1. Canvassing a realistic Cathedral with efficiency amongst its pillars

1. TOTAL WELFARE MAXIMISATION AND THE TWENTIETH-CENTURY SYNTHESIS

As I explained in the Introduction, I find some of the ideas developed by the economic approach to law to be really powerful. At the same time, what I found most puzzling, implausible, and irritating about this scholarship is the idea that distribution has little to no space in the economic analysis of law. The concern is the size of the pie—that is, the maximisation of total welfare, understood as “total consumer and producer surplus generated by those goods and services”.¹

I am not the only one in the law community to be concerned by this idea. Recently, a whole movement called Law and Political Economy emerged from an attempt to go beyond what leading figures in this movement named “the Twentieth-Century Synthesis”² in a foundational article that was accompanied by a “manifesto”.

The Synthesis is presented as a two-pronged phenomenon. One prong focuses on the economy and the other on politics-centred fields of law. What they have in common is shielding economic dynamics from legal intervention. Allocative efficiency and the economic approach to law feature prominently in the first prong: “in fields denoted as about ‘the economy’, the rise of law and economics centered efficiency and sidelined questions of distribution, power, and democracy”³. The effect is that most academics turned into “a band of methodologically equipped efficiency inspectors”⁴.

¹ Posner 1981: 60.
³ Ibid. Also Britton-Purdy et al. 2020: 58: The Synthesis “rests upon two interrelated developments. First, some legal subfields have been reoriented around versions of economic ‘efficiency.’ These are the fields in which law and economics has become dominant and which are generally considered to be ‘about the market’: contracts, property, antitrust, intellectual property, corporate law, and so on”.
⁴ Britton-Purdy et al. 2020: 85.
Against this background, Law and Political Economy proposes to focus on “who gets what (distribution) and who gets to do what to whom (coercion)”\(^5\) in an effort to develop a form of “democratic political economy”\(^6\) that is more capable of investigating the main issues of contemporary societies.

I sympathise very much with this project. I hope that the findings of this book and the research programme sketched in the Conclusions can be taken upon by the Law and Political Economy as part of their attempt to build a “positive agenda”.\(^7\)

2. **SOME PIECES THAT DO NOT QUITE FIT**

Law and Political Economy rests on an impressive account of the development of legal scholarship in the second half of the twentieth century, especially in the United States. There is much to learn from this account. However, from a future-looking perspective, Law and Political Economy concedes too much conceptual ground to the economic approach to law. In particular, allocative efficiency is elevated to the banner of the Twentieth-Century Synthesis. The assumption that efficiency and fairness (or equality, justice, etc) are two distinct concepts is another distinctive feature of the Twentieth-Century Synthesis which Law and Political Economy accepts.\(^8\)

Law and Political Economy builds on the idea that the law is constitutive of the economy. This idea enables one to criticise the “naturalisation” of certain political views about the economy. There is nothing natural in analysing market allocations for their ability to contribute to total welfare; only a set of decisions about the proper role of the law in the economy based on certain economic assumptions.

A more sophisticated version of the law-as-constitutive-of-the-economy view deserves our attention: the law and the economy are interconnected and influence each other both in practice and at the conceptual level. This idea is at the core of the so-called “legal-economic nexus”:\(^9\)

\[T\]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.

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\(^{5}\) Britton-Purdy et al. 2020: 82.

\(^{6}\) Britton-Purdy et al. 2020: 103.

\(^{7}\) Britton-Purdy et al. 2020: 100.

\(^{8}\) Building on this assumption, scholars have then tried to reflect on how to integrate efficiency and distributive concerns. See, Kraus 2001, Kaplow and Shavell 2002, Mathis 2009, Adler 2012.

