Updating the Law and Economics of Legal Parochialism

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1 Introduction

I have known Jürgen Backhaus since my early days in my career. One of the many issues he has discussed and analyzed in his scholarship is the possible German origins of Law and Economics, that is, the use of economic arguments and reasoning when understanding the law in the German tradition. Modern Law and Economics is based on the neoclassical paradigm, so a recent development from the viewpoint of legal history. However, the pre-neoclassical Law and Economics of imminent European origin has had limited influence in current Law and Economics dominated by American oriented scholarship. It seems to me that such observation underlies a broader problem, which I have defined as "legal parochialism."

The difficult path of Law and Economics outside of the United States has been a matter of debate for many years. When the article on why Law and Economics seems to fail outside of the United States was published[1] in 2008, we did not predict the extent to which the discussion would raise so much interest and attract so many

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[1]Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555 (2008).

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authors to propose alternative explanations.[2] Although there is disagreement over what actually explains the skeptical reception of Law and Economics outside of the United States, the entire body of literature provides systematic evidence of the following well-known facts: Law and Economics is influential in American and Israeli legal scholarship but it has little impact elsewhere; Law and Economics is dominated by legal scholars in the United States and in Israel but by economists elsewhere; the rate of acceptance of Law and Economics in American and Israeli courts is not impressive, but nevertheless significant, whereas the field is virtually ignored by courts elsewhere, albeit with some occasional references.

Obviously, there might be different degrees or tones of pessimism concerning these facts. Even in the United States, the alleged success and influence of Law and Economics is subject to different perspectives. For example, the established fact that some judges use Law and Economics in the federal courts could be seen as evidence of the importance of the field.[3] On the other hand, the fact that only some judges employ it could raise pessimistic concerns that the importance of Law and Economics in case law is still limited.[4] Several legal scholars have noted that Law and Economics is one of fastest growing fields in the United States.[5] At the same time, the numbers suggest that the field of Law and Economics is still composed of a minority of legal scholars largely confined to the top law schools.[6] In conclusion, in the United States, it is a matter of the half-empty and half-full bottle. But this is definitely not the case outside of the United States and Israel. There, we have a case of the fully empty bottle.

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[2]See, e.g., Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602 (2006); Alan J. Devlin, *Law and Economics*, 46 IRISH JURIST 2 (2011); Oren Gazal-Ayal, *Economic Analysis of "Law and Economics"*, 35 CAP. U. L. REV. 787 (2007); Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. L. & ECON. 485 (2007); Kristoffel Grechenig and Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L and COMP. L. REV. 295 (2008); Kilian Reber, *Once Upon a Time in America: Barriers to the Diffusion of Law and Economics* (July 17, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161129.

[3]See, e.g., Stephen J. Choi and G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N. Y.U. ANN. SURV. AM. L. 19, 20–21 (2005).

[4]Garoupa and Ulen, *supra* note 1, at 1574.

[5]See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 416–17 (1997); Robert Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 524–25 (2000); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385, 385 (1993); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316–17 (2002); Richard A. Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUROPEAN J. L. & ECON. 265, 275 (1995); Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35, 35–37 (2004); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. III. L. REV. 875, 906–07; Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*, 6 UNIVERSITY OF ST THOMAS LAW JOURNAL 303 (2009).

[6]Garoupa & Ulen, *supra* note 1, at 1573–74.

For many years, the argument was that Europe, Asia, and Latin America were moving toward neoclassical Law and Economics, but at a slower pace than the United States. That may well be the case, since it is likely that a window of time of 40 or 50 years is not enough to convincingly reject such a hypothesis. At the very least, however, we can say it is taking a long time. There is more neoclassical Law and Economics now in Europe, Asia, and Latin America than ever.[7] The influence of this work in legal scholarship and in legal policy is overwhelmingly disappointing, however, probably with the exceptions of competition and corporate law. As we noted in our original article, in vivid contrast with the United States, the main textbooks and treatises on property, contract, and tort law, or on procedure outside of the United States, simply ignore Law and Economics insights.[8]

Naturally, the lack of success of Law and Economics has intrigued scholars. The first wave of explanations developed in the early 1990s, still hoping that the whole process was merely delayed, focused on the obvious differences between the United States and the rest of the world. The most obvious and most popular explanations, for a while, were legal tradition (civil law is over-theorized, whereas common law is under-theorized) and language (legal scholars do not read English).[9] The problem is that these popular explanations seemed to neglect that Law and Economics also was not popular in the United Kingdom, nor in any other common law jurisdiction (with the exception of Israel, as we already noted).[10] In fact, looking at current trends in Europe, Law and Economics is in much better shape in Italy, Germany, and Spain than in the United Kingdom or in Ireland.[11] The idea that Law and Economics is

[7]There have been annual meetings of the European Association of Law and Economics since the early 1980s, the Latin American Law and Economics Association (ALACDE) since the mid-1990s, and the Asian Law and Economics Association since 2005.

