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Contract Law for Interesting Times

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THE ECONOMIC APPROACH TO LAW AS AN INTERDISCIPLINARY LEMON AND CALABRESIAN LAW AND ECONOMICS AS TRUST MARK*

Fabrizio Esposito

TABLE OF CONTENTS:

This article moves from the premise that the economic approach to law is valuable to legal research when it does not distort the content and function of the legal norms it purports to analyze. The value comes from useful analytical frameworks, especially of market-relatead matters. This value is particularly important for comparative law since it offers standpoints to look at the law of different jurisdictions from a detached point of view. However, the economic approach has lost momentum and failed to attract the attention of comparativists even in the United States, where it is mainstream legal scholarship. Garoupa and Ulen's explanation of these 'hard realities' rests on two main causes with limited explanatory power because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent). At the same time, in previous scholarship, Garoupa and Ulen claimed that the economic approach to law was less successful outside the United States and Israel due to legal parochialism: rent-seeking academic gatekeepers raise barriers to foreign legal innovation to their own benefit. Evidently, legal parochialism fails to explain the hard realities of the economic approach to comparative law in the United States. A plausible diagnosis reconciling this explanatory conflict is that we face an interdisciplinary lemon problem: quality variation of the economic approach to law and its opacity to legal scholars leads to a suboptimal level of interaction with economic analysts. The principled dereliction of problematic economic analysis negatively impacts also useful economic analysis. This article claims that shifting the focus from mainstream (comparative) Economic Analysis of Law to Calabresian Law and Economics will improve the situation. The latter offers a set of research questions and methods of interest to comparativists and answers them in methodologically sound ways, to the benefit of comparative research.

Keywords: Economic approach to comparative law – legal parochialism – principled dereliction – interdisciplinary lemon problem – Calabresian Law and Economics

INTRODUCTION

In a famous paper, Gunther Teubner introduced the concept of legal irritants.[1] In the context of European integration through law, Teubner exposed "a fundamental irritation which triggers a whole series of new and unexpected events" caused by legal transplants.[2] Indeed, Teubner's own reflections on the law as an autopoietic system[3] suggest that "law

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1 Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences," *The Modern Law Review* 61 (1998): 11.

2 *Ibid., 18*.

3 See, generally, Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell Publishers, 1993).

and …" movements can be legal irritants – that is, interdisciplinary irritants. When, moreover, the alien discipline under consideration is economics, namely the imperialistic social science *par excellence*,[4] the idea of an interdisciplinary irritant becomes a plausible one;[5] even more so considering that leading scholars within the economic approach to law[6] have expressed preoccupation about the fundamental irritation caused by their discipline.[7]

Ignoring the possibility that the economic approach to law is a Teubnerian legal irritant, Garoupa and Ulen have tried to explain the limited success of the economic approach to law outside the United States and Israel moving from the premise that the economic approach to law is an innovation.[8] This qualification is significant because it assumes that the economic approach to law is something positive or desirable, that rational legal academics should want to consume, provided that their selfish interest is aligned with the social interest.[9] In other words, legal scholarship faces a social dilemma: individual and societal costs and benefits are not aligned.[10] Garoupa and Ulen claim that this social dilemma is caused primarily by legal parochialism. "[L]egal parochialism operates like protectionism in trade":[11] in all legal academic markets, rent-seeking gatekeepers ostracize

[4] On the concept of scientific imperialism and its application to economics, see the essays in in Uskali Mäki, Adrian Walsh, and Manuela Fernández Pinto, eds., *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity* (New York: Routledge, 2017).

[5] Katja Langenbucher, *Economic Transplants: On Lawmaking for Corporations and Capital Markets* (Cambridge: Cambridge University Press, 2017) uses the expression "economic transplants" to present the use of economic concepts in legal practice as analogical to legal transplants. This is in line with the observation that comparative legal research can be expanded beyond its traditional realms; see, generally, Mathias Siems, "The Power of Comparative Law: What Types of Units Can Comparative Law Compare?," *The American Journal of Comparative Law* 67 (2019): 861. Accordingly, it is plausible to extend the idea of legal irritants from legal transplants to economic transplants which, Langenbucher defines so broadly as to cover the whole spectrum of scholarship produced using the economic approach to law.

[6] I will use "economic approach to law" as in Richard A. Posner, "The Economic Approach to Law," *Texas Law Review* 53 (1975): 757, to refer to what Calabresi calls Economic Analysis of Law on the one hand and Law and Economics on the other in Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (New Haven: Yale University Press, 2016). Note that according to this terminology, what Nuno Garoupa and Thomas S. Ulen, "Comparative Law and Economics: Aspirations and Hard Realities," *The American Journal of Comparative Law* 69 (2021): 664, name Comparative Law and Economics is a subfield of what Calabresi calls Economic Analysis of Law, not of Calabresian Law and Economics – the approach that I endorse here, as I did elsewhere; *see* [.

[7] See, for example, Anthony Ogus, "Law and Economics in the Legal Academy, or, What I Should Have Said to Discipulus," *The University of Toronto Law Journal* 60 (2010): 169, Alan Schwartz, "Two Culture Problems in Law and Economics," *University of Illinois Law Review* (2011): 1531, Qi Zhou, "What Can Economists Learn from Contract Lawyers?," in *Regulatory Reform in China and the EU*, ed. Stefan E. Weishaar, Niels Philipsen, and Wenming Xu (Cheltenham: Edward Elgar Publishing, 2017), 117. *See*, extensively, Section III.

[8] *See* Nuno Garoupa and Thomas Ulen, "The Market for Legal Innovation: Law and Economics in Europe and the United States," *Alabama Law Review* 59 (2008): 1555, and, more extensively on legal parochialism, Nuno Garoupa, "Updating the Law and Economics of Legal Parochialism," in *Law and Economics in Europe and the U.S.: The Legacy of Juergen Backhaus*, ed. Alain Marciano and Giovanni Battista Ramello (Cheltenham: Edward Elgar Publishing, 2016), 171.

[9] *See below*, Sections II.

[10] *Social Dilemma*, American Psychological Association, https://dictionary.apa.org/social-dilemma (last visited May 10, 2024). More extensively, see Ulrich Schulz, Wulf Albers, and Ulrich Mueller, *Social Dilemmas and Cooperation* (Berlin: Springer, 2012).

[11] Garoupa *supra* note 8, 179; *see also* Garoupa and Ulen, *supra* note 8.

foreign legal innovation to their own benefit. In the United States and Israel, this mechanism has more limited success because the local academic market (presented as a single one for both countries) is too large to effectively exclude the economic approach to law.

Recently, Garoupa and Ulen have reflected on the "hard realities" of the economic approach to comparative law. Notably, their analysis is in line with those offered by Paris and Vargas Weil. [12] An element that transpires from this recent scholarship is disappointment; this disappointment stems from the belief that the economic approach to law is valuable to legal scholarship because it offers a precise *lingua franca*.[13] Garoupa and Ulen's analysis stands out because they offer an evidence-based explanation of these hard realities: beliefs about methodological mismatches and implausible assumptions of the economic approach to law make it unpalatable to comparativists.[14]

Interestingly, the explanation of these hard realities rests uncomfortably with Garoupa and Ulen's previous legal parochialism perspective but approximates the legal irritant perspective. Looking at comparative legal scholarship in the United States, Garoupa and Ulen give more explanatory weight to the fact that comparativists believe they have good reasons not to consume the comparative economic approach to law.[15] This fact arguably follows from their focus on the limited success of the economic approach to comparative law in the United States, where this approach is considered successful in legal scholarship. However, since legal parochialism is a general phenomenon in their view, it should also be considered when focusing on comparative legal scholarship. In sum, Garoupa and Ulen have offered two explanations: one based on parochialism (selfish) and the other on rational distaste (non-selfish).

This article develops arguments in favor of the non-selfish explanation. Significantly, these arguments are not limited to comparative legal scholarship, but it is not surprising that the problem is more apparent in this field. The analysis ultimately leads to the following diagnosis: the economic approach to law is an interdisciplinary lemon. The intuition is that some of the scholarship produced by the economic approach to law makes legal discourse more confused and distorts legal concepts and the function of legal norms, contrary to the perception of the proponents of this approach. In light of the difficulties in distinguishing this problematic scholarship from the rest, legal scholars disengage,[16] leading to a shrinking

[12] See also F. Parisi, "The Multifaceted Method of Comparative Law and Economics," *Comparative Law Review* 12 (2023): 25, Giovanni B. Ramello, "Comparative Law and Economics," in *Encyclopedia of Law and Economics*, ed. Alain Marciano and Giovanni B. Ramello (Cheltenham: Edward Elgar Publishing, July 2023), and Ernesto Vargas Weil, "Map and Territory in Comparative Law and Economics," *Global Journal of Comparative Law* 11 (2022): 1.

[13] *See below*, footnote 27 and the accompanying text.

[14] *See below*, Section I.

[15] Cf. Garoupa, *supra* note 8, and Garoupa and Ulen, *supra* note 8 (not ruling out entirely the relevance that legal scholars' 'rational distaste' for the economic approach to law may play a role but significantly downplaying its explanatory relevance). *See below*, Section II.

[16] Directorate-General for Justice and Consumers (European Commission) et al., *Behavioural Study on Unfair Commercial Practices in the Digital Environment: Dark Patterns and Manipulative Personalisation: Final Report* (Luxembourg: Publications Office of the European Union, 2022), https://data.europa.eu/doi/10.2838/859030 (last visited May 24, 2024), 282 (noting that disengagement is a "market-related" phenomenon, not one imputable only to consumers). See also Christine Riefa, Paolo

of the economic approach to law akin to Akerlof's famous market for lemons.[17] Following Akerlof's path-breaking analysis,[18] it is up to scholars involved in the economic approach to law to help other legal scholars (whether comparativists or not) to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc.

Building on this diagnosis, this article presents Calabresian Law and Economics as a subfield that can be the trust mark that addresses the interdisciplinary lemon problem. In fact, it was recently observed that "(t)o a comparatist's ears, Calabresi's approach may sound like the theory of legalformants in action at its finest".[19] Two complementary developments of Calabresian Law and Economics are auspicious to this end: the Legal-Economic Performance (LEP)[20] and Legal-Economic Fitness (LEF)[21] frameworks. On the one hand, the LEP framework offers a method to describe situations of human interdependence with attention to their legal nuances, to then analyze the economic consequences of different institutional interventions with a rich and diversified set of methods, and without any normative pre-commitment. The LEP framework can, therefore, credibly deliver on the promise of a *lingua franca*; one that is, however, both legal and economic.[22] On the other hand, the LEF framework focuses on identifying those versions of an economic concept that fit best with actual legal reasoning. The recently formulated consumer welfare hypothesis[23] illustrates well the potential of this method. It will also be shown that the consumer welfare hypothesis is particularly promising for comparative legal research.[24] A thought-provoking implication of the consumer welfare hypothesis for the field is a *praesumptio efficientiam*, to be understood as a specification of the functionalist *praesumptio similitudinis*.

A caveat is in order. This article defends some claims about the relationship between the economic approach to law and comparative legal scholarship without explicitly articulating the varieties of comparative legal scholarship. At the same time, the article makes claims

Siciliani, and Harriet Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Cambridge: Cambridge University Press, 2019), 40–42.

17 George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84 (1970): 488.

18 Stefan Grundmann, "Knowledge and Information," in *New Private Law Theory: A Pluralist Approach*, ed. Stefan Grundmann, Hans-Wolfgang Micklitz, and Moritz Renner (Cambridge: Cambridge University Press, 2021), 241-46.

19 Marco Giraudo, "Some Remarks on Lawyers' Use of Knowledge. Charting a Course," *Isaidat Law Review* 13 (2021): 20, referring in particular to Sacco's theory of legal formants; see, Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," *The American Journal of Comparative Law* 39 (1991): 1.

20 Sarah Klammer and Eric A. Scorsone, *The Legal Foundations of Micro-Institutional Performance: A Heterodox Law & Economics Approach* (Cheltenham: Edward Elgar Publishing, 2022).

21 Fabrizio Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century* (Cheltenham: Edward Elgar Publishing, 2022).

22 *See below*, Section III.a.

23 See Esposito, *supra* note 21. See, Nuno Garoupa, "Fabrizio Esposito, 2022, The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century, Edward Elgar," *European Review of Contract Law* 20, no. 1 (April 2024): 148–53, and Valentina Calderai, "The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century," *European Law Review* 49, no. 2 (2024): 210–13.

24 *See below*, Section III.b.

about the beneficial contributions and possible interactions between the two disciplines. It necessarily follows that several aspects will remain underdeveloped. These are unavoidable limitations within the confinement of an article, even a long one. However, as Hans-Wolfgang Micklitz uses to say, "the goal is starting a conversation". In fact, the ultimate claim of this article is that scholars in the economic approach to law need to listen more[25] comparative legal scholars and make an effort to understand, rather than brush off, their concerns; at the same time, comparative legal scholars have arguably to benefit from engaging specifically with a minoritarian strand in the economic approach to law, namely Calabresian Law and Economics. The contribution of this article consists, first and foremost, in cleaning up and fertilizing the cognitive space where this interdisciplinary scholarship could root, blossom, and eventually flourish.

The article is structured as follows. Section I offers an analytical summary of Garoupa and Ulen's reflection on the hard realities of the economic approach to comparative law and compares it to the alternative explanation: the interdisciplinary lemon problem. Section II reflects on the unique role that comparative legal research can play in fruitfully and meaningfully integrating the economic approach to law within the legal community, but also exposes the limits of the value proposition the economic approach to law formulates for comparative legal research. Building on these findings, it then articulates the diagnosis that the economic approach to law is an interdisciplinary lemon. Section III explains why Calabresian Law and Economics would operate as a reliable trust mark, thereby reassuring that a certain piece of scholarship is typically worthy of comparativists' attention. In particular, the LEP framework is proposed as a general methodological approach for Comparative Calabresian Law and Economics. At the same time, the systematic investigation of the consumer welfare hypothesis using the LEF framework constitutes a progressive research program (in Lakatos's sense[26]) that, if properly nurtured, would eventually flourish in a grand theory of exchange contracts. The Conclusion summarizes the analysis and formulates the action plan that could be instrumental for Comparative Calabresian Law and Economics to root, blossom, and eventually flourish.

