LOST IN TRANSLATION: THE ECONOMIC ANALYSIS OF LAW IN THE UNITED STATES AND EUROPE*

Kenneth G. Dau-Schmidt**

Carmen L. Brun***

I. INTRODUCTION

The economic analysis of law enjoys a long and proud tradition in the United States (U.S.) and is firmly rooted in its legal system. The growth of the "law and economics movement" in the American legal environment has been compared to the release of the rabbit in Australia. "[E]conomics found a vacant niche in the 'intellectual ecology' of the law and rapidly filled it."[1] Although initially confined to areas like antitrust and regulated industries, thanks to pioneering scholarship of academic luminaries such as Gary Becker, Ronald Coase, Richard Posner, and Guido Calabresi, the American law and economics movement has moved into almost every nook and cranny

* The authors would like to thank Tom Ulen, John Reitz, Nick Georgakopoulos, Amitai Aviram and the rest of the participants of the Fourth Annual Meeting of the Midwestern Law and Economics Association for their useful comments on this essay. The authors would especially like to thank Professor Elisabeth Zoller for taking the time to tutor the authors on French culture and law during her comparative law seminars at Indiana University-Bloomington and Université Panthéon-Assas (Paris II). Any insights the authors have captured regarding the French legal system and the economic analysis of law were gained through discussions with Professor Zoller. Any mistakes, of course, are ours alone. This essay was originally written for a volume in honor of Professor Jost Delbrück, whose dedication to study and teaching on human rights has served as an inspiration for both authors. A version of it appears in ESSAYS IN HONOR OF JOST DELBRUCK (STEPHAN HOBE, ED. 2005) (forthcoming).

** Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University—Bloomington; Ph.D. (Economics) 1984, J.D. 1981, M.A. 1981, University of Michigan; B.A. 1978, University of Wisconsin.

*** Editor-in-Chief, Indiana Journal of Global Legal Studies, Indiana University—Bloomington; Research Assistant; J.D. Candidate, 2005, Indiana University School of Law—Bloomington; M.B.A., 1990, Kelley School of Business, Indiana University—Bloomington; B.A., 1988, Indiana University—Bloomington.

[1] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3 (3rd ed. 2000).

of the American legal landscape including criminal law, family law, employment discrimination, and procedural law.[2]

If the success of the application of economic analysis to legal problems in the U.S. can be compared to that of the rabbits released in Australia, the law and economics movement in Europe might best be compared to the experience of the camels that were released into the American southwest.[3] Although the economic analysis of law has been of some interest to European scholars, it seems curiously out of place in their work and, so far, the discipline has not been successfully transplanted to the European academic eco-system. Although European economists have shown a willingness to develop or apply economic analysis to law, the European legal system has remained largely immune to its benefits.[4] Indeed, Professor Dau-Schmidt's experience has been that the primary interest of European legal scholars in the economic analysis of law is for use as a window into the American legal mind, rather than for purposes of applying the same principles in the analysis of European laws. The impact of the economic analysis of law on European legislation and court decisions has been negligible.[5] Although it appears that the movement is currently under-appreciated in Europe, the authors believe there is tremendous opportunity for its future application on this continent.

---

[2] Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 INT'L REV. L. & ECON. 3, 4 (1997).
[3] *Cf.* Robert Berg, *Camels West*, SAUDI ARAMCO WORLD, May-June 2002, *available at* http://www.saudiaramcoworld.com/issue/200203/camels.west.htm.
[4] *See* Lionel Montagné, *Law and Economics in France*, *in* 1E NCYCLOPEDIA OF LAW AND ECONOMICS 150-51 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), *available at* http://encyclo.findlaw.com/0325book.pdf. *See also* Éric Brousseau,*Did the Common Law Bias the Economics of Contract…and May It Change?*, *in* LAW AND ECONOMICS IN CIVIL LAW COUNTRIES (Bruno Deffains & Thierry Kirat, eds., 2001), *available at* http://www.brousseau.info/en/publications/index.php?req=29 (last visited Sept. 17, 2004); Ugo Mattei & Robert Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265, 266 (1991).
[5] Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277, 277 (1991).

This essay will examine the reasons why the economic analysis of law has not flourished in European countries as it has in the U.S. In particular, this paper will focus on three European countries—the United Kingdom (U.K.), Germany, and France. Each of these countries has a different culture, legal system, and legal academy, which have led to different degrees of success in the application of economic principles in the analysis of law.

