
1. The past, present and future of comparative law and economics

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1. INTRODUCTION

What is ‘comparative law and economics’? Despite the deceptively simple nature of this question, ‘comparative law and economics’ is not easy to define. The label was originally introduced two decades ago by European legal scholars. It referred mainly to the application of economic analysis to comparative law and, with a weaker nuance, to applying greater focus on the legal framework within comparative economics (Mattei, 1994; De Geest & van der Berg, 2004).¹ However, the new ‘comparative law and economics’ demarcation did not attract much attention, so that its role remained marginal, even within comparative law, with only a small number of specific contributions produced in 20 years (Caterina, 2006). To date, there have been only a handful of published articles and a few books explicitly endorsing the label. This lack of uptake is likewise borne out by the anthology *Comparative Law and Economics*, compiled by Gerrit De Geest & Roger van Der Berg (2004) ten years ago, which is so far the only major collection of papers on the subject. It essentially gathers together articles – published over a 40-year time span in dispersed outlets, by authors coming from many disciplines – which can somehow be regarded as converging on ‘comparative law and economics’. On the whole, this anthology gives the feeling that most of the included articles – with a few exceptions – are ‘unconscious’ pieces of scholarship in comparative law and economics.

There are many reasons that might explain the slow pace of development of comparative law and economics. Part of the problem is doubtless the lack of a specific journal that can act as a focal point for the discipline. Elsewhere, dedicated journals have played an important role in helping newly minted scholarly disciplines forge an identity and develop. A notable example is law and economics, which greatly benefited from the *Journal of Law and Economics* (Coase, 1993).

¹ See also Caterina (2006) for a review covering the first decade of the field.

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Looking at the existing scholarly contributions in comparative law and economics, two salient features strike the eye that might explain why debate in this field has thus far been so limited. The first is a generalized failure to recognize the potentially broader reach of this discipline: i.e., that the comparative method is not just useful for highlighting differences between legal systems; it also represents an opportunity to adopt different viewpoints and tools for enriching mainstream law and economics scholarship. ‘Comparative’ thus takes on the broader meaning of ‘crossing boundaries’ – not only geographical or cultural boundaries, but also methodological ones.

The second possible hindrance to the development of ‘comparative law and economics’ might be that its stronger European connotations – as is also the case for comparative law – make it more difficult for this discipline to penetrate the American scholarly environment, which is the focal point of the global scientific community (Caterina, 2006). It has to be said here (and will be further argued below) that, on closer inspection, ‘law and economics’ itself also has European roots. However, its European legacy was deeply embedded rather than outwardly disclosed, allowing law and economics to be perceived as quintessentially American – a perception that proved instrumental in conferring a specific identity on the newborn field.

Today, however, law and economics has become sufficiently mature to adopt complementary methodological viewpoints. The comparative approach offers new opportunities to enrich its scholarship with an interesting added feature: whereas law and economics is (as noted above) an American approach with European roots, comparative law and economics reverses the perspective to provide a European standpoint, enriched by the participation of American scholarship. In fact, the European centres that cultivate comparative law and economics have, in the past couple of decades, become R&D laboratories for ‘cross-pollinating’ local sensibilities with a new influx of ideas brought by American colleagues. Indeed, this book itself is the product of one such centre, the IEL (Institutions, Economics and Law International Program) located in Turin (Italy). Over the past 12 years, the IEL has acted as a hub where European scholars from various distinguished institutions, and some American colleagues, converge with fundamental inputs from the leading edge of law and economics scholarship, and from ongoing new experimentation.² A pillar of

² The IEL program in Comparative Analysis of Institutions, Economics and Law was founded in 2004 under the auspices of the University of Turin with a pool of well-known institutions. The local ‘founding fathers’ are Gianmaria Ajani, Raffaele Caterina, Enrico Colombatto and Walter Santagata, while a number of very distinguished scholars and their institutions have been fundamental in

the IEL program has been the intensive participation of the Cornell Law School, and especially that of a subset of scholars active in the movement known as empirical legal studies (ELS) – which is considered to be the most important innovation of the past decade of legal scholarship (Diamond & Mueller, 2010). In particular, the tireless participation of Ted Eisenberg, a mainstay of the IEL program and the founding father of ELS (as well as co-editor of this volume) helped make possible the cross-fertilization of comparative law and economics with the new inputs from ELS. Although Ted did not himself explicitly use the label ‘comparative law and economics’, an extensive part of his recent research was aimed at promoting empirical comparative law and economics, and his enthusiastic participation in the project of this handbook further confirms his interest in the approach.³