[8]Garoupa & Ulen, *supra* note 1, at 1575–76.

[9]See, e.g., Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 461–62 (2004); R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, and Future*, 11 INT'L REV. L. & ECON. 261, 262 (1991); Dau-Schmidt & Brun, *supra* note 2, at 617–18; Aristides N. Hatzis, *The Anti-Theoretical Nature of Civil Law Contract Scholarship and the Need for an Economic Theory*, 2 COMMENTS. ON L. & ECON. 1, 30–31 (2002); Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS 66, 76–77 (2004); Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT'L REV. L. & ECON. 3, 4–5 (1997); Hans-Bernd Schäfer, *What Are the Practical Implications of Law and Economics Research in Germany?*, *in* PETER NOBEL AND MARINA GETS EDS., NEW FRONTIERS IN LAW AND ECONOMICS (2006).

[10]See, e.g., Christopher McCrudden, *Legal Research and the Social Sciences*, 122 L.Q. REV. 632, 639 (2006); A.I. Ogus, *Law and Economics in the United Kingdom: Past, Present, and Future*, 22 J.L. SOC'Y 26, 29–30 (1995).

[11]Recent developments include the annual meetings of the German Law and Economics Association (GLEA) since 2003, the Italian Society of Law and Economics (SIDE) since 2005, the Spanish Law and Economics Association (AEDE) since July 2010, and more recently the Polish Association of Law and Economics (PSEAP) since October 2012. Outside of Europe, we should notice the Brazilian Association of Law and Economics (ABDE) with meetings since October 2008. No such associations exist in the United Kingdom or in Ireland.

more relevant for judge-made law than for a legal system dominated by codification is simply rejected by the evidence.

A second popularized account was the need for a Legal Realism revolution to precede the expansion of Law and Economics.[12] Such explanation only pushes the discussion backwards, however, to a previous step: why was Legal Realism successful in U.S. legal academia but not elsewhere? In fact, it is accepted that Legal Realism did not even originate in the United States.[13]

Another explanation looked at ideology and legal philosophy.[14] The mistake here was to think of Law and Economics as a mere conservative legal movement to reduce the influence of liberals in law schools.[15] In our original article, we do not deny that Law and Economics was financed by conservative foundations, nor that it attracted many conservative legal scholars.[16] Nevertheless, there are many liberals producing excellent Law and Economics scholarship. Furthermore, while Law and Economics was initially associated with the University of Chicago (still a major player in the field nowadays), it has now emerged in many law schools that cannot be labeled as conservative. At the same time, if it is all about a particular ideology or a certain judicial philosophy, we would expect the liberal (or perceived to be liberal) legal movements to be very successful in Europe and elsewhere. As I argued I my original Article, this is hardly the case. In fact, my own perception is that, in Europe and in Asia, unlike in the United States, law schools are not seen as more liberal than economic departments or business schools. Yet, according to this explanation, pro-market theories popular with European, Latin American, and Asian economists were rejected by European, Latin American, and Asian legal scholars. It does not seem to be a convincing explanation.

We should acknowledge that legal scholars in Europe show an intense dislike for efficiency and seem to be much more open to social justice or redistributive legal arguments.[17] Chronologically, however, the distaste for efficiency seems to have been revealed when confronted with neoclassical Law and Economics. Therefore, it is unclear whether a neoclassical approach to law is rejected because legal scholars

[12]See, e.g., Charles K. Rowley, *An Intellectual History of Law and Economics: 1739–2003*, *in* THE ORIGINS OF LAW & ECON.: ESSAYS BY THE FOUNDING FATHERS 3, 11–12 (Francesco Parisi & Charles K. Rowley, eds., 2005).