II. ECONOMIC ANALYSIS OF LAW IN THE U.S.

The economic analysis of law has played a significant role within the U.S. legal academy as well as in the development of the country's legal system. The U.S. legal academy has engaged in a dynamic interdisciplinary debate for decades; included most prominently in that discussion is the law and economics movement.[6] Scores of articles are written analyzing American legal doctrines and statutes from an economic perspective.[7] Proponents of the economic analysis of law hold prestigious appointments to the federal bench, including Court of Appeals Judges Richard Posner and Frank Easterbrook and Supreme Court Justices Antonin Scalia and Stephen Breyer.[8] Why has the economic analysis of law prospered in the U.S.? An examination of the American culture, legal system, and legal academy yields many insights.

---

[6] *See* Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS 66, 66 (2004). *See also* Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35, 35-37 (2004); Robert S. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT. L. REV. 23, 29-30 (1989).

[7] *See* Posner, *supra* note 6, at 66, n.1.

[8] CENTO VELJANOVSKI, THE ECONOMICS OF LAW: AN INTRODUCTORY TEXT 26 (1990).

1. THE AMERICAN CULTURE AND LEGAL SYSTEM: THE PROTECTION OF RUGGED INDIVIDUALISM

Forged on the North American frontier, American culture is defined by the rugged individualism and autonomy of classic Lockean liberalism. Liberalism holds that citizens are inevitably self-interested.[9] Molding the citizenry towards a common good is a waste of time because one cannot remove self-interest, and in fact, diversity of interest precludes anything like a common good. The goal of classic liberalism is to encourage citizens to pursue their own views and goals.[10] Liberalism also holds that individuals are endowed with certain natural rights that are reserved by the individual in the social contract and not dependent on the government for their legitimacy.[11] This is inconsistent with the French version of the social contract based on the work of Rousseau, which will be discussed shortly, in which all individual rights are given up to the state and then returned to the individual. Moreover, since our experience as a British colony, Americans have been suspicious of big government and, therefore, strongly believe in limited government and decentralized decision-making.

These characteristics of American culture are consistent with the economic analysis of law. Neo-classical economic analysis is based on individual, rational decision-making, akin to the individual decision-making revered by classic liberalism. Moreover, the logic of neo-classical economic analysis supports decentralized decision-making by market participants with minimal government interference as a means of maximizing efficiency. This logic is consistent with the American distrust of government

---

[9] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 64, ¶ 124 (J.W. Gough ed., Basil Blackwell & Mott, Ltd. 1966) (1690). "[Y]et men, being biased by their interest." *Id.*

[10] *See id.* at 63-66.

[11] *See id.* at 43, ¶ 87.

power and our Constitutional system of protecting individual rights from government intrusion. Accordingly, it is not surprising that legal problems of interest to Americans are readily amenable to economic analysis.

Consistent with Lockean liberalism, individual rights in America are an integral part of the U.S. Constitution through the Bill of Rights. The government is responsible for protecting individual rights and, in the event these rights are infringed, the courts must decide the limits and proper protection of these rights. As a result of Americans' suspicion of big government, the U.S. Constitution created three separate and distinct branches of the federal government, each enjoying relatively equal distribution of power through a system of checks and balances. This system was established to protect individual rights, and the states, from federal government encroachment. The judiciary enjoys a relatively powerful role through judicial review established in *Marbury v. Madison*.[12]

The relative strength and fluidity of the American judiciary seem to have provided significant impetus for the growth of the economic analysis of law in the American experience.[13] Given their position of relative strength in our system of checks and balances, American judges are allowed, perhaps even compelled, to be more creative than their European counterparts. Even in comparison with their British common law cousins, American judges are "considered far more adventurous."[14] Legislation to countermand a court decision, or remedy a problem, has to clear more hurdles under the

[12] *See* Marbury v. Madison, 5 U.S. 137 (1803).
[13] *See* Posner, *supra* note 2, at 3-4.
[14] Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 295 (1996). *See also*, Nicholas L. Georgakopoulos, *Independence in the Career and Recognition Judiciary*, 7 CHI. ROUND TABLE 205 (2000) (using a comparative empirical analysis to establish that American judges exercise greater discretion than their European siblings).

