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### MULTI- AND INTERDISCIPLINARITY: MERE THEORY OR JUST PRACTICE?

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## **INTRODUCTION**

### **MULTI- AND INTERDISCIPLINARITY: MERE THEORY OR JUST PRACTICE?**

‘As lawyers we cannot simply accept the conclusions of others; we must make them our own, and to do this we need to step out of the legal culture and into that of the other one. In doing this we are not picking up “findings” but ‘learning a language’, wrote James Boyd White in 1990 in his book *Justice as Translation*.

This third issue of *Erasmus Law Review* addresses multi- and interdisciplinarity in law from the perspective of legal methodology. Was Richard Posner right when as early as 1987 he foresaw the decline of law as an autonomous discipline? The explosion of ‘Law and...’ movements seems to suggest that he was. Nevertheless, methodological and epistemological questions of intellectual integration within interdisciplinary movements all too often remain underexposed. What then is the similarity – and that at a fundamental level – between the two disciplines connected by the word ‘and’? And is the perceived connection between two disciplines in itself also an idea that should be elaborated? Or is interdisciplinarity only the importation of a technique or methodology from one field to another, for the sole purpose of solving a specific problem, the solution of which cannot be found in the original field itself?

As far back as ten years ago, Jack Balkin suggested that the ‘and...’ discipline might be an invader, or a coloniser, as the case of *Law and Economics* in several of its forms would seem to suggest. The success of the invader is often explained on the basis of the dominant consensus within the field of economics on the subject of methodology, whereas law, especially in the common-law tradition, is an easy prey for domestication, given its casuistic approach when it comes to the acquisition of ‘knowledge’. In this respect – now that the word ‘law’ still figures prominently in the name of interdisciplinary fields – interdisciplinary scholarship seems to be the result of an incomplete or failed takeover. More attention therefore needs to be paid to the question of whether a truly common, epistemological ground is to be found when disciplines form alliances of the ‘Law and ...’ kind. And if so, what does this mean for the concept of legal doctrine that we espouse? All too often the categorisation of knowledge in law starts from the premise that

law is a domain of rules, and rules only; however, that is a simplification that runs the risk of marginalisation of the ‘Law and...’ based on it, now that in both common-law and civil-law systems we have progressed beyond the formalist hermeneutics of more or less self-applying rules, and look upon law’s boundaries with notions derived from a contextual approach to law. Connected to all this is the problem of how to draw the boundaries when it comes to the difference between multidisciplinary and interdisciplinary perspectives in law, on the premise that this is not simply a semantic issue.

The authors in this issue offer a wide range of responses to these and related questions in the field of interdisciplinary movements. In ‘Forms of Thought and Language’, James Boyd White starts with what he calls the obvious point that law does not, and could not, exist in an intellectual or linguistic vacuum. He claims that no one believes that the law is or should be impervious to other languages, to other bodies of knowledge; in this regard, to him the argument about the ‘autonomy’ of law is an empty one. In ‘Facing the Interface: Forensic Psychiatry and the Law’, Hjalmar van Marle addresses the issue of how the concept of mental illness needed explanation to fit into the framework of the criminal justice system. With the emancipation of empirical psychology and the progress made with respect to the examination of the brains of patients, using modern imaging techniques, a separation developed between a naturalistic view on criminal offences and empiricism with its claim that only those facts are true that can be measured in reproducible tests. To van Marle, it is absolutely necessary for judges and lawyers to be educated in the use of empirical data. Barbara Pozzo’s article, ‘*A Suitable Boy*: The Abolition of Feudalism in India’, focuses on Law and Literature as a tool in teaching comparative law courses. She points to the importance of literature as a key in understanding the social impact of particular legal institutions. For Pozzo, this is particularly true in those cases, as in India, where the legal system consists of different layers: the traditional, the religious, and that of the colonial period. Finally, by referring to Vikram Seth’s novel, *A Suitable Boy*, her article examines a concrete example of the debate that concerned peasants’ property in the form of land as well as the abolition of the *zamindar*. In ‘Eclecticism in Law and Economics’, Alessandra Arcuri claims that the troubles begin when it comes to defining Law and Economics. Should the field be defined in relation to its subject matter or in relation to the methodology used? Because legal-economic scholars have analysed almost all fields of law, it is difficult to define Law and Economics in relation to its subject matter. Arcuri’s essay takes a critical stand and demonstrates that the narrow focus on efficiency and rational choice theory pays a disservice to what could be a fruitful and truly interdisciplinary study of the legal phenomenon.

*Jeanne Gaakeer*

# ESTABLISHING RELATIONS BETWEEN LAW AND OTHER FORMS OF THOUGHT AND LANGUAGE

*James Boyd White\**

## **Abstract**

The law does not, and could not, exist in an intellectual or linguistic vacuum. No one believes that the law is or should be impervious to other languages, other bodies of knowledge. In this sense the argument about the ‘autonomy’ of law is an empty one: law cannot be, should not be, perfectly autonomous, unconnected with any other system of thought and expression; yet it plainly has its own identity as a discourse, its own intellectual and linguistic habits, which it is our task as lawyers to understand and develop. It follows that an essential topic of legal thought is the proper relation between law and other forms of thought and expression – a topic that is important, difficult and full of interest.

## **1 Law and Ordinary Language**

Those who actually practice law, including both lawyers and judges, must always be prepared to go back and forth between the language of law and the languages of other disciplines and communities. One of these is the ordinary language<sup>1</sup> of the culture that is normally spoken by the parties, the witnesses

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<sup>1</sup> By this term, often used by analytic philosophers in the last century, I mean the whole cluster of dialects and idiolects spoken by people in the course of their existence (other than professional or disciplinary or other specialized discourses). You might say that someone’s ‘ordinary language’ is language at what feels like its most normal, least self-conscious, ‘just how we speak.’ But that does not mean that

and the jurors (if there are any). After all, the events upon which a lawsuit is based are experienced by people who may not have any idea about what the law says or how it says it: the client has been damaged in an automobile crash, or by prescription medicines that were perhaps misprepared, or by police who beat him on the street, or by the failure of a building contractor to do what in the client's view he agreed to do. The client has his own ways of talking about these experiences and what they mean, which may or may not be influenced by the law, and it is these he brings to his lawyer.

The client can in fact to a large degree process and deal with many of his experiences without ever consulting a lawyer. His own social and linguistic competence is normally enough for him to be able to say what happened, in his own terms, to articulate what ought to happen next, and to figure out a way to try to make that occur, or to come to terms with the reality that he cannot. It is when his ordinary social competence is not adequate to deal with the situation that he comes to a lawyer, whose task it will be to make sense of those events in another language, that of the law.

The primary world in which the parties and witnesses actually live is not then the legal world, whatever lawyers may be inclined to think, but the world of ordinary life and talk. When a lawyer is consulted, the obvious question is: What relation can and should be established between that world and the law? What can the things that the client is experiencing and saying be made to mean in legal terms? What happens when his story, cast in his own language, is recast into the language of the law? What, in short, will the lawyer be able to say, in what language, and with what effect?<sup>2</sup>

The conversation between lawyer and client is thus an exercise in perpetual translation and retranslation, moving from one way of talking to another and back again. In an explicit legal arena the case will for the most part be presented in legal language by a lawyer who draws distinctions and asks questions that might never have occurred to the client: about jurisdiction, for example, or choice of law, or modes of statutory construction or (especially in the common law) the way to interpret a key case. Part of the lawyer's task is to teach the client enough of the language of the law so that he can understand many of the forms of speech – the questions, the issues, the arguments, the genres of expression, the specialized words – that make up the way in which his case will be thought about in the

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it is not complex and interesting, nor that it does not vary, sometimes deeply, from speaker to speaker within a language community.

<sup>2</sup> Much of the life of the lawyer takes the form of asking these two questions: What can we say? What can they say? He is constantly imagining a conversation with an actual or possible adversary not only when he has a case that is the subject of litigation, but in planning as well, as he drafts contracts or other documents that will shape a relationship.

law, and do so well enough to enable him to make the judgments that only the client can make.

The translation is not in only one direction. If the lawyer is to speak meaningfully to his client, or to a witness or juror, or even to a judge, he must always be ready to frame his legal argument, his legal conclusions, his thoughts (however technical they may be) in an ordinary language of fairness. He must show that he knows how these events look to a party or a witness or a juror, and find a way to speak to them on that basis.

Judges know this well, and in their questioning often ask the lawyers, implicitly or explicitly: “How are we to explain the outcome you support in the ordinary language of the public world?” The kind of explanation that the judge is imagining is in fact necessary if a democracy is to accept the institution of law, for the law must make enough sense, enough of the time, to be tolerable to the citizenry. This means that the result the law reaches must in principle be justifiable not just in strictly legal terms, but also in ways of thinking and talking that are much more generally accessible in the relevant society and culture. The same is true of the arguments that lawyers make. To ensure that this is the case is one of the great aims and strengths of a public judicial system, especially when it involves the use of the jury.

The fact to which I am here drawing attention is, for me at least, one of the reasons that the practice of law is full of interest and value, both for the public and for its practitioners. The lawyer is not permanently enclosed in a single conceptual or linguistic system, the implications of which he elaborates by logical deduction, but is constantly faced with the wonderful task of working out claims of meaning in contrasting and competing languages. This fact has the benefit for the lawyer that he or she is constantly learning new ways of thinking and talking, new systems of knowledge and discourse, which is for most of us a source of real interest and pleasure. For the law as an institution it means that the law is in principle open to innumerable ways of thinking and talking about the problem before it; it is open, that is, to being informed and challenged from every side, a fact that is crucial to its democratic legitimacy.

## **2 Law and the languages of expertise**

### **2.1 Contradiction**

Another context in which the lawyer must connect the law with other languages is the courtroom, especially when, as we see every day, one side or the other seeks to introduce expert testimony. The problem here is structurally similar to the problem presented by the tension between law and

ordinary language, for the lawyer and judge are constantly asking what relation can properly be established between these different ways of thinking and talking. But it is worked out in a more self-conscious way, as one side or the other pushes the expert to express himself in ways favorable to its cause, as the other resists, perhaps making objections, and as the court rules on these objections and perhaps on proposed instructions to the jury as well. How the expert is to be allowed to speak is a topic of complex and elaborate thought in the law. From the point of view of the lawyer, this opportunity to face the difficulties, the impossibilities, of the moment of interaction between such languages can be an entrancing challenge.

Think, for example, of the testimony of the psychiatrist (or psychologist) in a criminal case in which the defense has argued for acquittal by reason of insanity. A standard formulation of this defense in the United States would require the trier of fact (judge or jury) to find that “by reason of mental disease or defect” the capacity of the defendant “to appreciate the criminality of his conduct” or “to conform his conduct to the requirements of law” was “substantially impaired.”

What happens when an expert psychiatrist (or psychologist) is asked to testify in a particular case as the sanity or insanity of the defendant? Of course he must ‘examine’ the defendant, that is engage him in a conversation of a certain sort as a result of which the psychiatrist is supposed to form a professional opinion relating to his sanity or insanity, taking into account as well other information about his history of behavior and treatment. Experts in the field have extensive experience in carrying on such interviews and drawing conclusions from them. This is a part of what they do professionally.

But what happens when such an expert testifies? One possibility is that he will be asked whether he or she has formed an expert opinion about the issues that the statute directs the trier of fact to decide: Does the defendant suffer from “mental disease or defect,” is his “capacity” to “appreciate the criminality of his conduct” or to “conform his conduct to the requirements of law” in fact “substantially impaired” or not?

Think of the situation of the psychiatrist asked these questions. Are they from his point of view fair and intelligible, within his expertise? Perhaps so, we think; after all, he must be used to classifying patients; his profession defines various “mental diseases or defects”; if he cannot tell us whether this patient suffers from such an affliction, who can? He should be similarly experienced at making judgments about the capacity of patients to ‘appreciate’ – not just intellectually but affectively – moral and emotional realities, such as the criminality or wrongfulness of their conduct, and their ‘capacity’ to conform their conduct to external norms.

But in fact psychiatrists often have a terrible time in these situations. The difficulty is not that they do not know how to carry on interviews or read files or to make judgments about mental disease or about the capacity to

appreciate or conform, but that they are used to doing these things for completely different purposes from those the law is now asking them to serve. They normally ask themselves these questions, that is, as part of a process of treatment. The fundamental issues for them are what treatment should be used, and how; whether they can expect treatment to work; and, sometimes, whether the person is likely to be dangerous to others and therefore needs some kind of restraint. In the courtroom the psychiatrist is being asked to use something that looks like his language to answer a completely different question: whether this person should be excused from criminal punishment.

This is not something within his expertise, to put it mildly. It is not a question the psychiatrist ever asks. His question is how to help the person, or perhaps how to prevent future harm, not whether he should be punished. He is in a situation that Kafka might have designed, where he is asked to use what looks like his language, what looks like his expertise, for purposes for which it is not suited at all, thus creating a situation in which he cannot make sense in his own professional language. Even worse is the ethical issue: He is for the moment asked not to imagine the defendant as a patient to be treated to the best of his ability, as an ill person in need of the kind help that is all the psychiatrist as such knows how to offer, but to declare whether the defendant should be treated as such person at all or instead be subjected to something called punishment, a practice that is shaped by the state for its own purposes, at least some of which involve using the person as part of a program of social control, that is, as a means to a social end and not as an end in himself.<sup>3</sup> These purposes are completely inconsistent with the kind of relation the psychiatrist establishes with his patient, which is never as an object, always as a person.

Suppose that a psychiatrist said to the court something like this:

I can use these labels, and others like them, for purposes of therapy and healing, but I cannot use them for the purposes of the law, for marking out the limits of the institution of criminal punishment, which in fact I do not understand. The question you are asking me to address is not a medical or therapeutic question, but a question of justice: Who should be punished for their wrongdoing, who excused by reason of insanity? And on that question I have no expertise at all. The fact that you have used a version of my language to articulate it does not mean that I can speak to it intelligibly. To try to force me to do so is a cruel joke.

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<sup>3</sup> For a fuller analysis of the relation between psychological and legal language in connection with the insanity defense, see my *The Legal Imagination* (Boston: Little, Brown and Company 1973) 317-361.

If the court insisted that he answer, saying that the category of ‘mental disease and defect,’ say, must be meaningful to him, the psychiatrist might answer:

I cannot use these categories where the purposes for which they are used are so fundamentally inconsistent with what I do. In fact, I do not think I can apply any labels at all in a meaningful way, where any of the contemplated outcomes would involve treating the defendant not as a person but as an object. And even if in some sense legal and medical categories can be said to overlap, there will always be borderline cases, and to address those I need to know as fully as possible the purposes for which the category is being applied. Indeed that is true not only at the edge but at the center of a term like ‘mental disease or defect.’ So: Can you tell me what the purposes of the insanity defense are? Or, since this defense is an exception to more general practice, can you first tell me what the purposes of criminal punishment are, then tell me the purposes of this defense?

This is a deeply embarrassing question. Although every state, and maybe every culture, has practices that could be called ‘criminal punishment’, every first-year student of criminal law should be able to tell us that we in the law have in fact no coherent answer to the question, “What are the purposes of the criminal law?”