While it is still too soon to measure the outcomes of applying the empirical approach to comparative law and economics, there are reasonable grounds to expect that ELS will bring a new dimension to comparative law and economics, imparting a broader methodological cognizance to its analysis, and introducing the important element of statistical measurement, which can in turn be expected to stimulate new scholarly contributions. Indeed, this cross-fertilization has already resulted in a number of new papers, which have now finally found the support of two proper publishing outlets on both sides of the ocean: the *Journal of Empirical Legal Studies* in US, led until his sudden disappearance – by Ted Eisenberg, and the *European Journal of Law and Economics* in the old continent, whose editorship is currently partially rooted in the IEL program, being the two current co-editors, Alain Marciano and myself, member of the IEL board.⁴

This chapter will thus attempt to define what comparative law and

making it a successful research and educational hub. It is impossible to list all of them here and details can be found at <http://iel.carloalberto.org/index.aspx>.

³ Eisenberg recently published a number of articles that might be classified as comparative law and economics, investigating the relationship between litigation and well-being in India, Israel’s supreme courts appellate jurisdiction, and rule-shifting in the Taiwanese supreme court (Eisenberg et al., 2013; Eisenberg & Huang, 2012; Eisenberg et al., 2011).

⁴ The *European Journal of Law and Economics* in its disclaimer asserts that it ‘[e]mphasizes [...] comparative analysis of legal structures, and solutions to legal problems in member states’ (<http://www.springer.com/economics/law+%26+economics/journal/10657>) and since its establishment in 1994 it has not only offered a space for law and economics contributions on Europe – including an article on bankruptcy in Finland by Ted Eisenberg himself (Bergstrom et al., 2004) – but also opened the analytical viewpoint to idiosyncratic topics relevant to comparative law and economics like ancient Greece (see e.g., Karayiannis & Hatzis, 2010, Kyriazis & Paparrigopoulos, 2012) and to the Muslim world (e.g. Fachini, 2010), among others.

economics is today, identify the main opportunities offered by the comparative method, and qualify its implications from a research point of view. Although comparative law and economics is very far from constituting a new and separate discipline, it does mark a new awareness of how extending the boundaries of both the research subject matter and the methodological approaches can enrich the core of the discipline.

The remainder of this chapter is organized as follows: Section 2 outlines the trajectory of law and economics toward a comparative approach. Section 3 illustrates the pre-existing comparative attitude within law and economics, while Section 4 further develops what it means to conduct comparative law and economics research. Section 5 attempts to position the comparative approach within the ongoing scientific debate, and finally Section 6 draws some conclusions.

2. THE ORIGINS OF LAW AND ECONOMICS AND THE RISE OF INTEREST IN THE COMPARATIVE APPROACH

What is generally known as ‘law and economics’ is now a well-established scientific approach, firmly rooted in our intellectual landscape. Its importance today is not only theoretical but also – and quite importantly – practical. The law-and-economics perspective is so relevant to tackling problems arising from everyday-life interactions between human beings embedded in a given legal setting that it now qualifies as a sort of programmatic approach, not only for scholars, but also for law practitioners and policy-makers (Marciano & Ramello, 2014). Indeed, the use of economics as a parsimonious tool to tackle otherwise difficult and complex legal problems has now become so frequent that a number of scholars regard this as possibly the most important novelty in all of modern legal scholarship (Denozza, 2013; Mattei, 1994). In fact, setting aside theoretical speculation, there is a growing number of judges and legal practitioners who have taken economics courses, are influenced by this approach, and are implementing this methodology in their everyday practice – certainly in the United States, and now increasingly also in Europe.

This change is the result of a movement that began before World War II, gained momentum in the 1950s, took further shape in the 1960s, and definitively established itself as a distinct discipline in the 1970s, essentially under the influence of economists and legal scholars in the US gravitating around Chicago and ‘[th]e purpose of carving out a separate field [. . . and] to identify the area of economic enquiry to which a substantial knowledge

of law in both its doctrinal and institutional aspects is relevant' (Posner, 1987, 3–4).⁵

Law and economics was from the outset a melting pot in the broadest sense – not just because it was a field of studies created at the intersection of economics and law, but also because it grew out of a blend of North American and European cultures. For a long time, during the discipline's infancy, this peculiar multifaceted character was ignored. Instead, the main efforts were directed at making it a unified and mature approach. As a result, for nearly 50 years, much of the emphasis of law and economics went into making it homogenous, building up a theoretical framework heavily grounded in efficiency, and establishing the boundaries of the new discipline. The initial dynamic was thus toward a process of homogenization, in which any internal disruption that might put the new field at risk was carefully avoided.⁶