\(^{9}\) Samuels 1989: 1558–9. See also Samuels 2007.
This idea was first made explicit by Warrens Samuels in 1989 and was quickly accepted by institutional economists.\(^\text{10}\) One point needs to be emphasised here. The nexus also exists at the level of ideas: a key component of the legal-economic system is the “belief system” that “governs the definition of reality that influences policy”.\(^\text{11}\)

Law and Political Economy authors also hint at the importance of ideas for their project. In particular, they emphasise that the socio-economic context is crucial for explaining the success of the old political economy movement and its gradual erosion and substitution by the Twentieth-Century Synthesis.\(^\text{12}\)

However, Law and Political Economy scholars propose to do without the concept of allocative efficiency, which they assume is necessarily about total welfare and remarkably separate from distributive concerns.

This book will show that on the basis of careful economic and legal analysis, a different notion of allocative efficiency is available, where the concern for the distribution of resources between consumers and producers is paramount.\(^\text{13}\) From this perspective, Law and Political Economy has failed to realise (so far) that in proposing to reject efficiency in favour of democratic political economy, it still builds on a central element of the Twentieth-Century Synthesis, namely that efficiency and fairness considerations are conceptually separate. It fell for the “linguistic trap” Samuels refers to,\(^\text{14}\) echoing Brecht’s words.

This conceptual separation is prima facie suspicious, and it should not be given the benefit of the doubt, especially in the European Union. For example, the Unfair Commercial Practices Directive prohibits trading practices that impede consumers from making an “efficient choice”.\(^\text{15}\) Conversely, Article 101 TFEU refers to consumers receiving a “fair share” of the productive effi-

\(^{10}\) See, for example, Medema 1992, 2016, Spithoven 2018 and Vatiero 2020.

\(^{11}\) Samuels 1989: 1569.

\(^{12}\) Britton-Purdy et al. 2020: 84.

\(^{13}\) It should be noted, in this regard, that in the field of antitrust law, consumer welfare is perceived to be part of the problem, not of the solution, in recent US scholarship. This is not surprising since the consumer welfare standard suffers from a very narrow understanding in the United States, and it has been twisted into a doctrinal obstacle for claimants. Khan 2018: 737–9, cited assertively by Britton-Purdy et al. 2020. See also the more moderate account by Hovenkamp 2019. However, the normative and institutional levels are different and it is meaningful and informative to make an effort to keep them separate (see, for example, Esposito 2017c).

\(^{14}\) Samuels 2007: 246.

ciencies created by anticompetitive agreements and Article 102 TFEU protects against “unfair purchase or selling prices or other unfair trading conditions” imposed by dominant firms.

In reality, fairness and efficiency coexist in legal practice. Once one accepts that there is a nexus between the law and the economy, this can hardly be surprising. If the law and the economy as well as the ideas we use to discuss them are in a nexus, it is odd to assume that the legal reference to the fairness of market transactions is separate from the economic reference to their efficiency. Indeed, one of the findings of Part I is that the language of equality features prominently in the reasons given in favour and against both the total welfare and consumer welfare conceptions of allocative efficiency.

In sum, neither legal practice nor economic theory relies on the conceptual separation between efficiency and fairness assumed by the Twentieth-Century Synthesis and carried over by Law and Political Economy. Yet, this separation, when banded together with the total welfare conception of allocative efficiency causes problems, as the next section illustrates.

3. HOW THE TOTAL WELFARE STANDARD HARMs ANTITRUST AND CONSUMER LAW SCHOLARSHIP

In 1974, Richard Posner, one of the founding fathers of the economic approach to law, criticised public choice theories of regulation, observing that “the ‘consumerist’ measures of the last few years … are not an obvious product of interest group pressures, and the proponents of the economic theory of regulation have thus far ignored such measures”. This is an accusation of cherry-picking, which consists in selecting the convenient evidence to support one’s views—it is a central concern in the research design of Part II of this book. For current purposes, what is important is that, as I have documented elsewhere, there is a certain confusion in the literature on the economic theory of regulation about whether the consumer interest has a special normative status.

