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# THE LAW AND ECONOMICS OF LEGAL PAROCHIALISM

Nuno Garoupa\*

*Law and economics is influential in U.S. legal scholarship, but not as much elsewhere. Different explanations have been suggested for this. In this Article, I argue that the problems faced by law and economics outside of the United States are neither particular to the field nor to the local context. I offer an interpretation based on the similarities between legal parochialism and trade protectionism. A tentative prediction is that globalization in legal markets might change the current patterns.*

## I. INTRODUCTION

When the article, which I coauthored with my good friend and colleague Professor Thomas S. Ulen, on why law and economics seems to fail outside of the United States was published,<sup>1</sup> we did not predict the extent to which the discussion would raise so much interest and attract so many authors to propose alternative explanations.<sup>2</sup> Although there is disagreement over what actually explains the skeptical reception of law and economics outside of the United States, the entire body of literature provides systematic evidence of the following well-known facts: law and economics is influential in U.S. and Israeli legal scholarship, but it has little impact elsewhere; law and economics is dominated by legal scholars

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

2. See, e.g., Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602 (2006); Alan Devlin, *Law and Economics*, 46 IRISH JURIST 165 (2011); Oren Gazal-Ayal, *Economic Analysis of "Law & Economics"*, 35 CAP. U. L. REV. 787 (2007) [hereinafter Gazal-Ayal, *Economics Analysis of "Law & Economics"*]; Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. L. & ECON. 485 (2007); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008); Kilian Reber, *Once Upon a Time in America: Barriers to the Diffusion of Law & Economics* (July 16, 2008) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1161129](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161129).

in the United States and in Israel, but predominated by economists elsewhere; the rate of acceptance of law and economics in U.S. and Israeli courts is not impressive—but nevertheless significant—whereas the field is virtually ignored by courts elsewhere, albeit with some occasional references.

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

For many years, the argument was that Europe, Asia, and Latin America were moving toward law and economics but at a slower pace than the United States. That may well be the case, since it is likely that a forty-year window of time is not enough to convincingly reject such a hypothesis. At the very least, however, we can say it is taking a long time. There is more law and economics now in Europe, Asia, and Latin America than ever.<sup>7</sup> The influence of this work in legal scholarship and in legal policy is overwhelmingly disappointing, however, probably with the exception of competition law. As we noted in our original article, in vivid contrast with the United States, the main textbooks and treatises on

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

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

5. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 416–17 (1997); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 524–25 (2000); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385, 385 (1993); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316–17 (2002); Richard A. Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUR. J. L. & ECON. 265, 275 (1995); Thomas S. Ulen, *A Crowded House: Socioeconomics (and Other) Additions to the Law School and Law and Economics Curricula*, 41 SAN DIEGO L. REV. 35, 35–37 (2004); Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law As the Scientific Study of Social Governance*, 6 U. ST. THOMAS L.J. 302 (2009); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 906–07.

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

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

property, contract, and tort law, or on procedure outside of the United States simply ignore law and economics insights.<sup>8</sup>

Naturally, the lack of success of law and economics has intrigued scholars. The first wave of explanations developed in the early 1990s; still hoping that the whole process was merely delayed, explanations focused on the obvious differences between the United States and the rest of the world. The most obvious and most popular explanations, for a while, were legal tradition (civil law is overtheorized, whereas common law is undertheorized) and language (legal scholars do not read English).<sup>9</sup> The problem is that these popular explanations seemed to neglect that law and economics also was not popular in the United Kingdom nor in any other common law jurisdiction (with the exception of Israel, as we already noted).<sup>10</sup> In fact, looking at current trends in Europe, law and economics is in much better shape in Italy, Germany, and Spain than in the United Kingdom or Ireland.<sup>11</sup> The idea that law and economics is more relevant for judge-made law than for a legal system dominated by code is simply rejected by the evidence.