Just when law and economics began to finally acquire a distinctive scientific character – around the end of the 1980s⁷ – major global events and a series of intense shocks imparted a new drift to the discipline, by collectively tending to foster a more open perspective toward the world. Most notably, the fall of the Berlin wall and the disintegration of the communist-block regimes suddenly removed what had until then been the principal foil and adversary of the Western economic system and of its main governing paradigm – that is to say, the market. Planned economies had provided a benchmark against which scholars could compare the market and its institutions, and the existence of political conflict also fuelled stronger support for the market paradigm. For mainstream economics and law and economics – with their shared neoliberal roots – planned economies had

⁵ Of course one can legitimately look for the pioneers predating the birth of current law and economics. It is possible to find scholars in Europe since at least the mid-eighteenth century (e.g., Cesare Beccaria) and in the US (early-twentieth century such as Commons and others). See, for instance, Backhaus (2005) and Posner (1998) in the EU, and Medema (1998) for the US. This would once again enable us to identify the European roots of the early American scholarship. However, we will focus on what is universally recognized as the current and modern form of law and economics.

⁶ Of course this does not prevent differences – sometimes significant ones – from existing within the approach. See e.g., Marciano & Ramello (2014) and Harnay & Marciano (2009).

⁷ The milestone marking when law and economics was officially recognized as a separate scientific discipline can be reasonably identified as the publication in 1987 of the article by Richard Posner 'The Law and Economics Movement' in the *American Economic Review*, a publication that is the focal point of the worldwide economics community.

become the common enemy and heresy to oppose (van Horn et al., 2011). The fall of communism brought forth a series of disruptive changes that opened up new opportunities for the social sciences – including for law and economics. First, the post-communist countries started a process of transition that furnished an unprecedented natural experiment on the dynamics of institutions. This not only supplied a broad array of case studies for political scientists, legal scholars and economists, but also started to cast doubt on the long-standing notion of ‘one size fits all’ institutional arrangements. Second, the scientific debate, which had until then been in large part ideologically driven, was able to take a more open attitude, giving more equal consideration to standpoints critical of the market system.

In this respect, it is interesting to note the flourishing of papers around the subject of law and economics that occurred during that time. Some contributions sought to definitively settle law and economics as an autonomous discipline (Posner, 1987) and establish its historical pedigree (Hovenkamp, 1995), while others provided critical perspectives (Donohue, 1988) and predicted either its inauspicious (Epstein, 1997) or bright (Baird, 1997) future, depending on the authors’ different personal expectations. This state of entropy can on the whole be interpreted as a sign of new vitality being infused into the discipline, and it in fact heralded the birth of comparative law and economics.

Many other germane fields such as public choice (Rowley, 1989), comparative law (Ajani & Mattei, 1995), institutional economics (Posner, 1993), and comparative economics (Djankov et al., 2003) were likewise directing their attention to the above-described geopolitical events. Those contributions in their turn provided food for thought to what we now call ‘comparative law and economics’, to the point that the boundaries between the different fields were – and in part still are today, as we shall see below – somewhat difficult to neatly distinguish.

This convergence of interest can be reasonably explained by the fact that recent historical events were seriously calling into question some of the tenets that had hitherto governed the scientific viewpoint – in law and economics, but also elsewhere – and that those events were at the same time pivotal to opening the door to what we call ‘comparative studies’.

The comparative disciplines, on both the legal and the economics side, in a certain sense attempted a ‘friendly takeover’ of comparative law and economics. Despite their distinct scholarly paradigms, both systems tried to use the new label as a way to explain different legal and institutional dynamics under the unified paradigm of economic efficiency (Mattei, 1994; Djankov et al., 2003). Legal scholars claimed that ‘comparative law and economics’ was a methodological marriage between ‘comparative law’ and ‘law and economics’, although it still remained relatively marginal to

the core of comparative law (Caterina, 2006). Meanwhile, scholars who studied economic systems – orphaned by the end of the conflict between planned and market economies – tried to repurpose rather than appropriate the label, by building a unified paradigm that could explain the institutional diversities between countries from a common viewpoint (Djankov et al., 2003). Notwithstanding these differences and their distinct methodological backgrounds, both disciplines were converging on the result that, from an efficiency standpoint, different legal solutions to the same legal problem in different countries might be equally appropriate depending on the circumstances (Mattei, 1994; Djankov et al., 2003). In addition to this, the economics literature stream had the further agenda of identifying the ‘genetic’ traits that make a specific legal system – namely common law – better suited to the market and efficiency (Glaeser & Shleifer, 2002).