We speak in terms of revenge (or retribution) for a wrong committed; in terms of deterrence of future misconduct by those who will be tempted to behave in criminal ways exhibited by this defendant; we speak of rehabilitation of the defendant himself, that is, his therapy or healing; we speak of his incapacitation, that is, preventing him from doing again what he did this time. But it is obvious on reflection that these do not form a coherent program. There are conflicts and contradictions between them, perhaps impossible to resolve.

I need not elaborate the difficulties further. For present purposes it is enough to see that there is an immense barrier between the languages of psychiatry and the criminal law, which arises from the contradictions between the nature of these two practices: between their respective purposes and between the set of human relations they each imply or require. This contradiction is intensified when we realize that the purposes of the criminal law itself cannot be rendered consistent or coherent.

What is the law to do? As for the inconsistency within the criminal law, I have argued elsewhere that the only hope for coherence is to give up the idea of deterrence as a goal (though of course any system of punishment will have some deterrent effects).<sup>4</sup> As for the tension between the language of psychiatry and that of criminal law, in practice the only hope seems to be

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<sup>4</sup> See ‘The Criminal Law as a System of Meaning’ in *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press 1986) 192-214.

to allow the witness to talk at length about his experience of the defendant, in whatever range of terms seems to him suitable, without testifying to legal conclusions, for example whether he suffered from “mental disease or defect” and whether his “capacity to appreciate the criminality of his conduct” was in fact “substantially impaired,” and so on. But even that involves the psychiatrist in a deep conflict of roles. The terrible problem of applying a defense to a system of punishment that cannot itself be rationalized will be left, where it probably best belongs, to the trier of fact.

I say this with no sense that I am proposing a systematic solution to the conflict of languages I describe. It is the nature of such conflicts that they must be addressed in particular ways, in particular cases, by an art of language and judgment that itself requires a healthy sense of the limits of the human mind, by a kind of wisdom in fact. My aim is rather to define the difficulty than resolve it, and to claim that the tension between languages seen here is an instance of a problem that runs throughout the law, close to its very heart.

## 2.2 Interaction

The lawyer must learn to manage the tensions between law and other languages not only with respect to the ‘ordinary language’ with which I began, but also, as we have just seen, with respect to the languages of a great many disciplines and professions, from engineering to linguistics to computer science to anthropology to medical science, and so on, indeed to any field of human expertise. This is never just a matter of translating individual terms, or giving them professional definitions, but always involves the establishment of a relation between two systems of language and of life, two discourses, each with its own distinctive purposes and methods, its own ways of constructing the social relations through which it works, and its own set of claims, silences, and meanings.<sup>5</sup>

To engage in the translation from another language into law and back again, as the lawyer must constantly do, is an activity that at once requires and offers an education in the nature of language itself, in the limits and power of the human imagination, and in the always hopeless, but always hopeful, quest for ways to claim effective meaning for experience. Perhaps more clearly than anyone else the lawyer sees that at moments of crisis we always have choices to make between systems of meaning, kinds of meaning; and that these choices must always be justified in immediate and

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<sup>5</sup> For more on the nature and difficulties of translation see A.L. Becker, *Beyond Translation* (Ann Arbor: University of Michigan Press, 1995) and my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press 1990).

particular ways, as the best that can be done in this rich and difficult situation. The next case, the next issue, will require another balance, another act of composition, of writing, in an effort of the mind to find ways of talking that will work to express what most needs to be expressed.

The lawyer is always interacting between different languages, different ways of making sense of life, different systems of thought and expression. To manage this interaction well, to help the law say what needs to be said, is at the center of his art. Like the translator, who despite his best efforts to be faithful to the meaning of the original always changes it, the lawyer seeks to do something that it is impossible to achieve with perfection, without flaw, but something that it is nonetheless necessary to attempt: to create effective and comprehensible working relations between different systems of language and thought.

The question of the proper relation between other disciplines and the law is thus not a new question for the law, not daring or original, but the stuff of the lawyer's life. It is a particular instance of a general problem that drives his or her whole professional life.

### 2.3 Translation

My main point so far is a simple one: that the law does not exist in a linguistic or intellectual vacuum but must establish relations with other forms of thought and language. These range from the ordinary speech of the jurors and witnesses (and voters too) to the languages used by various experts: not only psychiatrists of course, but engineers, medical doctors, linguists, diamond merchants, navigators, chemists, geologists, tree surgeons, race car drivers, and so on and on, through all the rich multiplicity of human endeavor. This means that when we as lawyers turn to the relations between law and other disciplines in the university we are actually on familiar ground. It is not a new thing for us to face the difficulties of trying to establish relations between law and other forms of thought and expression, but a constant feature of the practice of law, for lawyer and judge alike. In thinking about interdisciplinary work in the university, we as lawyers may be able to draw usefully from the general experience of our profession and thus to make a special, perhaps unique, contribution to understanding. To use the image suggested above, we are translators by profession, and this should help us think about the relation between law and other languages in a range of contexts.

As I have already suggested, and argued at length elsewhere, the activity of translation is an art that can never achieve its goals without distortion, for the new text always adds meaning to the original, removes meaning from it, and in doing so distorts the whole.<sup>6</sup> Yet translation is

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<sup>6</sup> See *Justice as Translation*, above n. 5.

necessary; all interpretation is a species of this art, and interpretation is necessary not only to the law, but to all social life. As we saw in the insanity case, there is simply no way that the psychiatrist can speak directly to the legal questions he is ultimately asked to address, yet it would be deeply wrong to say that he has nothing to contribute.<sup>7</sup> The question for the law is how to make possible an effective translation between these systems of discourse and human action, with some real awareness of the inherent distortions in what it does.

As the insanity case indicates, this effort often presents an immensely difficult and interesting problem, since statements cannot in fact simply be lifted from one language, and from the social and cultural context in which they function, and dropped into another. There is always real distortion. Yet it is also obviously important that the law must be able to find a way to benefit and learn from other disciplines, other professions, other systems of thought, such as those listed earlier. What is required in all of these cases, and many more, is that the lawyer, and the judge too, learn something of the language in question, understand at least roughly its purposes and limits, and thus become aware of the gap between those and the purposes and limits of the law—the gap it is his task to address in the compositions he creates. All of this is necessary to the task of translation I describe, with its special interests and challenges.

## 2.4 Tension

A second, more complex point emerges from the insanity example. We see here that each system of thought and language – whether an academic discipline, a profession or informal vernacular – has its own terms, its own structure, its own purposes, its own social and cultural context. Thus the psychiatric profession exists to heal or cure or make better, and its central concerns are with the identification of the mental difficulty and with assessing modes of treatment. The law, as we have seen, has as its central concern justice, and in the insanity case its task is to find a way to identify those whom it would be unjust to punish.

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<sup>7</sup> It should be plain from what was said about the insanity case that one cannot, as a certain social-science mentality might propose, ask experts simply to testify to the ‘facts’, as though that could be done in a language-independent way, perfectly transparent and perfectly translatable to another system of thought and expression. Even where the two languages have used the same or similar words (mental disease, for example), the words have different meanings in the intellectual and social activities represented by the two disciplines, here ‘healing’ and ‘punishing’, serving distinct goals, there ‘health’ and ‘justice’.

As an actor in his own field, the psychiatrist is engaged in trying first to interpret the patient, what he says and feels and thinks, and then to establish a relationship with him that will help that person come to greater health and understanding, whether by talk therapy or drugs or behavioral modification. The actors in the legal field are interpreters too, but they work with different material. They are always trying to interpret prior authoritative texts – whether constitutions, statutes, regulations, contracts or some other form – in the context of a particular set of facts, or perhaps a more generally recurring set of facts. Here the text whose interpretation shapes the lawyer's basic task is the statute defining the insanity defense, in the terms quoted earlier.

When they meet in the courtroom, the lawyer and the psychiatrist constantly face two tensions: the tension between the language of their profession and the human reality with which it deals, and the tension between psychiatry and law, tensions that call upon both, but especially the lawyer, to be a translator.

### **3 Disciplinary imperialism: law and economics**

I have so far suggested that the art that is required when one seeks to connect the law and another discipline is a form of translation. This is an art that can never be performed perfectly, as I say, for it always changes what it uses, but it must nonetheless be performed if the law is to learn anything from other fields and systems of discourse and put its learning to use. One of the appealing aspects of this vision of legal work is that it resists the idea that any one language is to be treated as having exclusive and automatic authority; rather, it invites the lawyer, and the law, to establish productive relations among many ways of thinking and talking, of imagining the world and acting within it. The law is in this way open to other worlds of meaning and thought. This fact is an important intellectual merit, for it works as a way of limiting the claims of the institution of law, which as an instrument of the state always has a tendency towards univocal authoritarianism, insisting instead on the boundedness of law, and of all human thought. It is a way of seeking to create and acknowledge a radical many-voicedness in human affairs. It is also a political merit, for it opens the law to other ways of speaking-, subjecting it to wider cultural and political processes. It even has built into it a principle of humility, for we always know that our ways of speaking are not the only ones.

It is possible, however, to think of the relation between discourses in different ways, and I wish to sketch out two of those briefly in what follows, for they both appear in contemporary legal studies.

The first of the two modes I have in mind is a form of imperialism rather than translation, namely an effort to insist that everything of value can be done in one language to the exclusion of all others. This could in principle

be done with any language, including the law, but has in my experience been done most fully and energetically in the field known as law and economics. I will accordingly take that as my example in the present section.

### **3.1 Authority**

I should say at the outset that it is perfectly possible for the law to make use of economics, as it does with other fields, in the way I have been describing above. On this view, the law would turn to an economist - whenever an economic question arose in the law - for example, when the legislature protects against predatory or unfair pricing, or against combinations in restraint of trade with the hope and expectation that he might have something helpful to say. But we would naturally expect that conversation to take place across exactly the kinds of barriers that we have seen with respect to psychiatry, since the mission and function of law are entirely different from those of economics. Economics is concerned with the description and prediction of certain forms of behavior, which it typically evaluates in terms of what it calls efficiency. Law is concerned with justice, a fundamentally different matter, especially since a crucial part of what the law means by justice is not simply a measuring stick by which to evaluate outcomes, but, of at least equal importance, the complex set of relations among legal actors defined by our legal institutions.

For the central idea of law in our constitutional system is the separation and distribution of power among different official actors, and private citizens as well. Thus the federal legislature has certain powers, the state legislatures others; the various judicial offices have their respective jurisdictions, which they can not exceed; agencies that are the creature of legislation likewise have their zones of authority; the individual citizen too has rights and competences of his own.

This means that when, in any given case, lawyers turn to the law, they ask a certain set of questions: What legal actors speak with authority to the case before them, and in what texts they do so; how those texts should be interpreted, in the light of all the other texts shown to be relevant; and to what degree the judgment reflected in them should in fact be accorded authority, and hence deference, and why? In briefest outline, the process of legal analysis is one of identifying the texts that speak with authority to the case, interpreting them and deciding what degree of deference is due to them: all issues on which we can expect the lawyers to argue vigorously from the perspective of their clients.

Economics can do none of this. It cannot identify or interpret legal texts; it has no way of respecting the authority of judgments made by other agencies or people, which is the principle at the heart of all legal institutions; and it certainly cannot speak the language of the law. What it can do is speak

to economic questions, addressing them in ways that serve the purposes of economics, not the law. When it does so, the law must face the familiar gap and tension between languages I describe above. The people of the law will have to bring what they can from the other language into their world, where they will use it in their fundamental activity of defining and interpreting the authority of legal speakers. This way of connecting law and economics, that is, would be an instance of the kind of work I have been talking about from the beginning.

### **3.2 Erasure**

But all too often what is called law and economics does not seem to work in this way. Rather, its tendency is to focus upon questions of policy abstracted from the network of texts and traditions and understandings by which the law works, and thus to disregard or erase the whole discourse I have described, the whole structure of legal thought.

Beyond certain clearly factual issues within its domain, the only question that law and economics can actually address is: What is the right outcome or rule under its own theory of efficiency? This is fundamentally a question of policy, in this context divorced from law, and invoking a normative theory with its own questionable premises and methods. Economics cannot do what law does, which is to serve as an arena in which many languages can speak and be heard and interact, as a center of translation.

The analysis typical of law and economics does not seek to inform the law, but to erase it by reducing legal judgment to the application of a single way of imagining the world and acting within it – a way that has no place for the distribution of authority among different agencies, no place for deference to the judgments of others, no place for the arts of interpretation and translation. What is more, the proposed way of doing law entirely lacks the democratic authority that law itself has; for unlike law, what is claimed to be authoritative here, namely a certain theory of human motivation and interaction, lacks the basis in democratic politics upon which the law itself systematically rests.

At least in this extreme form, the law and economics is not really interdisciplinary work in my sense at all, for it does not seek the kind of translator's cross-understanding that characterizes such work – the establishment of a relation between systems of thought in which each may learn from the other – but for the erasure of everything that is different from itself. It seems often to be assumed that this field has nothing to learn from history or philosophy or literature or engineering or anthropology or natural science or literature or any other field, including law. It is taken to be a complete and adequate system of thought, despite the fact that one simply

cannot do what the law does in this language. The results are not only intellectually but politically disastrous.<sup>8</sup>

#### **4 Comparing modes of thought and expression: law and literature**

##### **4.1 Activity of mind**

I wish to draw attention here to another form of interdisciplinary work, which takes the form neither of translation nor imperialistic erasure, but works by the comparison of forms of thought and speech, or what I often call languages. It happens to be the form of interdisciplinary work that has most engaged me, especially in my work on law and literature, upon which I shall draw in what follows.

The idea of this kind of work, as I imagine it, is not to look to another field for propositions or ‘findings’ about the world (or for ‘methods’ that might be borrowed<sup>9</sup>), nor to argue for the desirability of one rule over another, nor indeed to produce any material the law might use as a source of authority, but rather to find a way of thinking about the activities of mind and language in which lawyers and judges characteristically engage, the activities that define both legal education and the field of law itself.

The hope is not to inform the law, then, so much as to inform us, as lawyers and judges, about the law, about what we do when we think and talk as lawyers, so that we may learn to do these things more effectively and with greater intellectual and ethical awareness. This kind of work does not have the purpose, or the potential good effect, of more usual interdisciplinary work, which does seek to provide the law and lawyers with information they can use; but it does not have the characteristic problems of that kind of work either, for the very reason that it is not engaged in the effort to carry propositions about the world from one language to another. Instead, as I say above, the method of this work is to compare the activities of mind and language that are characteristic of law with others, with the object of making us more fully aware of what we do and enabling us to judge what we do, and to do what we do, more fully and intelligently.

In this kind of work we look at law itself not as the formation of policy judgments, nor as consisting of a set of rules that are more or less

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<sup>8</sup> For more on this topic, see chapter three of my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago 1994) and the interview published in 105 *University of Michigan Law Review* 1403 (2007).

<sup>9</sup> For more on this point, see my ‘Law and Literature: No Manifesto,’ in *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press 2001) 52-72.

complete and self-interpreting, but as an activity of mind and expression. From this perspective the rules of law, and the various texts in which they are articulated – from statutes to judicial opinions to contracts and regulations – are the primary materials for this activity of mind and expression: the activity that is the center of what lawyers do, and what law school teaches. Similarly, the law is not imagined as a set of existing institutions that can simply be described and evaluated, as if they exist always the same, for they are themselves constantly being created and recreated by judges and lawyers in the way in which they think and argue.