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[25] Similarly, Deirdre Nansen McCloskey, *Bettering Humanomics: A New, and Old, Approach to Economic Science* (Chicago: University of Chicago Press, 2021), especially viii-ix.

[26] See, in particular, Imre Lakatos, "Falsification and the Methodology of Scientific Research Programmes," in *Can Theories Be Refuted? Essays on the Duhem-Quine Thesis*, ed. Sandra G. Harding (Dordrecht: Reidel, 1976), 205; see, generally, Alan Musgrave and Charles Pigden, "Imre Lakatos," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman, Spring 2023 ed. (2023), summarizing Lakatos's "research programme" account of scientific practice as follows:

> Each theory produced within a research programme contains the same common or "hard core" assumptions, surrounded by a "protective belt" of auxiliary hypotheses. When a particular theory is refuted, adherents of a programme do not pin the blame on their hard-core assumptions, which they render "irrefutable by fiat". Instead, criticism is directed at the hypotheses in the "protective belt" and they are modified to deal with the problem. Importantly, these modifications are not random—they are in the best cases guided by the heuristic principles implicit in the "hard core" of the programme. A programme progresses theoretically if the new theory solves the anomaly faced by the old and is independently testable, making new predictions. A programme progresses empirically if at least one of these new predictions is confirmed.

Moreover, a programme is theoretically progressive because it generates new hypotheses (and, more generally, research questions).

I. TWO COMPETING VIEWS OF COMPARATIVE LEGAL SCHOLARS' COLD SHOULDER

This section summarizes Garoupa and Ulen's account and, with equal clarity, articulates the alternative view that this article argues for: the economic approach to law is an interdisciplinary lemon, and Calabresian Law and Economics is a reliable trust mark for legal scholars.

Garoupa and Ulen claim that:

> (1) The economic approach to law is valuable to comparative legal research because it offers a clear *lingua franca* for legal scholarship. However, (2) the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists even in the United States, where the economic approach to law is mainstream in legal scholarship. (3) Plausible causes are: the limited success of comparative law in the United States; a methodological mismatch between the economic approach to law and comparative law; an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law. (4) While this is the current situation, it might be too early to declare the economic approach to comparative law a faulty project because there might be forces at play that will lead the field to success in the future.

This claim comprises: a value proposition, proposition 1; the recognition of hard realities, proposition 2; a diagnosis of the hard reality, proposition 3; finally, a prognosis for the future, proposition 4. Notably, this view is based primarily on direct observation, publicly available data and, fundamentally, on the interview of "nineteen leading scholars".[27]

This article offers a different account, where comparative legal scholars are in good company to remain unimpressed by the economic approach to law and offers constructive proposals for reviving the field, relying on the Calabresian Law and Economics tradition (Comparative Calabresian Law and Economics):

> (1') The economic approach to law is valuable to comparative legal research because it offers a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*. However, (2) the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists even in the United States, where the economic approach to law is mainstream in legal scholarship. (3') *The following causes have limited relevance because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent)*: the limited success of comparative law in the United States; a methodological mismatch between the economic approach to law and comparative law, and an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law*; instead, a plausible cause is the quality variation of the economic approach to law and its opacity to legal scholars, which leads to an interdisciplinary lemon problem.* (4') While this is the current situation, it might be too early to declare the economic approach to

[27] Garoupa and Ulen, *supra* note 6, 682.

> comparative law a faulty project because there *are* forces at play that will lead the field to success in the future, *and these forces consist in shifting the attention from mainstream Economic Analysis of Law to Calabresian Law and Economics, which offers a set of research questions that comparative legal scholars may find interesting and answers them in methodologically sound ways, thereby operating as the quality signal (trust mark) that can address the interdisciplinary lemon problem*.

In other words, building on the recognition of the hard realities (proposition 2), a different diagnosis (proposition 3') is proposed, resting on a more cautious and self-critical value proposition (proposition 1'). This analysis will lead to a clearer and more optimistic prognosis (proposition 4').

II. A HARD LOOK AT HARD REALITIES: THE ECONOMIC APPROACH STRUGGLES TO DELIVER VALUE

According to Garoupa and Ulen, the following value proposition (proposition 1) is true: The economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship. In their own words: "law-and-economics tools were 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".[28] In this regard, and before assessing the merits of proposition 1, it should be noted that a *lingua franca* and conceptual precisions are some of the benefits associated with comparative legal research in general.[29] In this sense, comparativists have a rational reason to take the economic approach to law seriously – if proposition 1 is true.

Notably, proposition 1 is attractive to legal scholars in general; however, if true, it is particularly palatable for comparativists. Siems opens his textbook with this quote from Merryman: "Lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan".[30] If the problem economists are facing is getting parochial legal scholars to listen, comparativists are the most likely to do so. In fact, there are significant similarities between comparative research and economic analysis. As Huka observes, "comparative law and law and economics [*rectius* – the economic approach to law] are both essentially comparative in nature".[31] Michaels adds: "comparatists know that looking through the eyes of foreign law enables us better to understand our own, so looking through the eyes of foreign disciplines should similarly help us better to understand our own discipline".[32]

The economic approach to law is most compatible with the functionalist approach to comparative legal research. In fact, economic analysis could be fruitfully applied to the comparative institutional analysis of how similar problems are addressed in different legal contexts;[33] this possibility is more plausible when the focus is market-related institutions,

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[28] Garoupa and Ulen, *supra* note 6, 671. *See also below*, footnotes 40-42 and the accompanying text.
[29] Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2019), 345-73, 372-3.
[30] Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2022), 1.
[31] Jaakko Husa, *Interdisciplinary Comparative Law: Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd* (Cheltenham: Edward Elgar Publishing, 2022), 114.
[32] Michaels, *supra* note 29, 342.
[33] *See below*, footnote 77 and the accompanying text.

but there is reason to believe that the scope can be expanded beyond this realm.[34] In sum, economics can offer a detached standpoint for the comparison of different institutional arrangements.

Readers finding the opposition between functionalist and 'postmodernist' approaches to be a matter of degree rather than a qualitative distinction leading to incompatibility, can agree that the economic approach to comparative law should be of interest also to moderate postmodernists. Without any intent to provoke, the next section will suggest that even skeptics of the functional approach could incorporate in their research a sophisticated economic approach to comparative legal research. This approach is called Calabresian Law and Economics.[35]

However, the economic approach's ability to deliver what proposition 1 promises is, unfortunately, uneven. Accordingly, as it will be described more in detail in this section, the economic approach to law is not very good at reassuring legal scholars that, normally, the economic approach to law delivers the value it promises. Before articulating this partial explanation of the economic approach to comparative law's hard realities, it is helpful to offer examples in support of proposition 1 and examples of situations where that same value proposition is patently false.

a. An often ungrammatical lingua franca

Proposition 1 is arguably true, in part.[36] This section provides examples of that. However, examples of the opposite are also offered: in multiple occasions, the economic approach to law distorts the legal concepts it purports to clarify, to the effect that the results of the mainstream economic approach to law cannot be relied upon as a *lingua franca* for comparative legal research. Even worse, sometimes, the economic approach to law seems uninterested in legal concepts or even conceptual rigor. For example, this is how Mattei opens his seminal book on the economic approach to comparative law: "Legal interpretation should not be guided by justice. It should be guided by efficiency".[37] Notably, a more qualified argument in favour of the legal relevance of efficiency was offered by Craswell with the idea of a 'jurisprudential preface'.[38] From a legal theory perspective, however, even Craswell's cautious perspective is not cautious enough.[39]

Moving on, in Ulen's celebrated textbook written with Bob Cooter, one reads[40]:

> [w]hich law is better? Perhaps you think that fairness requires injurers to pay for the damage they cause. If so, you will approach the question as traditional

[34] *See below*, footnotes 156-172 and the accompanying text for important qualifications to this claim, and the constructive proposal of relying on the economic concept of situation of interdependence.
[35] *See below*, footnotes 138-152 and the accompanying text.
[36] Also, Langenbucher, *supra* note 5, offers a series of hard looks at value proposition 1 and would arguably endorse value proposition 1'. More extensively, Shawn Bayern, *The Analytical Failures of Law and Economics* (Cambridge: Cambridge University Press, 2023).
[37] Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997), 7.
[38] Richard Craswell, "Default Rules, Efficiency, and Prudence," *Southern California Interdisciplinary Law Journal* 3 (1993): 289.
[39] *See*, generally, Fabrizio Esposito and Giovanni Tuzet, "Economic Consequences for Lawyers: Beyond the Jurisprudential Preface," *Journal of Argumentation in Context* 9 (2020): 368.
[40] Thomas Ulen and Robert B. Cooter, *Law and Economics* (Boston: Pearson, 2016), 82.

> lawyers do, by thinking about causes and fairness. … Professor Coase, however, answered in terms of efficiency.

This statement is particularly noteworthy since Garoupa, Ulen[41] and Parisi[42] consider Cooter to be the scholar who, better than anyone else,[43] has articulated proposition 1. Two points must be stressed. First, none of these scholars acknowledges that the *lingua franca* ideal is an aspiration internal to comparative legal research.[44] Second, the level of dismissal for legal concepts in Cooter and Ulen's textbook is remarkable. One could claim that this textbook is outdated and does not fully reflect the state of the art. Indeed, Garoupa and Ulen report that Ulen has, over time, abandoned the legal-topic structure to teach the economic approach to law, in favor of an economic-concept-based structure.[45] Yet, in one of the chapters in the *Oxford Handbook Of Law and Economics*, in the volume dedicated to methodology (no less), one reads: "[W]e could define a 'perfect social norm' as a behavioral regularity caused by coordination, non-legal sanctions, and internalization. However, we will not labor over the definition. Economics is more concerned with causes than meanings, and so are we".[46]

One point both citations touch upon is causation. Hence, in the context of causation, one is entitled to expect that the rigor of the alleged *lingua franca* operates with full force. However, Ben-Shahar, one of the leading scholars in the field, in his 2000 chapter on causation for the *Encyclopedia of Law and Economics*, wrote: "The economic analysis of the law of causation illuminates both the cause-in-fact and the proximate cause doctrines".[47] This is a clear commitment to proposition 1. However, what is actually happening is an attempt to reformulate legal concepts to make them fit with economic optimal deterrence theory; in Ben-Shahar's own words[48]:

> This chapter … clarifies the basic distinction between retrospective (*ex post*) causation and prospective (*ex ante*) causation, a distinction that forms the core of many subsequent economic discussions of causation. Next, the explicit role of causation doctrines in inducing optimal care and activity levels is examined … . The analysis is then extended to cover several complications often plaguing the determination of causation: uncertainty over causation, joint actions among tortfeasors and unforeseeability of harm.

What is the distinction between retrospective and prospective causation? The former "exists if, all else held fixed, but for the action the harmful consequence would not have occurred".[49] This is, in other words, the familiar but-for test. "Prospective causation exists

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41 Garoupa and Ulen, *supra* note 6, 670-72.
42 Parisi, *supra* note 12, 28.
43 Parisi, nevertheless, believes that the intellectual father of the '*lingua franca* ideal' is Ugo Mattei and the place of birth is Mattei, *supra* note 37; *Id.* at 26. *Similarly*, Vargas Weil, *supra* note 12,1.
44 Michaels, *supra* note 29, 372-73; *see*, extensively, Uwe Kischel, Comparative Law (New York> Oxford University Press, 2019), 46-85.
45 Garoupa and Ulen, *supra* note 6, 681-85.
46 Emanuela Carbonara, "Law and Social Norms," in: *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts*, ed. Francesco Parisi (New York: Oxford University Press, 2017), 466, 469.
47 Omri Ben-Shahar, "Causation and Foreseeability," in: *Encyclopedia of Law and Economics*, eds. Boudewijn Bouckaert & Gerrit De Geest, vol. 2 (Chelthenam: Edward Elgar, 2000), 644, 645.
48 *Ibid.*
49 *Ivi*, 647.

when an action raises the probability of the harmful consequence".[50] Ben-Shahar illustrates the improvement of adopting the latter by reference to *Berry v. Sugar Notch Morough*.[51]

Unfortunately, the alleged improvement provided by the economic approach to law in 1980[52] was at the core of the jurisprudential analysis of causation offered by legal philosopher HLA Hart in 1959.[53] Moreover, contrary to Ben-Shahar, Hart articulates his analysis in the familiar terms of cause, effect, and purpose of the norm, concluding that purpose can lead to a teleological reduction of the results of the but-for test. That is not all: the conceptual analysis provided by Hart illuminates the core of the court decision in *Berry*, namely[54]:

> That [the driver's] speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety.

Admittedly, the court is not fully transparent in making the point, but it is pretty clear that the argument is that the purpose of the norm is to reduce speed and that since the accident could have happened at a lower speed, having violated the speed limit did not cause the accident in a legally relevant sense. Note also that Ben-Shahar belittles the language used by the court, namely "coincidental harm" and "abnormal risk" by writing that to avoid an unreasonable result, the court had to use "elusive concepts".[55]

At the same time, the advantage of the economic approach would be that "under prospective causation inquiry, the action of speeding is recognized to have not affected the likelihood of harm".[56] However, reading the case shows that the court is considering that, in principle, the likelihood or effect of the accident could have been lower at a lower speed. This is due to the higher space to break and the higher protection the vehicle would have offered. Yet, contrary to Ben-Shahar's hasty analysis, the court carefully points out the institutional limits that a jury would face in evaluating these elements; accordingly, the court concluded that it was best not to ask juries to consider them.[57] In sum, contrary to Ben-Shahar's celebratory views, legal scholarship had been and is still offering a better account of *Berry*.

