

# The Fall and Rise of Law & Economics in Europe

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## 1. INTRODUCTION

Law and economics has become an essential mode of analysis at many law schools in the United States.<sup>1</sup> The singular success of law and economics in the United States is regularly contrasted to the allegedly more modest foothold of the discipline in Europe. Thomas Ulen and Nuna Garoupa echo the ‘American superiority complex’, stating that ‘almost everyone who has moved between North America and Europe has the same strong sense that law and economics is vibrant, widespread and dominant in North American law schools but that it barely exists in European law schools’.<sup>2</sup>

Various observations allegedly support the superiority claim of law and economics in the United States. In contrast to cross-Atlantic counterparts, European law schools do not hire economists, prominent European law reviews publish relatively few law and economics-based articles,<sup>3</sup> law and economics scholars are underrepresented in major law and economics publications and at international law and economic conferences.<sup>4 5</sup>

By contrast, law and economics at US law schools is prominent by the frequent hiring of economists, the amount of law and economics publications by law school faculty,<sup>6</sup> the reference to law and economics publications in law reviews.<sup>7</sup>

Many reasons have been offered to explain the alleged gap between the widespread adaption of law and economics in the United States and its more modest success in Europe: a hostile ideological and political European climate,<sup>8</sup> path dependence in legal analysis,<sup>9</sup> the more limited role of judge made law in civil law systems,<sup>10</sup> the absence of truly great European law and economics scholars,<sup>11</sup> the undergraduate nature of legal education in Europe, the different nature of European

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<sup>1</sup> Mercurio & Medema, 2006.

<sup>2</sup> Garoupa & Ulen, 2007-2008.

<sup>3</sup> See Posner\_\_.

<sup>4</sup> Gazal-Ayal, 2007.

<sup>5</sup> Dau-Schmidt & Brun, 2005; Cooter & Gordley, 1991.

<sup>6</sup> See Posner, 2004)

<sup>7</sup> Garoupa & Ulen, 2007-2008.

<sup>8</sup> Vogel, 2002.

<sup>9</sup> Schäfer, 2006; Winkler, 2005.

<sup>10</sup> Mattei & Pardolesi, 1991; Sunstein, 1995;. POSNER, 1996; POSNER, 1995; Posner, 1997; Posner, 2004.

<sup>11</sup> Garoupa & Ulen, 2007-2008.

legal services markets,<sup>12</sup> the greater prestige of applied economics in the United States,<sup>13</sup> different academic promotion and tenure standards,<sup>14</sup> and a host of issues related to the lack of competition between universities in Europe, included lower salaries, and nepotistic hiring policies.<sup>15</sup>

Elsewhere I have argued that the gap between law and economics in the U.S. and Europe is narrower than conventionally understood.<sup>16</sup> When taking into consideration the institutional differences between academic and professional markets in Europe and the United States, law and economics in Europe is a successful discipline in its own right. First, the output of European law and economics publications, especially when taking into account applied, national domestic scholarship, is quite respectable. Second, despite the historic institutional impediments to interdisciplinary research at European law schools and the lack of incentives to produce such scholarship, impressive entrepreneurial initiatives by European law professors have matched (a European law and economics conference, a European law and economics organization, European law and economics journals and encyclopedias, etc.) and sometimes even surpassed their American counterparts (national and multi-national European master programs in law and economics, specialized Ph.d. programs, etc.).

Generally, the overstated accounts of the American superiority complex unfairly neglect the accomplishments of the law and economics movement in Europe; achievements that are all the more remarkable since they took place in the absence of institutional incentives.

In this Essay I look ahead and reflect on the future of law and economics in Europe. I first note that the basis of law and economics in Europe leaves it vulnerable. Specifically its recipe of pioneering academic entrepreneurs working at universities that lack inherent incentives to promote interdisciplinary scholarship sets it up for a decline over time. Second, against this background, I note that the future of law and economics is bright, however. While the days of heroic triumphs of pioneering European scholars seem past, the institutional foundations at European universities now provide fertile soil for the promotion and inevitable advancement of social science scholarship – including law and economics – in the European legal academy. I conclude that, despite the repetitive stand of American law and econ superiority, the gap between law and economics in the United States and Europe has always been smaller than portrayed and it will continue to narrow in the foreseeable future.