Two central questions for the lawyer and law student from this perspective are present in every moment of legal thought: What are these activities of mind and language? And: How can I master them? A third quickly follows: What does it mean, for me and for the world, that I have committed by mind and imagination to life on these terms? How, that is, do I evaluate the language of the law, the practices by which it lives, both as a social matter – Is this good for our world? – and as an individual one: Is it good for me, as an independent mind and person concerned with the ethical significance of what I do?

The aim of the sort of comparison I have in mind, then, is to study the activities that define the field of legal thought and expression partly from the outside, by placing pieces or instances of legal discourse next to others, all as a way of seeing more fully what law is and what it might become. This is of value not simply as an academic matter but as a way of learning to practice law better, whether as lawyer or judge, and to teach it better too. One does not look to literature, say, for statements about poverty or gender discrimination or the concentration of wealth or the incidence of taxation for material to cite in a lawyer's brief or judge's opinion, but for something quite different: for a ground of comparison that may elucidate what we do as lawyers and open it up to judgment.

#### 4.2 Thoughtful experience

By what I say here I do not mean anything especially odd or arcane, but to draw on an experience that is I think common among lawyers, which was in fact the premise of my early book, *The Legal Imagination*.<sup>10</sup> When I left law school, my sense was that I and my law school classmates had learned, reasonably well, a complex way of thinking and talking a language and a way of using it, which we called “thinking like a lawyer.” But we did not have a good way of thinking *about* what we had learned, and how it might be understood and improved. What exactly are the forms of thought and expression that characterize the lawyer's life? What do they mean, for the lawyer, for the client, for society? How might they be improved, either in the

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<sup>10</sup> J.B. White, *The Legal Imagination*, above n. 3.

course of particular performances or in a more radical way? For students in law school, the question can have a somewhat threatening cast: What does it mean for me to learn these practices of mind, to make them part of myself? Who do I become when I become a lawyer?

My premise was that what the lawyer has learned is not just a form of knowledge that can be expressed in statements about the world (“The law on this point is as follows”) but, much more interestingly and importantly, a capacity for thought and argument that will enable him or her to represent a client in a case that is different from any theretofore decided – as almost every case is, once you think about it hard enough. A legal education, that is, offers a capacity both for using legal language to think and argue well in new situations and for seeing what is new in a situation in the first place. The language of the law does not just flow through the mind of the lawyer, printing itself out in what he says or writes; it is the material of the lawyer’s art, always transformed, for good or ill, by the way his mind works with it and upon it.

The lawyer is at the center a writer and speaker, the composer of written and oral texts, and no question is more important to him than what excellence he can attain in this art, and how. This art of composition, of language use, is what we practice and what we teach; it is the central activity of the lawyer-present whenever the lawyer thinks about any professional question at all, whether of law or fact. It is crucial to our professional success that we learn how to write and speak, and sometimes transform, this language in compositions of our own, and that we do so with power and originality. It is crucial to our ethical success that we learn how to do this with honesty and decency, and out of a proper understanding of ourselves, of other people, and the situation we share.

How are we to understand and learn these things? That was and still is my question. It was obvious to me that little could be said about this in a prescriptive language of instruction: Do this, and then that. An art cannot be reduced to a how-to manual or a green-and-black book entitled *Legal Expression for Dummies*. The lawyer or judge is a writer, a speaker, a composer of art forms. How are we to learn to understand and criticize, and perhaps to transform, the conventions by which he does this, by which we do this?

One might try simply to examine these questions, in the manner say of an analytic philosopher, but I did not see how that could get us very far. What is the ground upon which we would stand when we did that? What was needed, I thought, was thoughtful experience of the work of others who are engaged in work that is at once similar and different, a set of comparisons that might give us a new sense of the realities and possibilities of legal expression to which we were devoting ourselves and our minds.

In *The Legal Imagination* the comparisons I suggest range very widely, from the students' own experience of the ways of thinking and talking they have learned in the course of their ordinary lives, to high literature (as in the work of Jane Austen and Homer and Malory) and philosophy (as in Plato and Aristotle and Wittgenstein) and history (as in Thucydides and Gibbon and Parkman) and sociology (as in Myrdal), and 'cost-benefit analysis', as in the Report of the Third London Airport Commission. It also includes such odd things as selections from Emily Post's *Etiquette*, the diary of Robert Scott, Dick Gregory's autobiography, Fowler's *Modern English Usage*, The Rules for Prisons in Wisconsin, Colorado, and Texas, the Constitution of Brook Farm, and so on and on. I do not look to any of these texts for statements about the world that can be used in the law, or for reforming it, but for performances with which we can compare our own.

How does the process of comparison work? Partly by just holding one text or language against another and asking what emerges, and what we think about it, but mainly in the service of a large set of themes or questions, of which the following are samples.

- First a general question: How can you use legal language without having it take over your mind, turning you into a caricature of a lawyer? Can you find a way to use the language and recognize what it leaves out? Is it helpful here to think of the way literary writers do these things, by metaphor, ambiguity and irony? Is the secret to all good writing to learn how to talk two ways at once?
- In any one case the lawyer will have conversations with many people: his client, the lawyer on the other side, the judge, the jury, to pick obvious ones. How do these conversations differ from each other, in purpose, role, style? How does the law regulate what can be said and how it can be said, and what can you do with and to those regulations? How can you speak well in all of these conversations? What is the art you are called upon to exercise here?
- Often a statute is the central text governing a case. How does a statute typically affect, for good or ill, the conversation by which it is interpreted and applied? What is the art required of the writer of a statute: managing the thought and conversation of others? Can you draw upon other instances of that art, in literature or life, to improve your own performance?
- How does the language of the law talk about the people whose conduct and lives it regulates: as caricatures, empty stick figures, or as the full and complex beings we know they are? Think here of the insanity defense already discussed, and the problems presented by the words of a statute that speaks, say, in terms of 'mental disease or defect.' How would you draft a statute dealing with this defense? Or think of the sentencing judgment: how should that be performed,

how regulated? Can you draw upon literature that has as its object the training of your capacity to form judgments about others (say Austen's *Pride and Prejudice*) to assist you? Or think of the ways in which the law uses the language of race to talk about people: Can you imagine doing that in a satisfactory way?

- Law is reason at work in the world, we learn in law school. But what kind of reasoning is it? How, for example, do you come to the conclusion that a particular analysis by a lawyer, or opinion written by a judge, is a good one? Where do you find a language in which to think about excellence in reasoning? Is it useful to look to other forms of writing here, say Plato's image of the cave or The Report of the Third London Airport Commission? This raises the question of legal criticism: how is it to proceed?
- In any real case, narrative is an essential part of what the lawyer does. What kinds of narrative does he tell, how do they move and work? How do they resemble or differ from other types of narrative, in literature and in life? The lawyer not only tells a story, he or she produces a legal analysis of it, and these are very different modes of thought and imagination: What relation can you create, or can you see others creating, between them?

And so on.

As these questions suggest, *The Legal Imagination* is a text for a course in writing (and speaking) as a lawyer. The students are asked to write a paper each week, bringing their attention to some difficulty or problem in legal language and expression. Often the assignment asks them to think about a situation in the world both as it is talked about by lawyers or judges and as it is talked about by others, including literary and philosophical and historical writers, and including also the students themselves in their ordinary lives. The idea of the assignment is always to put them in the position of the one whose fate, whose curse or privilege, it is to write and speak the language of the law, and see what they can do with it. The question is: How can they do it well, and 'well' not only in the sense suggested by a word like 'success', but well in a deeper way, at once ethical and political. Can they find a way to use legal language that will enable them to respect themselves and the profession they have chosen? The main way these questions are presented is through comparison, between legal language and other languages, legal thought and other forms of thought.

This is not exactly a 'law and literature' book, then, but a book about law itself, about how lawyers think and express themselves, asking this question always by comparison with other modes of thought and expression, and always from the point of view of one learning to be a lawyer and anxious about what this might prove to mean. This kind of work is not imperialistic, like law and economics, nor does it involve translating

propositions from one language to another, as happens in expert testimony, but works rather by a complex process of comparison that is meant both to suggest certain questions and to make possible fresh responses to them. In engaging in this comparison I use literature and various humanistic texts because that is what I know; but in teaching this course I would urge the students to use anything they knew, from music to mathematics to journalism to physical practices like gymnastics or horse-breaking. What I wanted was for them to have active in their minds aspects of themselves, capacities for functioning, by which they could test what they were learning as law students and which, in turn, what they learned in the law might affect, both in understanding and performance.

The ultimate idea of *The Legal Imagination* is that the law can be a wonderful field of life, for the practitioner and for the world, if we can make it so; if, that is, we do not learn it in dead and imitative ways but as an art of language and human relations. It has much to teach, as well as much to learn, and in my own writing I have tried to show how that works too.<sup>11</sup>

### 4.3 Recreated and redefined

The process of comparison that is at the heart of *The Legal Imagination* can work not only in a text that is composed for a class of law students but in a book of a different kind, for a more general reader. I can use as my example my own *Acts of Hope: The Creation of Authority in Law and Literature*,<sup>12</sup> which takes as its subject the central feature of legal thought I mention briefly above, namely the identification and interpretation of authoritative texts. My question is whether we can learn something about what lawyers and judges do, and how they can do it well, from other moments in life and literature in which a speaker claims authority for some text – or object or institution or practice – that is external to him. The instances I analyze here include Socrates's invocation (in the *Crito*) of the authority of the Nomoi of Athens, which he assumes forbid his escape after conviction; the claims made by Shakespeare's *Richard II* for the authority of the crown, which he calls upon to condemn resistance to his own unlawful acts; Richard Hooker's claims for the authority of the English church, against the claims of Roman Catholic and Puritan alike that it is heretical and false, in his *Ecclesiastical Polity*; Matthew Hale's way of thinking about the authority of prior law, not

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<sup>11</sup> The mode of analysis I work out in *When Words Lose Their Meaning* is in fact derived from my experience of law. In this book I bring it first to the *Iliad*, then Thucydides, then Plato, then a set of literary texts in English, and only at the end bring it back to the law, hoping that it derives new force and meaning from the uses that precede it.

<sup>12</sup> J.B. White, *Acts of Hope: The Creation of Authority in Law and Literature* (Chicago: University of Chicago Press 1994).

only over the judiciary but over the legislature as well, in his little-known but wonderful essay *On the Amendment of Lawes*; the authority that Jane Austen first gives to the language and culture of Mansfield Park, in her novel of that name, and then undermines and transforms; Emily Dickinson's struggle throughout her verse to transform the authority of sentimental and empty verse forms expected of poets of her era, especially of women; the way in which the plurality opinion in *Planned Parenthood v. Casey* defines and redefines the authority of *Roe v. Wade*; Abraham Lincoln's claims for the authority of the Union in his second inaugural address, and Nelson Mandela's comparable claims for the authority of the African National Congress, and his own acts of sabotage on their behalf, in the speech he gave from the dock after conviction.

These instances of the practices of mind and language by which a person claims authority for something external to himself, or resists or transforms that authority, demonstrate something remarkable. This is the element of creation I refer to in the subtitle of *Acts of Hope* and it works this way. When Richard, say, invokes the authority of the crown he does not simply point to the circlet of gold, or gesture towards what it has meant, but in speech after speech defines that object by an act of literary and intellectual creation, in what could be called a poetics of absolute monarchy. When Lincoln invokes the authority of the Union, it is not the authority of some object in the world to which he can simply point, but the authority of the Union that is created in his text. Similarly with Mandela and the authority of the ANC, Hale and the authority of prior law, Hooker and the authority of the church, *Casey* and the authority of *Roe*: In each of these instances it is the authority of the object not simply as seen or pointed to, but as recreated and redefined in the text itself that is invoked. To see this of course defines an enormous and important task for one who wishes, as lawyers and judges constantly do, to invoke an authority external to themselves; to do this well they must create it, and do so as an object deserving the authority that is claimed for it. This is a challenge worthy of any mind.

What is in fact ultimately authoritative in all these cases is in the end not the object or text itself, but the process by which it and its authority are understood and defended, the act and art of the creation of authority itself. What Richard is really saying is that if you support the monarchy you will have the benefit of his way of imagining the world, of speaking and thinking and being; if you reject his claim, all of that language will disappear, to be replaced by what? After Henry has seized the crown from Richard and claimed to be king, both in this play and the two parts of *Henry IV* that follow it, he faces what this means, for he has no language at all in which to describe and defend the 'crown' he claims or otherwise to justify his rule. Likewise, Lincoln is saying: Accept my claims and you will have this way of thinking about our nation and its history; reject them and you will not. Each

of the people studied here, in their own particular context and with their own particular needs and values, is engaged in the creation of authority, the creation of the authority of that for which they argue, an authority that is ultimately defined in their own processes of mind and language and character.

This art can obviously be performed well or badly. In assembling what seem to me excellent exemplars in a range of cases, I hope to present a challenge and an opportunity to the modern lawyer and judge, for they too must recreate in their prose the object for which authority is claimed, and it should be a real question for them how they can do this well.

## **5 Final remarks**

My aim in this paper has been to identify three different sorts of interdisciplinary work and to suggest that it is important, in many contexts, to keep clear the differences among them. First, the kind of translation from one discourse to another required in the insanity case, and in any case in which an expert testifies on a legal matter, indeed in any case in which one wishes to transfer findings or methods from one field to another. Second, the sort of imperialism, or anti-translation, which results when the proponents of one way of talking and thinking attempt to use it to perform functions it cannot perform and to erase the field they seek to take over, as I suggest is the tendency of much 'law and economics'. And finally, the comparison of modes of thought and expression, not to create propositions that another field can use, not to engage in imperialistic expansion, but as a way of making conscious, and hence the object of thought and attention, the modes of thought and expression that define the law we have learned, and practice and teach.

## **FACING THE INTERFACE: FORENSIC PSYCHIATRY AND THE LAW**

*Hjalmar van Marle\**

### **Abstract**

As we know from history, in court cases experts used to be called in when the defendant showed symptoms of a psychiatric illness. This was necessary, as the law itself did not provide rules about how to define abnormality. Mental illness needed an explanation for it to fit into the framework of the criminal justice system. With the emancipation of the empirical psychology and progress in the examination of patients' brains with modern imaging techniques, a separation has developed between the naturalistic man-oriented view of offending, and empiricism, in which facts are true if they are measured with reproducible tests. This is the case with judicial rulings about responsibility for a crime, the presence of illness at the time of the offence and the risk of recidivism concerning the length of treatment of mentally ill offenders and their targets. These aspects in the debate between the court and expert witnesses are discussed separately. The conclusion is that the field of law has been extended into the field of empirical sciences for more objectivity, and that the influence of these sciences on juridical reality can play an auxiliary role only. It is therefore necessary that judges and lawyers be trained in the use of empirical data. Still, forensic reality requires an interpretation, in which the forensic psychiatrist has different loyalties to the relevant parties in the court proceedings. But he is above all a medical man with ethical restrictions.