It is well known that the concept of transaction cost is central to the economic approach to law. Hence, one would expect such a central idea for a potential *lingua franca* to be reasonably clear. Yet, Vatiero, an institutional economist, concludes that the very concept

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[50] *Ibidem*.
[51] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899).
[52] Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," 9 J Leg Stud 463 (1980).
[53] H. L. A. Hart, "Causation and Sine Qua Non," in: *Causation in the Law*, 2nd edn, eds. H. L. A. Hart & Tony Honoré (1982), 109.
[54] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899), 348-9.
[55] Ben-Shahar, *supra* note 47, 647.
[56] *Ibid.*
[57] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899), 349.

of a transaction has not received enough attention from economists; even more surprisingly, he tries to clarify the concept by relying on legal categories.[58] As discussed in Section III, Vatiero is not alone in believing that legal concepts can help clarify economic ones.

Let us consider other concepts central to the microeconomic tools used by mainstream Economic Analysis of Law, such as market power, consumer welfare, and consumer sovereignty. These notions are intuitively central to any economic analysis of market relations.

Recently, Petit explains how competition law scholarship is ripe with controversies caused by "misconceptions about market power".[59] Notably, Petit sees economists as co-responsible in that "the market power story is not always uniformly told by economists. Subtle definitional differences that matter get overlooked in favour of 'simplistic notions', and all the more if lawyers are in the audience".[60]

We find a similar pattern for consumer welfare and consumer sovereignty. About consumer welfare, a famous misconception that economists have not helped in addressing is due to Bork. Bork famously argued that the term "consumer", as used in the Sherman Act, applies to consumers and producers in a specific market because producers in that market are consumers in other markets.[61] This claim, aptly called by part of the literature the Chicago trap,[62] conflates a normative argument often found in Economics 101 – namely that transfers cancel out because the benefits to consumers equal the benefit to producers – with a doctrinal argument on the meaning of "consumer" in the Sherman Act. A cursory investigation of the current state-of-the-art in competition law is enough to sense that the debate is more confused because of this claim, with leading scholars missing the point and others spending valuable energy trying to clarify the matter.[63]

The expression consumer sovereignty has been used sparingly in the economic approach to law. A scholar who has used it quite systematically is Alan Schwartz in a series of papers in the early 80s.[64] His account of the concept has been the reference point for the limited but significant economic approach to law literature relying on the concept of consumer

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[58] Massimiliano Vatiero, *The Theory of Transaction in Institutional Economics: A History* (Milton Park: Routledge, 2020).

[59] Nicolas Petit, "Understanding Market Power: An Economics Perspective," in: *Research Handbook on Abuse of Dominance and Monopolization*, eds. Pınar Akman, Or Brook & Konstantinos Stylianou (Chelthenam: Edward Elgar, 2023), 26.

[60] *Ibid.*, 26-7.

[61] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 110.

[62] See Doris Hildebrand, The Role of Economic Analysis in EU Competition Law: The European School (Alphen aan den Rijn: Kluwer, 2016), 26 (adding that "consumer welfare" is "*the most abused term* in competition economics", emphasis in the original). For a balanced analysis, see Daniel A. Crane, "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy," 79 Antitrust Law Journal 835 (2014) and the references therein.

[63] See, for example, for the United States, Lina M Khan, "Amazon's Antitrust Paradox," 126 The Yale Law Journal 710 (2017) and compare with Herbert Hovenkamp, "Is Antitrust's Consumer Welfare Principle Imperiled?," 45 Journal of Corporation Law 101 (2019); for the European Union, see Ariel Ezrachi, "The Goals of EU Competition Law and the Digital Economy," BEUC Discussion Paper (2018) and the systematic analysis paper by Konstantinos Stylianou & Marios Iacovides, "The Goals of EU Competition Law: A Comprehensive Empirical Investigation," 42 Legal Studies 620 (2022).

[64] For a *locus classicus*, see Alan Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis," 97 The Yale Law Journal 353 (1988).

sovereignty. The problem is that, for consumers to be sovereign in his account, it is sufficient that their preferences determine what is produced. However, a review of the economic literature on this concept shows that this account of what consumer sovereignty entitles consumers to is dramatically impoverished.[65]

These examples concerning central concepts in the economic analysis of market transactions confirm that perhaps the *lingua franca* value proposition is excessively gallant to the economic approach to law. Sometimes the economists' contribution is yet another voice in a cauldron of voices, leading to more noise rather than more clarity.

Finally, the view that efficiency is about maximizing total welfare is intimately connected to a surprisingly resilient critique of the internal market project, namely that it instrumentalizes consumers and consumer law.[66] This view is intimately connected to the idea of the maximization of total welfare: if the purpose of the market is to maximize total welfare, and the European Union harmonizes consumer law to foster the internal market project, then the justification for EU consumer law is supporting an institutional reform that is meant to increase total welfare. Hence, EU consumer law is not really committed to the interest of consumers but is used instrumentally to create the internal market. As Epstein wrote in the prestigious and widely read among EU lawyers *Common Market Law Review* in 2013: "Consumer protection is not an end in itself, especially in competitive markets; it can be justified, if at all, solely as a means to maximize the net value for both parties".[67] This is total welfare maximization as applied to contract settings.[68]

These are all examples of situations where the relevance of the economic approach to law cannot be denied. At the same time, all these examples show that the value proposition proposed by Garoupa and Ulen does not work.

An even more fundamental example of the failure to clarify legal concepts is the alleged opposition between the forward-looking or *ex ante* perspective characterizing economic analysis and opposed to the backward-looking or *ex post* perspective characterizing legal reasoning. Even admitting, for the sake of argument, that this difference is occasionally useful, every legal scholar knows that arguments based on consequences and focusing on the deterrence of sanctions play important – albeit not exclusive – roles in legal reasoning. Unfortunately, in the economic approach to law, this distinction is turned into a disciplinary boundary, occasionally with extremely aggressive language.[69] Momentously,

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[65] See Esposito, *supra note* 21, 30-9 and the references therein.

[66] Recently, Martijn W. Hesselink, Justifying Contract in Europe: Political Philosophies of European Contract Law (2021); Laura Burgers, Marija Bartl & Chantal Mak, "Introduction. The Evolving Concept of Private Law in Europe," (2022), https://papers.ssrn.com/abstract=4304717 (last visited May 26, 2024). Contra: Stephen Weatherill, The Internal Market as a Legal Concept (2017), 117 and Valentina Calderai, "The Consumer Welfare Hypothesis in Law and Economics Towards a Synthesis for the 21st Century," *European Law Review* 49, no. 2 (2024): 210.

[67] Richard Epstein, "Harmonization, Heterogeneity and Regulation: CESL, the Lost Opportunity for Constructive Harmonization," 50 Common Market Law Review 207 (2013), 219.

[68] For a *locus classicus*, see Anthony T. Kronman & Richard A. Posner, The Economics of Contract Law (1979), 1-2.

[69] *See* Frank H. Easterbrook, "The Most Insignificant Justice: Further Evidence," 50 The University of Chicago Law Review 481 (1983), at 486; compare with the milder view in Frank H. Easterbrook, "Foreword: The Court and the Economic System," 98 Harvard Law Review 4 (1984), 10-11.

even Garoupa and Ulen still buy into this idea,[70] although many scholars in the field have rejected it for a long time.[71]

As anticipated, this section does not claim that the economic approach to law never clarifies legal concepts and never improves legal analysis. Accordingly, some examples supporting value proposition 1 follow.

The first example comes from an area very far from markets, competition, and contracts, namely, proportionality. Proportionality reasoning is a very successful approach to resolving the conflict between human, fundamental, and constitutional rights. It is well-known that Robert Alexy's analysis of proportionality is very influential. It is perhaps less known that Alexy relied on multiple economic concepts to articulate his account of proportionality.[72] Notably, however, Alexy did not reduce the legal concepts used in proportionality analysis to economic concepts; instead, he relied on those economic concepts to clarify the legal concepts at play. The result was a legal *lingua franca*, widely used worldwide, which benefited from economic insights.

Moving to consumer law, an interdisciplinary team composed of an economist, a consumer lawyer, and a consumer activist has written a concise and highly insightful book entitled *Consumer Theories of Harm*.[73] The book articulates a framework for identifying situations where consumers are likely to be in a particularly weak position in the market and uses it to analyze several regulatory responses to these challenges. Consumer law scholars have received the book extremely well.[74]

This is a short list (only two, actually) of examples where economic analysis delivers on its value proposition to improve the clarity of legal discourse.[75] However, later this article will provide additional examples. It will do more: the rest of the article explains that there is a minoritarian economic approach to law with the credentials to systematically produce scholarship that succeeds in being helpful to and compatible with comparative legal research: Calabresian Law and Economics.

The following subsections focus on one aspect of legal concepts often threatened by the economic approach to law, namely the identification of the purpose and function of legal norms. It will become apparent that this common risk makes the economic approach to law difficult to accept, even for comparativists using the functionalist method.

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[70] Garoupa and Ulen, *supra* note 8, 667.

[71] *See*, e.g., Craswell, *supra note* 38; Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking about the Law (2008), 3-12.

[72] Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010).

[73] Riefa et al., *supra* note 16.

[74] Jules Stuyck, "Book Review: Consumer Theories of Harm, An Economic Approach to Consumer Law Enforcement and Policy Making Paolo Siciliani, Christine Riefa and Harriet Gamper, Hart, Oxford, 2019," 9 Journal of European Consumer and Market Law (2020) and, more at length, Fabrizio Esposito, "Towards a General Theory of Harm for Consumer Law," 44 J Consum Policy 329 (2021).

[75] Régis Lanneau, "The Relevance of Law and Economics for Practical Reasoning," in: *The Law and Economics of Justice*, eds. Avishalom Tor & Klaus Mathis (Dordrecht: Springer, 2024) (offering additional examples of situations where economic analysis raises conceptual concerns rather than offering useful conceptual insight).

b. A principled dereliction

The seed of the main reason why the economic approach to law fails to win the heart even of functionalists is planted even in Garoupa and Ulen's plea for reconsideration. They observe that, in the economic approach to law, the "scholarly gold standard is a demonstration that a particular legal rule or standard is demonstrably inefficient".[76] If this is the case, functionalists who do not see a specific institution as having the function of promoting efficiency will be justified, having read Garoupa and Ulen's article, to remain uninterested in the economic approach to law. The reason is simple: they believe that a specific legal institution does not have the function of promoting an efficient allocation of resources. The gold standard for one epistemic community has little value in a different community that does not recognize gold as a holder of value.[77]

In an attempt to benefit from the economic approach to law, comparativists have identified two ways to use efficiency analysis. One is more straightforward and can be called the externalist perspective: "Efficiency becomes the *tertium comparationis* of the comparison".[78] Accordingly, while one can offer rankings of norms from the perspective of their efficiency, as soon as one acknowledges that this account is partial,[79] the resulting ranking will be perceived as incomplete and arbitrary, at best. Arguably, for this reason, one can observe that this monistic approach has been largely abandoned in the analysis of domestic law, in favour of pluralist frameworks, where efficiency is balanced against other values.[80] Normative pluralism significantly weakens the promise of clarity enshrined in value proposition 1.[81]

The situation is even worse if one adopts the internalist perspective and takes as starting point the (set of) function(s) an institution has under national law (e.g., protect consumers against manipulation or reduce tax evasion). From the internalist perspective, foreign law is surveyed to search for alternative ways to achieve the domestic (set of) function(s).[82] Here, efficiency simply refers to the relationship between institutional input and output,

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[76] Garoupa and Ulen, *supra* note 8, 683.

[77] While gold is almost universally recognized in the modern economy as a holder of value, in some ancient societies in was almost unknown, so it could not play the role of a holder of value. *Generally*, Erica Schoenberger, "Why is Gold Valuable? Nature, Social Power and the Value of Things," 18(1) Cultural Geographies 3 (2011).

[78] Kischel, *supra* note 44, 117.

[79] Florian Faust, "Comparative Law and Economic Analysis of Law," in: *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann & Reinhard Zimmermann (New York: Oxford University Press, 2019), 826, 835.

[80] *See* Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," 8 The Journal of Legal Studies 103 (1979) already operated along these lines. Recently, see Omri Ben-Shahar & Ariel Porat, Personalized Law: Different Rules for Different People (2021). For theoretical analyses, see Kraus, *supra* note 71, and Klaus Mathis, Efficiency Instead of Justice?: Searching for the Philosophical Foundations of the Economic Analysis of Law (Dordrecht: Springer, 2009).

[81] Generally, Daniel Markovits & Alan Schwartz, "Plural Values in Contract Law: Theory and Implementation," 20 *Theoretical Inquiries L.* 571 (2019); with specific reference for comparative legal research, see Julie De Coninck, "The Functional Method of Comparative Law: 'Quo Vadis'?," 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 318 (2010), at 340; similarly, but less powerfully, Michaels, *suprasupra* note 29, 344 and 362; more extensively, see Jaakko Husa, "Farewell to Functionalism or Methodological Tolerance?," 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 419 (2003).

[82] Cfr. Faust, *supra* note 79.

evaluated in light of the (set of) function(s) the institution has under national law.[83] This internalist perspective is quite different from the externalist one, but the difference can be easily missed.[84]

The difference between the two leads to a radical and general obstacle to the economic approach to law highlighted by Dworkin more than 40 years ago[85] and exposed to the comparative law community by James Gordley:[86] the internalist challenge. Suppose that a particular scholar believes that the function of contracts and contract law is to ensure commutative justice in contractual relations or that the purpose is to let individuals achieve self-authorship.[87] As long as you move from either of these premises, any comparative analysis in terms of the relative efficiency of legal institutions will not interest you because this is not the goal that those institutions have from your perspective.