This Essay is organized as follows. Part II explains the historic growth of the law and economics movement in Europe. Part III suggests that the driving force behind that success leaves the discipline vulnerable at its core, susceptible to a venerable collapse. Part IV argues that a number of institutional directions in the academy are providing, for the first time in its history, a solid basis for continued growth. Part V concludes.

<sup>12</sup> See Dau-Schmidt & Brun, 2006.

<sup>13</sup> Posner, 1997.

<sup>14</sup> Gazal-Ayal, 2007.

<sup>15</sup> *Id.*

<sup>16</sup> Depoorter & Demot, 2010.

## 2. THE BASIS: LAW AND ECONOMICS ENTREPRENEURSHIP

Traditionally, law and economics, and interdisciplinary research more generally, faced steep institutional obstacles at European law schools.<sup>17</sup> Due to the relatively modest academic wages, many law professors combined their professorship with legal practice. As a result, scholarship has been predominantly focused on practice-oriented questions and domestic legal issues. Moreover, since faculty members at law schools did not compete to attract students or to place their article in top-flight journals, the incentive to produce innovative and interdisciplinary scholarship has been low; especially since the latter is more labor intensive, as it requires aptitude in a second methodology, than practice-oriented writings.

In this barren climate, however, a vibrant law and economics movement sprung to life. Since the late eighties, law and economics now figures prominently at many European universities. One prominent example is the European master in Law & Economics. Students are awarded a Master degree (LL.M./M.A./ M.Sc.) after completing an intense one-year program in law and economics. Annually, about ninety students complete a curriculum that includes courses such as Microeconomics, Comparative Law and Economics, Economic Analysis of Tort Law, Economic Analysis of Property Law, Economic Analysis of Contract Law, Antitrust Law and Economics, Corporate Law and Economics, Public Law and Economics.<sup>18</sup> Based on a partnership between several law schools (Hamburg, Ghent, Rotterdam, Haifa) and economics departments (Vienna, Warsaw, Aix-en-Provence and Mumbai), the Erasmus Mundus program in Law and Economics annually grants a substantial number of scholarships, including full scholarships to non-European students.<sup>19</sup> Other European Master programs in law and economics include Utrecht University, Bocconi University, and the University of Amsterdam. Additionally, European institutions offer an increasing amount of fully integrated Ph.d. programs in law and economics. For instance, the European Doctorate in Law & Economics, organized by the Universities of Bologna, Hamburg and Rotterdam with the collaboration of the Indira Gandhi Institute of Development Research of Mumbai graduates fifteen students each year who have completed an especially designed curriculum in law and economics.<sup>20</sup> Another major Ph.d program in Law and Economics is the International Program in Comparative Analysis of Institutions, Economics and Law (IEL) which is a collaboration between Turin Interuniversity Centre for the Comparative Analysis of Law and Economics, Economics of Law, Economics of Institutions (CLEI), Cornell Law School, the Centre de Recherche en Gestion Ecole, Polytechnique of Paris, and Ghent University Law School in Belgium.<sup>21</sup> Like the EDLE program this three-year doctoral program offers full scholarships to all participants. Study for this

<sup>17</sup> The institutional observations in the remainder of this essay are based on conversations with colleagues at European universities. While they do not represent the state of all European law schools, they describe to varying degrees the setting at many law schools in Europe including Belgium, France, Holland, Germany, Italy, and the UK.

<sup>18</sup> [http://www.emle.org/Subpages\\_rubric/index.php?rubric=EMLE\\_Course\\_Structure](http://www.emle.org/Subpages_rubric/index.php?rubric=EMLE_Course_Structure)

<sup>19</sup> [http://www.emle.org/EMLE\\_Main\\_rubric/index.php?rubric=Home](http://www.emle.org/EMLE_Main_rubric/index.php?rubric=Home)

<sup>20</sup> <http://www.edle-phd.eu/rubric/index.php?rubric=Home&PHPSESSID=e5biog9h8tuv6jm3vfaokgntd4>

<sup>21</sup> <http://iel.carloalberto.org/>

degree begins at the Università di Torino (Turin) and continues with research, which may be undertaken there, at other partner schools, or elsewhere. Graduates of these programs are prepared for academic careers or for positions in government, research organizations, international consulting groups, public organizations, multinational law firms and consultancy firms. The writings by these graduates, both during and after graduating, are another stream of output that finds its way into some of the domestic and topical journals described above.