The above-described contributions, taken together, were certainly important to the stream of studies that sought to understand different institutional and legal settings. They laid the groundwork for making comparisons between different legal cultures within the subject area of law and economics. However, our claim here that this comparative attitude and its provisional results were not, in and of themselves, anything new – as they had in fact been a feature of law and economics since its inception.⁸

3. THE ROOTS OF LAW AND ECONOMICS BETWEEN EUROPE AND THE US

Although the above discussion helps to historically pinpoint the genesis of the discipline, and provides an insight into the inner elements that characterize it, actually defining what ‘comparative law and economics’ is remains an open question that is not easy to answer. In the past two decades, a handful of articles and books have been published that endorse this label. Yet it seems that multiple definitions continue to apply, with different fields gravitating toward ‘comparative law and economics’ in their own distinctive ways.⁹ As noted above, both law and economics (as distinct disciplines) at one point mounted a friendly ‘takeover’ of comparative law and economics – trying to draw it, respectively, into ‘comparative law’ and

⁸ As it will be further argued the paper by Demsetz (1967) already starts from these premises.

⁹ Some contributions that can be regarded as gravitating toward the discipline include Mattei (1995, 1997), Ajani & Mattei (1995), Glaeser & Shleifer, (2002), De Geest & van der Berg (2004), Garoupa & Ginsburg (2009), La Porta et al., (2008) and Michaels (2009), Backhaus et al, (2012).

into ‘comparative economics’. Today, although both ‘comparative law’ and ‘comparative economics’ do have occasional links with ‘comparative law and economics’, neither can be regarded as its true ancestor. ‘Comparative law and economics’ represents a more complex doctrinal development, that has broadened the scope of ‘law and economics’ by gathering new stimuli from many directions, and fostering openness to diverse research and methodological sensibilities. Although ‘comparative law’ and ‘comparative economics’ do play an important role, they are only part of the story. Comparative law and economics represents an entirely novel way of approaching law and economics. While retaining the fundamental tenet of looking at laws and institutions through the lens of efficiency, it incorporates complementary methodologies that enrich the research perspective.

Examining the historical evidence, we will see that, in a sense, law and economics has always inherently included a comparative element. Therefore, the novelty of ‘comparative law and economics’ cannot simply consist in its looking at different legal and economic systems. Here I will argue that its true distinctiveness lies in the manner of conducting the analysis, that is to say, in the methodological standpoint. This novel methodological mindset can be regarded as an evolution, rather than a revolution – a natural progression of the law and economics field, which was from the outset a crossroads of different cultures and disciplines.

In fact, although the birthplace of law and economics is generally identified as Chicago, a more careful analysis reveals there is also a strong European legacy, making the discipline in reality a blend of US and European cultures. The famous ‘Chicago school’ of economics – where law and economics first developed – is deeply rooted in the European neoliberal tradition championed by von Hayek (van Horn et al., 2011; Harcourt, 2011). Also, two of the four acknowledged founding fathers of law and economics (Ronald Coase and Guido Calabresi) were European-born immigrants to the US.¹⁰

Ronald Coase was an Englishman, educated at LSE, who only moved to the US as an adult. His scholarship was fundamentally European, and his academic thinking was formed when, as a student at LSE, he attended the seminars held by Arnold Plant, who introduced him to Adam Smith’s ‘invisible hand’. As Coase himself explains in his autobiographical sketch for the Nobel Foundation, ‘He made me aware of how a competitive

¹⁰ Although there are a number of ancestors and many important scholars that contributed to the rise of the discipline, the recognized founding fathers of law and economics are Richard Posner, Ronald Coase, Guido Calabresi and Henry Manne (Marciano & Ramello, 2014).

economic system could be coordinated by the pricing system,' and this lesson oriented his entire academic life.¹¹ Another pivotal event in forming Coase's mindset, which made him sensitive to a comparative perspective, was a scholarship that led him to travel to the US to study the structure of American industry. This experience proved equally important in triggering his brainstorming about 'the introduction of a new concept into economic analysis, transaction costs, and the explanation of why there are firms'.¹²

Coase's cross-cultural nurturing of ideas can be likened to that described by De Tocqueville (1861, pp. 360–61), who a century earlier wrote:

In my work on America [. . .] [t]hough I seldom mentioned France [Europe, we would suggest in Coase's case], I did not write a page without thinking of her, and placing her as it were before me. And what I especially tried to draw out, and to explain in the United States, was not the whole condition of that foreign society, but the points in which it differs from our own, or resembles us. It is always by noticing likenesses or contrasts that I succeeded in giving an interesting and accurate description of the New World.