A second popularized account was the need for a legal realism revolution to precede the expansion of law and economics.<sup>12</sup> Such an explanation only pushes the discussion backwards, however, to a previous step: why was legal realism successful in U.S. legal academia but not elsewhere? In fact, legal realism did not even originate in the United States.<sup>13</sup>

Another explanation looked at ideology and legal philosophy.<sup>14</sup> The mistake here was to think of law and economics as a mere conservative

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

9. See, e.g., Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 *CAMBRIDGE L.J.* 456, 461–62 (2004); R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 *INT'L REV. L. & ECON.* 261, 262 (1991); Dau-Schmidt & Brun, *supra* note 2, at 617–18; Aristides N. Hatzis, *The Anti-Theoretical Nature of Civil Law Contract Scholarship and the Need for an Economic Theory*, in 2 *COMMENTARIES ON LAW & ECONOMICS* 1, 30–31 (2002); Richard A. Posner, *The Future of the Law and Economics Movement in Europe*, 17 *INT'L REV. L. & ECON.* 3, 4–5 (1997); Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 *RATIO JURIS* 66, 76–77 (2004); Hans-Bernd Schäfer, *What Are the Practical Implications of Law and Economics Research in Germany?*, in 1 *NEW FRONTIERS OF LAW AND ECONOMICS* 193 (Peter Nobel & Marina Gets eds., 2006).

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

11. Recent developments include the annual meetings of the German Law and Economics Association (GLEA) since 2003, the Italian Society of Law and Economics (SIDE) since 2005, and the Spanish Law and Economics Association (AEDE) since July 2010. No such associations exist in the United Kingdom or Ireland.

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

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

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

legal movement to reduce the influence of liberals in law schools.<sup>15</sup> In our original article, we do not deny that law and economics was financed by conservative foundations nor that it attracted many conservative legal scholars.<sup>16</sup> Nevertheless, there are many liberals producing excellent law and economics scholarship. Furthermore, while law and economics was initially associated with the University of Chicago, it has now emerged in many law schools that cannot be labeled as conservative. At the same time, if it is all about a particular ideology or a certain judicial philosophy, we would expect the liberal (or perceived to be liberal) legal movements to be very successful in Europe and elsewhere. As I argue later in this Article, this is hardly the case. In fact, my own perception is that in Europe and in Asia, unlike in the United States, law schools are not seen as more liberal than economic departments or business schools. Yet, according to this explanation, promarket theories popular with European, Latin American, and Asian economists were rejected by European, Latin American, and Asian legal scholars. It does not seem to be a convincing explanation.

We should acknowledge that legal scholars in Europe show an intense dislike for efficiency and seem to be much more open to social justice or redistributive legal arguments.<sup>17</sup> Chronologically, however, the distaste for efficiency seems to have been revealed when confronted with law and economics. Therefore, it is unclear whether law and economics has been rejected because legal scholars dislike efficiency, or efficiency is disliked because legal scholars rejected law and economics. It is clear that the discussion about efficiency as a relevant normative criterion for law has not been fruitful in Europe, where the overwhelming majority of legal scholars have joined the “no” side. This discussion did not take place, however, until European legal scholarship was confronted with law and economics. So the explanation that law and economics has been rejected by traditional legal scholarship in Europe because efficiency (or any utilitarian criteria) is philosophically inconsistent with European legal thought seems too simplistic and, to a certain extent, naïve. On a different matter, this explanation has also been used by Anglo-American audiences to justify why common law is efficient and why civil law is inefficient, as if efficiency of the law varies with the philosophical beliefs held by law professors.<sup>18</sup>

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15. See the debate by several scholars in Symposium, *Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship*, 64 MD. L. REV. 1 (2005), in particular, articles by Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005); and Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220 (2005).