These unique European initiatives at European law schools and economics departments offer more immersed and specialized training in law and economics than available in the United States.<sup>22</sup>

These examples of law and economics entrepreneurship in Europe are striking. The professors that seek to develop graduate programs in law and economics often faced adversity and criticism by colleagues at their home institutions. Since the government fully funds education at these public institutions, the universities seldom obtain any revenue from these programs; to the contrary, such programs tend to drain administrative sources.

What is the driving force that spurred the law and economics movement in Europe?

I believe the success of law and economics in Europe is due to the appeal and the inspiration that law and economics as an intellectual discipline has on a generation of uniquely entrepreneurial and resourceful European academics. Catching the wind of the burgeoning law and economics discipline in the United States, a cohort of European professors integrating law and economics in their own courses and subsequently found one another in the European Association of Law and Economics. These scholars undertook monumental entrepreneurial efforts to import the discipline into European academics. A generation of pioneers, including Boudewijn Bouckaert, Gerrit De Geest, Michael Faure, Claus Ott, Hans-Bernd Schäfer Göran Skogh, Wolfgang Weigel, and Roger Van den Bergh<sup>23</sup> made massive efforts to convince their home institutions, administrators, colleagues and administrators, to support new master programs, conferences and academic associations in law and economics.

As a result of these efforts, law and economics made great strides in Europe in the nineties and 2000's: law and economics training in Europe has become deeper, scholarly applications more extensive, and conference activities have been steady.

### 3. FALL: THE MISSING GENERATION

<sup>22</sup> Vanderbilt University is one exception where a United States law school recently instituted a law and economics doctorate. For more information, see <http://law.vanderbilt.edu/academics/academic-programs/phd-program-in-law--economics/index.aspx>. Law students in the United States can only specialize in law and economics by enrolling in a S.J.D./J.S.D. program. However, the focus of such programs is on independent research. Rarely, if ever, do they offer a specially designed curriculum program in law and economics.

<sup>23</sup> The names in this list appear in alphabetical order. Naturally, a different approach would invite trouble.

An academic field that is fueled by the inspiration and drive of a generation of scholars is an unstable foundation for the promulgation of a discipline. Since its success is based on personal contributions, academic retirements of the foundational generation of law and economics scholars present a potential end point of the movement. Given the lack of institutional incentives, leaders of the law and economics movement must not only ensure the longevity of the programs they put into place, they also face the task of finding and grooming a new generation of intrinsically motivated law and economics cohorts. This has been an uphill battle for the pioneering scholars. As the field of law and economics matured and grew in stature, students with training in law and economics increasingly find enumerative opportunities and temptations either outside of the academy at law firms and public bodies (antitrust law firms, the European Commission, etc.) as well as in US legal academy (brain drain).

To secure the ongoing growth of the field, pioneering professors must inspire the next generation of scholars (the easy part) and groom them for a position as successors at their home institution or other universities (the hard part). Many European law schools, however, operate in a zero-sum setting: the budget is fixed (by the government) and academic accomplishments do not directly increase the budget. In this environment, academic positions are filled in on a tit-for-tat bargaining basis across department inside a law school. Academic areas of interest are organized as fiefdoms at many European law schools, operating with some autonomy and collecting shares of the pie at collective faculty meetings. This is precarious setting; especially so when a head of a department approaches retirement. Upon retirement the political capital of any professor (even a legend in a field) is at its lowest (in the end game, the retiring professor has less opportunities to avenge adverse moves by their colleagues), yet at that time the most important concession for the academic discipline must be obtained: the allocation of a new position to the existing field. As noted earlier, crowning institutional achievements do not shield a professor against the possibility that his or her retirement will generate a new position in the same field; institutional efforts do not increase the size of the pie for faculty members that are not directly involved in their programs.

In theory, at least, the combination of unique individual contributions and the natural vulnerability of an academic fiefdom upon retirement create a perfect storm that could sink the progression of law and economics in Europe. Additionally, as outside opportunities increase due to the market value of an education background in law and economics, the academic basis of law and economics is destined to decline over time. Unless the persuasive force of law and economics as an intellectual discipline is strong enough to overcome these obstacles, it is unlikely that the second generation of law and economics proponents will be able to sustain the growth of the remarkable golden generation of Bouckaert, Faure and Van den Bergh.