U.S. legal system than under European parliamentarian systems.[15] Moreover, in America it is "altogether natural for a lawyer in the course of his career to be a professor, a practicing attorney, a judge, and even a politician …this fluidity of roles has enabled a number of law professors identified with the movement to become consultants, practitioners, government officials, judges, and even Supreme Court justices."[16] Some of the movement's best-known scholars, including Judges Richard Posner and Guido Calabresi, have been promoted to the bench.[17]

America's common law system itself is also widely believed to have helped spur the law and economics movement. It is presumed that a common law system is more efficient that a civil law system because "the common law [is] designed to give effect to private bargains with minimum active interference from the state…and common law rules tend to become precedential only to the extent that they are efficient…more efficient rules are upheld while less efficient ones are overruled."[18] Moreover, the role of the judge in the common law system is more extensive than that in a civil law system. Under a common law system, judges interpret statutes and the Constitution while "discovering" the common law that prevails in the absence of relevant legislation. Under

[15] Under the American system of checks and balances, laws must be approved by the House, Senate, and President to become law, and are subject to filibuster. Under the British parliamentary system, laws can be passed merely with the approval of one house of parliament. The German parliamentary system has two houses and the French Presidential-Parliamentary system has two houses and holds the possibility of a split in party allegiance between the President and the Parliament, however, in practice both of these systems generally offer an easier time for the passage of corrective legislation than the American system of checks and balances. Cooter and Ginsberg, *id.* at 295-96.
[16] Posner, *supra* note 2, at 3-4. *See also* Posner, *supra* note 6, at 76-77.
[17] VELJANOVSKI, *supra* note 8, at 26.
[18] Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1015 (1990).

a civil law system the judge is merely the "mouth piece for the law" interpreting the legal rights and relationships that are established by the legislature in the code.[19]

2. THE AMERICAN LEGAL ACADEMY

The American legal academy combines student graduate study with a professionally trained professorate in a way that provides little cover for an entrenched philosophy of legal discipline. In the U.S., students typically undertake study for a three-year graduate legal degree (J.D.) after they have already successfully completed a four-year undergraduate degree. Traditionally, American law school professors had no education beyond the same three-year graduate degree conferred upon all attorneys and were drawn from legal practice. This practice is changing, in no small part due to the success of the law and economics movement.[20] However, at the time of the rise of the law and economics movement in the U.S. during the 1960's and 70's, the American academy combined a relatively well-educated student body that had been exposed to a variety of academic disciplines with a faculty with a relatively small investment in any particular academic perspective or school of thought. This combination provided a fertile ground for the spread of economic analysis in the American academy in that it provided both students who had the undergraduate preparation for instruction in such theory and a professorate who were not overly wedded to existing legal philosophy.

---

[19] *See* M. DE SECONDAT, BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 170 (Thomas Nugent trans., George Bell & Sons 1906).

[20] The attainment of an additional graduate degree in law or even a Ph.D. in another discipline, is an increasingly important credential for young legal academics in America, while prior legal practice has declined in importance. *See* Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT. L. REV. 403, 414-15 (2004).

Further undermining the entrenchment of the academic status quo in the U.S. is the fact that American legal scholarship is published in an exceedingly large number of primarily student-edited journals. Because the vast majority of U.S. journals are student-edited, legal scholars do not need to convince a fellow professor, steeped in the arguments of the prevailing legal discipline, that an article is important in order to get it published. Only student editors need be convinced. Articles in student-edited journals are published not because they fall into the traditional legal discipline but because they are interesting, novel, or controversial. Accordingly, it is relatively easy for new and novel ideas from a variety of disciplines to find their way into the American legal literature.

Finally, just prior to the rise of the law and economics movement in the U.S., the American legal academy experienced a void in legal theory. During the middle of the twentieth century, the logic of legal formalism gave way to the empirical demands of legal realism in the United States.[21] Rather than divining the inherent logic of the law from disparate appellate opinions, the American legal academy became increasingly concerned with documenting the reality of the law in practice. At the same time, scholarship in philosophy undermined the traditional normative underpinnings of American legal thought.[22] This decline in formalism and traditional normative theory created an opportunity for the rise of the economic analysis of law in the American legal

---

[21] *See* Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 453-54 (1974).

> "Once upon a time there was Formalism. The law itself was a deductive system, with unquestionable premises leading to ineluctable conclusions. It was, potentially at least, all consistent and pervasive…Then, out of the hills, came the Realists…they were much more interested in the way law actually functioned in society…The critical questions were henceforth no longer to be those of systematic consistency, but of existential reality." *Id.*

See also Ulen, *supra* note 20, 403.