[13]*But* See Steven G. Medema, *Wandering the Road from Pluralism to Posner: The Transformation of Law and Economics*, 3 HIST. POL. ECON. (SUPPLEMENT) 202, 204 (1998); Rowley, *supra* note 12, at 3–29.

[14]Dan-Schmidt & Brun, *supra* note 2, at 616; Garoupa & Ulen, *supra* note 1, at 1578–79.

[15]See the debate by several scholars in *Symposium: Calabresi's* The Costs of Accidents*: A Generation of Impact on Law and Scholarship*, 64 MD. L. REV. 1 (2005), in particular, articles by Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 31 (2005); Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005); and Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220 (2005).

[16]See Garoupa & Ulen, *supra* note 1, at 1579–82.

[17]See Catherine Valcke, *The French Response to the World Bank's* Doing Business *Reports*, 60 U. TORONTO L.J. 197 (2010).

dislike efficiency, or efficiency is disliked because legal scholars rejected Law and Economics. It is clear that the discussion about efficiency as a relevant normative criterion for law has not been fruitful in Europe, where the overwhelming majority of legal scholars have joined the "no" side. This discussion did not take place, however, until European legal scholarship was confronted with the developments of neoclassical Law and Economics. So the explanation that Law and Economics has been rejected by traditional legal scholarship in Europe because efficiency (or any utilitarian criteria) is philosophically inconsistent with European legal thought seems too simplistic, and, to a certain extent, naïve. On a different matter, this explanation has also been used by Anglo American audiences to justify why common law is efficient and civil law is inefficient, as if efficiency of the law varies with the philosophical beliefs held by law professors.[18]

The failure of these early explanations called attention to a basic insight: the world of legal thinking is more complex! Legal culture, language, ideology, and legal philosophy are important factors that explain the particularities of legal scholarship in different countries. Altogether, however, they fail to pin down why Law and Economics has been so unsuccessful outside of the United States. Moreover, in a globalized world that has reduced cultural barriers, and when English has assumed the role of *lingua franca*, the prediction in the early 1990s was that soon Law and Economics would enjoy the same popularity in and outside of the United States.[19] Obviously, these predictions turned out to be largely incorrect.

By the mid-2000s, legal scholars produced a second-wave of explanations. These explanations reflected the struggle Law and Economics experienced outside of the United States while booming there and in Israel. They included the weak economic training of lawyers in Europe, in Latin America, and in Asia (no mathematical background[20]), the incentives established by legal academia in Europe that largely favor conformity rather than innovation (the core argument of my original article with Thomas Ulen[21]), or the relevance of a start-up process of legal innovations (concerning the relevance of publication outlets[22]). In my view, the important contribution of this second-wave literature is to expose Law and Economics as a legal innovation, and legal innovations can only be produced in competitive markets that generate appropriate incentives. If the incentives are appropriately designed, Law and Economics flourishes; if not, Law and Economics has a hard time emerging as a meaningful player in legal scholarship.[23]

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[18]See Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L. J. 287 (2011).

[19]See Cooter & Gordley, *supra* note 9, at 261–63.

[20]*Contra* Anthony Ogus, *Law and Economics in the Legal Academy, or, What I Should Have Said to Discipulus*, 60 U. TORONTO L.J. 169, 170 (2010); Dennis W.K. Khong, *On Training Law and Economics Scholarship in the Legal Academia*, 1 ASIAN J. L. & ECON., No. 2, 2010.

[21]Garoupa & Ulen, *supra* note 1, at 1603–04.

[22]Reber, *supra* note 2, at 12–15.

[23]Gazal-Ayal, Economic Analysis of "Law & Economics," *supra* note 2, at 787–98.

In the original article, we discuss in detail the development of the adequate incentives for legal innovation to flourish.[24] We mention the rigidity of the hierarchical relationships established in legal academia as a major drawback (whereas in the United States we tend to have an inverted pyramid—that is, many full professors and few untenured faculty—in Europe, we have a regular pyramid—that is, many untenured professors and few senior faculty).[25] In Europe, there is no meaningful academic mobility (in particular, no lateral mobility since salaries are rigid and usually fixed by the government). Law reviews are faculty-edited and value methodological conformity. The market for new law professors promotes inbreeding and the entrenchment of the *status quo*. We can easily extend our description to Asia and Latin America.