According to Medema (1998), Coase's European legacy is also detectable in his early American work on the US broadcasting industry, which was a continuation of his previous studies on the British broadcasting industry and its regulation. These investigations laid the groundwork for his major contribution, 'The Problem of Social Cost', which originated as a theoretical justification for using market mechanisms to allocate scarce and valuable resources such as radio frequencies. Taken together, these examples show how Coase's scholarship was from the beginning informed by a comparative viewpoint, which tackled American sensibilities through the scientific lens of a European education. This represented a novel approach to comparing and contrasting, that merged cultural elements with the subject matter.

Guido Calabresi – the other European founding father of law and economics – was born in Italy and spent his childhood there. His family moved to the US to escape fascism, and brought with them a lively Italian and European bourgeois environment. Guido's father was a cardiologist, and his mother a literature scholar.¹³ Although attempting to deduce impacts from historical backgrounds is generally a risky business (Kalman, 2014, p. 15), there is strong evidence that Calabresi did indeed blend his family's European culture with that of the US, and that this in turn had an

¹¹ See http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1991/coase-bio.html.

¹² See previous note.

¹³ For a short bio see e.g. http://en.wikipedia.org/wiki/Guido_Calabresi.

influence on his scholarship. Once, when asked what he considered to be the most important part of his legal education, Calabresi replied:

I am a refugee! And of course, how can I not have been influenced by the fact that we were antifascists and that we left Italy because my father had been jailed and beaten in 1923 and he was a democrat with a small 'd'; that we were very, very rich there and came here with nothing because it was against the law under penalty of death? If I write about capital punishment or if I make a decision, I am not going to be writing to push an agenda but, on the other hand, I would be pretty foolish not to be aware of the fact that that is in my background (Benforado & Hanson, 2005, p. 75).

On the whole, although we can leave it to the historians of law and economics to look for specific traces of European elements in his work, there is a sound basis for stating that Calabresi's scholarship, too, matured from its inception, as cultural anthropology would put it, in a cultural web suspended between Europe and the US (Geertz, 1975).

Finally, as a matter of fact, a comparative ethos – even if not explicitly declared – has long been a feature of law and economics. At least one of the discipline's early, seminal contributions, Demsetz's (1967) paper, 'Towards a theory of property rights', openly looked at different legal systems (comparing the land and property rights of different Native American tribes). This work consolidated and operationalized Coase's intuition on the role of property rights, and played a totemic role in the law and economics literature as far as the dynamics of property rights are concerned. In addition to being overtly comparative, Demsetz's paper clearly pointed out how, depending on the context, different legal solutions may equally well satisfy the efficiency criterion. 'Towards a theory of property rights' lends further credence to the claim that law and economics has been multicultural – and so also inherently comparative – from the very beginning.¹⁴

Yet, if 'law and economics' is itself inherently comparative, we cannot simply define 'comparative law and economics' as a variant that is more open to different legal systems and alternative legal solutions. Rather, we can say that 'comparative law and economics' denotes the explicit and conscious adoption of a comparative viewpoint – one that extends beyond the choice of subject matter to also cover the methodological approach. This new discipline not only openly advocates a comparative attitude, but also adopts a broader methodological mindset that embraces the recent advances in behavioural research and empirical legal studies. In other

¹⁴ This claim is further confirmed by the inclusion of Demsetz's article in the first anthology on comparative law and economics, published by De Geest & Van den Berg (2004).

words, the ‘comparative’ label marks the advent of new phase for law and economics, which expands the methodological boundaries of the standard approach.

4. TO CONTRAST AND TO COMPARE: COMPARATIVE LAW AND ECONOMICS AT WORK

In his poem ‘The English Flag’, Rudyard Kipling (1994, p.233) says, ‘what should they know of England who only England know?’ This echoes an idea expressed nearly a century earlier – albeit less concisely and in a totally different setting – by the French philosopher Jean Jacques Rousseau, about the myopic self-understanding of those who are unable to make contrasts and comparisons:

Le grand défaut des Européennes est de philosopher toujours sur les origines des choses d’après ce qui se passe autour d’eux [. . .] Quand on veut étudier les hommes, il faut regarder près de soi; mais pour étudier l’homme, il faut apprendre à porter sa vue au loin; il faut d’abord observer les différences pour découvrir les propriétés.¹⁵

While Rousseau’s remark applies almost everywhere in Western culture (and elsewhere), it is especially pertinent to the sciences of law and economics, both of which represent strong centripetal cultural paradigms. Scholars rooted in such resilient backgrounds may be less sensitive to variances, or perceive them in a manner strongly biased by their own point of reference. Looking at something does not automatically imply understanding what one sees. In fact, very often quite the opposite is true, with people tending to distort what they see to fit it into their own cultural mould. This type bias is very difficult to eradicate. Becoming at least aware of it is a first step toward reaping the benefits of the comparative method, which remains one of the most powerful tools – possibly the most important one – for advancing the social sciences.