This will hold even if, like Gordley or Dagan and Heller, you ultimately believe there is remarkable convergence between economic and philosophical frameworks in justifying specific doctrines. The reason is that convergence in outcomes without an agreement in the justifications is shallow and does not allow for the formulation of normative implications for the philosophical framework based on economic analysis. This is the case because since the two frameworks disagree about the justifications of outcomes, one can never be sure that the perspectives will converge over new cases. Convergence needs to be established on a case-by-case basis each and every time, making it of limited help, if any.

A similar situation can be observed in tort law, where the main conflict is between corrective justice and economic efficiency. Here, Calabresi has illustrated a different approach.[88] The competing theories are presented as different accounts of the same practice. Instead of alternatives, they are presented as complementary; they are, to use Calabresi's famous expression, different views of the same Cathedral. Calabresi moves from the economic perspective as foundational,[89] but then observes that "if – in order to deter by charging certain activities' their costs' – a society gives people the right to recover,

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[83] For economics, see Paul R. Krugman & Robin Wells, Economics (New York: Worth Publishers, 2009), 109. For the economic approach to law, see Avery W. Katz, "Economic Foundations of Contract Law," in: *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Letsas & Prince Saprai (New York: Oxford University Press, 2014) 174 and Lewis Kornhauser, "The Economic Analysis of Law," in The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, Spring 2022 ed. (2022), https://plato.stanford.edu/archives/spr2022/entries/legal-econanalysis/ (last visited May 24, 2024).

[84] Kischel, for example, does not distinguish between the two; compare Kischel, *supra* note 44, 115, para 60 and 117-8, para 66.

[85] Ronald M. Dworkin, "Is Wealth a Value?," 9 The Journal of Legal Studies 191 (1980).

[86] The economic approach to law "tr(ies) to show that a legal rule could promote 'efficiency' and conclude that they have thereby identified the purpose of the rule. … Indeed, the proponents of some economic explanations congratulate themselves on their ingenuity in discovering purposes for rules that never occurred to anyone else before, even to their colleagues who study law and economics"; James Gordley, "Comparative Law and Legal History," in: *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann & Reinhard Zimmermann (New York: Oxford University Press, 2019), 754, 765-6.

[87] In contemporary English-speaking scholarship, the first perspective is biunivocally associated with James Gordley's scholarship; see, see, for example, James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press, 1993). For the second, see Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (New York: Cambridge University Press, 2017).

[88] See, Guido Calabresi, "Toward A Unified Theory of Torts," 1 Journal of Tort Law 1 (2007).

[89] More precisely, Calabresi follows a cost internalization logic: "(C)ompensation was simply an effective way of charging activities with their costs" (*Id.* at 5).

such recoveries will surely affect what people think their rights are. And that in turn will surely affect that society's notions of corrective justice".[90] In Michaels's terms, Calabresi proposes an adaptionist account, which is "particularly apt for comparative law".[91]

Generalizing, to address the Dworkinian challenge, what is needed is an account of a specific institutional practice in terms that can accommodate within a unified account both the economic and the legal perspectives. Notably, even pluralistic frameworks cannot really meet the Dworkinian challenge unless efficiency is somehow internalized in the system.[92] After all, if efficiency is not internalized, it cannot be considered part of the values a legal system is trying to foster.

Against this background, the economic approach to comparative law does something different. It normally posits that certain institutions aim to increase economic efficiency and ultimately ranks the systems according to their ability to do so. However, in such an analysis, much of the functional diversity the comparative analysis should bring about is sidelined as irrelevant. This follows from the fact that the problem is not identified in descriptive terms, such as: "How do different legal systems govern car accidents?". Instead, the question is formulated in normative terms and efficiency is the goal: "Which system is more efficient in governing car accidents?". As just noted, the answer to the second question is unattractive to the law community until the Dworkinian challenge is met. As Section III.a shows, the Legal-Economic Performance framework allows to integrate economic and legal analyses in a way that circumvents the Dworkinian challenge. Section III.b adds that the Dworkinian challenge can be met using the Legal-Economic Fitness framework.

To summarize. To contribute to legal analysis, economic concepts need to be integrated into accounts of legal practices that are acceptable to the legal community. This is a critique that the economic approach to law has failed to address for over 40 years. What is needed in each and every one of these situations is a sort of Rosetta Stone allowing for the translation of economic concepts into legal concepts and vice versa. This is an observation that Bruce Ackerman[93] formulated more than 30 years ago, and that is also at the core of Calabrasian Law and Economics, as we shall see in Section III.

Notably, at least two additional reasons may justify the principled dereliction – the choice not to consume – the economic approach to comparative legal research. Garoupa and Ulen mention both, at least in part.

First, "[c]omparatists tend to become very exercised when they perceive law and economics as being antithetical to some of their deepest-held views about law"; in particular, (comparative) legal scholars "perceive law as being about fairness, social justice, and morality. Additionally, they find the egoistic assumption of law and economics abhorrent".[94] Contrary to Garoupa and Ulen's belief "that those feelings about fairness

[90] *Id.*, 9.
[91] Michaels, *supra* note 2, 348.
[92] Esposito and Tuzet, *supra* note 39 and F. Esposito, "Rever Engineering Legal Reasoning", in Peter Cserne and Fabrizio Esposito (eds.), *Economics in Legal Reasoning* (Palgrave, 2020).
[93] Bruce A. Ackerman, "Law, Economics, and the Problem of Legal Culture," 1986 Duke Law Journal 929 (1986). See also Schwartz, *supra* note 7 and Bayern, *supra* note 36.
[94] Garoupa and Ulen, *supra* note 8, 684. *See also* Kischel, *supra* note 44, 116.

and egoism and economics had been addressed",[95] I submit that this problem has not been addressed,[96] as hinted to also by Parisi.[97] Properly addressing this problem would indeed have fundamental implications for the success prospects of the economic approach to comparative law and, more generally, to legal research.

Second, the excessive focus on rational and selfish behavior given to Garoupa and Ulen as a reason to reject the economic approach to law calls for two separate lines of reflection. As noted above, even Garoupa and Ulen's legal parochialism explanation[98] rests on selfish behavior. However, at least for part of the literature, this claim is inaccurate.[99] A whole field of research has been developing over the last 20 years by challenging these assumptions. On the other hand, it must be emphasized that behavioral studies' hallmark is that the assumptions of rational and selfish behavior are relaxed, not rejected. And for a good reason.

Scholarship in various disciplines is still capable of producing insightful results relying upon these assumptions. For example, Robert Frank in the *Darwin Economy* identifies a social dilemma that stems from the fact "that in many important domains of life, performance is graded on the curve", in the sense that the reward derives from the ranking, not the absolute quality of the performance;[100] this problem exists even if one assumes that individuals are rational and markets are competitive. More fundamentally, the multidisciplinary research on reciprocal behavior moves from models where rational and selfish agents cooperate based on their reputation only,[101] to then explain the development of social norms and institutions as part of the adaptive process that supports cooperation via reciprocal behavior.[102]

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[95] Garoupa and Ulen, *supra* note 8, 684.

[96] To see that this is not the case, it is sufficient to check the survey of the critiques in the *Oxford Handbook of Law and Economics* offered by Driesen and Malloy; David Driesen & Robin Paul Malloy, "Critiques of Law and Economics," in *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts*, ed. Francesco Parisi (New York: Oxford University Press, 2017), 300. At the same time, in Nuno Garoupa, *Trends in Comparative Law and Economics* (Milton Park: Routledge, 2022), the term "fairness" appears only twice and it means "making administrative adjudication acceptable" (p. 50); and other terms as "justice" and "equity" are never used to refer to the related substantive values.

[97] Parisi, *supra* note 12.

[98] Cfr. *supra* note 11 and the accompanying text.

[99] Faust, *supra* note 79, 829 observes: "it has been widely acknowledged that the model of the rational, utility-maximizing individual has to be refined". *See also* Giesela Rühl, "Behavioral Analysis and Comparative Law: Improving the Empirical Foundation for Comparative Legal Research," in: *Research Methods in Consumer Law*, eds. Hans-Wolfgang Micklitz, Anne-Lise Sibony & Fabrizio Esposito (Chelthenam: Edward Elgar, 2018), 477-512 (discussing the benefits for comparative research deriving from behavioral scholarship). See, generally, Eyal Zamir & Doron Teichman, *Behavioral Law and Economics* (New York: Oxford University Press, 2018).

[100] Robert H. Frank, *The Darwin Economy: Liberty, Competition, and the Common Good* (Princeton: Princeton University Press, 2012), 11.

[101] A turning point in this regard is represented by the study in Hisashi Ohtsuki & Yoh Iwasa, "How Should We Define Goodness? Reputation Dynamics in Indirect Reciprocity," 231 J Theor Biol 107 (2004).

[102] *See*, generally, Martin A. Nowak and Karl Sigmund, "Evolution of Indirect Reciprocity," *Nature* 437 (2005): 1291 and Isamu Okada, "A Review of Theoretical Studies on Indirect Reciprocity," *Games* 11 (2020): 27. Marco Perugini et al., "The Personal Norm of Reciprocity," *European Journal of Personality* 17 (2003): 251 review specifically the literature on the role played by the internalization of social norms in this context. *See also* Jon Elster, "Reciprocity and Norms," in *Social Ethics and Normative Economics: Essays in Honour of Serge-Christophe Kolm*, edited by Marc Fleurbaey, Maurice Salles, and John A. Weymark (Berlin: Springer, 2011), 327-337.

We can find a parallel with Holmes's idea of the bad man.[103] The point is not that we are all or that most of us are selfish. The point is that command and control are particularly relevant to govern the behavior of those people who are not motivated by the social values incorporated in legal norms.[104]

As anticipated, the critique is not completely ungrounded. Even leading scholars like Cooter and Porat can abuse the self-interest assumption. In their 2014 book, *Getting Incentives Right*, (ironically) Cooter and Porat conclude that "if the rule is no liability, the injurer has no economic incentive to take precaution and so will minimize expenditure on precaution by taking none".[105] Normative proposals are derived from this conclusion, which is based on an unconvincing use of rational choice theory and an unconvincing defence thereof.[106] In fact, one will take zero precautions without economic incentives only if no other motivating factor is at play. Hence, the focus is Holmes's bad man, not a normal person, and the level of precaution normal people will take remains unknown. Failing to acknowledge this is a real problem and can explain legal scholars' disengagement. Similarly to Cooter and Porat, writing in 2022 on the prestigious *Stanford Encyclopedia of Philosophy*, Kornhauser goes as far as saying that the influence on behavior of elements other than economic incentives has not been addressed by "[p]hilosophers".[107] This is not true.[108] Moreover, in the 1990s, scholars in the economic approach to law started investigating the expressive function of the law and its interaction with social norms;[109] this topic is now integrated into mainstream Economic Analysis of Law.[110]

At most, therefore, what we observe about the modeling of individuals is again a problem of opacity, namely the problem of struggling to identify those situations where the assumptions of rational and selfish behavior are reasonable from those where they are not. In adjudication contexts, the negative reaction of the legal community to implausible economic considerations has been amply documented. Even a Nobel Prize awardee can fail to be considered an expert by a US trial judge if the proposed model seems too

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[103] *See*, William Twining, "Bad Man Revisited," *Cornell Law Review* 58 (1973): 275; Marco Jimenez, "Finding the Good in Holmes's Bad Man," *Fordham Law Review* 79 (2011): 2069.

[104] Here I am assuming, for simplicity, that social values are morally defensible and that legal norms are aligned, so that the social fabric is coherent. This obviously need not be the case, which leads to important phenomena, such as immoral laws, changes of social values, and crowding out effects. At the same time, I am not assuming that command and control is the best way kind of legal intervention. For an accessible introduction, *see* Benjamin van Rooij and Adam Fine, *The Behavioral Code: The Hidden Ways the Law Makes Us Better or Worse* (Boston: Beacon Press, 2021).

[105] Robert D. Cooter and Ariel Porat, *Getting Incentives Right: Improving Torts, Contracts, and Restitution* (Princeton, Princeton University Press: 2014), 94.

[106] *See* Ronen Perry, "Getting Incentives Righter: A Comment on Getting Incentives Right," *Jerusalem Review of Legal Studies* 12 (2015): 202 and Robert Cooter and Ariel Porat, "Getting Incentives Right—Responding to Critics," *Jerusalem Review of Legal Studies* 12 (2015): 237, 249.

[107] Kornhauser, *supra* note 83.

[108] *See*, generally, Elizabeth Anderson, "Beyond Homo Economicus: New Developments in Theories of Social Norms," *Philosophy & Public Affairs* 29 (2000): 170.

[109] *See*, generally, Cass Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144 (1996): 2021; Robert Cooter, "Expressive Law and Economics," *The Journal of Legal Studies* 27 (1998): 585; Eric A. Posner, *Law and Social Norms* (2000).