All of these explanations are important and relevant, but they do not seem to capture the full puzzle. Somehow they seem to be circular. If incentives explain the success and failure of Law and Economics across jurisdictions, a new question emerges: why is it that some jurisdictions seem to be able to develop the adequate incentives to promote legal innovation, whereas others support and protect the *status quo*? There is always the possible explanation of chance: the United States and Israel were lucky, whereas the rest of the world was unlucky. In the original Article, I do not exclude the possibility of the great man or woman theory, wherein a famous champion of a particular legal innovation promotes its development through legal entrepreneurship.[26] Such an explanation, however, does not seem to be accurate as a general basis for legal innovations.

In fact my aim is to emphasize a more general perspective. In particular, I suggest that there is nothing particular to Law and Economics that explains its current lack of success outside of the United States. In my view, this is related to a more general problem, which I call "legal parochialism." My argument was already echoed in my earlier article with Thomas Ulen, but it was largely neglected in the debate.[27] I think, however, that this legal parochialism is a more important insight proposed in the original article than the competitiveness of the market for legal scholarship, the latter being much more noticed by other authors.

This Article proceeds in the following order. Part II explains the general problem in more detail. Part III discusses legal parochialism. Part IV concludes the paper.

[24]Garoupa & Ulen, *supra* note 1, at 1627–31.

[25]*Id.* at 1603–04.

[26]*Id.* at 1611–14.

[27]*Id.* at 1632.

2 A More General View

The explanations for why Law and Economics has largely failed outside of the United States neglect the fact that other areas of the "Law and" movement have been similarly unsuccessful abroad, most of them with little or no influence from economics.[28] Consider all the following fields of legal scholarship: empirical legal studies,[29] critical legal studies,[30] feminist jurisprudence,[31] law and literature,[32] law and politics,[33] law and psychology,[34] law and cognitive sciences,[35] law and biology,[36] and law and anthropology.[37] All of them are important American legal innovations of the last decades. They all have been largely ignored outside of the United States. Clearly, lack of success outside of the U.S. legal academia has little to do with Law and Economics.

It could be that all these legal innovations were received with skepticism outside of the United States because these were developments taking place in the United States. My argument, however, is that such skepticism is not particular to American legal products. While Law and Economics became popular in the United States, other legal innovations were developed around the world. Here are a couple of

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[28]Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law* Ands, 1997 WIS. L. REV. 375, 381.

[29]For examples, see generally issues of the *Journal of Empirical Legal Studies*, as well as Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns*, 2011 U. LLL. L. REV. 1713 (2011).

[30]See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

[31]See, e.g., JUDITH A. BAER, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE (1999); FEMINIST JURISPRUDENCE (Patricia Smith ed., 1993); Gillian K. Hadfield, *Feminism, Fairness, and Welfare: An Invitation to Feminist Law and Economics*, 1 ANN. REV. L. & SOC. SCI. 285 (2005); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

[32]See, e.g., RICHARD A. POSNER, LAW AND LITERATURE (1998); LAW AND LITERATURE: CURRENT LEGAL ISSUES 2 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

[33]See generally issues of the *Journal of Law and Politics* (University of Virginia) and the *Texas Review of Law and Politics* and more recently *Journal of Law and Courts*, as well as Keith E. Whittington et al., *The Study of Law and Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington et al., eds., 2008).

[34]See generally issues of *Law and Psychology Review* and *Psychology, Public Policy and the Law* as well as BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein, ed., 2000) and Christine Jolls, *Behavioral Economics and Its Applications*, *in* BEHAVIORAL LAW AND ECONOMICS 115 (Peter Diamond & Hannu Vartiainen eds., 2007) (providing an overview of the field).

[35]See, e.g., Matthias Mahlmann & John Mikhail, (2005).

[36]See, e.g., Owen D. Jones & Timothy H. Goldsmith (2005); Owen D. Jones, (2001).

[37]ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000); JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER (2005); BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES (David Theo Goldberg et al., eds, 2001); .INSIDE AND OUTSIDE THE LAW: ANTHROPOLOGICAL STUDIES OF AUTHORITY AND AMBIGUITY (Olivia Harris, ed. 1996.)

examples: Socio-legal studies in the United Kingdom[38]; *Droit Économique* (Economic Law) and *Sociologie du Droit* (Sociology of Law) in France[39]; and *Wertungsjurisprudenz* (Jurisprudence of Value Judgments, used in interpretation of private law), *Verwaltungswissenschaft* (Science of Administration) and *Staatswissenschaften* (German Law and Politics) in Germany.[40] All these innovations in legal thinking had little to no influence in the United States. In fact, most of these innovations had little impact outside of the legal culture in which they were developed.