This problem does not stop there. As seen in Section 1, Law and Political Economy has focused its attention on a very different type of distributive concern, namely that between the community members, not the one between the participants in a certain market exchange. These concerns are connected,

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17 Esposito and de Almeida 2018.
but also different. In so doing, part of the problem has disappeared from the cognitive space and, ultimately, from the debate.

An interesting example of the social costs represented by the time spent in debates building on faulty assumptions is the recent exchange of views about autonomy as self-authorship and efficiency analysis of contracts between Tel Aviv Professor Hanoch Dagan and Harvard Professor Oren Bar-Gill. As I discuss in detail elsewhere, accepting that allocative efficiency is about consumer welfare allows for a more fruitful integration of the views of these two authors. There is more. Dagan shares with Law and Political Economy a commitment to self-rule. Since the consumer welfare conception of allocative efficiency rests on the idea of consumer sovereignty (among others), it really seems that a new liberal-egalitarian and pluralistic account of allocative efficiency based on consumer welfare would play a role in overcoming the current gridlock stemming from the Twentieth-Century Synthesis.

The two areas of the law where it is easier to see the importance of the consumer interest are antitrust and consumer law. A bird’s-eye view of the development of the academic discussion in these areas offers telling examples of the problems caused by the view that an allocation is efficient if it maximises total welfare.

One problematic feature of state of the art in both antitrust and consumer law is the unclear position taken by authors concerning values.

In the area of consumer law, the coherent total welfare view is that “[c]onsumer 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”. Leading authors, however, find it hard to be fully consistent in endorsing this view. For example, in his book Seduction by Contract, Bar-Gill cannot really choose between a total and a consumer welfare standard. At the same time, among EU contract law specialists, a connected idea

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19 Esposito 2019b.
21 See, in more detail, 84–6.
23 Bar-Gill 2012. A similar conclusion is reached by Collins 2014. See also Korobkin 2003: at 1252–5. For a discussion, see Esposito 2017c: 391–3. Compare also Gomez Pomar 2003: 3 (“To say that the goal of consumer protection law is to promote the benefit and the interests of consumers is almost tautological”) and Gomez Pomar 2006: 7 (“From an economics perspective, it seems logical to start with efficiency as a plausible mission in the regulation of commercial practices … the desirable outcome is that the surplus … is maximized”).
lingers, namely that EU consumer law instrumentalises consumers’ interests. 24 This idea survives even if it does not withstand rational scrutiny. 25

An interesting approach to this confusing situation was recently offered by Siciliani, Riefa, and Gamper in Consumer Theories of Harm. 26 The authors completely ignore the law and economics view on the welfare standard to use, posit that fair market outcomes are achieved when consumer welfare is maximised and then build on this premise one of the most interesting contributions to the economic analysis of law written in recent years. 27

In antitrust law, one often finds a horizontal integration strategy, where allocative efficiency is balanced against “distributive justice”. 28 According to this pluralistic account, economists get to establish what is efficient, but do not have the final word in matters of competition policy. Prima facie, horizontal integration seems an acceptable compromise. However, it has led to a two-step degradation of the policy discussion: first, a laundry-list approach; second, a tabula rasa temptation.

The laundry-list approach consists in making a long list of values competition law pursues, without any real attempt to investigate their relations. For example, in a report published by BEUC, the European Consumer Association, Oxford Professor Ariel Ezrachi lists seven goals and values of EU competition law 29 without “attempting to imply a hierarchy”. 30 While the author notes that these goals and values often overlap, they are still presented as separate conceptual entities. 31 Something similar is found in the influential Amazon’s

24 “[T]he official purpose of the various EU directives in the field of contract law is to contribute to the proper functioning of the internal market by approximating certain aspects of the contract laws of the EU Member States (Article 114 TFEU). In addition, within these harmonization measures ‘a high level of consumer protection’, as required by Article 169 TFEU, is often considered instrumental to the market-building aim as well: consumer protection boosts consumer confidence, which, in turn, will lead to more crossborder shopping” (Hesselink 2021: 3). See also Hesselink 2021: 297, 299, making the connection explicit.