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

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

18. See Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L. J. 288 (2011).

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

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

In the original article, we discuss in detail the development of the adequate incentives for legal innovation to flourish.<sup>24</sup> We mention the rigidity of the hierarchical relationships established in legal academia as a major drawback (whereas in the United States we tend to have an inverted pyramid—that is, many full professors and few untenured faculty—in Europe, we have a regular pyramid—that is, many untenured professors and few senior faculty).<sup>25</sup> In Europe there is no meaningful academic mobility (in particular, no lateral mobility since salaries are rigid and usually fixed by the government). Law reviews are faculty edited

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

20. *Contra* Dennis W.K. Khong, *On Training Law and Economics Scholarship in the Legal Academia*, 1 *ASIAN J.L. & ECON.*, no. 2, 2010 at 1, 10; Anthony Ogus, *Law and Economics in the Legal Academy, or, What I Should Have Said to Discipulus*, 60 *U. TORONTO L.J.* 169, 170 (2010). I am not discussing the particular developments in economics that might have affected law and economics in the last decades in this Article. For a discussion of that topic, see E. ROY WEINTRAUB, *HOW ECONOMICS BECAME A MATHEMATICAL SCIENCE* 9 (2002).

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

22. See Reber, *supra* note 2, at 12–15.

23. See Gazal-Ayal, *Economic Analysis of “Law & Economics,” supra* note 2, at 787–98.

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

25. *Id.* at 1603–04.

and value methodological conformity. The market for new law professors promotes inbreeding and the entrenchment of the status quo. We can easily extend our description to Asia and Latin America.

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

I emphasize a more general perspective in this Article. In particular, I suggest that there is nothing specific to law and economics that explains its current lack of success outside of the United States. In my view, this is related to a more general problem, which I call “legal parochialism.” My argument was already echoed in our original article, but it was largely neglected in the debate.<sup>27</sup> I think, however, that this legal parochialism proposed in our original article is a more important insight than the competitiveness of the market for legal scholarship, the latter being much more noticed by other authors.

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

## II. A MORE GENERAL VIEW

The explanations for why law and economics has largely failed outside of the United States neglect the fact that other areas of the “law and” movement have been similarly unsuccessful abroad, most of them with little or no influence from economics.<sup>28</sup> Consider all the following fields of legal scholarship: empirical legal studies,<sup>29</sup> critical legal studies,<sup>30</sup>

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26. See *id.* at 1611–14.

27. See *id.* at 1632.

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

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

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

feminist jurisprudence,<sup>31</sup> law and literature,<sup>32</sup> law and politics,<sup>33</sup> law and psychology,<sup>34</sup> law and cognitive sciences,<sup>35</sup> law and biology,<sup>36</sup> and law and anthropology.<sup>37</sup> All of them are important U.S. legal innovations of the last decades. They all have been largely ignored outside of the United States. Clearly, lack of success outside of the U.S. legal academia is not unique to law and economics.

It could be that all these legal innovations were received with skepticism outside of the United States because these were developments taking place in the United States. My argument, however, is that such skepticism is not particular to U.S. legal products. While law and economics became popular in the United States, other legal innovations were developed around the world. Here are a couple of examples: Socio-legal studies in the United Kingdom;<sup>38</sup> *Droit Économique* [Economic Law] and *Sociologie du Droit* [Sociology of Law] in France;<sup>39</sup> and *Wertungsjurisprudenz* [Jurisprudence of Value Judgments, used in interpretation of private law], *Verwaltungswissenschaft* [Science of Administration], and

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

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

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

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

35. See, e.g., Matthias Mahlmann & John Mikhail, *Cognitive Science, Ethics and Law*, in EPISTEMOLOGY AND ONTOLOGY 95 (Zenon Bankowski ed., 2005).

36. See, e.g., Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001).

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

38. See generally the Socio-Legal Studies Association and issues of the *Journal of Law and Society and Social & Legal Studies*, as well as A. JAVIER TREVIÑO, *THE SOCIOLOGY OF LAW: CLASSICAL AND CONTEMPORARY PERSPECTIVES* (2008) (summarizing the vast literature on socio-legal studies produced in the United Kingdom and in other commonwealth jurisdictions).