Some of these foreign innovations closely trace American innovations. For example, U.S. law and society, U.K. socio-legal studies, and French *Sociologie du Droit* can be regarded as adjacent developments in legal scholarship. There are some important differences, but we could argue that they do not constitute major impediments to scientific dialog. The British version was initially more empirically oriented, whereas the French version has been more theorized, and the American version is probably somewhere in between. Nevertheless, these legal methodologies largely share the same concerns and legal perspectives. Still, a quick look at the main journals of these fields tells us that there are few cross-references.[41]

Other innovations reveal the polarization of legal debate, whereas Law and Economics focuses on efficient legal rules based on the aggregation of individual preferences and actions, *Droit Économique* studies the mechanisms adequate to favor state intervention from the perspective of the interests of the state. Law and Economics frames state intervention in the context of market failures. *Droit Économique* rejects the role of the market altogether. Not surprisingly, broadly speaking, each side ignores the others.

Furthermore, with the exception of German legal science from the early 1900s, foreign developments of legal scholarship have been virtually ignored in the United States, even those in English-speaking countries with a common law tradition.[42]

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[38]See generally the *Socio-Legal Studies Association* and the issues of the *Journal of Law and Society* and *Social & Legal Studies*, as well as A. JAVIER TREVINO, THE SOCIOLOGY OF LAW (2007) (summarizing the vast literature on socio-legal studies produced in the United Kingdom and other commonwealth jurisdictions).

[39]For examples, see generally the *Association Internationale de Droit Économique* and the issues of the *Revue Internationale de Droit Économique* as well as LAURENCE BOY ET AL., DROIT ÉCONOMIQUE ET DROITS DE L'HOMME (2009) and JEAN-PAUL VALETTE, DROIT PUBLIC ECONOMIQUE (2009) (providing general introductions to the field). Both French methods were deeply influenced by Marxism and Marxist legal scholars.

[40]*See also* REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS (2008) (explaining German law and summarizing methodological developments in German legal scholarship).

[41]Many legal scholars of these movements attend the annual meeting of the Law and Society Association yet they seem to develop their legal methods largely independently. See generally issues of the *Journal of Law and Society* and *Law and Society Review*, as well as KITTY CALAVITA, INVITATION TO LAW AND SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW (2010) (summarizing the American-based law and society scholarship) and MARK KELMAN, *supra* note 30.

[42]David S. Clark, *Development of Comparative Law in the United States*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 187 (Mathias Reimann and Reinhard Zimmermann, eds., 2006).

The explanation I propose for these facts is legal parochialism. Law and Economics, as well as other developments of the "Law and" movement, has been a victim of legal parochialism outside of the United States inasmuch as other legal innovations have been victims of legal parochialism inside the United States. In my view, legal parochialism provides a more comprehensive understanding of the problem. Most of the first- and second-wave explanations simply reflect different aspects of this significant legal parochialism.

3 Legal Parochialism

My theory is that legal parochialism operates like protectionism in trade.[43] We can envisage a global market for legal innovations in scholarship. Each jurisdiction protects its own market from foreign competition. The protection of the local market is important for local producers (i.e., legal scholars). It increases their return on local human capital, including providing for important network effects.[44] Therefore, they have an interest in avoiding foreign competition.

The first condition to implement protectionism in legal innovations is to recognize that a small group of producers is able to cartelize and secure the benefits from closing down the market. At the same time, the losers (the local consumers) must have dispersed interests that can hardly be coordinated to avoid protectionism.[45] So legal parochialism emerges as the result of cartel behavior from the main beneficiaries: the local incumbents, who are the law professors and legal scholars.

The second condition is that the local incumbents exercise some significant market power in the relevant industry. Such market power can be reflected in different relevant dimensions. For example, they can exert some control over the supply of legal reform so that legal policymakers do not look for alternative providers elsewhere. In this respect, local incumbents operate as a powerful lobby that discourages legal reformers from looking for multiple sources of legal thinking.