[110] Cfr. Carbonara, *supra* note 46.

simplistic to fit the relevant factual scenario.[111] A recent comparative US-UK study on the use of economic evidence in the regulatory state found similar dynamics behind the allocation of decisional power to the institutional actors involved.[112]

This dynamic is ultimately connected to a broader concern that, especially comparativists may have, namely the risk of reductionist explanations. Parsimony is a methodological virtue.[113] *Ceteris paribus*, a more parsimonious explanation is preferable. However, whether the *ceteris* are *paribus* is often controversial. Disagreement on this point leads to consider an explanation derogatorily reductionist.[114] The 2008 article by Garoupa and Ulen on the market of legal innovations is an excellent example of such a phenomenon. In fact, Garoupa and Ulen dedicate a significant number of pages and careful reflection to identify a long list of factors that may contribute to explaining the limited success of the economic approach to law outside the United States and Israel. This list includes: political ideology and normative philosophy; private funding supporting the economic approach to law; common vs civil law; the structure of legal education, the characteristics of academic positions; the influence of legal realism and other elements of legal culture. However, their proposed explanation derives solely from applying the model of protectionism in trade to the market of legal innovation. All the other considered factors have been explained away as "derivative of whether the legal academy is competitive".[115] Yet, at the very least, market openness can hardly explain the usefulness of economic concepts to offer an organizing framework that legal dogmatics provides in civil law countries, which the authors present as central to the common vs civil law distinction.[116]

In light of the previous analysis, it is possible to reconsider the diagnosis Garoupa and Ulen offer in support of their observation that the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists (proposition 2). Their initial diagnosis (proposition 3) must be qualified to accommodate the wealth of counterevidence offered above. Notably, the offered evidence is not meant to reject *in toto* the proposed explanation. The only part that is rejected is the assumption that comparative legal scholarship in the United States is a special case: there is no qualitative difference in the attitude of comparativists, who are just more explicit in the assessment. Accordingly, the qualified version of proposition 3 defended in this article is: (3') *The following causes have limited relevance because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent)*: the limited success of comparative law in

111 *See*, Nicola Giocoli, "Rejected! Antitrust Economists as Expert Witnesses in the Post-Daubert World," *Journal of the History of Economic Thought* 42 (2020): 203.

112 Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence* (New York: Cambridge University Press, 2022).

113 *See*, Xavier Gabaix and David Laibson, "The Seven Properties of Good Models," in *The Foundations of Positive and Normative Economics: A Handbook*, ed. Andrew Caplin and Andrew Schotter (New York: Oxford University Press, 2008), 292. As one of several desirable properties, parsimony should not be overemphasized; see generally Albert O. Hirschman, "Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse," *Economics & Philosophy* 1 (1985): 7. See also Péter Cserne, "The Uneasy Case for Parsimony in (Law and) Economics: Conceptual, Empirical and Normative Arguments," *Global Jurist* 19 (2019).

114 *See*, generally, Raphael van Riel and Robert Van Gulick, "Scientific Reduction," in *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Spring 2019 ed. (2019).

115 Garoupa and Ulen, *supra* note 8, 1619.

116 Garoupa and Ulen, *supra* note 8, 1588 and Faust, *supra* note 79, 844.

the United States; a methodological mismatch between the economic approach to law and comparative law, and an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law; *instead, a plausible cause is the quality variation of the economic approach to law and its opacity to legal scholars, which leads to an interdisciplinary lemon problem*.

The following section uses economic analysis to derive a consequential implication of proposition 3': the economic approach to law is currently an interdisciplinary lemon, not a uniform interdisciplinary irritant. The task is, therefore, explaining how to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. Only when this screening is made easy can one expect comparativists to systematically perceive the value for them of the economic approach to law (proposition 1'). A way to do so is to focus on Calabresian Law and Economics, as discussed in Section III.

c. Behind the hard reality: Protectionism and/or lemon problem?

Garoupa and Ulen's hard realities article bridges two strands of literature. The first, arguably more familiar to comparativists, consists of reflections on the relationship between the economic approach to law and comparative legal research.[117] The second one is the so-called economic analysis of the economic approach to law and consists in investigating the success of the economic approach to law with the tools typical of economic analysis. As noted in the Introduction, the present article was prompted by the observation that Garoupa and Ulen have failed to relate their analysis of the hard realities of the economic approach to comparative legal research with legal parochialism – their original contribution to the economic analysis of the economic approach to law.

Before offering an alternative to the legal parochialism hypothesis, it is noteworthy that much of the *explanandum* in this line of research is controversial. Garoupa and Ulen build on the widely shared view that the economic approach to law is mainstream in the United States (with the important exception of comparative law) and Israel but not so much everywhere else.[118] Depoorter and Demot suggest that the discipline's success in the European context is higher than normally perceived and is, in any event, growing.[119] A recent empirical investigation suggests that when the focus is on hardcore journals associated with the economic approach to law, the discipline is quite successful outside the United States.[120] At the same time, Mattei has predicted that the economic approach to law has entered into a process of decline which is connected more broadly to "a decline

[117] Cfr. Faust, *supra* note 79, Parisi, *supra* note 12, Vargas Weil, *supra* note 12.
[118] *See also* Oren Gazal-Ayal, "Economic Analysis of Law in North America, Europe and Israel," *Review of Law & Economics* 3 (2007): 485.
[119] Ben Depoorter and Jef Demot, "The Cross-Atlantic Law and Economics Divide: A Dissent," *University of Illinois Law Review* 2011 (2011): 1593
[120] Jaroslaw Kantorowicz and Elena Kantorowicz-Reznichenko, "Law & Economics at Sixty: Mapping the Field with Bibliometric and Machine Learning Tools," *Journal of Economic Surveys* 2024 (2024): 1.

phase of US legal scholarship in the global scenario",[121] while Siems is optimistic about the relevance of the economic approach to comparative law.[122]

Section II found that legal researchers have rational, non-selfish reasons to reject the economic approach to law. Again, this does not mean that those parochial motivations initially identified by Garoupa and Ulen are not at play, at least partly. However, this does not mean the whole problem can be meaningfully reduced to parochialism either.

The parochialism account articulated by Garoupa and Ulen runs as follows. All legal academic communities are parochial, and they try to increase entry barriers to benefit the insiders. More specifically, gatekeepers defend their prominence in the local debate by limiting access to scholars with different perspectives. Like protectionism in trade, the implication is that the broader local community – the consumers of legal scholarship – loses. Probably every academic has experienced, to a larger or narrower extent, the effects of such a mechanism. In normative terms, this is a form of epistemic injustice, defined as "those forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative practices".[123] Epistemic injustice is indeed a problem that is denounced in a large variety of academic contexts.[124] The charge of imperialism moved to economists can be seen as a form of epistemic injustice.[125]

To a large extent, we might face a problem of divergent perceptions between insiders and outsiders. Garoupa and Ulen, as noted, were surprised to learn that their view on efficiency, fairness, rationality and egoism does not match the one of comparativists. Similarly, Cooter and Gilbert confidently state that "[p]eople mostly agree on the value of efficiency but disagree on distribution".[126] Similarly, Faust states that "[a]n efficiency evaluation will be acceptable to most, if not all, modern societies".[127] Bearing in mind the

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121 Ugo Mattei, "The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi," *Maryland Law Review* 64 (2005): 220, 220.

122 Cfr. Mathias Siems, "New Directions in Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2019), 852.

123 Ian James Kidd, José Medina, and Gaile Pohlhaus Jr., "Introduction," in: *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 1. The authors continue: "These issues include a wide range of topics concerning wrongful treatment and unjust structures in meaning-making and knowledge producing practices, such as the following: exclusion and silencing; invisibility and inaudibility (or distorted presence or representation); having one's meanings or contributions systematically distorted, misheard, or misrepresented; having diminished status or standing in communicative practices; unfair differentials in authority and/or epistemic agency; being unfairly distrusted; receiving no or minimal uptake; being coopted or instrumentalized; being marginalized as a result of dysfunctional dynamics; etc." See also, Morten Fibieger Byskov, "What Makes Epistemic Injustice an 'Injustice'?" *Journal of Social Philosophy* 52 (2021): 114, and Leonie Smith and Alfred Archer, "Epistemic Injustice and the Attention Economy," *Ethical Theory and Moral Practice* 23 (2020): 777.

124 Heidi Frasswick, "Epistemic Injustice in Science," in *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 1. For specific instances, see Swethaa S. Ballakrishnen and Sarah B. Lawsky, "Law, Legal Socializations, and Epistemic Injustice," *Law & Social Inquiry* 47 (2022): 1026; Himani Bhakuni and Seye Abimbola, "Epistemic Injustice in Academic Global Health," *The Lancet Global Health* 9 (2021): e1465.

125 Kristina Rolin, "Scientific Imperialism and Epistemic Injustice," in *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity*, ed. Uskali Mäki, Adrian Walsh, and Manuela Fernández Pinto (New York: Routledge, 2018).

126 Robert D. Cooter and Michael D. Gilbert, *Public Law and Economics* (New York: Oxford University Press, 2022), 29.

127 Faust, *supra* note 79, 835-6 (immediately adding that "there will be disagreement about the role efficiency is to play", nonetheless concluding that a ranking in efficiency terms "permits a comparison of the rules").

citations from Cooter and Ulen's textbook and Mattei's seminal book reported in Section II, one cannot be surprised if Kischel writes instead: "From the outset, the direct question of which solution is fairer or more just does not arise in economic analysis".[128]

This observation allows us to focus on a limit of the legal parochialism hypothesis, namely that it qualifies the economic approach to law as a product that rational legal scholars – the consumers – should buy because of value proposition 1, but they do not do it because individual and social interests are not aligned (hence, the nature of a social dilemma). However, Section II has shown that this is only part of the story. There are rational reasons that justify the choice of not consuming scholarship from the economic approach to law, which are not selfish but principled.[129] These reasons warrant caution in formulating value propositions about what the economic approach to law has to offer to legal scholars.

Against this background, a humbler view, encapsulated in value proposition 1', seems more appropriate: The economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*.

Building on proposition 1', we can apply with full force to the hard reality of the economic approach to law the economic logic behind Akerlof's analysis of the market for used cars with uncertain quality.[130] Akerlof's celebrated model illustrates the effects of asymmetric information about higher- and lower-quality goods on market outcomes.[131] In other words, the hard reality of the economic approach to comparative law (proposition 2) is explained by the fact that legal scholars in general (proposition 3') struggle to distinguish scholarship produced by the economic approach to law based on its quality.

The mechanism identified in Akerlof's seminal model is the following. If used cars are of different quality, a uniform market price will be systematically advantageous to the sellers of low-quality cars (the lemons) since they will get a price that is more than the car's worth. Conversely, some (not all, at least at the beginning) sellers of high-quality cars who cannot signal that their product is of high quality will prefer to keep the car and enjoy its value directly instead of monetizing it. In parallel, without appropriate institutional protection, buyers are reluctant to buy out of fear of overpaying a lemon. This leads to a dynamic effect where the average quality and, consequently, the market price drops and more sellers choose to leave the market; the average quality and, consequently, the market price drop

[128] Kischel *supra* note 44, 114.

[129] In economic terms, they are based on the justified belief that reading time might be better invested in reading something from outside the economic approach to law; that is, the opportunity cost is higher than the benefit.

[130] George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84 (1970): 488. For empirical evidence supporting the model, *see* Winand Emon and George Sheldon, "The Market for Used Cars: New Evidence of the Lemons Phenomenon," *Applied Economics* 41 (2009): 2867. For an analysis of this model's impact on legal scholarship, see Grundmann, *supra* note 18, 241-6.

[131] In economic terms, these are more precisely called vertically differentiated goods, as opposed to horizontally differentiated goods. Vertically differentiated goods are ranked on the basis of quality variations that are widely shared (e.g. Casio vs Rolex; Twingo vs Ferrari). Horizontally differentiated goods will be ranked differently by different people on the basis of their preferences (e.g. pizza margherita vs Ceasar salad; baseball vs basketball).

more and more sellers leave; the average quality and, consequently, the market price drop more etc. In sum, consumers do not trust sellers, sellers do not demonstrate trustworthiness, and the market collapses.

In reality, we do not see such a mechanism at play so drastically in markets with quality asymmetry, thanks to complementary institutions. As Akerlof noted, remedies for lack of conformity, commercial guarantees, and trust marks, are among the institutional mechanisms to reassure clients that they are not buying a lemon.[132]

The interdisciplinary lemon hypothesis has two crucial features. First, it explains why the scholars initially focusing on the economic approach to comparative law have largely moved their attention elsewhere rather than enlarging their ranks:[133] there was little demand, and so scholars moved to other sub-fields, either in the economic approach to law or in more traditional areas of legal research under the adaptionist pressure of publish or perish (or just out of frustration). Second, the interdisciplinary lemon hypothesis indicates that the independent variable is not parochial legal scholars: legal scholars are the buyers who prefer to stay away from the market because the sellers fail to reassure them about the quality of their products.[134] Ultimately, the burden of persuasion is on the proponents of the economic approach – its producers and sellers.

To clarify. The claim is not that only Calabresian Law and Economics is valuable to comparative legal scholarship. For example, Garoupa and his co-authors have contributed significantly to the critique of legal origin scholarship from within the Economic Analysis of Law.[135] The claim is that to overcome the opacity which leads to the interdisciplinary lemon problem, it is sufficient (not necessary) to make scholarship in the Calabresian Law and Economics Tradition salient.

The interdisciplinary lemon hypothesis is compatible with the professional incentive hypothesis proposed by Gazal-Ayal.[136] Contrary to Garoupa and Ulen, Gazal-Ayal does not limit his analysis to comparing legal academic markets. Instead, he compares the determinants of professional success for academics in economics and law. On these grounds, he concludes that the differences between the incentives provided by the disciplines have a remarkable explanatory power of the mixed success of the economic approach to law. Consistently with Gazal-Ayal's view, the interdisciplinary lemon hypothesis holds that legal scholars from different fields and legal contexts face barriers of varying heights to perceive that the economic approach to law can produce research that is valuable to them. Hence, context and chance lead to different degrees of expansion of the discipline.

Garoupa and Ulen did not consider this scenario, as shown by their surprise when they learned that comparativists still harbor negative "feelings" for – *rectius*, have principled

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[132] Akerlof, *supra* note 130, 500. For a recent overview, see Schäfer Hans-Bernd and Ott Claus, *The Economic Analysis of Civil Law* (Chelthnam: Edward Elgar, 2022), 459-464.