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## 1 Introduction

Courts of law have always asked for the assistance of non-judicial experts. The presence of a medical expert, however, was not always accepted and in some cases laymen or clergymen were asked to give their opinion on the suspect's mental condition. In cases with a strong emphasis on the mental state of the suspect, it wasn't until the sixteenth century that doctors were asked to advise the court.<sup>1</sup>

In the middle of the nineteenth century, neurology, the science of the mind at that time, had grown to be a medical specialisation. Law and medicine had both become professions requiring academic training. From that time on, courts turned to medical specialists for expert opinion, as they were the self-proclaimed experts in the field of those mental disturbances that led to antisocial behaviour and crime. Research in neurology then was empirical and used the possibilities of its time: a fully somatic origin of brain diseases was suspected, while neuroanatomy took place mainly by visual inspection or under a microscope. Emil Kraepelin (1856-1926) was the pioneer of neuro-psychiatric nosology (the taxonomy of diseases) at the end of the century. Before him, Wilhelm Griesinger (1817 – 1868) had already said that all mental diseases were diseases of the brain.

What claims can psychiatry make nowadays regarding its field of knowledge? With its origins in medicine, it has an empirical side, on which much emphasis is put. Technology has made it possible to use fMRI (functional magnetic resonance imaging) to make images of the brain when it is having symptoms like hallucinations or performing certain tasks. Genetics is making remarkable progress in showing the function or dysfunction of certain genes, with all the various consequences for the metabolism of nerve cells. Much more understanding has been reached with regard to the chemical substances in the brain called neurotransmitters. Not only have more specific anti-psychotic and anti-depressant drugs been developed, but the complexity of the brain has also been demonstrated by working with functional neural circuits connected by these neurotransmitters in bio-physiological research.

Psychiatry, however, although its origins lie in everyday practice and patient care, also has a psychological and philosophical side. It is concerned with the patient as a human being, with his or her individual vulnerability and dependence on rewarding relationships, the social context of disease, like living in a dangerous neighbourhood and the presence of alcohol and drugs, and man's limited ability to make choices, such as the cooperation with a treatment for his illness or the willingness to resume his work after an illness which has not totally disappeared. Psychiatry, like all practices in

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<sup>1</sup> M. Prosono, 'History of forensic psychiatry' in R. Rosner (ed.), *Principles & Practice of Forensic Psychiatry* (London: Hodder Education 2003, 2<sup>nd</sup> ed.) 14 at 30.

medicine, is both the art of maintaining a good relationship with one's patients and creating a supportive network around him, and the science of using the right techniques and treatments for a certain disease, as has been worked out in 'evidence based medicine'.<sup>2</sup>

## **2 Forensic framework**

In forensic psychiatry, when a doctor wants to treat mentally disordered offenders, he applies the same skills and medical ethics as used in regular psychiatry. But there is more: the context, which is no longer merely social, but juridical – another domain of rules and science. It has been reduced to special laws, for example mental health laws and criminal law, which means that others than the psychiatrist have their special expertise. The psychiatrist not only works within his own field of knowledge and the rules reigning in it, but is also restricted by rules from another field of knowledge in his primary concern: the relationship with his patient. So forensic psychiatry works within a three-partite model, which should be integrative: the legal-empirical-forensic model.<sup>3</sup> This model has a legal background and uses juridical definitions, taken from law books, and jurisprudence, taken from court cases. To operate in this domain in court, the expert witness is required to have the necessary knowledge and experience.

The second, the empirical part of the model concerns the application and analysis of the juridical criteria in the psychiatric or psychological examination of the patient. A check should follow of the findings of the examination, by comparing them with the observations already made and the interpretations thereof. Preferably, the methods of the examination will be strictly empirically based, which means that for measurements validated methods from an independent theory or model are used as much as possible. These can be structured checklists for the main topics on which the arguments in the model are based, like drug use, changes in the level of consciousness and amnesia. The third, the forensic aspect concerns the specific characteristics of the examinee, patient and/or suspect, and the situation and circumstances of the offence, brought together in a hypothesis and its possible affirmation by the found facts. The forensic view implies the conclusion that the examinee does or does not fit the juridical context brought forward by the questions of the court on certain forensic psychiatric criteria founded on the real examination.

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<sup>2</sup> H.J.C. van Marle, *Tussen wet en wetmatigheid. De forensische psychiatrie in sociaal perspectief*, Inaugural lecture (Deventer: Kluwer 2004).

<sup>3</sup> R. Rogers and D.W. Shuman, *Fundamentals of Forensic Practice; Mental Health and Criminal Law* (New York: Springer 2005).

With this legal-empirical-forensic model and within its domain of 'reasonable medical certainty', psychiatry has the following contribution to make to the domain of law: a diagnosis with a specific context as criterion for conclusions about the possible relationship, such as offence (criminal law), competence (health law), capacity to work (insurance), and damages (liability in law). This diagnosis – not to be confused with a category in a diagnostic classification, such as the DSM-IV – leads to conclusions about responsibility, fitness to stand trial, competence for decision making, compensation for being not able to work and compensation for damage done. Medical knowledge then can assess 'with medical certainty' the development of a certain disorder and predict possible problems or risks which are the consequences of this disorder. With that, essential clues in behaviour can also be assessed and after that managed by a specific psychiatric treatment. Because of their experience in this field, forensic psychiatrists are often asked to participate in the drafting of new laws on the above-mentioned subjects.

The definition, then, of forensic psychiatry is the application of psychiatric examination, diagnosis and treatment within the realm of law, according to those criteria which need to be explained to legal experts before they are able to apply the rules of law, such as jurisprudence or risk for recidivism (dangerousness). There is an interface with the law, which means that forensic psychiatry and the law have something in common, concepts used in law, defined by law but to be filled in by forensic psychiatry. So forensic psychiatry has to know these definitions and their usage, and it has to translate them into psychiatric concepts which are suited for further psychiatric examination. Research within a forensic psychiatric population does not mean that this is forensic research. A forensic examination and research bear in mind certain juridical criteria, like risk, recidivism, responsibility and violent behaviour. In this view, forensic psychotherapy means that forensic patients with a juridical background and aim, which is to control the psychiatric disorder so that re-offending is prevented. From now on I will use the term forensic psychiatry in relation to criminal law, because in criminal law offences and the use of the criterion of responsibility are well-defined, in contrast to damage and liability law. Still, the analogy remains with forensic psychiatric activities in other domains of the law.

### ***3 Theoretical model***

This legal-empirical-forensic model needs a theory, a view on human behaviour, as it examines the interactions between a persons biological aspects like the functioning of his brain circuits, his psychological states and traits and the social context he lives in. A comprehensive model to combine these different levels of human functioning is the bio-psycho-social model of

Engel<sup>4</sup> in which, depending on the latest development in psychiatry, the emphasis of the research can switch between these interdependent fields. It is questionable, however, if this often-mentioned model does indeed integrate the thinking and practice of these three levels, or that the word 'model' is used only to serve as window-dressing for pursuing efforts in one domain instead of all three together. With the modern demands for evidence-based medicine, research nowadays is on an empirical basis, and so is mainly epidemiological, psycho-biological and psychological assessment. The preferred tool for scientific empirical research is the randomised controlled trial (RCT), which, because it uses a control group, is different from the individual-based forensic psychiatric examination. A scientific comparison with a control person is not possible, as the examination with or without auxiliary empirical examinations, such as fMRI, tries to find an answer particular to one case only, within the context of that specific situation. That is why judges and psychiatrists feel comfortable with each other: They both focus on a specific and unique individual.

For the court, the purpose of the forensic psychiatric assessment is to inform the judges about the person and personality of the suspect with regard to the offence he has been charged with.<sup>5</sup> As each case is different in its psychiatric diagnosis, criminal context and the manner in which the offence was committed, different scientific models can be applied to a case. Depending on the background of the forensic psychiatrist and the clarification which has been sought to make the case understandable and open to judgement by others, he can choose a model with the best fit. Like regular psychiatry, forensic psychiatry is a multidisciplinary specialisation, based on its broad bio-psycho-social model. These models for investigation, explanation and conclusions should be based on available scientific knowledge and the 'state of the art' of the forensic psychiatric field.

In the United States, agreed-upon criteria are used to judge the scientific level of the forensic report, the so-called Daubert criteria (from the 1993 court case *Daubert v. Merrell Dow Pharmaceutical, Inc.*) for scientific evidence. These are:

1. Falsifiability should be shown by the fact whether it can be and has been tested.
2. The theory or technique has been subjected to peer-review and publication.

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<sup>4</sup> G.L. Engel, 'The clinical application of the biopsychosocial model' (1980) 137 *American Journal of Psychiatry* 534 at 544.

<sup>5</sup> H.J.C. van Marle, 'Het strafrechtelijk psychiatrisch gedragskundigenonderzoek' in B.C.M. Raes and F.A.M. Bakker (eds.), *De psychiatrie in het Nederlands recht* (Deventer: Kluwer 2007, 5<sup>th</sup> ed.) 113 at 136.

3. The known or potential rate of error of the technique and procedures can be established.
4. The theory or technique has general acceptance in the relevant scientific community.

Especially in the dialogue between courts and psychiatrists, tests with a numerical conclusion seem important, but behind such a clear answer lies the validity of these tests and the reliability and experience of the expert with these tests. Also, there are no rules whether or not to use tests in forensic psychiatry, only on a scientific level. But these tests, with the exclusion of risk-assessment scales for recidivism, are not able to give an answer to juridical questions like responsibility or competence, as these concepts are juridical and philosophical by nature. Conclusions from tests and other empirical measurements like medical diagnostics are far from exact, considering their internal correlations and certainty of their prediction. Until now, a chance of more than 80 per cent never has been demonstrated. Nor can the rate of error in psychiatric technique be shown, as it is a verbal medical examination, reproducible only by the same or another psychiatrist in the same way and with the same patient. For forensic psychiatry, the hallmarks of expertise are peer-review, publication and general acceptance in the relevant scientific community.

There is not just one expert: forensic expertise can only be tested by the court by asking another psychiatrist or psychologist for a second opinion. In criminal court sessions with a great impact on the life of the suspect (prison sentence or detained under a hospital order) the expert should be interrogated by the court and not be a decision-making member of it. Psychiatry, and therefore forensic psychiatry, working from their bio-psycho-social framework, will not succeed in meeting these Daubert criteria fully; certainly not in Europe, where due to the philosophical background the emphasis is more on 'man as a whole'. So next to giving responsibility for the quality of the scientific level of the conclusions in the report itself, each case assessment has to be acknowledged by expert colleagues (the peers) in the form of guidelines by the responsible professional organisations about the quality of the report.<sup>6</sup> These guidelines prescribe the contents, the required validity of the connections between subjective accounts, objective symptomatology, decrease of mental functioning; they also dictate the criteria for the court, such as responsibility for the offence, fitness to stand trial, the mental capacity for decision making, and the ability to resume work and further social functioning. They also include warnings on unverifiable data, like unconscious motives, or unwarranted conclusions, drawn for example from childhood. The guidelines reflect the current state of (forensic)

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<sup>6</sup> R. Weinstock, G.B. Leong and J.A. Silva, 'Ethical Guidelines', in R. Rosner (ed.), *Principles & Practice of Forensic Psychiatry*, above n. 1, 56 at 72.

psychiatry and are subject to regular renewal by special representative committees.

Giving advice about the link between the mentally disordered offender and the crime he has committed is the essential activity and primary idea in forensic psychiatry, as this link justifies the presence of forensic psychiatrists in court in a certain case. Only once the connection between offence and disorder has been demonstrated (step 1) can the level of responsibility for this offence be assessed (step 2). As a third step, it is possible to advice about the treatment necessary in this case to reduce the risk of re-offending. There are three theoretical behavioural models to be used for forensic fact finding. Firstly, we have the ideographic model, in which psychiatric diagnostics and assessment of impairment in functioning are at the centre and are judged in their relationship to the offence. This is plain psychiatric diagnosis based on the story of the examinee and the actuarial reports. Secondly, there is the cognitive-behavioural model, with its contingencies and learned behaviour as a result of both psycho-biological factors and contextual reinforcement. It has been tested in empirical research for its efficacy in treatment and supported by laboratory models, and uses essential psychological reasoning. Finally: the phenomenological model comes to the fore, with its emphasis on understanding and clarification of the offence in terms of meaning and motives. It has the advantage of producing a carefully painted picture of the examinee, but the disadvantage is the irreproducible, highly personal nature of the 'facts', which are based on opinion rather than verification. An example of this kind of examination is the psychoanalytical one, which is for that reason not used anymore. But in its impressionistic way it resembles the stories told in court and with them a deepening of insight seems possible with regard to the question: How could this have happened? It is appealing, but not verifiable.

#### ***4 Ethical demands***

It is then the psychiatrist who examines the suspect or the forensic patient within a double framework: as a doctor and as a forensic specialist. Should he identify with a 'welfare paradigm', whereby he upholds the altruistic and beneficent tenets of medicine 'to do good for the patients'? Or should he be required to act within an opposite 'justice paradigm', in which he is expected to act and to uphold justice principles as applied in due legal process?<sup>7</sup> In my opinion, the two paradigms do not exclude each other, as they are normal activities done by a psychiatrist from the essence of being a doctor. The

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<sup>7</sup> J.E. Arboleda-Florez,, 'The ethics of forensic psychiatry' (2006) 19 *Current Opinion in Psychiatry* 544 at 546.

Hippocratic oath, *primum non nocere*, primarily means: Do nothing that can harm your patient. It not only includes the use of different medical treatments (not harmless in early years and even still with regard to the treatment of cancer) but confidentiality as well. Medical confidentiality is based on the ethical rule that a patient has the right to visit a doctor without running the risk of his doctor breaching his confidentiality, so that the patient will no longer feel free to speak about his ailments. But from the year 1976 the rulings of the Supreme Court of California in the *Tarasoff* case spread all over the world: the duty doctors and psychologists have to protect the physical and psychic integrity of a third subject against assaults made by their patients. One can also question to what extent a mentally disordered offender is harmed when the psychiatrist, using his knowledge of the treatment, warns his patient not to continue his threatening behaviour, or reports to the probation officer or the police in extreme cases with a high risk of a new offence. Of course, contacting a colleague before that time has its advantages, but with a highly explosive patient there is not much time. But even then, the forensic expert will protect his patient from another trial and verdict, and perhaps from remorse about another victim.

So, in forensic psychotherapy and forensic assessment and examination, there are rules to this engagement, which are intended to lead to motivation for participation and informed consent. Informed consent is based upon sufficient information to make a choice and enough time to consider the alternatives which should also have been proposed by an impartial and trusted expert. In these rules, the different roles of the expert and doctor are described so as to reflect the different responsibilities and ethical stances. In my opinion, the forensic expert and the forensic therapist must be able to speak of their separate loyalties to their patient, explain them, and, with the patient's consent, apply them if necessary. Complete confidentiality is no longer ethical in forensic psychiatry, as we have the knowledge (to a certain extent) to predict when harm will come to others, as former behaviour is the best predictor for future behaviour. Having this knowledge means we also bear responsibility for the community in which we live. General psychiatry also has to reckon with the possibility of criminal acts by a patient for the first time; these colleagues, too, should be trained to use the instruments of risk assessment, as they might know from their practice where risk factors lie hidden in the history or tales of their patients.