At the same time, local incumbents will push for "subsidizing" local production using arguments that are similar to the traditional infant industry rationale.[46] Typically, they will insist on culture, language, history, and other national symbols to promote protection and allege a better understanding of the local needs. Within this protectionist view, potential competition has to be excluded in order for the

[43]For an introduction, see KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM (2002), and ROBERT C. FEENSTRA, ADVANCED INTERNATIONAL TRADE: THEORY AND EVIDENCE (2004).

[44]See Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339 (2006); Anthony Ogus, *The Economic Basis of Legal Culture: Networks and Monopolization*, 22 OXFORD J. LEGAL STUD. 419 (2002).

[45]See FEENSTRA, *supra* note 43, at 300–337.

[46]*Id.*

local incumbents to keep additional rents. Rejection of foreign law, sources, legal education, and legal practice is promoted to avoid market contestability.

Legal parochialism, in my view, is just a form of trade protectionism in the context of the market for legal ideas. The consequences of legal parochialism are the standard losses from trade protectionism: less efficient allocation of resources in supply of legal norms, under-development of new legal innovations, and significant opportunity costs disseminated across society.[47]

Legal parochialism is stronger in some jurisdictions and weaker in others, depending on the combination of market determinants. A larger local incumbent profession reduces the cohesion and ability for cartel behavior. Consequently, not only is legal parochialism somehow diluted, but also the large size of the local legal profession creates the conditions for a competitive market, thus significantly reducing the costs of protectionism. On the contrary, a smaller local incumbent profession supports a more consistent cartel and decreases competition in the local market, therefore enhancing the costs of protectionism.

My perception is that the United States is an example of a large local incumbent profession, whereas most European, Latin American, and Asian jurisdictions are examples of the opposite case. I do not suggest that the United States is an exception; quite the contrary. I think the United States is consistent with the model, but because the market determinants are different, due to the size of the legal profession, legal parochialism is likely to be weaker. As recognized by the literature on trade protectionism, however, notice that legal parochialism is consistent with an aggressive strategy of exporting legal scholarship. Educating foreign human capital, establishing an international network of legal thinking, and influencing foreign legal reforms are not in contradiction with legal parochialism, whereas legal parochialism is about deterring importation of legal ideas, educating foreign human capital, and influencing foreign legal reform are about exporting legal ideas.

Another example I have mentioned is Israel. Again, I do not think this is an exception to my model. They have been in the early stages of the process of shaping their local legal system and so, presumably, they have been in a situation where the incumbent local cartel is relatively weak. As a consequence, legal parochialism has not been able to exert the same influence in Israel as it has elsewhere. As for the future, I predict that legal parochialism will be stronger in Israel in the decades to come as the process of shaping their legal system reaches maturity.[48] At the same time, I suggest that the fairly positive reception of Law and Economics, and other American legal innovations, in small legal communities like Taiwan reflects very much the same lack of a well developed and established incumbent legal theory.[49]

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[47] *Id.*

[48] See Haim Sandberg, *Legal Colonialism—Americanization of Legal Education in Israel*, 10 GLOBAL JURIST, MAR. 2010.

[49] For a more general discussion of successful American legal education in Asia, see Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 J. LEGAL. EDUC. 413 (2008).

Presumably, we should expect an identical course of action in mainland China in the next decade or so.

Keeping the metaphor between legal parochialism and trade protectionism, we can identify serious threats to legal parochialism in recent years. Presumably, these serious threats will increase in the coming decades. As with protectionism in trade, legal parochialism can be significantly reduced by pressure of external forces. The most obvious one is the globalization of legal services that has resulted in the ongoing globalization of legal education. In the United States, the importance of international, comparative, and foreign law in the J.D. curriculum is still disappointing, but most law professors would recognize that offerings of such courses have increased steadily in the last decades. My impression is that a similar path is recognizable in Europe. International exchange of students and faculty in law schools is still probably insignificant compared to the hard sciences and the social sciences. But the general impression is that exchange programs have more demand now than they did years ago.

A second threat to legal parochialism has been the integration of legal markets. Such process has had remarkable effects in Europe, as national law subsided to European Union law in many relevant fields. There have been occasional backlashes exhibiting strong legal parochialism, but the process has eroded significantly the power of local legal elites and has forced the open exchange of ideas in Europe.[50] Obviously, we are still far from a fully integrated market for legal ideas in Europe, as some barriers are artificially kept by local incumbents, but progress in the last decades is noticeable.