In an imaginative contribution, the social anthropologist Alan Macfarlane (2004, p.94) makes the key point that the work of any social scientist ‘is indulging in comparison all the time’, and cites Evans

¹⁵ The English translation might be: ‘The great mistake of Europeans is to always philosophize on the origins of things according to what happens in their home [. . .] One needs to look near at hand to study men; but to study Man, one must learn to look from afar; one must first see differences in order to discover characteristics.’

Pritchard's (1963, p.3) claim that 'in the widest sense there is no other method. Comparison is, of course, one of the essential procedures of all sciences and one of the elementary processes of human thought'. This idea can in its turn be traced to Durkheim (who wrote that it is only possible to explain by making comparisons). In other words, making comparisons – whether we look at similarities, or at differences and contrasts – is a very central and natural manner of understanding phenomena (Macfarlane, 2004).

However, there are various ways in which comparisons can be made, and considering them is especially relevant for understanding comparative law and economics. The most familiar way, and the one applied in the literature cited thus far, essentially consists in 'familiarizing the distant' – that is to say, in studying a subject matter extraneous to one's own cultural background (Macfarlane, 2004). While this is the more immediate way of conducting comparisons, there is the risk of distorting one's understanding by unwittingly forcing things into familiar categories. This might easily happen with the categories of law and economics, where sometimes the mere fact of investigating non-US or non-Western legal objects gives the impression of conducting a comparative study.

As pointed out previously, this approach, grounded on the paradigm of economic efficiency, is the one that law and economics analysis (traditional and comparative) has mostly followed. Although challenging and attractive from an academic point of view, comparisons have been a regular feature of mainstream law and economics since its inception. Applying the same methodology to different research objects does not imply a major shift in the analytical paradigm. Rather, if this were the only novelty implied by the adjective 'comparative', one could argue such comparisons were anyhow already there from the beginning. To be sure, the act of systematizing such an approach is still valuable, but it cannot be regarded as a disruptive innovation in the discipline.

Rather, the true innovation of 'comparative' law and economics is its ability to investigate even a single research object from a multifaceted perspective, capturing diverse sensibilities through the simultaneous use of complementary research methods. Achieving this requires a further comparative ability to 'distance the over-familiar', which acts as a reverse telescope, providing a new lens for looking at something already well known (McFarlane, 2004). It is this alternative paradigm that makes the comparative method and its implications more dramatic and relevant to the field.

An example of this is the case of trademark, which the standard law and economics literature regards as an instrument for serving efficiency and solving an asymmetric information problem (Landes & Posner, 1987; Akerlof, 1970). The fact that trademark emerged in very distinct cultural

and legal settings – such as in ancient Greece, in the Roman Empire, and in ancient China – makes it a good candidate for discussing the comparative method (Greenberg, 1951; Diamond, 1983; Ramello, 2013). Such an analysis might even initially suggest that the repeated emergence of trademark in different societies and legal systems ‘can best be explained on the hypothesis that the law is trying to promote economic efficiency’ (Landes and Posner, 1987, p.265). However, this suggestion is dispelled once we fully apply the comparative method. By learning to compare and contrast at the same time, we can discover that, despite apparent similarities, the role and meaning of intellectual property has distinct and idiosyncratic interpretations in different societies. For example, although both the Western world and China adopted trademarks, they did so with very different meanings, which can in turn account for their different ways of developing and enforcing them.

The use of trademarks in ancient China for silk textile production dates back thousands of years of long-distance trade. Yet exploitation of trademark developed very differently in China, which failed to foster the development of branding that is instead the core of the modern trademark use (Alford, 1997; Ramello, 2006; Guo & Qiu, 2013). In fact, despite the spontaneous emergence and the venerable age of this trade device in China, the first Chinese Trademark Law was amended only less than a century ago, in 1923, and even then it was not a response to the dynamics of endogenous market forces, as in the Western world (Ramello & Silva, 2006). Instead, the amendment was ‘the outcome of long negotiations between the Chinese government, the Japanese government and Western governments led by the British government, and was intended to settle trademark infringement disputes caused by Chinese merchants from the 1890s’ (Motono, 2011, p.9). Thus, despite being a major exporter and trading nation, China did not feel the need to amend its trademark law until the modern era, and even then it did so only in response to protracted lobbying from other countries.