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



*Staatswissenschaften* [German Law and Politics] in Germany.<sup>40</sup> All these innovations in legal thinking had little to no influence in the United States. In fact, most of these innovations had little impact outside of the legal culture in which they were developed.

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

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

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

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

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40. For further examples, see REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS (2008) (explaining German law and summarizing methodological developments in German legal scholarship). I am grateful to Martin Gelter for providing me with these German examples.

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

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

## III. LEGAL PAROCHIALISM

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

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

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

At the same time, local incumbents will push for “subsidizing” local production using arguments that are similar to the traditional infant industry rationale.<sup>46</sup> Typically, they will insist on culture, language, history, and other national symbols to promote protection and allege a better understanding of the local needs. Within this protectionist view, potential competition has to be excluded in order for the local incumbents to keep additional rents. Rejection of foreign law, sources, legal education, and legal practice is promoted to avoid market contestability.

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

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

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

45. See FEENSTRA, *supra* note 43, at 300–37.

46. See *id.*

47. See *id.*

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

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

Another example I have mentioned is Israel. Again, I do not think this is an exception to my model. Israel has been in the early stages of the process of shaping its local legal system and so, presumably, it has been in a situation where the incumbent local cartel is relatively weak. As a consequence, legal parochialism has not been able to exert the same influence in Israel as it has elsewhere. As for the future, I predict that legal parochialism will be stronger in Israel in the decades to come as the process of shaping Israel's legal system reaches maturity.<sup>48</sup> At the same time, I suggest that the fairly positive reception of law and economics, and other U.S. legal innovations, in Taiwan reflects the same lack of a well-developed and established incumbent legal theory.<sup>49</sup> Presumably, we should expect an identical course of action in mainland China in the next decade or so.

Keeping the metaphor between legal parochialism and trade protectionism, we can identify serious threats to legal parochialism in recent years. Presumably, these serious threats will increase in the coming decades. As with protectionism in trade, legal parochialism can be signifi-

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48. See Haim Sandberg, *Legal Colonialism—Americanization of Legal Education in Israel*, 10 *GLOBAL JURIST*, Mar. 2010, art. 6.

49. I am grateful to Yun-chien Chang for calling my attention to the exceptional case of Taiwan. For a more general discussion of successful U.S. legal education in Asia, see Gail J. Hupper, *The Academic Doctorate in Law: A Vehicle for Legal Transplants?*, 58 *J. LEGAL EDUC.* 413 (2008).

cantly reduced by pressure of external forces. The most obvious one is the globalization of legal services that has resulted in the ongoing globalization of legal education. In the United States, the importance of international, comparative, and foreign law in the JD curriculum is still disappointing, but most law professors would recognize that offerings of such courses have increased steadily in the last decades. My impression is that a similar path is recognizable in Europe. International exchange of students and faculty in law schools is still probably insignificant compared to the hard sciences and the social sciences. But the general impression is that exchange programs have more demand now than they did years ago.

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

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

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50. For example, as we mentioned in our 2008 article, consider the following episode: “[I]n a letter to the President of France, [in December of 2006,] forty well-known French law professors . . . rejected EU law as law that deserves to be studied and analyzed. Only French law should be taught at French law schools according to these law professors.” Garoupa & Ulen, *supra* note 1, at 1626 n.313.

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

## IV. CONCLUSION

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

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

On a positive note, I share the optimism of many legal scholars who have predicted the expansion of law and economics (and, I should add, empirical legal studies) outside of the United States. By recognizing legal parochialism, I suggest that it is easier to understand that the future

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

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

of law and economics outside of the United States requires a careful focus on local legal problems. Such a path requires excellent comparative work, an application of law and economics to local legal doctrines, and local publication outlets.<sup>54</sup>

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54. These publication outlets include the *European Journal of Law and Economics*, the new *Asian Journal of Law and Economics*, and the forthcoming *Latin American Journal of Law and Economics*.

