nominally, the rule is now "de facto extinct"[63]. There is no explicit evidence that law and economics has influenced the overruling, but the *Makessi* and *ParkingEye* test on penalties seems to be less inefficient than the *Dunlop* one. At least, legitimate commercial interest in performance is taken into account.

Other common law jurisdictions, such as Australia and Ireland, are faced with the new English approach, but convergencies and divergencies are still discussed by legal scholars[64].

In the United States, the distinction between liquidated damages and penalties is illustrated by both the Uniform Commercial Code (§2-718) and the Second Restatement of Contracts (§356). According to them, penalty is a term fixing unreasonably large liquidated damages and its reasonableness must be evaluated *ex ante* and *ex post* the contract conclusion. Besides, some States have regulated the treatment of liquidated damages clauses and penalty clauses by statutes[65]. With this regard, a recent study shows that, notwithstanding some differences in laws and doctrines, California and New York courts share similar approaches as to stipulated damages. In California law, for contracts other than those ones involving consumer goods and services and leases of residential property, "the [penalty] rule has been relaxed and liquidated damages clauses are now presumptively valid, 'unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made'"[66]. In New York law, there is the same presumption of validity for liquidated damages valid. Moreover, the New York courts are reluctant to interfere with parties' agreements and "frequently look at the sophistication

[61] *Id.*, at 47.
[62] *Id.*, at 48 f..
[63] W. Day, *A Pyrrhic Victory for the Doctrine against Penalties: Makdessi v Cavendish Square Holding BV*, in 2 J. Bus. L. 115 (2016).
[64] See C. McEneaney, *Penalty Clauses and Liquidated Damages: The Divergence in English and Irish Jurisprudence*, in 8 KILR 1 (2019); M. Yip and Y. Goh, *Convergence between Australian common law and English common law: The rule against penalties in the age of freedom of contract*, in 46 Common L. World Rev. 61 (2017).
[65] See, for example, California: Marquard, *supra* note 13, at 646.
[66] *Ibid.*

of the parties and procedural aspects, such as negotiation, relative bargaining power, and whether the parties were represented by counsel. Many courts stated that contracts resulting from arms-length negotiations by sophisticated parties are entitled to judicial deference"[67]. In comparison with English jurisprudence, American courts are generally more influenced by law and economics scholarship, even though its impact is not always clear. However, an author highlighted that the role of the economic literature has been evident in the case of liquidated damages clauses. Indeed, courts have relatively frequently cited the article by Charles Goetz and Robert Scott, "and in this instance the law seems to be on the move as well"[68].

The examined case law demonstrates how both UK and US common law are moving towards more flexibility on penalty clauses. The new enforceability tests are not fully consistent with economic arguments not being properly transparent and introducing a certain degree of uncertainty into the contracting process due to the strict distinction between primary and secondary obligations[69]. Nevertheless, the new benchmarks are less inefficient than the civil law ones as addressed by national courts.

VI. HARMONIZATION PROJECTS ON PENALTY CLAUSES: AN UNSATISFACTORY COMPROMISE

Differences between legal systems have been described so far. The most direct tool to overcome them is notoriously harmonization. In the last decades, there were several initiatives at the European and international level on harmonizing contract law, involving the treatment of penalty clauses. Moreover, these clauses are often included in international commercial contracts and there has long been a need for legal convergence about them: the Resolution of the Council of Europe on Penal Clauses in Civil Law was adopted in 1978[70]. Although harmonization projects belong to soft law, it is worth assessing their regard for efficient legal solutions. This way we can see whether an economic rationale has been taken into account by the expert committees about the law of *ex ante* stipulation of damages. We draw attention to the provisions adopted after Mattei's analysis; thereby, we only look at the

[67] *Id.*, at 650.
[68] Harrison, *supra* note 20, at 21.
[69] About some criticisms against the *Makessi* test, cf. McEneaney, *supra* note 61, 28 ff.; E. Calzolaio, *supra* note 56, 820.
[70] Council of Europe, Resolution (78) 3 relating to penal clauses in civil law, adopted by the Committee of Ministers on 20 January 1978, at the 281st meeting of the Ministers' Deputies.

rules included in the Principles of European Contract Law[71] (art. 9:509), the Draft Common Frame of Reference[72] (art. III.-3:712) and the UNIDROIT Principles[73] (art. 7.4.13).