But, to be explicit, a doctor remains a doctor, even when working for a third party, like a court. In his attitude towards the patient or examinee, he puts the well-being of his patient in first place by giving respect, whatever the circumstances, and by building up a relationship with a beginning, a middle and an end, after which the patient is left unharmed and informed. As such, the forensic physician can be seen as the patient's counsellor, who mediates between him and society. Forensic assessment for the courts is a

translation of the patient's *status mentalis* to the law, an explanation of the patient's inner status when he committed the offence, viewed from his mental state at the moment of examination. The question of the responsibility then is a reconstruction, with all the distortions that makes possible. This, however, is not an empirical question, but a juridical one. Fact-finding and assessment take place in the juridical domain and the answer should also be sought within that domain. The purpose of this translation is to provide building bricks for the conclusion in the verdict. This participation by interpretation is the interface between psychiatry and the law, the law and psychiatry: participation is not possible without knowing each other's rules and appreciating them.

## 5 Assessment

The relationship between the psychiatrist and the person undergoing assessment is different from that in a treatment situation. The difference needs to be made clear to persons being examined, in view of the fact that, based upon their previous experience with doctors, they will have the tendency to see no difference between the two and regard them as identical. Therefore, the meetings between the examiner and the examined should begin with information about the reason for and the nature of the examination, the questions put by the judge and the role of the examiner as independent expert. It should be made clear that the suspect does not have to cooperate with the examination.

Contrary to the treatment situation, there is no question of secrecy on the part of the examiner. He is obliged to report all that he hears and this should be made clear to the suspect at the beginning so that he can take this into account. However, this lack of professional confidentiality does not mean that the examiner, psychiatrist or psychologist is not bound by his professional code; he must not exert unnecessary pressure on the suspect or cause psychiatric damage by a careless termination of the contact. The relationship between examiner and examinee should be partly for the benefit of the person being examined, who should, for example, be treated with respect and should benefit from the examination by gaining insight into his deeds. The examiner will have to actively guard against ending up in a pseudo-treatment relationship, in which the person being examined gives him confidential information that is not intended for use in the report. The methodical form and management of the relationship also play a role in the examining situation. Nevertheless, when the suspect makes confessions about crimes that he has not been charged with, then the examiner must immediately stop the examination and refer him to his lawyer. The examiner cannot carry out criminal investigations, which means that new questions

need to be put by the judge in order to include the new crimes in the behavioural examination. In addition, the knowledge of other, possibly more serious crimes make it impossible for the examiner to answer the original questions without involving, from a behavioural point of view, the new crimes, which are, after all, involved in the personality of the suspect.

Finally, the person being examined needs to receive the assurance that the report will only be used by the court and by persons who are authorised to treat him in connection with the same crimes. There is no intention whatsoever to use this forensic psychiatric report outside the legal system, such as in custody disagreements and insurance questions, in view of the fact that the collection of the data and the means of argumentation are determined by the legal questions. Unfortunately, there are a number of cases in which judicial psychiatric reports have led a life of their own in other (legal) fields, to the disadvantage of the person examined.

The court's report is of particular importance because it enables the court and the public prosecutor as well as the lawyer to form an idea about the state of mind of the suspect at the time of the crime with which he is charged. An increasing number of psychiatrists and psychologists are involved in reports being drawn up nowadays. Although in the past usually done by a psychiatrist, the advent of the psychologist reporting to the court (together with or separate from the psychiatrist) has heralded the arrival of multidisciplinary reporting. Other academic experts, who have taken over the field of psychological debate and test-diagnostics as a separate department, can also take on the role of examiner and reporter. At the request of the examining judge, the psychiatrist often first issues a short report concerning the desirability of having a judicial psychiatric report. It is also possible for the district psychiatrist to inform the examining judge of the necessity of such a report without having been asked in advance. The examining judge may then issue an order for ambulant or clinical research.

The questions put to the experts can vary in the way in which they are stated, but in principle will cover the following five questions:

1. Does the suspect show any signs of inadequate development and/or pathological illness of his psychic capacities?
2. If so, is there a relationship between this inadequate development and/or pathological illness and the crime of which he is accused?
3. If so, what is the nature of the relationship and to what extent does it exist?
4. To what degree can the suspect be said to be accountable for his actions?
5. Do you have any advice concerning the choice of treatment that may prevent a repeat of the crime of which he is accused?

The elaboration of these questions forms the evaluation of the accountability of the offender for the benefit of answering the question of diminished responsibility. The examination is thus intended in the first place to look at

the presence or absence of an inadequate development and/or a pathological disorder of the mind. These terms both appear in various places in Dutch law books and have an evident meaning for both the lawyer and the behavioural expert. Specific psychiatric diagnoses are not stated in the Dutch law itself. Inadequate development means that certain mental functions, such as the conscience and the emotional inner life, or intellectual powers have not grown to their full capacity. The term pathological disorder points to the presence of psychiatric symptoms, symptoms of mental illness. Psychiatric and psychological examination supplement each other in the sense that the psychiatrist makes the diagnosis according to the medical model with 'poor health' and 'good health' as points of reference, and the psychologist works from the point of deviation and deviating behaviour relative to a certain norm of healthy behaviour.

For the benefit of the Dutch court, another question is often added to those listed above, one derived from the M'Naghten-rule (1843) and used in many countries. This rule asserts that the suspect is mentally healthy unless proven otherwise. Two mental abilities need to be intact in the first place: awareness of the nature and the results of the criminal behaviour, and insight into its illegal nature. The element of free will can also be added to both these cognitive elements of human behaviour, so that no judicial choice needs to be made between determinism and indeterminism of the human spirit. The key question is: Is the person concerned less able to determine his own free will than the average person?

## **6 Diminished responsibility**

Central to the judicial psychiatric assessment and report, which can be both ambulant and clinical in implementation, is the degree of responsibility of the person being examined. The degree to which there is a relationship between the disorder and the crime (or crime charged) is decisive in that the person involved can bear less responsibility for his crime if the influence of the disorder is greater. It is the medical model that determines when someone has a broken leg and cannot walk even if one wishes to, and that thus determines when one is not responsible for one's illness. Nevertheless, this model is difficult to standardise, so evaluations are likely to differ in practice. If a judge has the idea that he or she is not able to hold the defendant fully responsible, he or she will ask the forensic behavioural expert for advice concerning the extent to which the suspect is amenable to their (the judge's) assessment.

What is important here is the degree in which the illness has driven someone to a certain delinquent behaviour. Judicially, illnesses and deficiencies are recognised as limitations to a person's free will, so that the

perpetrator is accounted less responsibility for (criminal) acts that were carried out (partly) as a result of illness. The juridical criterion for the psychic disorder is “having an impaired development and/or pathological disturbances of the psychic capacities”. By relating this criterion to the offender-patient, a unique depiction is created of the combination of the crime and its perpetrator. In this way it is possible to put offence, offender and the connecting psychic disorder within the legal grounds for a certain degree of responsibility.

Of course, this broad definition of psychic illness does not mean that these experts have *carte blanche* to diagnose as they see fit and instinctively allot someone a particular limitation (as in, “anyone who does such a thing must be mad”). Only when the diagnosis has been determined – assuming that it can be determined, because it is also possible that no disorder is found – will attention shift to the question if there is a relationship with the crime. The forensic method for this is, by assuming a certain intention and opinion on the part of the person and by way of presupposition, to link the found forensic psychiatric and psychological phenomena to these intentions and opinions. After that, it is the specific situation leading up to the crime that emphasises these characteristics of the perpetrator or even causes a drastic deterioration in his illness. The relationship between disorder and crime can be recognised in the motives of the perpetrator, the circumstances of the crime and its nature.

In the Netherlands, five grades of accountability are used, even though Dutch criminal law does not distinguish degrees of diminished responsibility. Of course, such a division into five levels does not do real justice to the complexity of the relationship between the crime and the disorder that is behaviourally possible. After all, the behavioural personality model works via continuity, and not via categories. But the fact that these five categories (and not, say, eight or ten) are used has to do with the fact that they provide judges with a practical division for the benefit of accountability. A distinction is made between undiminished responsibility, slightly diminished responsibility, diminished responsibility, severely diminished responsibility and irresponsibility.

Undiminished responsibility means that the person had complete access to his free will at the time of the crime with which he is charged and could therefore have chosen not to commit it. Irresponsibility means that the person concerned had no free will at all to make a conscious choice to satisfy his motives (disturbed as they may be) and needs. Irresponsibility means that the person cannot be held accountable for his acts, which means that punishment in itself is excluded and compulsory placement in a psychiatric hospital for the maximum period of one year will be indicated. The difference between diminished and severely diminished responsibility is that in the first, the role played by free will was greater and a correspondingly greater amount of punishment can be imposed. What is important here is the

determination of the moment when aspects of the disorder became manifest in the situation (“the scene of the crime”) that eventually led to the perpetration.

A behavioural, three-way division takes place in order to justify the polymorphousness of psychopathology and its influence on behaviour, where slightly diminished and severely diminished responsibility can be found on either side of diminished responsibility. Severely diminished responsibility entails a further reduction of free will as a result of a severe psychiatric illness or a situation-determined exacerbation in the mental clinical image. Certain stimuli from the scene of the crime will then have a specific effect on the state of mind of the perpetrator, often resulting in a reality-testing disorder that spontaneously dies off after some time (psychotic episode) or that provokes a psychosis. Separate from the severity of the psychiatric picture and/or the impaired development is the degree in which the offence could have been avoided by the patient, which is another factor involved in determining the limits of irresponsibility and diminished responsibility.

Slightly diminished responsibility means that there are a number of prominent characteristics that make the perpetrator more susceptible to committing crime, such as impulsiveness and anxiety. However, free will is only slightly limited in this case because the motives for the crime are the usual ones that can also be expected in the average person. In cases of slightly diminished responsibility, the person still has a degree of freedom of choice such that a considerable reduction in the chance of recidivism is not to be expected following treatment of the inadequate development or pathological disorder. Nevertheless, treatment, in combination with a (prison) sentence, can help reduce recidivism when given in the form of a special condition in the conditional part of the prison sentence, as long as the person concerned is motivated. The specific vulnerability factors in the personality can be treated, to keep delinquent impulses under better control and avoid situations conducive to crime.

## **7 Risk assessment**

Regarding custodial clinics, it has been apparent from the outset that risk assessment has to be carried out not only on the basis of static (non-variable) factors, but especially on the basis of dynamic (variable) ones. These factors must relate to the individual and his treatment as well as to his future and past. The emphasis here is on the evaluation of the treatment provided under a hospital order in the hope that it has improved the behaviour of the offender to such an extent that the inclination to re-offend has diminished. Static factors that determine a risk of recidivism in the future are inadequate

on their own because they fail to meet the objective of predicting this risk after treatment under a hospital order. They cannot be altered, such as the age at which the first crime was committed. On the other hand, they should not be ignored, because static factors have a powerful predicative value.

Risk assessment has a number of characteristics:<sup>8</sup>

1. Checklists with scales against which the answers are plotted;
2. These scales have been compared and tested on certain research groups, from which their standard is derived; in other words, they can be compared with one another;
3. The method is objective: the questions are always similar and asked in the same manner; the answers are evaluated on the basis of standard scores for the various groups that have been examined;
4. The information has been acquired in a structured manner and verified for completeness.
5. The information is clear as far as answers are concerned.

This method, however, also has its drawbacks. Specialists are needed, for example, who are specially trained to work out the tests and to translate the scores from the checklists into assessments about the individual. The validation of the checklists in the case of specific groups determines the way they are completed by other groups, who may occasionally interpret certain questions in a completely different manner or for whom the checklist is less applicable (I have in mind the difference between first offenders, offenders under a hospital order and persistently dangerous, long-term offenders under a hospital order). This validation also includes cut-off points; in other words, the degree of risk, deviation or illness accepted is arbitrary. These cut-off points are based on agreements made among experts themselves or between them and policymakers. A checklist should also contain enough dynamic factors if it is to be suitable for assessing the progress of treatment, otherwise an individual's prognosis will remain permanently dependant on his unchangeable past. The conclusions based on risk assessment therefore indicate the probability of future risks.

But clinical assessment of the 'risk of recidivism' posed by offenders under a hospital order is also based on probability. Clinical data, as well as behaviour in the ward and case history, are used to assign a certain degree of risk to a particular individual. On the one hand, this assessment appears to be more specific; additional personal information is taken into consideration, as situational factors and the nature of the crime can be immediately deduced from the case history of the individual. On the other hand, the expertise of the assessors can only be evaluated to a certain extent,

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<sup>8</sup> H.J.C. van Marle, 'Van gevaar naar risico: regelen in plaats van waarschuwen. Risk-assessment in de forensische psychiatrie' (2001) 43 *Tijdschrift voor Psychiatrie* 151 at 161.

as the number of years' experience is not representative and the standards they use to make their assessments cannot be made more explicit, as they are often based on a subjective form of expertise and training.

Another drawback is that a clinical assessment is usually made in an implicit and intuitive manner and does not involve any objectification standards. Often the risks that are taken into consideration during clinical assessments and the nature of their severity are uncertain. In any case, the clinical decisions can be used for an individual patient in a particular circumstance, in granting various forms of leave and privileges, for example. Risk assessment always involves a (quantifiable) probability margin, that of 'false positive' and 'false negative' predictions, of a specific instrument within a specific population over a specific period. That is why, in an individual case and on the basis of that probability, another, separate decision is required for the application of a specific intervention, which is, after all, bound by time and situation. The advantage of this 'clinical' decision, incidentally, is that it is standardised, since arguments and risk factors can be described in full.

Over the past few years, risk-assessment instruments have acquired considerable influence in the discussion on evaluating the risk of recidivism. Some custodial clinics already implicitly use assessment data in the recommendations they make to courts concerning extensions of hospital orders. Courts are therefore saddled with various evaluation models (under the same Penal Code) for convicted individuals. This affects the principles of equality before the law and legal certainty enjoyed by every offender under a hospital order. How should the information in the recommendation to extend a hospital order be interpreted and to what extent is it objective? By the way, it is amazing that till now risk assessment in the Netherlands has been limited to criminal law – in this case the evaluation of offenders under a hospital order. In my opinion, risk assessment is equally applicable to all those psychiatric patients who have been placed involuntarily in general psychiatric hospitals by means of a court order.

## **8 Debate**

The rules of the interface are that everyone is committed and thus knows both goals of the interpretation, but from their own professional point of view. Judges do not have to measure but they should know what certain measurements mean with regard to their case. Psychiatrists are not law experts but they should know that their answers to juridical questions have to fit into the juridical system. So they have to know the meaning and limitations of a sentence before they can give a practical advice, making permanent education among confrères necessary. Now that forensic

psychology, with its research emphasis on courtroom sessions, is making its way to the court, much criticism from that side has been voiced on the interface of law and forensic psychiatry. The main difficulty encountered by forensic psychology is that the concepts used in that interface cannot be measured, are not objective from an empirical point of view and are ill-defined. From my point of view this is not necessary, as the questions are answered within the juridical domain and are not suited for empirical research. The following will clarify this point of view.

From the behavioural sciences there is often criticism about the fact that forensic psychiatrists and psychologists use the phrases 'free will' and 'responsibility for the offence' freely, while there are no empirical measurements whatsoever for these concepts. My opinion is that these critics look only from the side of their own domain of knowledge to the interface of law and psychiatry, and do not speak the common language. The forensic examination is necessary to find answers to juridical questions and thus the ruling domain is the juridical. In this domain free will is a juridical and philosophical idea, not a 'thing' that can be measured in laboratory situations. The axiom of law is that it is there for everyone and exceptions should be few (for instance when a person's capacities to make decisions or control emotions are diminished by a psychiatric illness). For the law we are all the same and we all live under the same idea of free will. How free and how determined men are does not matter in this case; the reasoning starts with identifying the exceptions mentioned by the law itself, all others are equal in their decision making.