25 See Weatherhill 2017. As I explain elsewhere, Hans Micklitz, who was an early supporter of the instrumentalisation critique, has changed his view on the matter in Micklitz 2018 (see Esposito and de Almeida 2019).

26 Siciliani, Riefa, and Gamper 2019.

27 For a review, see Esposito 2021.

28 For example, Monti 2007: 26.

29 Consumer welfare, consumer well-being, efficiency and innovation, effective competition structure, fairness, market integration, pluralism and economic freedom.


31 Ezrachi 2018: 5 includes a table that reifies the conceptual separation between these goals and values.
Paradox by the current President of the US Federal Trade Commission, Lina Kahn.32

The laundry list makes the normative landscape foggy, which supports the temptation of a doctrinal tabula rasa. A clear example of this is how Raitt opens the gap in the literature that he then plans to fill with a call for common sense and reasonableness. His main focus of attack, being an Australian scholar, is the Harper Review, a report written by a panel of experts making 56 reform proposals to Australian competition law. Raitt writes: “The Harper Review refers to ‘consumer welfare’ without clarifying whether this refers to allocative efficiency (consumer welfare) or productive efficiency (total welfare) as the objective of competition law”.33 It is clear that a belief system where one can legitimately doubt that “consumer welfare” actually means consumer welfare in the absence of any evidence suggesting otherwise is doomed to depict as contestable even settled case law.

There is also a more problematic implication of the idea that antitrust law is about consumer welfare, but allocative efficiency is about total welfare. In some instances, the view is close to a vertical integration strategy, where the special concern shown by antitrust law is presented as a pragmatic approximation of what the real test should be, but for institutional limitations.34 The implication is that it is always subject to debate whether the institutional limitation in a certain case justifies focusing on the proxy goals rather than the “real” one.

More subtle is the view that the adoption of the consumer welfare standard is a recent political choice by the European Commission.35 The immediate conceptual implication is that being a recent political decision, a new political decision could go in a different direction.

Part II will show that the evolution of EU antitrust and consumer law fits with the view that these branches of the law are designed to support the construction of an internal market where undertakings ought to succeed or fail based on their ability to serve consumers. This system speaks using terms of fairness and equality between market participants, and is concerned about the distribution between them. These features can be accounted for in efficiency terms when allocative efficiency is about consumer welfare.

To achieve this result, a commitment to the careful analysis of legal doctrine—to enter the Cathedral—is necessary.

32 Kahn 2018: 737–45.
33 Raitt 2019: 17.
34 Hovenkamp 2013: 2477–9.
35 Witt 2016: 56.
4. MAKING THE SAMUELS-CALABRESI THEOREM EXPLICIT

This section articulates an idea that follows from the methodological reflections of Warren Samuels and Guido Calabresi and will prove critical to go beyond the Twentieth-Century Synthesis while carrying allocative efficiency further. In their honour, I call it the Samuels-Calabresi Theorem.

Samuels-Calabresi Theorem: identify the concepts that fit with both legal and economic reasoning about the legal-economic nexus.

Warren Samuels is the institutional economist who theorised the legal-economic nexus, and Guido Calabresi is the founding father of the economic approach to law who defends the need for a bilateral relationship between law and economics. The Samuels-Calabresi Theorem is a positive theorem. It aims at making explicit that “[t]he legal-economic nexus is a human artifact … Whether we like it or not, there is no way to reject it”.36

I will offer a two-step argument in favour of the Samuels-Calabresi Theorem. First, I will show that looking at the law’s effects only offers a very limited and distorted view of legal practice. Second, I will illustrate why taking legal reasoning seriously is beneficial to economic analysis.