[22] Leff, *supra* note 21, at 454-55.

academy.[23] Not only was the structure of the American legal academy amenable to change, but the American legal academy needed to borrow from economics and other disciplines to fill the gaps in its own disciplinary perspective. Among all of the disciplines that the law has borrowed from, economics is the most important. "The moving force of this change is not *all* of the 'law and' developments of the last twenty years but one particularly—law and economics."[24]

3. WHY THE ECONOMIC ANALYSIS OF LAW HAS SUCCEEDED IN THE U.S.

The American cultural and legal landscapes have proven extremely fertile ground for the law and economics movement. The neo-classical model of individual rational decision-making through decentralized markets strikes a harmonious cord with American individualism and our distrust of centralized government power. Moreover, our system of governmental checks and balances and common law adjudication makes for a relatively strong and adventuresome judiciary that is more likely to be subject to evolutionary pressure towards efficient legal rules or to decide cases on the basis of public policy. Finally, the history and structure of our legal academy allows for a wide-open scholarly debate that incorporates facets from many disciplines. Thus, it is not surprising that the careers of the greatest theorists in the law and economics movement,

---

[23] *See* UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 85 (1997).

> "[O]ne of the reasons for the success of law and economics in America was the need for 'reconstruction' after years of realist jurisprudence had reduced legal scholarship to little more than a sterile commentary on case law. Law and economics was seen as a tool for thinking about the law in broad theoretical terms, giving scholars back their role as social engineers."

Id. (citing BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); P.L. Chiassoni, *Economic Analysis of Law, in Search of Constructive Realism*, *in* LAW AND ECONOMICS: SOME FURTHER INSIGHTS (R. Pardolesi & R. Van Den Bergh, eds., 1991)).

[24] Ulen, *supra* note 20, at 405.

including Ronald Coase, Guido Calabresi, and Judge Posner, have been undertaken in the United States.

III. ECONOMIC ANALYSIS OF LAW IN EUROPE

Although Europeans are curious about the law and economics movement, its impact on their legal environment has been comparatively slight, especially in the civil law countries. Few European universities offer classes strictly devoted to the study of law and economics.[25] Additionally, the study of law and economics is not generally incorporated into traditional law courses.[26] Articles employing the economic analysis of law are relatively rare in the European academy and there is only one European journal dedicated solely to the economic analysis of law.[27] Economic analysis is fairly uncommon in European cases outside its traditional stronghold of antitrust, and there are no comparable judicial appointments of law and economics scholars to the bench as there has been in the U.S. Of the three countries profiled in this paper, law and economics has been most successful in England and least successful in France. An examination of the cultures, legal systems, and legal academies of these various countries, in comparison with our analysis of the U.S., will yield insight into this observation.

1. EUROPEAN CULTURE AND LEGAL SYSTEMS: CULTURED COLLECTIVISM

a) The United Kingdom: A Proud Tradition of Collective Laissez-Faire

[25] In Germany, for instance, only law schools in Hamburg, Munich, Oldenburg, and Hanover regularly offer courses in law and economics. Thomas Henne, *Environmental Policy in Germany and the United States*, 51 AM. J. COMP. L. 207, 226, n.84 (2003) (reviewing SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES (1995)).
[26] *See* Kirchner, *supra* note 5, at 279-80.
[27] Posner, *supra* note 6, at 66.

The British have a strong class hierarchy. Unlike in the U.S. where wealth and social stature can be attained through individual achievement, wealth and social stature in England are traditionally determined at birth.[28] Class organization is strong among, but not between, the classes. The organized working class has little trust in the upper class, which includes much of the British legislature and judiciary.[29]

The British are more invested in history and tradition than Americans, even though both countries follow the common law system. Unlike the U.S., England has no written constitution. The British constitution is not the outcome of a revolution as in France and the U.S. Instead, it is an historical constitution to which only gradual, inch-by-inch, changes are made over centuries. The British have always looked to their inheritable past and time-honored traditions to determine the scope of their laws.[30]

Parliamentary sovereignty reigns in the U.K. Parliament is comprised of a compound body made up of the Crown, the Lords, and the Commons.[31] There is nothing above parliament. Parliamentary sovereignty has facilitated a strong legislature at the expense of the executive and judiciary, and consequently, even though the British have a common law system, the judges have only a limited role in the interpretation of the law.

b) Germany: Human Rights in a Well-Ordered System of Co-Determination

---

[28] Kenneth G. Dau-Schmidt, *Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model*, 8 TULANE J. INT'L & COMP. L. 117, 137 (2000) (citing HENRY BROWN, THE ORIGINS OF TRADE UNION POWER 208-09 (1983)).
[29] *Id.*
[30] *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G.A. Pocock ed., 1987). "The [Glorious] Revolution [of 1689] was made to preserve our *ancient*, indisputable laws and liberties and that *ancient* constitution of government which is our only security for law and liberty…All the reformations we have hitherto made have proceeded upon the principle of reverence to antiquity." *Id.* at 27-28.
[31] *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 407 (9th ed. 1962) (1885). *See also* Human Rights Act, 1998, c. 42 (Eng.), *available at* http://www.hmso.gov.uk/acts/acts1998/80042--a.htm#1.