The same holds true with regard to the three degrees of diminished responsibility. These are very practical for judges, as they refer to different sanctions within the realm of criminal law. We have the prison sentence, detainment under a hospital order and a combination of the two. But in the psychiatric domain there are no measurements which can show the differences between these degrees in the examination of one person. Psychiatrists can draw conclusions about full responsibility (no mental disorders), total irresponsibility (a mental disorder has taken over the control of the mind of the patient, as in psychosis), and the intermediate area of diminished responsibility, where mental disorder and situational influences interact in an escalating process. Variations in the diminished responsibility, like slightly or severely diminished, are not measurable by psychiatric or psychological means. It is extracted from the findings of the forensic examination but weighed intuitively against other cases. At that moment the psychiatrist sits in the judge's chair, as he cannot motivate his conclusion on the basis of his own medical paradigm. It is an impressionistic conclusion, which has nothing to do with a medical attitude towards the patient and should be abstained from. The frontier of the interface has been reached.

The same problem is encountered in the reconstruction of the situation of the perpetrator and his offence. The psychiatrist works in the

past and tries to distil psychiatric 'facts' from the past and the present from the words of his examinee. How can they ever become real facts and what are they good for in court cases, in how far are they reliable? Here, too, the answer comes from the interface: a court examination is in the juridical domain. Facts gleaned from witnesses, perpetrators and experts are as good as they are; these facts are examined by experienced forensic experts and commented on by them as an advice to the court. And then the juridical ruling takes place in its own domain with its own criteria of justice, fairness and proportionality. Please note that it is an advice, so it brings with it the possibility of being rejected. Its contents should be clear and of sound judgement, the empirical facts well-clarified and shown in relation to other possible interpretations. If a suspect refuses to talk or denies the offence, no examination can take place, no answer found. As with any other patient in general practice, an examination is not possible if he does not co-operate, only circumstantial data can be known from other information. This is not enough information to turn up juridical answers about this person. Facts about the offence will not be found, as the forensic examination cannot be executed, but only the present state diagnosed. Psychiatric interpretations of the present to the past of the offence are not possible, as this past does not exist in the examining situation. Because in the interface the forensic psychiatric examination is 'patient-context-past'-oriented, in these cases the examination itself is invalid and cannot be used in court.

With regard to the enforcement of detention under a hospital order, risk-assessment instruments are particularly important in evaluating the treatment process, as they record differences over the course of time. We cannot afford to ignore these instruments, since failure to use them has been shown to affect our evaluation of danger and is therefore unethical with respect to the patient and the general public.<sup>9</sup> Those factors that can be altered during a treatment situation or during follow-up care are especially relevant for assessment in everyday situations. Historical factors cannot, after all, be changed. As a result, they cannot serve as a guiding principle for intervention, even though they are powerful predictors of future risks. That is why they must somehow be included in the everyday depiction, as their presence always entails an increased risk. A model in which static and dynamic factors are compared and correlated is therefore required for the clinical decision process.

Selecting treatment evaluation with the help of dynamic factors explicitly involves the choice of certain types of risk-assessment checklists,

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<sup>9</sup> W.M. Grove and P.E. Meehl, 'Comparative efficiency of informal (subjective, impressionistic) and formal (mechanical, algorithmic) prediction procedures: The clinical-statistical controversy' (1996) 2 *Psychology, Public Policy, and Law* 293 at 323.

namely those allowing enough variable factors to be checked which reflect the results of the treatment provided under a hospital order. The assessments made at various times during the treatment already provide information about the responsiveness of the relevant individual to the treatment. These measurement points, however, cannot replace daily decisions relating to the patient's behaviour, such as clinical supervision and placement in an isolation cell. Furthermore, the patient's cooperation is required for the completion of the checklists, which must be based on trends in the treatment and not on incidental moments. The knowledge and skills of staff with clinical experience is essential for daily departmental management.

### **9 Concluding remarks**

In the interface between law and forensic psychiatry the influence of modern examination techniques and risk assessment is growing increasingly. These techniques, however, are not forensic in the way that they can connect their empirical facts to the individual patient as the suspect who will be tried in a court of law. Their conclusions still need to be interpreted in the light of the juridical situation and the individual case history. The forensic behavioural experts are the interpreters. Their interpretation has its limits, as the emotional 'facts' should be reproducible in peer-review and the methods of examining and interpreting should be accepted by the relevant scientific field. The empirical sciences give more objectivity in their findings, but their influence still can be only auxiliary to the juridical reality and the daily practice of forensic treatment.

## A SUITABLE BOY: THE ABOLITION OF FEUDALISM IN INDIA

Barbara Pozzo\*

### Abstract

This article focuses on law and literature as a challenging tool in teaching courses in comparative law. Certain representative novels may provide important analytical instruments, especially in approaching legal systems that do not belong to the Western legal tradition but that involve a set of values profoundly rooted in a specific conception of society. In these instances, literature is used as a key in understanding the social impact of particular legal institutions, the nature of which seems difficult for European scholars to comprehend. This is particularly true in cases such as those in India, where the legal system is composed of different layers: the traditional, the religious and that of the colonial period.

The article examines a concrete literary example offered by Vikram Seth in his novel *A Suitable Boy*, in which the author deals with the debate about peasants' property in the form of land and about the abolition of the *zamindari system*, which had been introduced in India by the Mughals to collect land taxes from the peasants. It was continued by British rulers during the colonial period, but after independence in 1947 the system was abolished and the land was turned over to the peasants. To Westerners, the abolition of the *zamindari system* would seem to have been a sign of real independence and of the will to abolish feudalism. Nevertheless, the abrogation did not prevent the emergence of farm suicides in India, which have occurred since the middle of the 1990s.

Seth's novel allows us to witness firsthand the events that took place during the period when the law that put an end to the *zamindari system* was passed and to see with new eyes the genuine impact of such a reform.

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## 1 At first sight: a love story

*A Suitable Boy* is essentially a love story that centres on the efforts of the wife and mother, Rupa Mehra, to arrange the marriage of her younger daughter, Lata, to a 'suitable boy'. 'You too will marry a boy I choose' is the first line in the book, and the words are spoken firmly by Rupa Mehra to Lata on the day that the older daughter, Savita, marries Pran Kapoor. Though Lata, at 19 years old, appears to be a vulnerable college student, she is nevertheless determined to have her own way and not to be influenced by her strong-willed mother or her opinionated brother, Arun.

Ultimately, the story revolves around the choice Lata is forced to make between her suitors, Kabir, Haresh and Amit, but at the same time it examines the inner machinations of and the problems faced by four families: the Kapoors, the Mehras and the Chatterjis, who are all Hindus, and the Khans, who are Muslims.

The novel depicts in detail the lives of these families over a period of 18 months in the newly independent India; four family trees are also provided to help the reader keep track of the complicated and interwoven family networks. The Mehras live in a fictional town, *Brahmpur*, in a fictional state, *Purva Pradesh*, which along with other *real* Indian towns, like Calcutta, Delhi and Kanpur, forms a colourful backdrop for the emerging stories.

## 2 An important role for Law and Literature: many different stories

Though at its core the novel is about the search for a husband of suitable *Hindu* character for Lata, who is in love with a Muslim boy, Kabir, the plot is more complex.

Throughout the novel, the author examines important national issues of a political nature in the period leading up to the first post-Independence national election of 1952: namely, the psychological and economical effects of the partition between India and Pakistan on the refugees, as well as the status of lower caste peoples, such as the *jatav*. At the same time, this epic novel highlights various other issues including Hindu-Muslim strife, abolition of the *zamindari system*, land reforms and the empowerment of Muslim women. However, the book's most important tool by which to interpret Indian culture is the questioning of the generally acknowledged view held by Western lawyers concerning the role of the law in society.

*A Suitable Boy* is able to demonstrate many diverse aspects of Indian law as well as the persistence of old traditions, notwithstanding the introduction of legislative mandatory norms of varied significance.

Current Indian jurisprudence has written laws and a written Constitution, proclaiming the constitutional rights of Indian people, including Hindu, Islamic and others, although the *law in action* is still deeply rooted in ancient traditions.

As Patrick Glenn has pointed out: ‘It looks a lot like US law, yet there remain profound differences’.<sup>1</sup>

Though Indian law is clearly different, it is difficult to convey to students of comparative law *how* different it is, and to show how life and social behaviour in modern India is still conditioned by ancestral rules even if the *law in the books* seems highly similar to that of the Western legal tradition. This is something that does not correspond to the task of the classical introductions to comparative law, like those by René David, *Les grands systèmes de droit contemporains*, by Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* or by Gambaro and Sacco, *Sistemi giuridici comparati*.<sup>2</sup>

In this field, the role of *law and literature* in the teaching of comparative law could be of considerable interest, and Vikram Seth’s novel offers a number of indications in this regard.

From a comparative point of view, and for a better understanding of the struggle that the novel explores, it is important to remember the relevance of the newly fashioned Indian Constitution, which introduced a broad principle of non-discrimination among castes.<sup>3</sup>

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<sup>1</sup> H.P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press 2000) at 275.

<sup>2</sup> If we consider the state-of-the-art comparative law research on the Indian legal system, it is in fact to underline that it is not particularly rich if we exclude the chapters that we find in more or less all volumes of introduction to comparative law in general terms. Attention to the Indian legal system is nevertheless increasing. See e.g. G. Sharma (ed.), *An Introduction to Legal Systems of the World* (New Delhi: Deep and Deep Publications 2008); G. Sharma, *Ancient Judicial System of India*, (New Delhi: Deep and Deep Publications 2008); W. Menski, *Hindu Law: Beyond Tradition and Modernity* (New York: Oxford University Press 2003). See also the interesting volume D.R. Saxena (ed.) *Law, Justice and Social Change* (New Delhi: Deep and Deep Publications 1996) where different authors deal with the question of how law can introduce social change in India. A comparison between different conceptions of ‘law’ is at the core of an important volume by R. May, *Law and Society, East and West: Dharma, Li and Nomos, Their Contribution to Thought and to Life* (Stuttgart: Franz-Steiner-Verlag-Wiesbaden 1985).

<sup>3</sup> Art. 15 of the Indian Constitution introduced a Prohibition of discrimination on grounds of religion, race, caste or place of birth, stating: ‘Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to: (a) access to shops, public

The principles introduced by the Indian Constitution not only concern a general prohibition of discrimination but insist on a positive role of legislation in order to promote the most disadvantaged people. The more detailed Article 16 of the Indian Constitution foresees that the State may introduce provisions for the reservation of appointments or posts in favour of 'any backward class of citizens which, in the opinion of the State, is not adequately represented', and in particular for Scheduled Castes and Scheduled Tribes.<sup>4</sup> Scheduled Castes consist mostly of former *untouchables* (now known as *Dalits*, which means '*the oppressed*'), while Scheduled Tribes are indigenous peoples, isolated from mainstream society. Under the Indian Constitution, Scheduled Castes and Tribes are automatically allotted a reservation proportional to their share of the population: about 22.5%

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restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children'.

<sup>4</sup> Art. 16 of the Indian Constitution (Equality of opportunity in matters of public employment) foresees: 'Equality of opportunity in matters of public employment.- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. (4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.] (B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year. (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination'.

nationwide.<sup>5</sup> The notion itself of *untouchability* is abolished by the Constitution, while the enforcement of any disability rising out of it is considered an offence punishable in accordance with the law.<sup>6</sup>

In reading Vikram Seth's book, the lawyer is obliged to consider the effect of written law, even of a superior kind, like constitutional law, on the power and the strength of traditions, and especially on traditionally based divisions within society.<sup>7</sup>

One might recall that after India gained independence from Britain in 1947, the new Indian government planned to codify the law.<sup>8</sup> And far from being a univocal reaction to British colonial law, the Hindu Code was aimed at unifying in statutory form Anglo-Hindu law, and in particular the whole of family law and the law of succession. The new law was meant to establish a single statutory standard for all Hindus,<sup>9</sup> without distinction of caste. The draft was strongly opposed by the conservatives, for whom any code 'was anathema and also by those who were unprepared to give up the special customary laws of their locality'.<sup>10</sup>

Contentious debate followed the presentation of the Hindu Code in the Indian Parliament. In the end, a series of four major pieces of legislation were passed in 1955-56 and these laws form the first point of reference for modern Hindu law: the Hindu Marriage Act (1955), the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956) and the Hindu Adoptions and Maintenance Act (1956).

The novel provides important insights into these developments, which took place under Minister President Nehru and the first Law Minister of the Indian Republic, Dr. Ambedkar, 'the great, already almost mythical, leader of the untouchables'.<sup>11</sup> In particular, the novel explains not only the

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<sup>5</sup> See S. Pager, 'Comparisons in Color Consciousness Affirmative Action Targeting in the US, India, and France,' in B. Pozzo (ed.) *Multiculturalisms: Different Meanings and Perspectives of Multiculturalism in a Global World* (Bern: Stampfli 2008).

<sup>6</sup> Art. 17 (Abolition of Untouchability) foresees: "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of 'Untouchability' shall be an offence punishable in accordance with law'.

<sup>7</sup> It is worth noting that Rupa Mehra, Lata's mother, not only makes a strong distinction between Hindu and Muslim and – among Hindus – between different castes but also inside the 'right caste', in which she would like to choose between light-skinned and dark-skinned people a husband for her daughter.

<sup>8</sup> T. Weir (tr.), K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (New York: Oxford University Press 1998, 3<sup>rd</sup> ed.) at 318.

<sup>9</sup> Glenn, above n. 1 at 275.

<sup>10</sup> Zweigert and Kötz, above n. 8 at 318.

<sup>11</sup> V. Seth, *A Suitable Boy* (New York: Harper Collins Publishers 1994) 'Novel' at 1132. Dr. Bhimrao Ramji Ambedkar (1891–1956) rose from a community of 'untouchables,' to become a major figure in modern Indian history. On his role in

efforts to introduce a new Hindu Code but also the struggle of Ambedkar and Nehru to introduce new principles of law in defence of oppressed people:

In Delhi, in Parliament, opposition by Members of the Parliament from all sections of the House, including his own, forced him to abandon his attempt to pass the Hindu Code Bill. The legislation, very dear to the Prime Minister's heart – and to that of his Law Minister, Dr. Ambedkar – aimed to make the laws of marriage, divorce, inheritance and guardianship more rational and just, especially to women.<sup>12</sup>

The reader is then forced to look at these initiatives from a new perspective: the Hindu Code was not only a way to recast the old law after independence from British rule but was also a subject of controversy among Hindus themselves about the purposes of the new law in India.

With regard to untouchability, Seth unequivocally demonstrates the struggle between old traditions and new mandatory rules. Though untouchability had been abolished by the Constitution, the traditional approach to castes remained:

In the villages, the untouchables were virtually helpless; almost none of them owned that eventual guarantor of dignity and status, land. Few worked it as tenants, and of those tenants fewer still would be able to make use of the paper guarantees of the forthcoming land reforms. In the cities too they were dregs of society. Even Gandhi, for all his reforming concern, for all his hatred of the concept that any human being was intrinsically so loathsome and polluting as to be untouchable, he believed that people should continue in their hereditarily ordained professions: a cobbler should remain a cobbler, a sweeper a sweeper.<sup>13</sup>

Nevertheless, *A Suitable Boy* does not limit itself to describing the broad spectrum of life and social changes in newly independent India but goes into detail regarding a specific legal issue that concerns land reforms that were enacted in that period. The reforms were aimed at abolishing the *zamindari system*, which for centuries, and since the times of the Mughal, had dominated landlord-tenant relationships.