Another example of integration of legal markets is the explosion of legal transplants promoted by the governments of developed countries and international organizations. Such movement had two important consequences for the market of legal ideas. Many legal innovations are now competing for the market of legal ideas in developing economies, with mainland China being an obvious example. The United States and Europe are aggressively exporting their legal models, educating foreign human capital, and lobbying legal reform. The expansion of American and European law schools to Asia in the last decade is remarkable. Legal ideas and traditions are forced to compete in distant markets. At the same time, they are also pushed to compete inside international organizations in order to capture and determine their legal policy agendas. In this respect, for example, law and economics has been remarkably successful due to the strong position of economists in international organizations such as the World Bank or the International Monetary Fund.[51]

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[50]For example, as mentioned by Garoupa and Ulen, consider the following episode: "[I]n a letter to the President of France, [in December of 2006,] forty well-known French law professors … rejected EU law as law that deserves to be studied and analyzed. Only French law should be taught at French law schools, according to these law professors." Garoupa & Ulen, *supra* note 1, at 1626 n.313.

[51]See Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT'L L. 647 (2009).

4 Conclusions

The main thesis of this Article is that the slow growth of law and economics outside of the United States is part of a more general problem: legal parochialism. At the same time, the effects of legal parochialism can be less severe if the "protected market" is significantly large, with the United States fitting this particular case. Conversely, if the "protected market" is small and easily cartelized, the effects of legal parochialism can be important, with Europe, Latin America, and Asia exemplifying this situation more consistently.

The challenging note is always to explain the difficult reception of Law and Economics outside of the United States, whereas neoclassical economics has become dominant around the world. More generally, in the context of my theory, there must be an explanation for why we have legal parochialism, and not parochialism in other social sciences (economics, sociology, and psychology), that is, in fields of study where the argument of local culture to justify isolationism could apply as well. In my view, the reason is purely market-driven and explained by non-academic rents. Scholars in economics, sociology, and psychology, and even business studies, do not significantly derive their income from sources outside of academia. Naturally, there is less concern in protecting the domestic market because the demand for rent-seeking is less important (albeit not absent). Law professors outside of the United States make most of their income outside of academia, strictly speaking, as they practice law, advise the government, and play an active role in lawmaking (for example, they tend to dominate code redrafting committees or law commissions).[52] These outside activities generate significant rents; thus, protecting the domestic market is of utmost importance.[53] Therefore, my explanation does not rely on law being different from other social sciences, but on market opportunities.

On a positive note, I share the optimism of many legal scholars who have predicted the expansion of Law and Economics outside of the United States. By recognizing legal parochialism, I suggest that it is easier to understand that the future of Law and Economics outside of the United States requires a careful focus on local legal problems. Such a path requires excellent comparative work, an application of Law and Economics to local legal doctrines, and local publication outlets.[54]

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[52]These rents vary across fields of law. Presumably business law is more profitable than legal history.

[53]This effect could be reinforced if the outside market is dominated by legal scholars from the top universities who have no interest in sharing their rents with other legal scholars from lower ranked schools, let alone scholars with foreign methodologies or foreign legal education. In fact, if the outside market is dominated by a small handful of top law professors, politically and socially influent, the ideal conditions for cartel behavior are more likely to be satisfied.

[54]Such as the *European Journal of Law and Economics*, the *Asian Journal of Law and Economics* and the new *Latin American Journal of Law and Economics*.

More recently, we have followed the development of empirical legal studies.[55] Once more, as with Law and Economics, its expansion and acceptance outside of the United States has been slow and limited. The Society of Empirical Legal Studies is massively American and there are no equivalent organizations elsewhere. The Journal of Empirical Legal Studies is dominated by American scholars with occasional papers making use of non-American datasets. Yet empirical legal studies do not suffer from the standard critiques. They are unrelated to efficiency or to any alleged conservative movement. Datasets are now widely available and funding for assembling data is not difficult to find outside of the United States. It does seem to me that once again "legal parochialism" plays a significant role that delays the application of empirical legal studies to relevant legal problems outside of the United States.[56]

[55]Supra note 29.

[56]See Emanuel V. Towfigh, *Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a Doctrinal Turn?*, 12 INT'L J. CON. L. 670 (2014).