[133] Garoupa and Ulen, *supra* note 8, especially 682-683 and Parisi, *supra* note 12, 32.

[134] *See also* Schäfer and Ott, *supra* note 132, 458. Riefa et al., *supra* note 16, 40-42 (discussing the rational apathy of consumers).

[135] *See* Nuno Garoupa, Carlos Gómez Ligüerre, and Lela Mélon, *Legal Origins and the Efficiency Dilemma* (Milton Park: Routledge, 2017).

[136] Gazal-Ayal, *supra* note 118.

objections to – the economic approach to law.[137] Perhaps they did not consider this option because they can discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. If this is the case, a clear directive follows: insiders of the economic approach to law shall help legal scholars overcome this opacity problem. They are the cheapest cost avoiders,[138] so it is efficient that this duty falls primarily upon them.

In sum, like in any academic community, there is a certain degree of parochialism among legal scholars (comparativists or not). At the same time, the lack of trust generated by opacity over the quality from a legal standpoint of the economic approach to law also has an important role in explaining the hard reality of the economic approach to comparative law.

This perspective offers a new explanation for the success of the economic approach to law in the United States and Israel. The explanation is simply that: legal education in the United States (where most Israeli academics received their post-graduate education) builds upon previous undergraduate studies; accordingly, it is plausible that undergraduate education equips US and Israeli legal scholars better than others in overcoming the interdisciplinary lemon problem; in parallel, it could make these scholars less capable of perceiving the existence of the problem in the first place since their training in other disciplines may make them less concerned with the distortion of legal concepts.

Some collective and coordinated effort by comparative legal scholars to engage systematically with the economic approach to comparative law could be extremely helpful to test the lemon problem hypothesis. For example, Garoupa has recently mapped the field of the economic approach to comparative law with a book that is concise, but also broad in scope.[139] If a lemon problem exists, a significant part of the findings presented as valuable in the book will actually have the limits stressed by this article: comparativists will not consider these findings as 'innovation' because they distort the analyzed legal concepts and legal functions. A group of experts on the different topics covered by the book could test this hypothesis rather easily.

This second and complementary, not alternative, explanation in terms of interdisciplinary lemon problem has a practical advantage over the one in terms of legal parochialism (only). The interdisciplinary lemon hypothesis suggests a clear way to increase the positive impact of economic analysis on legal scholarship: the economic approach to law needs to be critically assessed by its insiders to identify the features that make it sound from a legal point of view. As in Akerlof's analysis, it is up to sellers to reassure the buyers.

Section III argues in detail that a trust mark to this effect exists already: it is a brand of the economic approach to law that is not mainstream, and it is called Calabresian Law and Economics.

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[137] Garoupa and Ulen, *supra* note 6, 684. *See above*, Section II.b.

[138] Seminal on this concept, Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Have> Yale University Press, 1970). *See*, generally, Farnsworth, *supra* note 61, 47-56.

[139] Garoupa, *supra* note 96.

III. CALABRESIAN LAW AND ECONOMICS AS TRUST MARK

Guido Calabresi, emeritus professor and former Dean of the Yale Law School, US federal judge, tort law leading scholar, is also a founding father of the economic approach to law, of which he heralds (if not embodies) the so-called New Haven School of Law and Economics.

In 2016, Calabresi published an inspirational book called *The Future of Law and Economics*. In this book, Calabresi distinguishes between the mainstream approach in the field – Economic Analysis of Law – and an alternative approach that he has practiced his entire life – Law and Economics. According to this distinction, the Economic Analysis of Law is essentially normative, theory-driven, and externalist. Economic models and accounts of legal institutions are used to check if those institutions fit with models belonging to a given economic school, paradigm, approach, etc; for the distinction to hold, which school, paradigm, approach, etc, does not matter.[140] If legal institutions do not fit, economic rationality prevails: legal institutions are criticized, and their reform is demanded.[141] Economic rationality is presented as external, and its legal relevance is not argued for; it is just assumed or, better, demanded. Moreover, fitness is primarily focused on the content of legal norms, not the justification given to those norms in legal practice.[142]

On the contrary, Law and Economics has a descriptive, observation-driven, and internalist approach. In Calabresi's words[143]:

> What I call Law and Economics instead begins with an agnostic acceptance of the world as it is, as the lawyer describes it to be. It then looks to whether economic theory can explain that world, that reality. And if it cannot, it asks two questions. The first is, are the legal scholars who are describing the legal reality really looking at the world as it really is? … If, however, even a more comprehensive view of legal reality discloses rules and practices that economic theory cannot explain, Law and Economics asks the second question. Can economic theory be amplified, can it be made broader or more subtle … so that it can explain why the real world of law is as it is?

Calabresian Law and Economics is descriptive in that its primary aim is making sense of legal institutions in economic terms. This means that Calabresian Law and Economics uses economic concepts to offer a functionalist description of institutional practice as described by participants.[144] It is observation-driven because if a specific economic model fails to make sense of those legal institutions, the problem is the model, not the observed

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[140] Calabresi, *supra* note 6, 7.

[141] Calabresi, *supra* note 6, 2-3. This critique cuts deeper and is largely independent from the useful list of common analytical problems in the economic approach to law by Bayern, *supra* note 36.

[142] *See* Brian H. Bix, *Law and Economics and the Role of Explanation: A Comment on Guido Calabresi, The Future of Law and Economics,* 48 European Journal of Law and Economics 113 (2019); Fabrizio Esposito, *On the Fitness between Law and Economics—Or Sunstein between Posner and Calabresi* 19(3) Global Jurist (2019); Giovanni Tuzet, *Calabresi and Mill: Bilateralism, Moral Externalities and Value Pluralism*, 19 Global Jurist (2019); Giraudo, *supra* note 19.

[143] Calabresi, *supra* note 6, 3-4.

[144] *See* Michaels, *supra* note 29, 365 on the relevance of this perspective for comparative legal research.

reality.[145] Finally, Calabresian Law and Economics is internalist in that the observed data include the justifications given to existing legal institutions.[146]

It is widely accepted within the economic approach to law that Calabresian Law ad Economics is not mainstream.[147] This situation has not been fundamentally changed by the behavioral turn in economics and in the economic approach to law, although an important degree of convergence can be observed in part of the literature.[148] For example, according to Garoupa and Ulen's account, proving the inefficiency of a legal institution is the gold standard in the Economic Approach to Law; and it cannot be doubted that claiming that an institution is efficient or inefficient is, according to economists, a reason to argue for its change.[149] It is the reality that needs to fit with the model, not the other way around. This is externalist and normative discourse, pure and simple.[150]

It should be noted, however, that especially in the past, the distinction between the mainstream approach associated with the Chicago School was described by its flagbearer Richard Posner as a positive approach in opposition to the one of the New Haven School, which Posner presented as normative.[151] This distinction relied on Posner's most impressive intellectual achievement, the so-called efficiency hypothesis of the common law.

At least at the beginning of the economic approach to law, Posner did not offer a justification for the claim that efficiency had an important role to play in US (common) law. Posner was trying to show that efficiency emerged from within the law as an important legal value. In other words, back then, efficiency did not have a normative justification separated from the authority of the common law itself. The situation changed in 1979,[152] and efficiency has been assessed as an independent normative standard ever since. However, the positive versus normative labels are still used in the field to distinguish two approaches,[153] in a way that is opposite to the distinction proposed by Calabresi. This is another example of the difficulty that the intended consumers of the economic approach to law face because of the opacity of its language to outsiders: 'descriptive' and 'positive' as well as 'normative' can have opposite meanings depending on the scholar using the terms.

As discussed, Calabresian Law and Economics has a descriptive, observation-driven, and internalist approach. Since reality comes first, it is hard to charge Calabresian Law and

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145 Note that Calabresi points out that the problem could be also in the representation of the reality provided by legal scholars, which may not accurate.

146 *See* Esposito, *supra* note 142.

147 *Generally*, Alain Marciano and Giovanni Ramello, "Consent, Choice, and Guido Calabresi's Heterodox Economic Analysis of Law," *Law and Contemporary Problems* 77 (2014): 97.

148 This has been noted by Calabresi, *supra* note 6, 4-5. For a fuller analysis, see Esposito, *supra* note 6.

149 *See* Klammer and Scorsone, *supra* note 20, 22-25. *See*, for example, Herbert Gintis, *Individuality and Entanglement: The Moral and Material Bases of Social Life* (Princeton: Princeton University Press, 2016), 251-252.

150 Cfr. Garoupa, *supra* note 76, 7.

151 *See*, Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981), 775.

152 Posner, *supra* note 80. For a review of his different positions on the matter, *see* Mathis, *supra* note 80, 143-183.

153 Cfr. F. Parisi, "Positive, Normative and Functional Schools in Law and Economics," *European Journal of Law and Economics* 18 (2004): 259.

Economics with unacceptable normative or descriptive pre-commitments. If an analysis in this tradition rests on faulty descriptive assumptions, reason demands to scholars committed to this tradition to abandon said assumptions. It also follows that Calabresian Law and Economics could welcome an efficiency hypothesis of the law, if tested in a descriptive, observation-driven way, and from the internal point of view.[154]

Two recent proposals in the tradition of Calabresian Law and Economics develop on these two ideas at book length. The first one is the Legal-Economic Performance (LPE) framework. This general analytical framework is not necessarily connected to individual egoism and efficiency and builds on the premise that legal conceptual tools can improve the quality of economic analyses. The diffusion of this framework could lead quite easily to the diffusion of Comparative Calabresian Law and Economics. The second book challenges the traditional definition of efficiency in the analysis of exchange contracts using the Legal-Economic Fitness (LEF) framework. The LEF framework does not reify normative concepts such as efficiency, fairness, and equality; instead, it tests the degree of fitness of such normative concepts (and their different conceptions) with the content of legal reasoning. This framework is used to defend the consumer welfare hypothesis, according to which EU antitrust and consumer law is better understood in efficiency terms if the welfare standard is consumer rather than total welfare. The question arises whether developing the consumer welfare hypothesis can build a path-breaking account of the law of exchange contracts. This is a grand question, particularly appropriate for comparativists to investigate.

Let us consider these two frameworks more in detail.

a. The Legal-Economic Performance framework: a lingua franca for social scientists

How can economics become a reliable *lingua franca* or offer *tertia comparationis* between institutions from different legal systems? Is there, in other words, a method that addresses the lemon problem identified in Section II credibly and systematically? A recent book by two economists operating in the institutionalist tradition offers an answer to these questions that is worthy of attention. The book is called *The Legal Foundations of Micro-Institutional Performance. A Heterodox Law & Economics Approach.*

The book "introduce[s] and appl[ies] a method of institutional impact analysis centered on the idea of human interdependence", built by connecting concepts from legal and economic literature.[155] In Klammer and Scorsone's own words[156]:

> the Legal-Economic Performance (LEP) framework … works by starting with the identification of an economic situation where agents are interacting with or in interdependence with one another. The Hohfeldian framework is used to identify the status quo and understand the current structure of legal relations. Once the analyst has identified a situation of interdependence, the next step is to identify the institutional (legal) options available to address the

[154] *See*, Guido Calabresi, "The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?" *The Proceedings of the British Academy* 10 (1982): 85, 87-8 (admitting the appeal of Posner's efficiency hypothesis *in abstracto* while calling it a sophistry *in concreto*).

[155] Klammer and Scorsone, *supra* note 20, 5.

[156] *Ids.*, 6.

> interdependence. This is where the analyst considers all of the possible alternatives that are available and the Hohfeldian language of legal structure and legal change come into play. Finally, the third part of our new framework is the determination of economic performance outcomes from the intersection of the situational and structural components outlined above.

In other words, the LEP framework has four steps: after having identified a situation of interdependence (step 0),[157] that interdependence must be analyzed in terms of jural relations (step 1); next, the institutional alternatives have to be specified (step 2); on these grounds, the outcomes can be 'determined' (step 3).

At this stage, it is helpful to clarify the notion of "situation of interdependence" since it is the starting point for applying the LEP framework. In a first approximation, interdependence exists every time a correlative relationship in the Hohfeldian sense exists.[158] However, interdependence cannot be reduced to the existing legal institutions but also requires considering how "humans interact with them".[159] Ultimately, "[i]nterdependence takes on the idea that we and our decisions are interconnected even if we have not entered into a bargaining situation".[160]

This section will connect the LEP framework to comparative legal research. First, it is noteworthy that the LEP framework rests on the opposite of proposition 1: legal research can make economic analysis more rigorous (proposition ¬1). More relevantly for comparative legal research, it will be argued that: 1) the LEP framework can be easily and meaningfully included in the comparative legal research toolkit; and 2) the reasons that make legal scholars distrust the economic approach to law do not apply to the LEP framework. Hence, the use of the LEP framework is a trust mark that could solve the interdisciplinary lemon problem.

Klammer and Scorsone do not speak directly to the comparative law community. On the contrary, their target audience is the economic community at large, to whom they offer a value proposition according to which economic analysis can benefit from using legal analytical tools to identify better the institutional features of the situations of interdependence economists are analyzing (proposition ¬1). Without the "domain knowledge" that legal scholars can provide, "we [the economists] run the risk of drawing misleading conclusions at best and useless or damaging conclusions at worst".[161] This is exactly the concern legal scholars have, as documented by topical examples in Section II.

There is no need to adjudicate between value propositions 1' and ¬1 since they are complementary. On the contrary, it is arguably the case that both are true. In fact, proposition 1' is just a version of proposition 1 that is humbler and more sensitive to 'legal reality'. At the same time, it is for the economists to assess whether Klammer and Scorsone are right and proposition ¬1 is true. Interested legal scholars should invest energy and

[157] Identifying the situation interdependence is presented as step 0 since Klammer and Scorsone consider only the next three steps as actual parts of the analysis.
[158] *Ids.*, 3.
[159] *Ids.*, 31.
[160] *Ids.*, 32.
[161] *Ids.*, 4.

resources to provide examples of what legal analysis can offer to economists in terms of institutional nuance.[162] The content of the next section can be seen as a flagship example of this potential.