#### **4. RISE: A BASIS FOR SUSTAINED GROWTH**

A few recent academic trends have changed the outlook for law and economics in Europe from gloomy to bright, however. As a result of these new developments,

the projected decline of law and economics, as described in III above, is less likely. The following institutional and scholarly developments actually provide a more stable foundation for the consolidation and sustained growth of law and economics over the long run.

#### *4.1 Empirical Studies for Lawyers*

The highly compartmentalized nature of European law schools has stunted the growth of law and economics since its inception. Each professor is considered the master of his or her field at his or her home institution. In this culture, it is not appropriate, for instance, for a professor in one area of law to criticize or comment on the work of a professor in another domain.

Remarkably, the compartmentalized nature of most European law schools settings extends also to methodological fields of research at many European law schools. For instance, a law and economics scholar in contract law might be in a law and economics research institute and not cross path much with faculty in the doctrinal contract law department.<sup>24</sup>

This lack of perceived interconnectedness between areas of law at European law schools is due to the strict division of many law schools into individual departments. But the institutional separation across fields is reinforced also by an intellectual shortcoming: many European law school are still in a “pre-Calabresi and Melamed”. Many law professors are unaware that or resist adapting core concepts (such as the distinction between liability and property rules) that inform all areas of law.<sup>25</sup> As a result, scholars do not share the common ground to interact analytically across different areas of law.

This lack of interconnectedness inhibits the natural growth of *any* individual field. Every field regards additional hiring in another field as a lost opportunity. Assuming equal bargaining positions,<sup>26</sup> staffing in each department expands or shrinks in proportion to the law school budget. Like other fields, law and economics simply has to wait its turn for a new position.

Recently, however, a fresh academic wind is starting to break down the traditional barriers across fields, and the advancement of a more functional, interdisciplinary approach to legal studies. Due to attention to big data and the increased availability of public databases, policy makers are increasingly eager to learn about

<sup>24</sup> This intellectual divide has traditionally been stronger in Europe than in the US. Law schools in the United States are not divided in departments as strictly and interdisciplinary and methodological concepts are considered to span across areas of law.

<sup>25</sup> In their seminal treatment of remedies, this groundbreaking article created categories (property and liabilities) rules, the dynamics of which are useful across all areas of law. A professor of public law with knowledge of these concepts can comment on ideas in contract law. If however, the perception is that remedies in public law are of a different nature than those in contract law, the room for cross interaction is less very limited.

<sup>26</sup> Until recently, doctrinal scholars had better bargaining positions in law schools. Law and economics scholars are often abroad, missing meetings that are regularly attended by doctrinal scholars who travel less often, given their private practice.

the effects of laws in a concrete, evidence-based manner. Grant proposals with data-driven approaches are more appealing, making law schools more receptive to creating faculty positions to support such endeavors. Additionally, perceived as being less tied to normative theories, law and economics assumptions, and sophisticated mathematical formulae, conventional legal scholars are less hostile to empirical legal studies than they are to law and economics.

This advancement of empirical studies of law increases the demand for faculty members with an economics background or training in social science methodology. Overall, the advent of empirical research helps move the needle towards more functional research conducted in a less compartmentalized setting.

#### *4.2. Behavioral Law & Economics as a Gateway*

In 2002, Daniel Kahneman received the Nobel Prize in economics. In 2017 Richard Thaler received the Nobel Prize in economics. These pioneering economists provided richer accounts of models of human behavior in economics by introducing concepts of human fallibility – borrowing concepts from cognitive and social psychology.

These advances in behavioral economics have trickled down into law and economics.<sup>27</sup> The behavioral law and economics movement has inspired a new generation of law and economics scholars, including researchers with a keen interest in psychology and other social sciences.

The advancement of behavioral law and economics has softened the hostility to law of economics among doctrinal scholars. Some of the opposition against law and economics is based on an aversion to legal realism. But even more so, the traditional association to neoclassical economics creates aversion to law and economics. The market-based approach of the Chicago school economics is an ideological mismatch for the average European scholar. Moreover, the lack of fallibility of the rational man in the neoclassical model does not resonate with many law professors. Conflicts in tort law, contract law, criminal law, and family law settings commonly involve human error, accidents, or malicious behavior. As a result, the rational choice model is perceived as a poor fit for these area of law by many legal scholars. Economists of course recognize the analytical value of the “as is” approach of economic science.<sup>28</sup>

In this context, behavioral law and economics soften the opposition to law and economics at European law schools. The premise that individual suffers from biases and are prone to cognitive errors, as highlighted by empirical findings in behavioral economics, resonate with the intuitions and experiences of many traditional legal scholars.