4.1 Pars Destruens: a unilateral view of the Cathedral is not enough

In The Future of Law and Economics, Guido Calabresi presents the distinction between two ways of looking at the relationship between law and economics. The first, dominant view, which Calabresi calls “Economic Analysis of Law”, is a normative project where the legal structures are chosen on the basis of an independently selected economic theory. Calabresi endorses the second approach, “Law and Economics”, where the relationship between law and economics is “bilateral” and the first research goal is finding an economic theory that fits with the “legal world”.37

An important and counterintuitive aspect of this distinction is that also Law and Political Economy counts as an example of Economic Analysis of Law. In fact, the distinction is methodological and it does not matter which economic theory one chooses.38 Accordingly, the Law

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37 Calabresi 2016: 2, 4. See also Silvestri 2019 and Tuzet 2019.
38 “To many modern practitioners of Economic Analysis of Law, the theory is ‘Chicago’ or ‘Viennese’. But precisely the same approach could use Marxist economic theory” (Calabresi 2016: 7).
and Political Economy’s call for a paradigm shift from the efficiency-as-total-welfare-centred Twentieth-Century Synthesis to legal structures implementing a “democratic political economy” is a different version of the unilateral approach.39

As a matter of values, Law and Political Economy is in line with the approach of old institutional economics and that of the New Haven School of economic approach to law, which lost the battle for ideas with the efficiency-as-total-welfare-centred approach.40

Be this as it may, legal structures have been recognised as important data for positive economic analysis, for example, by a methodologically parsimonious economist such as Robert Frank: “[r]egulations are data … we can learn something about the kinds of regulations that democratically elected representatives choose to implement”.41

In this regard, a parallel can be drawn with the behavioural turn in the economic approach to law.42 When the turn was gaining momentum, a key question was whether models based on rational choice had to be replaced by behaviourally informed ones. As Cooter and Ulen put it in their textbook, choosing between the two approaches “depends on which one predicts the law’s effects on the behavior more accurately”.43 In Seduction by Contract, Bar-Gill offers a similar view.44

Generalising the idea that data about law’s effect are the ultimate test for theories that describe human behaviour leads to the modest conclusion that data about the law can teach us something about the legal-economic nexus.

Against this background, questions arise as to whether it is sufficient for the economic theory to fit with the effects of the law, or whether fitness with the concepts used in legal reasoning is necessary (effect-based vs concept-based fitness).45 Effect-based fitness, as discussed in more detail in Chapter 4, is the methodological core of Posner’s efficiency hypothesis of the common law. However, a bilateral approach requires concept-based fitness. In fact,

39 For example, “Like many of the cases we have advanced here, the substance of these arguments lies in political morality. A democratic political economy is a moral project” (Britton-Purdy et al. 2020: 1832). The outline of the research programme makes it clear that fitness with existing doctrine is not perceived as a relevant tool for the lawyer-and-political-economist.
40 On value in old versus new institutionalism, see Spithoven 2018; on value in the New Haven School, see Esposito 2017c: 383–8, who more generally suggests that the behavioural turn has vindicated the New Haven School.
41 Frank 2012: 75.
42 See, more broadly, Esposito 2017c.
43 Cooter and Ulen 2014: 51.
45 See, in more detail, Esposito 2019a.
Calabresi observes that the inquiry has to start with “an agnostic acceptance of the world … as the lawyer describes it to be”.\textsuperscript{46} A crucial element of legal practice is that it is a reason-giving practice, where reasons are given, accepted and challenged in support of doctrinal claims about the content of the law. From this fact about the law follows the conclusion that an economic theory that does not account for the reason-giving dimension of legal practice fails to establish a bilateral relationship between law and economics.

Accepting the existence of the legal-economic nexus reinforces this view. If the law and the economy are in a relationship of mutual influence, which extends to concepts, a good description of the legal-economic nexus has to use (and, if necessary, develop) concepts that fit with economic theory and legal practice.

The proof of the pudding is in the eating, the old saying goes. I do not particularly like pudding, but the next section offers a delicious and well-seasoned appetiser in support of the view that economists can learn something from the careful analysis of legal reasoning.