Comparative legal research is particularly fit for being plugged into the Legal-Economic Performance framework. This is the case for at least two reasons. The first is more apparent and deals with the need to "identify the institutional (legal) options available to address the interdependence".[163] Here comparative legal research has a great deal to contribute; perhaps no other field is as useful as comparative legal research to this end. Notably, the LEP framework is methodologically pluralistic, especially in step 3. Klammer and Scorsone unambiguously declare: "Once the alternative institutions are carefully specified, institutional analysis is not limited to any particular method of investigation".[164] It follows that even postmodernists could have an important role in the practical application of the LEP framework.

The second opportunity of collaboration is less apparent but also significantly more fundamental, and it focuses on step 0 of the LEP framework, where one has to identify a "situation where agents are interacting with or in interdependence with one another".[165] It is arguably the case that the LEP framework articulates the first step of comparative research – namely, identifying a "social problem" [166] – in original terms.

Michaels observes that the reference to a problem is ambiguous along at least two lines. At a universal level, a problem can be a "problem of general jurisprudence" or an "empirically universal problem".[167] In the second case, two traps need to be avoided: first, defining the problem in too abstract terms (e.g., social stability) or too contingently and institutionally embedded (e.g., how to design the right to withdraw in consumer contracts); second, assigning a specific normative goal to the institution.[168] This normative presupposition is arguably the misunderstanding that leads scholars in the economic approach to law to insist that mainstream Economic Analysis of Law is particularly fit for functional comparative legal research.[169] When this happens, the focus is not on what is, but on how to achieve something; when the legal relevance of this *quid* is dubious, the

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[162] *See*, *supra* notes 50-6 and the accompanying text on *Berry v. Sugar Notch Morough*, and *infra* notes 180-85 and accompanying text on the consumer welfare hypothesis.

[163] Klammer and Scorsone, *supra* note 20, 6.

[164] *Ids.*, 103.

[165] *Ids.*, 6.

[166] This is a point where it seems that there is overlapping consensus among comparativists. This is indeed the starting point for functionalists: Siems, *supra* note 30, 16 ("The recommendation is therefore that a real-life, socio-economic problem should be the start point"). At the same time, it seems that postmodernist critiques do not challenge this part of the comparative method, as described by functionalists: see Kischel, *supra* note 44, 173-4. *See also* Balazs Fekete, "Cultural Comparative Law?," in: *Legal and Political Theory in the Post-National Age*, eds. Péter Cserne and Miklós Könczöl (Lausanne: Peter Lang, 2011); Vargas Weil, *supra* note 12, 11-3.

[167] Michaels, *supra* note 29, 367.

[168] *Id.*, 367-8, who does not distinguish the contingent from the normative clearly. However, the distinction between normative, prescriptive, and descriptive level of analyses justifies the distinction; on these three levels of analysis, see see Gillian Hadfield, "The Second Wave of Law and Economics: Learning to Surf," in *The Second Wave of Law and Economics*, eds. Gillian Hadfield & Megan Richardson (Alexandria: Federation Press, 1999), 50-66; Esposito, *supra* note 6.

[169] *See*, Garoupa and Ulen, *supra* note 6; Parisi, *supra* note 12; Vargas Weil, *supra* note 12; Mattei, *supra* note 37.

Dworkinian challenge deals an often fatal blow from a legal point of view to economic analysis, as noted in Section II.b.

The LEP framework can bring real clarity here. In fact, the focus on the situation of interdependence allows one to identify as relevant for the comparison of all and only the norms and institutions that play a role in creating and governing that situation of interdependence – *i.e.*, social problem. In other words, the situation of interdependence can be taken as a redescription of the existence of a social problem. A significant advantage is that the concept of "situation of interdependence" is detached from any normative goal (internal or otherwise). Accordingly, car accidents could be a situation of interdependence (step 0); how different legal systems govern them is described in Hohfeldian terms (steps 1 and 2); the consequences of the different approaches are identified (step 3); a comparison follows.

Normative presupposition about the goal being corrective justice, economic efficiency, etc. simply do not play any role in the identification of the situation of interdependence to be studied. Thus, the LEP framework credibly reassures the skeptical legal reader that the descriptive and the normative analyses are severable. In fact, institutional performance can be measured according to multiple indicators;[170] being wary of the distrust economists suffer for the common dismissal of distributive concerns, Klammer and Scorsone defensively add that the analysis "should include distributional consequences across stakeholders".[171] In other words, the LEP framework is committed to the ideal of the economist as a social engineer, laying down alternatives to be presented to decision-makers.[172] Of course, methodological choices and institutional preconceptions could hide normative agendas;[173] but this is a problem that comparative legal scholars are well aware of.[174] It follows that the Dworkinian challenge is not a problem for the LEP framework because pre-commitment to any institutional function, purpose, goal, or aim is sidelined by design. This is a major difference with the Economic Analysis of Law, as seen.

In sum, the Legal-Economic Performance framework is value neutral, methodologically pluralist, and clearly committed to taking legal concepts seriously to avoid distorting the observed reality. Accordingly, this framework embodies all the commitments enshrined in value proposition 1' and can contribute to addressing the interdisciplinary lemon problem. Ultimately, the LEP framework could deliver on the promise of a *lingua franca* for comparative legal research. A *lingua franca* that, notably, is not purely economic as suggested by scholars in the economic approach to comparative law; it is both economic and legal.

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170 Cfr. Klammer and Scorsone, *supra* note 20, 103: "Measures of performance might include the measurement and enforcement of implementation and other transaction costs, some valuation of gains in knowledge, social cohesion or various measures of productivity within a going concern, or measures of compliance with a rule or its adoption".

171 *Ids.*, 114.

172 *See*, Peter Bowttke & Kyle W. O'Donnell, "The Social Responsibility of Economists," in *The Oxford Handbook of Professional Economic Ethics*, eds. George F. De Martino & Deidre McCloskey (New York: Oxford University Press, 2016).

173 Cfr. Klammer and Scorsone, *supra* note 20, 114: "Analysts should be cautious of making statements about preferred alternatives without a normatively determined set of criteria".

174 Cfr. Kischel, *supra* note 44, 46-53.

b. The Legal-Economic Fitness framework and the Consumer Welfare Hypothesis as a grand question

One of the institutional economists who have inspired Klammer and Scorsone is Warren Samuels. Warren Samuels has provided a penetrating analysis of the law in action, which he distilled into the concept of the legal-economic nexus[175]:

> [T]he perceived spheres of polity and economy, of law and market, are not self-subsistent, and … it is helpful to understand what transpires by identifying the existence of a legal-economic nexus in which both seemingly distinct spheres commonly originate

An important feature of the legal-economic nexus must be stressed from the outset. The spheres Samuels refers to also include seemingly distinct "belief system(s)".[176] In other words, simply assuming that the use of different terms in legal and economic belief systems implies that different concepts are used in those systems means falling into a "linguistic trap".[177]

A recent book identifies the complementarity between Samuels's legal-economic nexus and Calabresian Law and Economics. The book is *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century*. In fact, the book's ultimate goal is finding the economic concepts that fit with the 'real world of law' Calabresi refers. As noted, this fitness check is the first step of any analysis in Calabresian Law and Economics. At the same time, the outcome is, using Samuels' terminology, a better description of the legal-economic nexus. Accordingly, the book introduces a methodological 'theorem', called the "*Samuels-Calabresi Theorem*: identify the concepts that fit with both legal and economic reasoning about the legal–economic nexus".[178] The Legal-Economic Fitness (LEF) framework[179] was built to operationalize Calabresi's methodological call to search for economic concepts that fit with the worldview of the legal community.

The LEF framework is descriptive, observation-driven, and internalist, as Calabresian Law and Economics requires. The LEF framework is descriptive because there is no normative defense of any efficiency hypothesis before testing its fitness with legal discourse. It is observation-driven in that the efficiency hypothesis that fits best is the one that is preferred. At the same time, the LEF framework is internalist and meets the Dworkinian challenge because each hypothesis is tested against the content of legal reasoning, not the effects of the law (according to a particular descriptive economic theory). True, the law could be ineffective in achieving a goal, but this issue can actually be better appreciated once a reasonable claim is made about the economic consequences that matter. After all, how can one lament that the law will have unintended consequences[180] without first identifying the intended ones?

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[175]Warren J. Samuels, "The Legal-Economic Nexus," *George Washington Law Review* 57, no. 6 (1989): 1556, 1558-9. See also Warren Samuels, *The Legal-Economic Nexus: Fundamental Processes* (Milton Park: Routledge, 2007).

[176] *Id.* 1989, 1556.

[177] *Id.* 2007, *supra* note 175, 246.

[178] Esposito, *supra* note 21, 12.

[179] Notably, this is not how the framework was described in the book. But the name seems quite appropriate given the emphasis on the importance of the legal-economic nexus and on the idea of concept-based fitness.

[180] Brian Bix, *Economic Approaches to Legal Reasoning and Interpretation* (Chelthenam: Edward Elgar, 2018) (noting that the economic approach to law is particularly effective in identifying unintended consequences)

As a case study, the book analyzes two competing definitions of "allocative efficiency" which co-exist in the history of economic thought.[181] The first definition states that an allocation of resources is more efficient than another when it maximizes total welfare. This is the familiar notion of efficiency that the legal community has traditionally challenged as having limited normative attractiveness. The alternative definition of allocative efficiency states that an allocation of resources is more efficient than another if the consumers in the considered market are better off. This second definition has a remarkable historical and conceptual pedigree. In particular, one can find it in the thought of Adam Smith, John Hicks (of Kaldor-Hicks efficiency), and even Ronald Coase.

Building on these findings, the book introduces and tests (successfully) the consumer welfare hypothesis. The consumer welfare hypothesis holds that "as a matter of economic theory, an allocation of resources in a market can be better or worse based on the benefits it delivers to consumers; legal structures that are at the centre of the EU market-building project fit with this understanding of allocative efficiency".[182]

To test the consumer welfare hypothesis, the book investigates the degree of fitness of these two conceptions of allocative efficiency with the content of legal reasoning in EU antitrust and consumer law based on four inferential disagreements; that is, disagreements about the content legal reasoning should have if the goal is one welfare standard or the other.[183] The LEF framework also includes criteria to distinguish the degree of fitness between economic and legal concepts and rules for aggregating the findings regarding different legal materials.[184]

Three main points need to be emphasized here. The first is how the LEF framework introduces two improvements compared to the way Posner's (total welfare) efficiency hypothesis of the common law was tested. The second is that the analysis rejects the popular assumption that efficiency and fairness are necessarily conflicting concepts. The third is that the consumer welfare hypothesis leads to a series of analytical directives that are particularly fit for answering the following grand question, which has significant comparative potential: do legal institutions governing exchange contracts fit best with the total or the consumer welfare conception of allocative efficiency? Let us consider these three points in turn.

When we compare how the consumer welfare hypothesis is tested with the approach used by Posner to advance his efficiency hypothesis of the common law, two differences stand out. The first difference is that the LEF framework looks at the content of legal reasoning. For this reason, the LEF framework addresses the Dworkinian challenge. Instead,

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[181] Esposito, *supra* note 21, 19-60.

[182] *Ivi*, 3.

[183] The disagreements, in synthesis, are:
1 Harm: all instrumentally relevant or not?
2 Defences and exceptions: internal fuzziness and external clarity or vice versa?
3 Sanctions: to deter and redress harm or to internalize social costs?
4 Deadweight loss, elasticity, and productive efficiency: quantity-effects over price-effects or vice versa?
See, *ivi*, 74-84.

[184] In synthesis, the LEF framework uses a triadic scale which distinguishes explanations of high- and low-quality as well as unacceptable explanations on the basis of their degree of fitness with legal reasoning, and aggregates them by giving lexical priority to high-quality and unacceptable explanations; *Ivi*, 63-72.

Posner's methodology focused on whether legal norms incentivize efficient behavior and disincentivize inefficient behavior, but no attention was paid to the reasons given to justify the legal validity of those norms.[185] The second is that the scope of the consumer welfare hypothesis and the evidence considered have been carefully selected and justified.[186] Instead, the scope of the efficiency hypothesis of the common law was never clearly articulated and justified.[187] Hence, the reliability and relevance for the legal community of the consumer welfare hypothesis are clearly superior to those of Posner's original total welfare efficiency hypothesis.

The widely held assumption that efficiency is opposed to fairness, equality, and justice[188] is conceptually problematic[189] and socially undesirable.[190] It is conceptually problematic in that it treats as real entities concepts developed in different disciplines;[191] that is, concepts used by different epistemic communities. It might well be the case that terms like allocative efficiency and contractual fairness offer the same justification for the same institutional arrangements. At the very least, the possibility should not be ruled out from the outset. This possibility is supported by several linguistic uses in EU law[192] and the finding that both efficiency hypotheses are supported by equality norms, albeit different in contents.[193] Moving from this conceptual premise, the LEF framework does not try to accommodate allocative efficiency and fairness in the same conceptual framework. In particular, references to fairness in legal discourse are part of the *explanadum*. In other words, the LEF

185 Posner, *supra* note 151, 775; see also, Richard Posner & William Landes, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987). Similarly, Parisi, *supra* note 153.

186 Esposito, *supra* note 21, 84-96. In particular, the LEF framework is meant to comply with Susan Haack's theory of the how evidence can warrant a claim; see, Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (New York: Cambridge University Press, 2014). A point that is in need of further development is the distinction between exchange and production contracts which delimits the current scope of application of the hypothesis. In fact, it is common to include labor contracts in the category of exchange contracts; *see*, e.g., James Gordley & Hao Jiang, "The Maze of Contemporary Contract Theory and a Way Out," *The American Journal of Jurisprudence* 68 (2022): 1.