These rules are almost identical and as a consequence share pros and cons. About the first, there is no distinction between liquidated damages clauses and penalty clauses, so that an agreed payment for non-performance is enforceable regardless of its function[74]. Anyway, on the tracks of civil law tradition, the stipulated sum may be reduced to a reasonable amount. On the other hand, the provisions are not detailed, and many questions have no explicit answer. For instance, it is not clear whether the judge can reduce the penalty on his own motion (*ex officio*)[75]. As has been seen before, the presence of this further judicial power would lead to inefficient outcomes. Moreover, the proposed law moves away from efficiency opting for an *ex post* excessiveness test, since the stipulated sum is considered grossly excessive in relation to the loss resulting from the non-performance and the other circumstances. Another possible shortcoming for efficiency goals concerns the notion of "loss". Indeed, a scholar argues the following point about the DCFR's provision on penalties: "If 'loss' is intended to refer to the sum which a court is likely to award in an objective assessment, the rule may constitute a serious impediment to efficient contracting, since the stipulated sum may reflect a very high subjective interest in performance which courts in practice would be reluctant to recognise"[76].

This brief overview shows that harmonization projects, clearly influenced by a compromise rationale, do not seem to embrace the economic perspective on penalty clauses more than the national systems do. At least, there is large room for judicial interpretation.

VII. Conclusions

In 1995, penalty clauses were subject to a comparative law and economics analysis, the conclusion of which was that in this field civil law is less inefficient than common law. The ban of penalties along with the enforcement of liquidated damages clauses has been

[71] O. Lando and H. Beale (eds.), *Principles of European Contract Law*, Parts I and II (The Hague, London, Boston: Kluwer Law International, 2000).
[72] C. von Bar *et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law*, *Draft Common Frame of Reference* (DCFR) (Munich: Sellier, 2009).
[73] International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts*, (Rome: UNIDROIT, 2016).
[74] F.P. Patti, *Contratti internazionali e clausola penale: esigenze di armonizzazione*, in Cherti, *supra* note 3, at 246.
[75] *Id.*, at 251 f.
[76] A. Ogus, *Measure of Damages: Expectation, Reliance and Opportunity Cost*, in F. Chirico and P. Larouche (eds.), *Economic Analysis of the DCFR – The work of the Economic Impact Group within the CoPECL* (Munich: Sellier, 2009), 140.

considered a stronger barrier to efficiency more than the judicial reduction of grossly excessive penalties is. To this end, the main argument was the exceptional nature of the civil law judicial modification in coherence with the freedom of contract principle, which was instead completely constrained by the common law penalty rule.

Almost three decades later, the previous conclusion should be overturned. Even though English and American courts continue to follow the distinction between liquidated damages and penalties, they have refrained from applying the rule strictly. The *Makessi* and *ParkingEye* tests of the UK Supreme Court placed emphasis on the aspects of commercial justification of stipulated damages overlooking the specific amount of the agreed sum. California and New York courts usually give relevance to the parties' bargaining power: when the latter is relatively equal, the forfeited damage clause is more likely to be enforced.

Conversely, several civil law courts are not anymore reluctant to reduce stipulated damages. The recognition of an *ex officio* judicial intervention where the agreed damages are deemed to be unreasonable, the adoption of *ex post* evaluation and the invalidity presumption of lump-sum penalty clauses push towards the uncertainty of parties' agreement regardless of economic concerns. Indeed, these general changes (i.e. not limited to specific situations) cannot be justified on the grounds of the new insights coming from behavioral law and economics. Although they may advocate for more paternalism, tackling cognitive biases would require different tools, that need a preliminary identification of the vulnerable agents and of the market sectors more frequently subject to failures. Moreover, as Mattei already noted, "neither are reasons in terms of justice intuitive, unless we are willing to believe that fairness requires decision-making biased towards the debtor-defendant"[77]. In light of that, there are no significant reasons to follow the new civil law trend. Eventually, this article briefly examined European and international harmonization projects on contract law. The compromise solutions adopted by them are not very satisfactory in terms of efficiency.

[77] Mattei, *supra* note 6, at 443.