We cannot only look at the legal-economic nexus from all possible external angles; we also have to enter the Cathedral: much of what is valuable and relevant cannot be experienced from the outside.\textsuperscript{47}

\subsection{Pars Construens: entering the Cathedral}

It is high time to develop the positive project of identifying the economic ideas that animate existing legal-economic structures. These ideas may actually make sense from an(other) economic point of view. When that happens “problems of welfare economics must ultimately dissolve into a study of aesthetics and morals”.\textsuperscript{48}

These are Coase’s words from the conclusions of \textit{The Problem of Social Cost}. Coase is correct. Economists, like everybody else, are moral agents. Also, in the same way as everybody else, economists have a duty to respect the law. Somewhere between these two duties, one finds the duty to take the law seriously and make an effort to cast it in its best light. This is a duty that applies to legal practitioners and legal academics. I see no reason why it does not apply to economists (or anybody else, for that matter) proposing to change the law.

This moderate normative approach to the legal-economic nexus is attractive: we do not summarily dismiss “the world … as the lawyer describes it to be”

\begin{footnotes}
\item[46] Calabresi 2016: 3.
\item[47] See 61–6.
\item[48] Coase 1960: 43.
\end{footnotes}
and try to reinvent the wheel. Reinventing the wheel is a waste of brainpower and other socially valuable resources.

This societal waste is unintendedly illustrated by nothing less than Coase’s *The Problem of Social Cost*. The very first actual case Coase analyses in his seminal article is that of an externality between the activity of a bakery and that of the neighbouring doctor; the doctor complained that he could not practice due to the vibrations caused by the baker’s pestles and mortars. The doctor won the case. Coase explains that “[w]ith costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources”.49

It is often overlooked that Coase discusses the reasoning of the court to some extent. Coase notes that the judges were concerned with the “prejudicial effect upon the development of land for residential purposes”.50 What Coase ignored is the defendant’s observation “that if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant’s kitchen, he would not have experienced any noise or vibration”.51

So, if we want to minimise social costs, we have to allocate rights to incentivise building the separation wall and avoid the conflict. Of course, who builds it or pays for it is not of the essence. Indeed, the common law includes a coming to the nuisance defence.52 In other words, we have an efficiency reason to think that *Sturges v Bridgman* was poorly decided. Maybe justice was delivered; efficiency, not so much.53

*The Problem of Social Costs* being a (if not the) foundational text for the efficiency-as-total-welfare-centred economic analysis of law, one would expect Coase’s mistake to be corrected in a matter of years at the most. Yet, we had to wait 20 years for this inefficiency to be brought to light—that is, until Donald Wittman published “First Come, First Served: An Economic Analysis of ‘Coming to the Nuisance’” in 1980.54

Wittman explained why ignoring “who should have come first” leads to inefficiency.55 Curiously, while Wittman discusses various cases, some of which closely resemble *Sturges v Bridgman*, he failed to present his analysis

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49 Coase 1960: 10.
51 *Sturges v Bridgman* (1880), p. 349.
52 Similarly, under Italian law, Article 844 Cod. Civ. establishes the threshold in that of the “normal tolerability” and establishes that “the judicial authority must balance the needs of production against the reasons of property. It may take into account the priority of a particular use”. On the economic analysis of this provision, see Cooter et al. 2006: 48–54.
53 But I doubt that justice was delivered either.
54 Wittman 1980.
as an amendment to the Coasian framework. Yet, it would have been enough to read the seven-page decision in *Sturges v Bridgman* to see the same observation made by Bridgman’s lawyer in 1880 (and ignored by the court).\(^{56}\)

The lesson is that legal reasoning is a source of valuable inputs for economic analysis, in particular, but not exclusively, if you endorse the Samuels-Calabresi Theorem.

In a sense, the rest of this book is mostly proof of the claim that it is meaningful to search for economic concepts in legal reasoning.\(^{57}\) In particular, as the subtitle of this book suggests, the findings about allocative efficiency and consumer welfare are at the core of a vast research programme that can help us move beyond the Twentieth-Century Synthesis without losing valuable insights and without alienating part of the academic community.