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post-independent India see C. Jaffrelot, *Dr. Ambedkar and Untouchability, Fighting the Indian Caste System* (New York: Columbia University Press 2005), in particular Chapters 7 and 8.

<sup>12</sup> Novel, *Id.* at 1104.

<sup>13</sup> *Id.* at 1131, where Seth quotes Gandhi on the very essence of Hinduism: 'One born a scavenger must earn his livelihood by being a scavenger, and then do whatever else he likes. For a scavenger is as worthy of his hire as a lawyer or your President. That, according to me, is Hinduism'.

### 3 The birth of the *Zamindari System* in India

The *zamindari system*<sup>14</sup> originated in India during Mughal domination.<sup>15</sup> Although the word *zamindar* is of Persian origin and means ‘the controller or holder of *zamīn*, or land’,<sup>16</sup> the use of it as a *legal* concept originated in India; the word is practically unknown in Persia.<sup>17</sup>

A *zamindar* in Mughal times was a ‘vassal in chief’ and *zamindari* was defined as ‘the right which belonged to a rural class other than, and standing above, the peasantry’.<sup>18</sup>

As a property right,<sup>19</sup> *zamindari* had, in the first place, specifically rural and agrarian associations. In the second place, legal definitions dating back to Mughal times stress the superior nature of *zamindari* right, in the sense that it was seen as being extended to the village rather than to any particular plot of land.<sup>20</sup>

Fundamental historical sources from the 15th and 16th century witness that peasants recognised the *zamindars* as proprietors and acknowledged their right to evict them and to give their land to others for cultivation,<sup>21</sup> although the chief objective of a *zamindar* in normal circumstances would have been to keep his peasants rather than to lose them.

It has been underlined that this right of eviction might originally have had little practical significance, as an abundance of land characterised the Mughal period, while later on this prerogative became a merciless instrument in the hands of the *zamindars* when the population increased rapidly under the British regime.<sup>22</sup> On the other hand, it is not certain whether the *zamindars* could legally force the peasants to remain on their lands.<sup>23</sup>

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<sup>14</sup> On the origin and evolution of the *zamindari* system, see I. Habib, *The Agrarian System of Mughal India, 1556-1707*, (Oxford: Oxford University Press 1999, 2<sup>nd</sup> ed.) at 169 ff., all of Chapter V is dedicated to the topic.

<sup>15</sup> On the Mughal invasion and domination of India, see G. Dunbar, *A History of India from the Earliest Times to the Present Day* (London: Nicholson-Watson Publisher 1942, 3<sup>rd</sup> ed.). My reference is to the Italian Translation: *Storia dell’India*, by F. Valori, 1961, at 181 ff.; P. Spear, *India, A Modern History* (Ann Arbor: The University of Michigan Press 1961). My reference is to the Italian translation, *Storia dell’India*, (Milan: Rizzoli 1970) at 149 ff.

<sup>16</sup> Habib, above n. 14 at 169.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 174.

<sup>19</sup> On the concept of *property*, according to Hindu Law, see *id.* at 169

<sup>20</sup> Habib, above n.14 at 173.

<sup>21</sup> *Id.* at 178.

<sup>22</sup> Dunbar, above n. 15, in the Italian version, at 538.

<sup>23</sup> Habib, above n. 14 at 178.

The purpose of *zamindari* was of course to provide possessors with an income.<sup>24</sup> This could derive from the land's products, as well as from holding back a share of the annual harvest, but also from other sources, such as the sale of milk.<sup>25</sup>

In this situation, agricultural production was not at all left intact in the hands of the peasants: it was creamed off by the land tax, with the government, central or provincial, taking the major share. The rest went to local landholders, with a small residue allotted to the villages collectively and from which corporate village life and its services were maintained. The actual cultivator was left with just enough to subsist on and with no reserve against famine.<sup>26</sup>

As in all feudal societies, the *zamindars* also had a significant social function: namely, that of defending their families and the peasants against the gangs of plunderers that frequently sacked Indian villages.<sup>27</sup>

At the same time and consequently, *zamindars* considered that they were entitled to levy a number of miscellaneous cesses, like *jalkar* and *balkar*, or levies on water and forest produce, and poll taxes on men, as well as taxes on marriages and births<sup>28</sup>:

In the end, almost throughout the Mughal empire there existed fiscal claims of the zamindars upon land lying within his zamindari, the claims being met either through cesses or levies on the peasants and others or through the holding of a portion of the land free revenue-free or through a cash allowance out of the revenue collected from the entire land by authorities.<sup>29</sup>

These taxes represented a large part of the *zamindar's* income, which was obtained on the basis of his proprietary right. But there was another important source of income, which arose out of his position as a servant of the State, 'a cog in the machinery of revenue collection'.<sup>30</sup> For his services, the *zamindar* received a 'subsistence' allowance, called *nankar*, ranging from 5 to 10 percent of the revenue, paid in money or in the form of revenue-exempt land.<sup>31</sup>

To people in rural areas, the government appeared mainly as a revenue-collecting agency. The cultivated land was recorded, the value of the crops was assessed and the share of the government was determined. The

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<sup>24</sup> *Id.* at 179.

<sup>25</sup> *Id.* at 180.

<sup>26</sup> P. Spear, *A History of India, Vol. 2, From the Sixteenth Century to the Twentieth Century* (London: Penguin Reprint 1990) at 49.

<sup>27</sup> Dunbar, above n.15, in the Italian version, at 538.

<sup>28</sup> Habib, above n. 14 at 181.

<sup>29</sup> *Id.* at 186.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

distinguishing feature of the Mughal period was that assessment was on the whole fairer and more accurate than it had been for some time previously, thanks to the work of Akbar's Hindu revenue Minister, Todar Mal.<sup>32</sup>

When the English arrived in the 18th century, they found only the remains of this system and 'they admired it in ruins'.<sup>33</sup> The initial result was that while feudalism in Europe was slowly declining during the 18th and 19th centuries as a way of structuring social and in particular agricultural relationships, the English rulers consolidated the *zamindari system* as an instrument of land administration that persisted into the 20th century.

#### 4 The British ruler

Classical Hindu law<sup>34</sup> was not based upon formal laws but rested on the works of private scholars, whose inspiration stemmed from the Vedas,<sup>35</sup> foundational scriptures that for the Hindus are the source of all manner of knowledge.<sup>36</sup>

The *dharmaśāstras*, or the *doctrine of proper behaviour*, was believed by Hindus to have at its very root a divine revelation,<sup>37</sup> and under British colonial domination this doctrine was used to form part of the legal system. This was formally established in 1772 by Governor-General Warren Hastings, who declared in his *Plan for the Administration of Justice* that 'in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to the Mohamedans and those of the Shaster with respect to the Gentoos shall invariably be adhered to.'

It has often been pointed out that British rulers in India adopted a respectful attitude towards ancient local traditions, without any political agenda of imposing the common law in the new colonies.<sup>38</sup> From this perspective we can understand the effort by British rulers to introduce *pandits*: namely, natives learned in the *dharmaśāstras*, who were attached to

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<sup>32</sup> Spear, above n. 26 at 49.

<sup>33</sup> Spear, above n. 14 from the Italian version, at 306.

<sup>34</sup> It is worth noting that Sanskrit contains no word that precisely corresponds to *law* or *religion* and, therefore, the label 'Hindu Law' is a modern convenience used to describe this tradition. On the differences between the concept of *dharma* and the *concept of law*, compare May, above n. 2

<sup>35</sup> Zweigert and Kötz, above n. 8 at 317.

<sup>36</sup> Compare R. Lingat, *Les sources du droit dans le système traditionnel de l'Inde - École Pratique des Hautes Études* (La Haye/Paris: Mouton & Co. 1967); Italian Translation by D. Francavilla : *La Tradizione giuridica dell'India*, (Milan : Giuffrè 2003) at 18 ss.

<sup>37</sup> On this concept, see L. Acquarone, *Tra Dharma, Common Law e WTO, Un'Introduzione al sistema giuridico dell'India* (Milan: CUEM 2006).

<sup>38</sup> On the impact of foreigners on the law in India, see Glenn, above n. 1 at 273.

the courts and to whom the British judges could ask particular questions. The substance of Hindu law was in fact implemented through early translations from Sanskrit texts, and reference to the pandits permitted English judges to understand the actual meaning of the provisions included. The British, however, misunderstood the *dharmasastras* as *codes of law* and failed to recognise that these Sanskrit texts were not intended as statements of positive law.

In any case, the institution of *pandit* was abandoned in 1864 and since then judges have made their own decisions, with the help of case-law and a number of law books. ‘The judges used prior decisions not only as a starting point for argument but as binding authorities in accordance with the principle of “stare decisis”’.<sup>39</sup> However, the application of the *stare decisis* and the necessity to express Hindu concepts using English legal terminology resulted in a ‘hybrid monstrosity’.<sup>40</sup>

The English maintained the same attitude in their administration of the new territories as well. Historians have stressed that the English as foreigners tried to rule Indians along Indian lines and largely through Indian agency, and their governing took the form of supervision rather than of detailed administration.<sup>41</sup> They strove to become the guardians of an ancient society, and as such their intention was to protect and to foster it.<sup>42</sup>

This does not mean there were no attempts to introduce into India typical characteristics of English common law and society. In particular, Charles Cornwallis, who was appointed Governor General in India in 1789, tried to introduce two features into India society, neither of which generated much notice, because neither was fully understood. One was the *rule of law*, which was outside Indian experience at that time and related to new tangled courts and therefore was not taken seriously. The class that would benefit from it had not yet arisen. The other was the introduction of English landlordism.<sup>43</sup> This had, in fact, a large impact on the cultivator, but its

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<sup>39</sup> Zweigert and Kötz, above n. 8 at 317.

<sup>40</sup> D. Derret, *Sir Henry Maine and the Law in India*, in *The Juridical Review*, 1959, at 47, republished in *Essays in Classical and Modern Hindu Law, Vol. II* (Leiden: E.J. Brill 1977) at 53. A similar opinion is expressed by B. Stein, *A History of India* (London: Blackwell 1998) at 213.

<sup>41</sup> Spear, above n. 26 at 93.

<sup>42</sup> *Id.* at 99.

<sup>43</sup> ‘Most of the little kings who survived the eighteenth century ... were ‘permanently’ settled as zamindars, the Persian term for landlord, on proprietary estates. Political relations were rechanneled into the new domain of proprietary law’. See N.B. Dirks, ‘From Little King to Landlord: Colonial Discourse and Colonial Rule,’ in N.B. Dirks (ed.), *Colonialism and Culture* (Ann Arbor: The University of Michigan Press 1992) at 177-182.

implications were not immediately realised. And it was, after all, an adjustment of relationships rather than a revolution within them.<sup>44</sup>

Under the *zamindari* or *permanent settlement* system, introduced around 1793, feudal lords were declared proprietors of the land on condition of fixed revenue payments to the British regime. Peasants were transformed into tenant farmers, and rents were collected by a range of intermediaries below the level of the *zamindars*.<sup>45</sup>

As far as taxation was concerned, the British took advantage of the semi-feudal agrarian system, with ownership of land concentrated upon a few individual landlords, these being the *zamindars*, which India had inherited from Mughal times.<sup>46</sup> In this system, the land revenue, which most closely affected the lives of the people, was collected along traditional lines, though with new personnel at the top and enhanced powers for the *zamindars*.

This situation is powerfully described by Vikram Seth:

The British had been happy to let the zamindars collect the revenue from land-rent (and were content in practice to allow them whatever they obtained in excess of the agreed British share), but for the administration of the state they had trusted no one but civil servants of their own race, selected in, partially trained in, and imported from England – or later on, brown equivalents so close in education and ethos as made no appreciable difference.<sup>47</sup>

The *zamindari system* evolved out of the British need for clearly identifiable owners of land, who in turn would owe them revenue. In this manner the British ruler was able to maintain – on the surface – the prior system of land administration and at the same time to transmit the legal categories that they knew from their own judicial system and that the common law had

<sup>44</sup> On the introduction by Cornwallis of the land reform with the *Permanent Settlement*, compare M. Edwardes, *A History of India. From the Earliest Times to the Present Day* (London: Thames and Hudson 1961); Italian Translation by G. Veneziani: *Storia dell'India, Dalle origini ai giorni nostri* (Laterza: Bari 1966) at 318 ss.

<sup>45</sup> R. Mearns, Access to Land in Rural India, Policy Issues and Options, *Policy Research Working Paper Series, No. 2123* (Washington D.C.: World Bank 1998) at 7.

<sup>46</sup> The same was done in the Fiji Islands. Compare S. Harzenski, 'Post-Colonial Studies: Terrorism, A History, Stage Two' (2003) *17 Temple International and Comparative Law Journal* 351, with special reference to footnote 174: 'This same mind-set characterized British endeavours in India where British governance brought about a transformation from little kings or palaiyakkarar, whose landholdings existed in fluid interrelationships to the other inhabitants of the community, to permanently settled landholders, zamindars, entitled, as in England, to possession of the land against all other claimants'.

<sup>47</sup> Novel, above n. 11 at 305.

developed on the basis of the Norman feudal system. When coupled with the gross inequities of the caste order in the village, this rapidly became a huge exploitative mechanism whereby a handful of landed gentry owned vast tracts of land and thereby held thousands of impoverished, landless people in a state of servitude.

Under British domination, there had already been a few initiatives to free the exploited peasants from the unbearable burden of this system. In Bengal, this effort resulted in the promulgation of the Bengal Rent Act in 1859, which conferred to peasants an occupation right to land if they were able to show that they had been working it for more than twelve consecutive years.

The *Panjab* and the *Oudh Tenancy Act* followed in 1868, but it was only with Independence in 1947 that major agricultural reform could take place.

### **5 The Zamindari system: through the looking glass of Law and Literature**

Vikram Seth's novel sheds light on the social significance of the *zamindari system* and on the profound impact of the reform that, by sweeping away this archaic system, prepared the path to the contemporary agrarian structure in India. The author achieves this through his depiction of the friendship that links two of the book's main characters: the Minister proposing the reform, Mahesh Kapoor, and the Nawab Sahib of Baitar, the head of the family Khan and an important *zamindar*.

The respect between the two friends, who try to understand the reasons behind each other's stance, is in stark contrast to the rancorous parliamentary discussion of the bill aimed at the abolition of the *zamindari system*.