Due to their experience in World War II, modern Germans place the utmost importance on human rights and collective cooperation. German law values people as humans rather than commodities. Moreover, the Germans have organized their society in a way that allows for the state mediation of interests among groups. For instance, Germany regulates its industrial relations system to encourage nation-wide collective bargaining between labor and management in and environment of cooperative consultation and exchanges of information.[32] The net result is a more cooperative and productive system of industrial relations, with fewer work stoppages than in the U.S. and the U.K.[33]

While Germany does have a separation of powers doctrine, historic events have modified this doctrine to grant more power to the legislature, at the expense of the executive and the judiciary. Although the German judiciary is independent, its discretion is generally limited to the interpretation of the civil code enacted by the legislature.[34] "The German law courts tend to stay within the boundaries of traditional legal reasoning to keep their factual autonomy vis-à-vis the legislature."[35] Like the British, German judges avoid bringing external value judgments into the decision-making because of the ease in which the German legislature can overturn a judge-made legal rule.[36]

Not only does the threat of the loss of autonomy limit the role of German judges but the nature of a civil law system also narrows judicial discretion. Under a common law system, the "judge is somehow expected to judge" whereas in civil law systems, the

[32] Dau-Schmidt, *supra* note 28, at 146.
[33] *Id.*
[34] *See*, Kirchner, *supra* note 5, at 283-84.
[35] *Id.* at 285.
[36] *Id.*

code is expected "to have already judged."[37] Civil law "judges are not to be the cheerleaders for capitalism" but, instead, they should passively and mechanically enforce the law without regard to the wealth or social class of the parties.[38] Values of fairness and equity tend to be more important under civil law systems than the efficiency that often influences U.S. common law decisions.[39]

c) France: "Liberté, Egalité et Fraternité!" dans une Société de Confrontation et de Conflit

The effect of the French Revolution was to overthrow the class-based system and to create national sovereignty.[40] Unlike England, the French cultural and legal landscape is not predicated on class. The French do not focus on individual self-interest but rather the common good of society. "[L]aws are supposed to primarily organize relationship among people in order to avoid negative externalities and to ensure public order."[41]

The French cultural and legal landscape has been shaped by Jean-Jacques Rousseau's theory of social contract.[42] Under the social contract, all people form an

---

[37] Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 UTAH L. REV. 471, 471 (1997).
[38] Posner, *supra* note 6, at 76. "[T]he national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or its rigour." MONTESQUIEU, *supra* note 19, at 170.
[39] Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT. L. REV. 521, 539 (2004). In contract disputes, French courts are less willing to allow the parties to renegotiate the terms of a contract and are more willing to grant specific performance over efficient breach because these doctrines will guarantee the fairness of the contract. By contrast, American courts are more flexible and apply the doctrine that will provide the most efficient outcome. *See* Brousseau, *supra* note 4, at 4.
[40] A nation "is a body of associates, living under a *common* law, and represented by the same *legislature*, etc." Emmanuel Joseph Sieyès, *What is the Third Estate?*, *in* POLITICAL WRITINGS 97 (Michael Sonenscher trans., 2003).
[41] Brousseau, *supra* note 4, at 5.
[42] *See* Jean-Jacques Rousseau, *On the Social Contract*, *Or Principles of Political Economy*, *in* ON THE SOCIAL CONTRACT AND DISCOURSES 15-103 (Donald A. Cress ed. & trans., 1983).

association by giving to this community all of their individual rights. None are reserved to the individual. In return, the community provides order and gives back these rights to its citizens guaranteeing the rights in the social contract. The community defends and protects the people and their goods. [43] The sovereign, in this case the nation, creates an ordering system to determine what is right for the common good of the community.[44] Because law is an expression of the general will, it is not subject to judicial review. It is the law that decides the division of rights and not the courts.