5. THE REST OF THE BOOK IN A NUTSHELL

The *Consumer Welfare Hypothesis in Law and Economics* is divided into two parts, followed by the Conclusions.

Part I offers conceptual and historical reasons in favour of the view that a market allocation is efficient when it maximises consumer welfare.\(^{58}\) Chapter 2 focuses on the conceptual reasons. The main findings are that: (1) in flat contradiction with the conceptual separation assumption, equality considerations are invoked even in textbook analyses of why a market allocation is efficient; (2) there is an obvious similarity between principal-agent models and consumer-producer transactions, so that if it is acceptable from an economic point of view that principal-agent models maximise principal welfare, it should be acceptable for market models to maximise consumer welfare; (3) all of the above fits beautifully with the literature on consumer sovereignty, where the consumer is the sovereign and the produce is the servant.

\(^{56}\) *Sturges v Bridgman* (1880), p. 349: after noting that the pestles and mortars had been used for at least 20 years before the doctor moved in, the baker observed that “if the plaintiff had built his consulting room with a separate wall, and not against the wall of the defendant’s kitchen, he would not have experienced any noise or vibration”.

\(^{57}\) See, on this, the collection of essays in Esposito and Cserne 2020.

\(^{58}\) A conceptual clarification is useful, although the point normally goes unnoticed (consider all the quotes about efficiency in this chapter). The efficiency of a state of affairs is a relational concept: state of affairs S\(_1\) is more or less efficient in comparison to state of affairs S\(_2\). However, efficiency is normally lumped together with optimality, which is the state of affairs where no more efficient state of affairs exists. The overlap is understandable: when one compares a limited number of options, the efficient one among them is also the optimal one among them; in particular, when one compares two options only, the efficient option and the optimal one coincide.
Chapter 3 reinforces this conceptual inquiry with an historical one, focused on the thought of nine economists, divided into three groups in light of their relevance for the economic approach to law. The research question is whether they endorsed a consumer welfare standard in the analysis of a market allocation. Adam Smith, Alfred Marshall, and Arthur Pigou, the pioneers of market analysis, all endorsed the consumer welfare standard. Amongst the three efficiency-label economists, Vilfredo Pareto used a total welfare standard, but did not look at a single market allocation, but at the market economy as a whole; on the other hand, Nicholas Kaldor explicitly supported the idea of consumer sovereignty and John Richard Hicks used Kaldor-Hicks efficiency to identify regulatory interventions that were justified for their positive effect on consumer welfare. Finally, Frank Knight, George Stigler, and Ronald Coase are considered here as the pillars of the Chicago School. While Stigler is a straightforward total welfarist, both Knight’s and Coase’s views support the consumer welfare standard.

Part II moves to the positive analysis of the reasons given in EU antitrust and consumer law to identify the conception of the legal-economic nexus enshrined in the law that satisfies the Samuels-Calabresi Theorem. Chapter 4 lays the methodological foundations and roots them in an improved version of Posner’s search for efficiency in the common law. To this end, a total welfare hypothesis is opposed to a consumer welfare hypothesis; the two are operationalised by four disagreements about the content of legal reasoning (inferential disagreements). The chapter then identifies the dataset analysed, which was selected for reasons of topicality and to avoid risks of cherry-picking. On these grounds, Chapters 5 and 6 analyse EU antitrust and consumer law. The finding is overwhelmingly in favour of the consumer welfare hypothesis.

The Conclusions take stock of the analysis and sketch a research programme building on it. In particular, the partial view of the legal-economic nexus building on the idea that allocative efficiency is about consumer welfare is made explicit. On these grounds, two famous normative theorems at the core of the Economic Analysis of Law enshrined in the Twentieth-Century Synthesis are updated.

In sum, we can move beyond the Twentieth-Century Synthesis without discarding the centrality of allocative efficiency for market analysis.