Zooming into present-day trademark practices helps us to better understand these differences. Even today, there continues to be a substantial discrepancy between how trademark laws are applied in China and the West, which can to a great extent be explained by the specific local reception and understanding of trademark in China (Alford, 1997; Grinvald, 2008).

Distancing the over-familiar through the lens of semiotics helps us understand the inner dynamics of signs within societies (Beebe, 2004). By so doing, analogous perplexities arise concerning the life of trademark within Western society and its homogenous interpretation within that legal system. Partially departing from the efficiency tenet of mainstream law and economics (Landes & Posner, 1987), we can adopt a more complex

and multifaceted perspective in which efficiency may be at best one of the outcomes (Ramello, 2013). In fact, unveiling how signs work within human society helps to understand the inner structure of trademark. In this light, trademark is not merely a label for filling the gap created by the asymmetric information in a voluntary exchange. It is also a container for a broader meaning that can enhance consumers' willingness to buy, to the point of becoming a commodity in itself, creating the specific type of utility known in marketing and trade as 'brand equity'. In such a case, we can certainly envisage another way of promoting efficiency through the creation of distinct markets. However, this new paradigm is very different from the mainstream one, and still carries with it the spectre of market power that lowers rather than increases efficiency (Ramello, 2006; Ramello & Silva, 2006).

Whatever the outcome of such speculation, we can see that a 'hidden life' of trademark emerges thanks to the adoption of an external fulcrum – in this case, semiotics (Beebe, 2004). This alternative analytical perspective provides a new and deeper understanding of what was otherwise perceived as a quasi-natural and one-dimensional phenomenon.

In short, although the comparative method can be applied in many ways, what makes 'comparative law and economics' relevant is not just the application of a common methodology to compare different research objects. Its most innovative feature is in reality its use of external methodological pivots that provide a more complex and multifaceted understanding of legal institutions and their dynamics.

5. LOOKING FORWARD

'Familiarizing the distant' has traditionally been the more common comparative approach, because it offers a wider choice of potential subject matters. On the other hand, 'distancing the over-familiar' introduces a critical perspective by making the methodological orientation relative. Comparative law and economics – rooted as it is in the development of law and economics and its fundamental traits – can best find its identity by adopting both perspectives. The 'distancing the over familiar' method of comparison brings in something truly new compared to the standard approach. In the past 20 years there has been increasing curiosity and openness toward complementary methodologies, as scholars actively seek out different fulcra for analysis. As we have seen, simply focusing attention on different legal systems is not in itself anything new, because this is already a feature of comparative law. The use of economic analysis is also nothing new, since this is already a feature of the new comparative eco-

nomics (and has anyhow been embedded within law and economics since its birth). An openness toward different systems is thus only a part of what defines ‘comparative law and economics’. Another important pillar is its new methodological openness that makes it possible to distance the subject under study, also providing multiple perspectives on the same legal system. This attitude, too, has always been part of the DNA of law and economics, but the comparative approach enables it to emerge more clearly.

Often, achieving this methodological estrangement requires recourse to a different discipline. This was the role of economic categories – especially efficiency – in early law and economics, as also that of semiotics for understanding trademark. Today, various epistemological tools supply many new opportunities. For example, the behavioural studies and psychological investigations that shift the viewpoint to the level of the individual make it possible to grasp the apparent anomalies and contradictions not predicted by the efficiency paradigm.¹⁶

In the past decade, a pivotal role in advancing traditional legal scholarship has been played by the creation of the movement known as ‘empirical legal studies’ (ELS). Born as an unstructured enterprise, it has become a prominent object of study in many US law schools, and is currently expanding around the world (Eisenberg, 2011). Because ELS relies upon empirical analysis, it would appear to be linked to the econometrics stream of law and economics research – and indeed some of its founding members, including Ted Eisenberg, Jennifer Arlen and Geoffrey Miller, are active within the law and economics community (the first two being also members of the Advisory Board of the American Law and Economics Review). However, ELS introduces a distinct approach designed to specifically benefit from interdisciplinary perspectives on law. Its declared aim has from the outset been not to compete with the other ‘law and’ social science disciplines, but rather to act as a complementary field that helps study law and the legal system (Eisenberg, 2011). This programmatic attitude makes ELS a potentially valuable companion to comparative law and economics. Specifically, there are three main features of ELS that make it a good fit with comparative law and economics. First, it originates from the legal disciplines, which will help attenuate the economics bias that has long characterized law and economics. This need to re-balance law and economics coincides with sentiment in Europe, where law and economics seems to otherwise be turning into an exclusive province of economists.