France, like Germany, is also a civil law system. Common law was shunned because it was "identified with the losing side" of the French Revolution.[45] Judges were viewed with suspicion because they had upheld the class-based ancient régime by regularly overruling bourgeois reforms. The revolutionaries "wanted to uproot 'medieval' practices and replace them with 'rational' ones. The revolutionaries proclaimed that law derived its authority from the popular will as expressed through legislators, not from social norms as found by judges."[46]

2. THE EUROPEAN ACADEMY

In general European legal education combines undergraduate study for students with extensive academic preparation for the professorate. In France and Germany, a law diploma is an undergraduate degree taught by highly professional scholars with graduate degrees beyond the regular law degree. Although the traditional method of legal education in the U.K. is by reading for the bar, recently the British have adopted legal

---

[43] *Id.* at 23-25.
[44] *Id.* at 25-26.
[45] Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1650 (1996).
[46] *Id.* at 1650-51.

education through formal undergraduate education at degree granting institutions. European law professors, on the other hand, undergo not only years of undergraduate study, but also years of practicum and graduate study, emerging from the end of a long process with degrees and training that would be the American equivalent of a Ph.D. in law. As a result, in comparison with their American colleagues, European law professors teach students who have less preparation in other disciplines and European professors are more heavily invested in existing legal scholarship.

Institutional features of the European academy further entrench disciplinary practices and ideals. Publication by European legal scholars is mostly in faculty-edited books or journals. There are fewer European journals overall and only one European journal dedicated solely to the economic analysis of law.[47] Very few of the general journals publish articles by law and economic scholars.[48] Tenure, at least in France, is granted on a national, rather than an institutional, basis. Review is undertaken through a unitary national process and review committee. As a result, new approaches in the analysis of law must receive approval from scholars invested in the existing body of scholarship before they can be published or gain the author tenure.

Finally, formalism did not suffer the same precipitous decline in Europe that it did in the U.S. The European conception of "legal science" consists of a massive body of legal scholarship that can trace its roots all the way back to Roman law and which is considered such an important backdrop for the drafting of modern legal codes that all legal arguments generally start, and finish, with this body of accumulated wisdom.[49] Although the legal realist movement made a strong challenge to formalism in Germany in

[47] Posner, *supra* note 6, at 66.
[48] Henne, *supra* note 25, at 226, n.84.
[49] Mathias Reiman, *Nineteenth Century German Legal Science*, 31 BOSTON COLLEGE L REV. 837(1990).

the 1920's and 30's, the movement became associated with the Nazi regime and accordingly suffered a disadvantage in its consideration by modern European legal theorists.[50] European scholars of course recognize that strict formalism is not a completely accurate view of the development of law, but because this school of thought did not suffer the same precipitous decline it suffered in America, there has been no similar void in the discipline of law for the law and economics movement to fill. European legal academic institutions are less open to change because the law is already an established discipline and scholars are not necessarily looking to supplement it with other disciplines. Accordingly, in Europe, the discipline of law has suffered less of a crisis of confidence, and there has been less need for legal theorists to borrow from other disciplines, including economics.

3. WHY EUROPE HAS NOT BEEN FERTILE GROUND FOR THE ECONOMIC ANALYSIS OF LAW

The relative lack of success of the economic analysis of law in Europe to date can be traced to characteristics of European culture, legal systems, and the European legal academy.

In general European culture is more communitarian and steeped in history and tradition than American culture. European society is more state-oriented and less trusting of the market.[51] These aspects of European culture often make analysis of legal problems from the perspective of individual rational actors more curious from a European

[50] *See* R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT'L REV. L. & ECON. 261, 262 (1991) (citing Kirchner, *supra* note 5, at 284).
[51] John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TULANE L. REV. 1121, at 1130 (2001).

perspective. British culture organizes its society and law more around the traditional interaction of social groups than rational individual action. For example, for years the British tolerated one of the most inefficient industrial relations systems in the industrialized world, based on work days lost to industrial strife, due to their acceptance of a tradition of class conflict through industrial strife.[52] Similarly, the Germans' commitment to human rights causes them to disdain express discussions of the value of human life and the efficient level of medical care or regulation.[53] However, perhaps the French pose the best example of a communitarian society with their commitment to national sovereignty and the social contract as envisioned by Rousseau. The French conception that the nation state adopts a system of ordering and law is inconsistent with the assumptions of the normative equality among all activities and the valuation of entitlements based on willingness to pay implicit in the simple neoclassical economic model.[54] Moreover, the French do not focus on individual exchange and efficiency but rather on fairness and equity. "The rationality of the economic agent who is perfectly aware of prices, and operates calculated choices in order to maximize his pleasure at the least cost, is a disconcerting model for one who searches solutions in equity and not in utility."[55]

---

[52] Dau-Schmidt, *supra* note 28, at 139-40.
[53] This statement is based on Professor Dau-Schmidt's seminar discussions with German students at the Institut für Internationales Recht, Christian-Albrechts-Universität on the value of human life and efficient safety regulation.
[54] For example, in his lectures at Université Panthéon-Assas (Paris II) concerning the Coase theorem, Professor Dau-Schmidt found that his French students were particularly skeptical of Coase's claim of the reciprocity of harm. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 3-4 (1960). Similarly, Becker's notion of the efficient level of crime based on an implicit valuing of the benefits of crime to the criminal makes no sense to the French. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).
[55] Montagné, *supra* note 4, at 154.