As a result, as inter-disciplinary research finds a more welcome home at European law schools. As doctrinal scholars increasingly co-author publications and

<sup>27</sup> Ulen, 2002.

<sup>28</sup> Friedman, 1953.

submit grant proposals with behavioral scholars, traditional barriers to law and economics continue to erode.

### *4.3. Post-Graduate Competition*

In addition to these intellectual stimuli, several institutional changes are having a noticeable impact on the growth of law and economics at several European law schools.

Public funding for education has decreased over time in many European countries. In other countries funding has leveled as a growing student population increasingly strains resources.

As a result, law schools are turning to new means of obtaining financial resources – efforts that increase the potential role for law and economics.

#### 4.3.1. Post-Graduate Programs as Income

One of the concessions that academic administrators obtained in their negotiations with Ministries of education in many European countries is the freedom to charge higher tuition for post-graduate law programs, such as LL.M's.

With the establishment of these international “master after master” programs, law schools experience a more intense level of competition. In pursuit of international students, law schools must not only turn to international topics, but also benefit from offering courses on topics that are attractive to students. This increases the appeal of inter-disciplinary topics. More generally, the pursuit of income from post-graduate program moves priority away from domestic local practice oriented scholarship to more outward and international or comparative focused research and teaching. This trend favors law and economics.

#### 4.3.2. Research Grants As Income

Another major shift at many European law schools is the increased pressure to obtain research grants at the European and national level. As universities seek to increase their budgets (from the overhead charged on grants) and law schools desire expansion (additional researchers hired on grants), the hunger for research grants has grown significantly. As a result, law schools and departments within schools find themselves in fierce compete for research grants. Several law schools have set obtaining multiple grants as a condition for promotion, tenure, etc.

The emphasis of grant-based research, favors the rise of law and economics in several ways. First, policy-makers are more receptive to research that studies the effects of laws. Research that includes cost-benefit analysis or empirical methods is more directly applicable to policy makers, as compared to traditional doctrinal work. This increases the value of law and economics scholars at law schools and the potential gains from hiring additional scholars in this field. Second, successful grant application by law and economics scholars directly increase the amount of law and



economics scholars at a law school. By avoiding the centralized bottleneck of faculty hiring, law and economics departments can build a large department that provides overhead income to the law school and university. Strengthened by additional faculty, staff, and resources, the political capital of law and economics departments increases as well.

#### *4.4. The Law School Recession in the United States*

After experiencing exponential growth in the nineties-early 2000's, the law school market experienced a deep recession in 2007 and onwards. As the amount of law school applications more than halved, U.S. law schools were forced to offer generous tuition reductions. In response to these faltering budgets, law schools reduced the hiring of new professors.

As a result of this reduced appetite for hiring at U.S. law schools, the opportunities of European scholars to enter the U.S. teaching market has been reduced for almost a decade. This especially affected young European professor on the entry-level market.

While the US law school market continues to recover, a generation of European law and economics scholars are setting roots in Europe at law schools. With every passing year, the chance reduces that these scholars will make the move to the United States and uproot their professional and personal lives; even as the U.S. law school market continues to recover.

This sustained presence of the *strongest* European scholars has been crucial for the advancement of law and economics in Europe this past decade. These are the scholars most likely to successfully obtain research grants and build political capital at European law schools.

## 5. CONCLUSION

Reflections on the state of law and economics across the world have been rife with overstated accounts of American academic superiority. These accounts negate the accomplishments of a golden generation of European scholars that advanced law and economic in Europe despite all odds.

This Essay noted that the institutional backdrop of the law and economics movement in Europe leaves it vulnerable to a potential downfall, however. Despite this risk, I noted that the future of law and economics is bright, however. While the days of heroic triumphs of pioneering European scholars may be gone, a set of new institutional and intellectual dynamics now provide fertile soil to sustain and further advance law and economics scholarship in the European legal academy.

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