Second – and this is again linked to the aforementioned need for

¹⁶ On this topic see Jolls (2007) and, for a critical viewpoint, Wright & Ginsburg (2015).

openness – ELS is highly receptive to contributions from all the social sciences, and so provides a natural testing ground where scholars from varied backgrounds can meet and conduct comparative analysis. ELS actively strives to gather research sensibilities from diverse fields – including political science, sociology, health care, finance, and criminology – to inform empirical research on law-related issues. This fosters the emergence of a comparative ethos that promotes cross-pollination of ideas and breaks down isolation, without sacrificing the distinct contribution that each discipline's sensibility can bring to empirical scholarship.¹⁷

Third, ELS requires participants in the movement to share a common ground – that is to say, its empirical tools – in order to make communication between fields possible. This adoption of common empirical tools – explicitly required of all those who engage in ELS – is far from being a trivial feature. Quite the contrary, it may be the working element that unleashes the added value of a social-science-oriented, interdisciplinary approach to law.

The necessity of communicating across disciplinary lines is much more important than it might seem. Looking at the articles published between 2004 and 2010 in the most legally oriented journal of law and economics, the *Journal of Legal Studies*, Eisenberg (2011) notes that, even there, economics-trained scholars largely dominate the pool of authors (62.6 per cent), followed by a minority of legal scholars (27.5 per cent), while the remaining share is fragmented among other fields. Although this is a static picture, and further investigation is needed to draw a strong conclusion, it does suggest that the boundaries of law and economics are becoming increasingly difficult to cross – not just for scholars outside the discipline, but even for legal scholars. In the short run, this might seem to benefit economists, by allowing them to increasingly monopolize the discourse. However, in the long run it will likely cause the withering of a discipline such as economics, whose lifeblood is the intersection and comparison of cultures.

The model provided by ELS, based on the continual search for a shared language among scholars willing to study legal institutions, can be regarded as the engine of the 'comparative' method. It infuses standard law and economics with an element of ongoing renewal that keeps the discipline open to a broader community, and preserves what the learning and innovation literature calls 'absorptive capacity' – that is, the ability of the discipline and its scholars to recognize the value of major scholarly breakthroughs, and seize the opportunities they offer (Cohen & Levinthal, 1990). In this

¹⁷ For a detailed narrative of the genesis of ELS see Eisenberg (2011).

respect, even if the comparative approach is perhaps not in itself a separate discipline from law and economics, it does impart a specific sensibility that makes it possible to profit from the ongoing scholarly debate, especially that taking place outside the boundaries of standard law and economics. In this way, it helps keep open the possible future trajectories of the discipline, which would otherwise be at risk of endogamy.

6. CONCLUDING REMARKS

From the preceding discussion, 'comparative law and economics' appears to be more a methodological orientation within law and economics than a separate stream of research. This might be regarded as a limitation, but is also in a sense a strength, because it does not put the fields in competition with each other. Essentially, 'comparative law and economics' provides a powerful, modern way of working in law and economics. Comparing different legal institutions (that is, applying the same analytical lens to different research objects) is just one possibility the method offers. However, its most interesting feature is the adoption of multiple, alternative and complementary methodologies, to simultaneously view a given research object through diverse analytical lenses. Certainly, 'comparative' denotes a conscious willingness to preserve a controlled state of methodological entropy, that helps keep a substantial openness toward the most interesting academic developments that might provide fulcra for conducting comparisons.

In other words, the 'comparative' label, which originally meant only openness to studying different institutional settings, has today taken on the wider meaning of openness to adopting a broader set of research directions, and keeping the door open to scholars and tools coming from law, economics and other relevant sciences. As a result, 'comparative law and economics' plays a sort of geopolitical role in controlling the hegemony of economics within 'law and economics'. This would also explain the strong support given to the new discipline by comparative law. Although as an economist I of course fully support my own discipline, it would be misguided to think that reducing everything to a province of the economics empire can be healthy. It is in everyone's best interest, economists included, to cultivate opportunities for cross-fertilization that can make possible novel explorations not included in the mainstream of the discipline. This was the reasoning (and method) that led to the creation of law and economics, and it is the way for it to continue being a fertile (independent, yet interconnected) ground for the advancement of scholarship.

During its infancy, 'law and economics' was straightforwardly American

(although with a subterranean European legacy) and its consolidation demanded a strict Chicagoan orthodoxy. Now that it has come of age, 'law and economics' can make more of its European roots, and take better advantage of the wider debate and developments taking place on both sides of the ocean. The 'comparative law and economics' approach marks the consciousness of this opportunity, and the willingness to benefit from it.

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