European legal systems also are less amenable to the economic analysis of law than the American system. The European parliamentary systems allocate power more to the legislature, and less to the judiciary, than the American system. Under British parliamentary sovereignty, the word of parliament is supreme. Similarly, Germany's separation of power doctrine allocates power to the legislature at the expense of the judiciary. Although the German judiciary is independent, it is very careful not to "invoke external values or consideration of public policy" and risk losing its autonomy.[56] As a result, the use of social sciences has met with great resistance when such arguments have been raised in legal interpretation.[57] French judges also have a limited role in creating new law. Like their German counterparts, French judges are ostensibly only to interpret the law because the law, as written by the nation, has already judged.[58] Express policy-based arguments, like those used in economic analysis, are generally not welcomed.

The European civil law systems generally provide a more limited role for judges. "Civil law reasoning typically starts from abstract premises and concepts and, therefore, gives little room to the kind of consequentialist, forward-looking reasoning on which law and economics relies."[59] Although European scholars recognize that in reality even merely "reading" a statute can involve important policy decisions, the rhetoric of European legal practice in the civil systems is that all of the policy decisions have already been addressed by the legislature.[60] Even though the British have a common law system

---

[56] Kirchner, *supra* note 5, at 285-86.
[57] *Id.* at 284.
[58] de S.-O.-l'E. Lasser, *supra* note 37, at 471.
[59] Spector, *supra* note 39, at 536.
[60] Dawson and Merryman believe that French judges are going beyond strict formalism in the decisions but are having to do it behind the scenes, "behind the veil of the formal French judicial decision: French judges do approach cases with a certain pragmatic concern for realism, equity, and justice. On the other hand, the dominant, rigid French conception of adjudication requires French judges mask their pragmatism, forcing them to operate under the table. This cuts French judges off from each other, preempting any

that is the precursor of our own, the role of the judges is more limited in the British system. Because of parliamentary sovereignty, judges are less likely to be adventurous and stray too much from the time-honored traditions.[61] They tend to rely more on the doctrine of *stare decisis* than even their American common law counterparts, which has the effect of leaving little roomfor policy analysis. [62]

Moreover, the relationship of the judiciary to practitioners and academics in Europe, and the lack of fluidity among these three forms of practice, may also contribute to the slow growth of the law and economics movement in Europe. The British legal profession "'has been notoriously unwilling to admit the relevance of social science'" into the discipline.[63] "The English legal fraternity is wary of theory, contemptuous of experts and academics, and reluctant to accept the idea that other disciplines have something valuable to say about 'law.'"[64] In Germany, the legal academy is under the influence of the judiciary.[65] The judiciary's cautionary relationship with social sciences has prevented economic analysis from becoming an integral part of the German legal academy.[66] Lastly, a European legal scholar is unlikely to move from professor to practicing attorney to judge and to legislator. In Germany and France, for instance, the judiciary is a separate profession. "The isolation and the relative political impotence of European judiciaries have contributed to their formalist approach, in which law is

---

reasoned and collective application of caselaw techniques. The result is a combination of frustratingly formalist decision making and closeted, individual, ad hoc, unprincipled, and unconstrained judicial pragmatism." Mitchel de S.-O.-l'E. Lasser, 1997 UTAH L. REV. 471, 474 (1997).

[61] Cooter & Ginsburg, *supra* note 14, at 295.

[62] Spector, *supra* note 39, at 537.

[63] VELJANOVSKI, *supra* note 8, at 11 (quoting A.J. Ogus & G. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 26 CAMBRIDGE L.J. 284 (1977)).

[64] *Id.* at 12.

[65] Kirchner, *supra* note 5, at 284.

[66] *See id.* at 284.

conceived of as a technical, autonomous discipline sealed off from other fields, such as economics."[67]

Finally, the structure of the European legal academy has been less amenable to the growth of the law and economics movement in Europe. The Europeans are heavily invested in law as an autonomous discipline and are quite happy with the academic product they produce. Although there is certainly interest in inter-disciplinary research, the Europeans perceive no intellectual void or disciplinary crisis of confidence that they must fill with the economic analysis of law. Moreover, the European systems of publication in faculty-edited journals and national tenure help to reinforce the entrenched academic establishment. In order for new methods of analysis to make it into European scholarship, they have to gain at least some acceptance by academics that have built their careers on the status quo.