187 *Generally*, Nuno Garoupa, Carlos Gómez Ligüerre & Lela Mélon, *Legal Origins and the Efficiency Dilemma* (Milton Park: Routledge, 2017).

188 The recent book-long analyses by Langenbucher, *supra* note 5, and Mantzari, *supra* note 112, both move from this conceptual separation. In the economic approach to law, see, for example, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge, Mass.: Harvard University Press, 2002), but also Calabresi, *supra* note 6; Schäfer and Ott, *supra* note 132, instead, manage to have a more blended perspective on multiple issues they analyse in their textbook.

189 David Chavanne, "Thinking Like (Law-And-) Economists – Legal Rules, Economic Prescriptions and Public Perceptions of Fairness," *Review of Law & Economics* 16 (2022): 50 offers empirical support to the claim that assuming the opposition between fairness and efficiency is implausible. Using vignettes based on normative Economic Analysis of Law, the author shows that the solution proposed by this approach in several areas is perceived as fair by respondents. This is conceptually problematic as it limits the realm of possible conceptual relations, as shown by Jody S. Kraus, "Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy," 11 Philosophical Issues 420 (2001) and Mathis, *supra* note 80, 185-6.

190 Concerning its social undesirability, *see*, Esposito, *supra* note 21, 8-11 (illustrating that this position leads to parochial entrenchment, distrust in legal institutions, and a *tabula rasa* temptation).

191 Treating concepts as real entities is the core of the so-called 'reification fallacy', which is common in Western philosophy, according to Robert Sinclair, "Reification," in *Bad Arguments: 100 of the Most Important Fallacies in Western Philosophy*, eds. Robert Arp, Steven Barbone & Michael Bruce (Hoboken: Wiley, 2018), 378. See also Konstantinos Kavoulakos, "Reification," in: *International Encyclopedia of Ethics*, eds. Hugh LaFollette and others (Hoboken: Wiley, 2019), 1.

192 Esposito, *supra* note 21, 6-8.

193 *Ivi*, especially 25, 27-9 and 32-3.

framework can compare the degree of fitness with legal discourse of different economic, moral, and political theories. The evidence shows that central legal institutions in the governance of exchange contracts can be meaningfully analyzed in efficiency terms without creating any apparent conflict with the normative rationales one finds in the relevant legal materials, such as the *desiderata* of creating the EU internal market, the protection of the consumer as the weaker party, or the protection of competition.[194] All these goals are presented as justified in efficiency terms once the maximand is consumer welfare.

The consumer welfare hypothesis has a remarkable conceptual feature, namely that it includes a concern for the distribution of the benefits generated by the exchange in the very concept of efficiency. This feature makes most of the concerns about efficiency vs distribution disappear. But not all. This is not a drawback; it is a design feature: the consumer welfare hypothesis applies only to exchange contracts and recognizes that consumer welfare is not the only societally relevant value. This means that, for example, the interest of workers or environmental concerns may prevail over the interest of consumers in a given situation. The task of an institutionally accurate theory is providing a convincing account of when this happens.[195]

The previous discussion has already provided some relevant remarks about the last point to be considered, namely that the consumer welfare hypothesis is at the center of a grand question, with significant comparative potential: do legal institutions governing exchange contracts fit best with the total or the consumer welfare conception of allocative efficiency? From a different perspective, can the systematic testing of the consumer welfare hypothesis provide path-breaking insight into the varieties of legal-economic nexus that pertain to exchange contracts in different jurisdictions? This question is clearly amenable to being investigated in multiple legal contexts synchronically and diachronically.

A thought-provoking implication of the consumer welfare hypothesis is a sort of *praesumptio efficientiam*, to be understood as a specification of the functionalist *praesumptio similitudinis*. The *praesumptio efficientiam* would hold that legal institutions pertaining to the legal-economic nexus about exchange contracts can be meaningfully compared to see how much they fit with the consumer and the total welfare hypotheses. Notably, Williamson introduced an idea along these lines in institutional economics, although it was always controversial.[196] Would Williamson's position be less controversial if the welfare standard was consumer welfare?

Notably, the evidence supporting the consumer welfare hypothesis suggests that at least a weak *praesumptio efficientiam* could be worth exploring. In fact, the choice of testing the hypothesis in the context of EU antitrust and EU consumer law is based on the observation that EU antitrust and EU consumer law adopt very different notions of 'consumer' and rely on very different institutional frameworks; hence, it can be expected that the hypothesis also holds in the context of intermediate definitions of consumer, such

194 *Ivi*, 97-174.
195 *Ivi*, 180.
196 On this matter, *see* Irène Berthonnet, "North Vs Williamson: The Debate Over Institutions' Efficiency," *History of Economic Ideas* 21 (2013): 53.

as air passenger, energy client, or investor.[197] Ultimately, this is a form of intra-system *praesumptio efficientiam*. While extending this presumption to comparative settings might be premature, the claim seems worth investigating.

CONCLUSION. THE FUTURE OF THE ECONOMIC APPROACH TO COMPARATIVE LAW: GOOD FORTUNE OR CALABRESIAN?

Garoupa and Ulen conclude their article with a timid note of optimism: "It may take much, much longer for any effects of [the economic approach to comparative law] to manifest themselves".[198] This note of optimism is timid, arguably because it fails to identify any reason for optimism. No method, research topic, academic network, or other remarks by the authors support the belief that the mainstream economic approach to law can become more attractive for comparativists (or any other legal scholar, for that matter). In other words, Garoupa and Ulen do little more than relying on good fortune. The same goes for Vargas Weil, who offers a remarkable account of the benefits of the economic approach to comparative law, but does not formulate any concrete proposal.[199] Parisi has reason to be more optimistic, as he writes in a special issue where a group of young and talented researchers has produced comparative legal research using economic insights.[200] However, regardless of the intrinsic quality of this new wave of scholarship, the interdisciplinary lemon problem remains an obstacle to this scholarship's ability to attract readers.[201]

Contrary to this recent literature, this article identifies a precise path leading to a brighter future for the economic approach to comparative law: Calabresian Law and Economics. This path starts with recognizing that the economic approach to law sometimes fails to deliver on Garoupa and Ulen's value proposition 1, as made explicit by value proposition 1': the economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*.

Accordingly, the value of scholarship produced by the economic approach to law for legal scholars is opaque. This opacity leads to an interdisciplinary lemon problem (proposition 3'). The interdisciplinary lemon problem hypothesis provides a rational explanation for the hard reality of the economic approach to comparative law, which is not based (only) on parochialism or selfishness. On the contrary, it is rational for legal scholars who want to produce useful research to disengage themselves from a field where they struggle to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. The way to address the lemon problem is by offering

197 Esposito, *supra* note 21, 85-6.
198 Garoupa and Ulen, *supra* note 6, 688.
199 Vargas Weil, *supra* note 12.
200 *See* Vanessa Villanueva Collao, "Empirical Methods in Comparative Law: Data Talks," *Comparative Law Review* 12 (2023): 55; Giuseppe Versaci, "The Law of Penalty Clauses: 'New' Comparative and Economic Remarks," *Comparative Law Review* 12 (2023): 115; Koki Arai, "Comparative Law and Economics in the Field of Modern Competition Law," *Comparative Law Review* 13 (2023): 141; Francesca Leucci, "Comparing the Efficiency of Remedies for Environmental Harm: US v. EU," *Comparative Law Review* 13 (2023): 171; Federico Riganti, "The Key Role of Comparative Law and Economics in the Study of ESG," *Comparative Law Review* 12 (2023): 208.
201 *See above*, Section II.c.

straightforward ways to distinguish research valuable for comparative legal scholars from that which is not; a trust mark is the most plausible solution.

Calabresian Law and Economics is that trust mark. In other words, comparativists can consume research rooted in the Calabresian tradition with confidence; the rest should be consumed with care and at one's own risk and peril. It may go well, or not; the point is that it is hard, time-consuming and energy.draining to establish that.

It follows that the challenge for the economic approach to law in the 21st century is making it easy for legal scholars to distinguish research that belongs to Calabresian Law and Economics from research that does not. Quoting Calabresi's scholarship or that of authors closely associated with the New Haven School of Law and Economics is neither necessary nor sufficient for research to be qualified as Calabresian Law and Economics. This qualification is based on methodological commitments: the analysis shall be descriptive (at least as a first step), observation-driven, and internalist.

To provide guidance in this regard, Section III has proposed a general framework for an economic analysis that is Calabresian, which should appeal to comparative legal scholars: the Legal-Economic Performance (LEP) framework. According to the LEP framework, the analysis is composed of four steps: the identification of a situation of interdependence is followed by its qualification within the Hohfeldian framework of jural positions; then, comparative law can contribute to the identification of the possible institutional arrangements to address said situation of interdependence. Finally, a multimethod approach can be used to identify and quantify, to the extent possible, the performance of alternative institutional arrangements. Importantly, the normative evaluation of the performance so identified is excluded from the normal tasks that belong to the LEP framework, and it can be performed on the basis of multiple normative standpoints. In other words, the LEP framework is methodologically pluralist, built on the importance of legal concepts, and credibly committed to the ideal of the economist as a social engineer. It is, therefore, descriptive and observation-driven. It is not internalist, but it is compatible with any internal perspective. For these reasons, the LEP framework has all the credentials to support an economic approach to comparative law that is fruitful for both legal and economic analyses: Comparative Calabresian Law and Economics.

Section III has also introduced a different framework, with a more limited purpose: the Legal-Economic Fitness (LEF) framework. The LEF framework aims to identify economic concepts that fit with legal reasoning. If applied systematically, this approach will identify the linguistic grounds for a common legal-economic vocabulary for analyzing varieties of the legal-economic nexus. A *lingua franca*, not only for legal analysis; a *lingua franca* for legal-economic analysis. It was then suggested that a detailed and coordinated engagement by comparative legal scholars with Garoupa's recent map of the economic approach to comparative law could be a feasible and effective way to move in this direction.[202]

The consumer welfare hypothesis epitomizes the potential of this approach. This hypothesis challenges the mainstream view that allocative efficiency is about maximizing

[202] Garoupa, *supra* note 9.

total welfare; it holds that, from an(other, respectable) economic point of view, allocative efficiency is about maximizing consumer welfare only. This hypothesis relies on a careful analysis of economic thought and is supported by the inferential analysis of EU antitrust and EU consumer law.

A more systematic exploration of the consumer welfare hypothesis constitutes an original and innovative research question that is particularly amenable to be studied from a comparative law perspective. Perhaps provocatively, one can go as far as formulating a *praesumptio efficientiam* in favor of the consumer welfare hypothesis as starting point to analyze the portion of the legal-economic nexus about exchange contracts. This presumption can be systematically tested by relying on the LEF framework.

On these grounds, there is reason to believe that a bright future for the economic approach to comparative law exists, to the extent that energies are invested in producing research in the Calabresian tradition.

At the institutional level, it should be noted that recent years have observed the birth of rapidly expanding associations that could credibly nurture the growth and eventually flourishing of Calabresian Law and Economics. One is APPEAL, and the other is WINIR. 'APPEAL' stands for Association for the Promotion of Political Economy and the Law. Its main aims are: "Understanding the economy as a system interconnected with law and government"; "[q]uestioning policies and theories that assume self-regulating or optimizing markets"; "[e]xpanding the possibilities for policies responding to inequality, insecurity, and environmental destruction"; and "[d]eveloping a law and economics that enhances democracy, justice, along with inclusive and sustainable prosperity".[203] This association is relatively young, but its commitments go precisely in the direction of Calabresian Law and Economics, and the relevance for APPEAL of the LEP framework has been recognized already.[204] 'WINIR' stands for World Interdisciplinary Network for Institutional Research. It is a 10-year-old association open to multiple methods for studying institutions, credibly committed "to try to develop a cross-disciplinary consensus on some key issues"[205] and particularly open to comparative institutional analysis. The relevance of the LEF framework for WINIR has been recognized already.[206]

In sum, comparative legal scholars willing to invest energy in the economic approach to law are advised to: first, pay particular attention to the Calabresian tradition, starting with

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[203] *Home*, Association for the Promotion of Political Economy and the Law (APPEAL), https://www.politicaleconomylaw.org/content.aspx?page_id=0&club_id=456963 (last visited May 10, 2024). See also Martha McCluskey, "Association for the Promotion of Political Economy and the Law (APPEAL): Transforming Law and Economic Power," *Journal of Law and Political Economy* 4 (2023).

[204] Scorsone presented his co-authored book on December 2, 2022 to the whole network, and a workshop including both authors was held on April 29, 2023: *Past Events*, Association for the Promotion of Political Economy and the Law (APPEAL), https://www.politicaleconomylaw.org/content.aspx?page_id=22&club_id=456963&module_id=258898 (last visited December 10, 2023). Recently, he became a member of APPEAL's Board.

[205] *About*, World Interdisciplinary Network for Institutional Research (WINIR), https://winir.org/?page=about&side=about_winir (last visited December 10, 2023). See also, S. Deakin, D. Gindis, G. M. Hodgson, K. Huang & K. Pistor, "Legal Institutionalism: Capitalism and the Constitutive Role of Law," *Journal of Comparative Economics* 45 (2017): 188.

[206] A special panel on the framework was organized at the 2022 WINIR conference; cfr. *WINIR 2022-Programme*, World Interdisciplinary Network for Institutional Research (WINIR), https://winir.org/winir-2022-programme/ (last visited May 10, 2024).

Calabresi's seminal writings, but also more recent developments, namely the LEP and LEF frameworks; and, second, join APPEAL and WINIR and engage with their members. This is the concrete proposal for a brighter future for the economic approach to comparative law. The alternative is relying on good fortune.