IV. THE FUTURE OF LAW AND ECONOMICS IN EUROPE

Although the economic analysis of law may never be as important to Europeans as it is to Americans, it undoubtedly has applicability to European legal problems and potential to grow in its importance. No civil code is without its flaws. Scholars have long known that "the official and perfectly formalist conception of passive adjudication on the basis of the unproblematic application of the Codes' grammar is...no longer...tenable."[68] Civil law judges often have to fill these holes in the code with policy-based rules, although this process is often hidden from public view. Moreover, civil law systems are increasingly relying on case law as well as statutes and regulations outside of

[67] Posner, *supra* note 2, at 5.
[68] de S.-O.-l'E. Lasser, *supra* note 37, at 488.

the code to resolve disputes.[69] Economic analysis can be a valuable tool in making such decisions.

If law and economics is to be successfully implemented in European countries, especially in those where the judiciary is not on equal footing with the legislature, then the economic analysis of law must permeate not only the legislature but also judicial interpretation. Although it is true that even civil law judges inevitably make policy decisions in reading the code and deciding cases, within the European legal environment arguments that present express policy considerations are more appropriately made to the legislature. If economic analysis of law is openly considered and applied by the legislature, then these arguments will become important to European judges and academics.

The economic analysis of law may also become more important to Europeans as the European Union continues extend its regulatory coverage. As European countries continue to work together within the Union, they will need a common language to unite their regulatory efforts and objectives. Although the language of the law may differ among European countries, the language of economics is universal.[70] Moreover, although its structures were crafted in light of the more state-centered political systems of Europe, the European Union was founded on the idea of liberalizing markets among the member states and has been supported by pro-market scholars.[71] Given its foundations in market theory, it will be difficult for the European legal community to ignore the success of law and economics in analyzing the legal problems posed by the European Union.

---

[69] Mattei & Pardolesi, *supra* note 4, at 268-69. For example, a body of case law has been developed for nuisance law in France and product liability law in Germany. *Id.* at 269.
[70] Posner, *supra* note 2, at 6.
[71] Claus Offe, *The European Model of 'Social' Capitalism: Can it Survive European Integration?*, 11 J. OF POL. ECON. 437 (2003).

The economic analysis of law may also enjoy more success in Europe as alternatives such as behavioral law and economics and socio-economics become more important in the law and economics movement.[72] These alternatives to traditional neoclassical economic analysis consider limits to human rationality and group dynamics that may seem more realistic and appealing to European audiences. In considering the legal questions posed by societies that are organized more around the interaction of classes and groups in society, Europeans may find the analysis of socio-economics more compelling. Even Americans are now being drawn to these less traditional economic analyses in examining legal questions.[73]

While Europe currently lags significantly behind the U.S. in the economic analysis of law, it is possible for this gap to be quickly reduced. The success of the European Union may create the opportunity for economic analysis to succeed first with the European legislatures and then with the judiciary and academy. If the desire is there, the talented and highly skilled European academy can quickly assimilate this method of analysis. Moreover, because European judges are generally recruited directly from law school, if the legal academy develops a program of study in which economic principles were consistently taught, these concepts will quickly enter the European judiciary. [74] Although the law and economics movement in Europe currently suffers a fate similar to

---

[72] See for example THOMAS ULEN AND RUSSEL KOROBKIN, COGNITION, RATIONALITY, AND THE LAW (FORTHCOMING UNIVERSITY OF CHICAGO PRESS 2005); Russel B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1054 (2000); LYNNE L. DALLAS, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (FORTHCOMING 2005); Kenneth G. Dau-Schmidt, *Economics and Sociology: the Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389.

[73] Kenneth G. Dau-Schmidt, *Pittsburgh, City of Bridges: Developing a Rational Approach to Interdisciplinary Discourse on Law*, 38 LAW & SOC. REV. 199, 201 (2004); Kenneth G. Dau-Schmidt, *Law and Economics*, in H. KRITZER ED., LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL AND CULTURAL ENCYCLOPEDIA 856, 859 (2002).

[74] *See* Mattei & Pardolesi, *supra* note 4, at 271.

that of feral camels of the American Southwest, perhaps now that the camel's nose is under the tent, we'll soon see the more of this homely, yet useful, animal.