Thus, in the novel, Mahesh Kapoor distinguishes the *person* from the *role* of the *zamindar*, admitting: 'There are zamindars and zamindars. Not all of them tie their friendship to their land. The Nawab Sahib knows that I'm acting out of principle'.<sup>48</sup>

The Nawab Sahib appears instead to acknowledge that his friend Kapoor is justified in his views regarding the revolution that he is initiating, notwithstanding the risks for him and his family. Seth describes the Nawab Sahib's state of mind during his attendance at one parliamentary hearing where the bill was being discussed:

...another reason why he was present in the House today was that he realised – as did many others, for the press and public galleries were all crowded – that it was a

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<sup>48</sup> *Id.* at 20.

historic occasion. For him, and for those like him, the impending vote was one that would – unless halted by the courts – spell a swift and precipitous decline. Well, he thought fatalistically, it has to happen sooner or later. He was under no illusions that his class was a particularly meritorious one. Those who constituted it included not only a small number of decent men but also a large number of brutes and an even larger number of idiots. He remembered a petition that the Zamindar's Association had submitted to the Governor twelve years ago: a good third of the signatories had used their thumb-prints.<sup>49</sup>

The Bill on the abolition of the *zamindari system* is strongly opposed by a Member of Parliament, Begum Abida Khan, the sister-in-law of the Nawab Sahib; she is rendered sufficiently sympathetic to the reader by the fact of being a Muslim woman fighting in a world of men and passionately dedicated to defending the social role of the *zamindars*:

...the fact is that it is we zamindars who made this province what it is – who made it strong, who gave it its special flavour. In every field of life we have made our contribution, a contribution that will long outlive us, and that you cannot wipe away. The universities, the colleges, the traditions of classical music, the schools, the very culture of this place were established by us. When foreigners and those from other states in our country come to this province what do they see – what do they admire? The Barsaat Mahal, the Shahi Darvaza, the Imambras, the gardens and the mansions that have come down to you from us. These things that are fragrant to the world you say are filled with the scent of exploitation, of rotting corpses. Are you not ashamed when you speak in this vein? When you curse and rob those who created this splendour and this beauty?<sup>50</sup>

Vikram Seth opposes Begum Abida Khan's speech on the social role of the *zamindars* by means of the Nawab Sahib's silent reflections:

...(he) was compelled to admit...Most zamindars – himself, alas, perhaps included – could hardly administer even their own estates and were fleeced by their munshis and money-lenders. For most of the landlords the primary question of management was not indeed how to increase their income but how to spend it. Very few invested it in industry or urban property. Some certainly, had spent it on music and books and the fine arts. ...But for the most part the princes and landlords had squandered their money on high living of one kind or another: on hunting or wine or women and opium. A couple of images flashed irresistibly and unwelcome across his mind. One ruler had such a passion for dogs that his entire life revolved around them: he dreamed, slept, woke, imagined, fantasized about dogs; everything he could do was done to their greater glory. Another was an opium addict who was only content when a few women were thrown into his lap; even then, he was not always roused to action; sometimes he just snored on.<sup>51</sup>

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<sup>49</sup> *Id.* at 304-305.

<sup>50</sup> *Id.* at 307-308.

<sup>51</sup> *Id.* at 305-306.

More than any doctrinal explanation, the confrontation between these two approaches and states of mind, one expressed vividly by Begum Abida Khan, the other sealed in the silence of the Nawab Sahib's thoughts, enable the reader to understand the struggle between century-long traditions that have supported art, music and education on the one hand, and the new upcoming era dominated by principles of equality and meritocracy on the other. In the words attributed to Prime Minister Nehru, the novel aims to emphasise this struggle between Old and New:

India is an ancient land of great traditions, but the need of the hour is to wed these traditions to science... We must have science and more science, production and more production. Every hand has to be on the plough and every shoulder to the wheel. We must harness the forces of our mighty rivers with the help of great dams. These monuments science and modern thinking will give us water for irrigation and also for electricity. We must have drinking water in the villages and food and shelter and medicine and literacy all around. We must make progress or else we will be left behind....<sup>52</sup>

In the novel, once approved by the Indian Parliament, the *Zamindari Abolition Act* is challenged in front of the High Court and then appealed to the Supreme Court<sup>53</sup>. Even here the lawyer is able to find a series of details that render the depiction of the legal frame fascinating as a reflection of the past world of British common law embodied in the judges who form the Court:

And now judges followed in their black gowns... They wore no wigs, and a couple of them appeared to shuffle slightly. They entered in order of seniority: the Chief Justice first, followed by the puisne judges whom he had assigned to this case. The Chief, a small, dry man with almost no hair on his head, stood before the central chair; to his right stood the next seniormost judge, a large, stooping man who fidgeted continually with his right hand; to the Chief's left stood the next seniormost judge of this bench, an Englishman who had served with the judicial service of the

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<sup>52</sup> *Id.* at 1354. On the real anti-*zamindari* attitude of Nehru, compare R.C. Sterne, 'Law & Literature: Civil Disobedience, Violence, and Colonial "Justice" in two Indian Novels' (1999) 24 *Legal Studies Forum* 527, especially at 548 ff.

<sup>53</sup> In fact, we know that during the 1950s several statutes aimed at abolishing the *zamindari system* and other intermediaries were enacted in the different States of India: e.g. in Bihar, Madhya Pradesh and Uttar Pradesh (1950), in Assam (1951) and in Rajasthan (1959). In some of these States, though not in others, the Acts were challenged in front of the Courts. Compare T. Besley and R. Burgess, 'Land Reform, Poverty Reduction and Growth: Evidence from India' (1998) *The Development Economics Discussion Paper Series No. 13 October 1998*. The same happened in Bengal and Bagladesh. See K.L. Rosenbaum, 'Rule of the Land: Life and Law in Bangladesh' (1999) 59 *Oregon State Bar Bulletin* 9.

Indian Civil Service and had stayed on after Independence; he was the only Englishman among the nine judges in the High Court at Brahmipur. Finally, at the wings, stood the two juniormost judges.<sup>54</sup>

In the discussion of the case, it is worth noting that the existence of a written Constitution emerges as the new differentiating feature of the Indian legal arena in comparison with the British common law system; it is a feature that places the Indian legal system in a situation closer to that of the United States as far as the presence of a written constitutional text is concerned. This appears clear in the dialogue that takes place among those lawyers in Court who try to challenge the validity of the Act under the Constitution, when the senior barrister, turning to his junior partner, says: 'Find me whatever American case-law you can on the point, and bring it here to me at eight tomorrow morning'.<sup>55</sup>

Vikram Seth explores with precision not only the minds of the *zamindars* sitting in Court, waiting for the decision that will decide the destiny of their fortunes but at the same time the attitude of the judges who have to take that paramount decision<sup>56</sup>. The reader might be led to think that the author of such descriptions must have received a legal education, not only because of the precise quotation of the Constitution articles but much more because of the intriguing debate between Bench and Bar during the discussion of the case; it clearly indicates how much was at stake and the profound reasons that support the different legal arguments.

When the critical moment arrives, the author's writing style is such that it transports the reader to the Courtroom where the Chief Justice has just entered:

The Chief Justice looked to left and right, and the chairs were moved forward. The Court Reader called out the numbers of the several conjoined writ petitions listed "for pronouncement of judgement". The Chief Justice looked down at the thick wad of typed pages in front of him, and riffled through them absently. Every eye in court rested on him. He removed the lace doily from the glass in front of him, and took a sip of water. He turned to the last page of the seventy-five-page judgement, leaned his head to one side, and began reading the operative part of the judgement. He read for less than half a minute, clearly and quickly: "The Purva Pradesh Zamindari Abolition and Land Reform Act does not contravene any provision of the Constitution and it is not invalid. The main application, together with the connected

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<sup>54</sup> Novel, above n. 11 at 743.

<sup>55</sup> *Id.* at 754.

<sup>56</sup> This is put splendidly in the mouth of the Senior Barrister, with this wording: 'It is probable that no case of similar significance from the people of this state has been fought in this court before, either under the emblem of the Ashoka lion or under the lion and unicorn'. Novel, at 744.

applications, are dismissed. It is our view that parties should bear their own costs, and we order accordingly”.<sup>57</sup>

When the Chief Justice finishes reciting the judgement, the reader is there in the Courtroom: like the rest of the onlookers, he rises when the judges leave and he sees the Raja of Mahr, one of the most arrogant and uneducated *zamindars* depicted in the novel, wondering:

But aren't they going to read the judgement? ...Have they postponed it? He could not grasp that so much significance could be contained in so few words. But the joy on the government side and the despair and consternation on his own brought home to him the full import of the baleful mantra. His legs gave way; he pitched forward onto a row of chairs in front of him and collapsed on the ground; and darkness came over his eyes.<sup>58</sup>

In the novel, the Supreme Court judges agree on the constitutional validity of the *Zamindari Acts*,<sup>59</sup> but the moral of the story leaves bittersweet taste.

## 6 The persistence of old traditions: a look into reality

Vikram Seth does not leave the reader with a happy, hopeful ending. It is true that after Independence a new Constitution is introduced that renders all Indian citizens equal; a statute is passed that abolishes the feudal structure of the land and is aimed at enabling peasants to cultivate their own land; and the same statute is confirmed in its validity by the Supreme Court. However, the novel also tells of the illegal manoeuvres that the expropriated *zamindars* conceived in order to frustrate the aims of the Act, according to which five years of continuous tenancy would have been considered enough to establish the labourer's right to land: 'The idea is to move the tenants around...Keep them running – this year this field, next year, that'.<sup>60</sup> Hence, nobody would ever have been able to demonstrate five years of continuous tenancy.

As the novel clearly illustrates, the problem was strictly connected to that of land registration. Most of the *zamindars'* records were kept by local clerks. Some of the records were poor and many of the clerks were corrupt. A dishonest clerk could quickly produce a new record of tenancy, and fraudulent and conflicting claims appeared everywhere.<sup>61</sup>

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<sup>57</sup> *Id.* at 819-820.

<sup>58</sup> *Id.* at 820.

<sup>59</sup> Novel, above n. 11 at 1464: 'The judges of the Supreme Court had agreed that the *Zamindari Acts* were constitutional; they were in the process of writing their judgement, which would be announced to the world at large in a few days.'

<sup>60</sup> *Id.* at 585.

<sup>61</sup> See Rosenbaum, above n. 53 at 2.

In fact, the entering into force of the Act has led in only a few cases to substantial justice: land reforms in India have divested princes and large landowners, who owned huge estates of 10,000 to 20,000 acres, of their hereditary property. The ones who have gained are the medium-size prosperous farmers in the immediately lower ranks, not the people who till the soil. Former feudal lords still own hundreds of acres of land acquired or held either by exploiting legal loopholes or through illegal schemes.<sup>62</sup>

As recent research by the World Bank has pointed out, the cost of the abolition of intermediaries was high: the heavy compensation paid to former *zamindars* enabled many of them to become rich agro-industrialists, and many acquired ownership rights over land they did not previously own. These early reforms left substantially unchanged the inequalities in land holdings and the precarious position of sharecroppers and agricultural labourers.<sup>63</sup>

The implementation of *tenancy reforms* has generally been weak, non-existent or counterproductive, resulting in the eviction of tenants and their rotation among landlords' plots to prevent them acquiring occupancy rights, as well as a general worsening of their tenure security.<sup>64</sup>

Even today we should again question the real role of legislation in India: statutes that attempted to ban tenancy outright, as in Uttar Pradesh, Orissa and Madhya Pradesh, had a particularly adverse effect and inevitably led to concealed tenancy arrangements being even more informal, shorter and less secure than they had been prior to reform.<sup>65</sup>

This does not mean that legal reforms designed to increase tenure security for tenants are bound to fail. They can succeed provided that sufficient attention were paid to the institutional conditions required for their successful implementation and if the balance of power shifts sufficiently in favour of tenants.

In West Bengal, the most notable aspect of the reform process was not legislative change – many of the central provisions had been on the statute books since the 1950s – but political change at the State level, reinforced by effective institutions at the local level. With popular support and local political representative bodies, well-publicised land settlement camps moved from village to village, updating land records and offering tenants the right to register their tenancies at the same time. This concerted effort between government and citizens' representative bodies helped to

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<sup>62</sup> Land Research Action Network, *Land Reform in India, Issues and Challenges* <[www.landaction.org/display.php?article=57](http://www.landaction.org/display.php?article=57)> (accessed January 21 2003).

<sup>63</sup> Mearns, above n. 45 at 11.

<sup>64</sup> *Id.* at 12.

<sup>65</sup> *Id.*

bring about a significant shift in the bargaining power of tenants in relation to landlords, and was ultimately the key to success.<sup>66</sup>

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<sup>66</sup> *Id.*

## ECLECTICISM IN LAW AND ECONOMICS

*Alessandra Arcuri\**

### **Abstract**

As the popularity of ‘law and economics’ is rapidly increasing, this essay is an invitation to pause and reflect on its methodology. Mainstream law and economics is generally associated with a paradigm that embraces rational choice theory as the theoretical grid that best understands human behaviour and efficiency as the primary goal to be achieved by legal rules. This essay contends that the mainstream paradigm is inadequate because it cannot deal with a series of issues relevant for the understanding of legal-economic questions. The limits of rational choice theory employed as an *exclusionary* mode of analysis and of efficiency, considered to be the *ultimate* and *only* goal for policymakers, are thereby identified. Notably, the critiques formulated do not imply a rejection of rational choice theory altogether; rather, it is suggested that other theories may well enrich the analytical apparatus of L&E. It is further argued that an approach labelled ‘eclecticism’ is most desirable where eclecticism is understood to mean a paradigm open to different methodologies, doctrines, and styles. Before concluding that eclecticism is a better approach, the criticisms that such an approach may attract are considered. Drawing on the meaning of the word ‘eclectic’, it is concluded that this approach is suitable for an economic analysis of law. Finally, it is shown that law and economics scholars to a certain extent already practise eclecticism; hence, the real issue may be more a question of acknowledging its endorsement rather than advocating for it.

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## 1 Introduction

Law and economics (hereinafter L&E) is today a well-established and successful field of study. Success notwithstanding, L&E also attracts harsh critiques, and the relationship between legal scholars and legal-economic scholars is often problematic. One reason underlying this uneasy relationship may be that L&E is largely perceived as a monolithic intellectual enterprise, dominated by a bizarre concept of rationality and by an obsession with efficiency. But is L&E as uniform as its discontents allege? The answer depends on the way L&E is defined.

Most legal-economic scholars arguably agree that L&E is the application of economic analysis to any area of law;<sup>1</sup> the definition of economic analysis, however, is contentious because of the different approaches that characterise this discipline. One commonly drawn divide is between mainstream and heterodox economic theory: the former primarily employs the tools of neoclassical economics,<sup>2</sup> whereas the latter is open to pluralism in relation to the techniques of inquiry.

In accordance with the aforementioned distinction, L&E is labelled 'mainstream' when it endorses rational choice theory as the sole mode of analysis, and efficiency as the exclusive focus of the inquiry.<sup>3</sup> Let me emphasise, however, that it is beyond the scope of this contribution to assess empirically whether what is commonly regarded as mainstream is currently the prevailing paradigm.<sup>4</sup> This jargon is used simply because L&E has in important respects endorsed the neoclassical paradigm, as is evidenced by a number of definitions to be found in fundamental texts of L&E; we read for instance that L&E is 'the application of the rational choice approach to law'<sup>5</sup>

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<sup>1</sup> Some authors have endorsed a somewhat narrower definition in which law and economics is viewed as 'the application of economic analysis to any area of the law except those areas where its application would be obvious.' T.S. Ulen and N.M. Garoupa, 'The Market for Legal Innovation: Law and Economics in Europe and the United States', *University of Illinois Law and Economics Research Paper No. LE07-009*, available at SSRN: <<http://ssrn.com/abstract=972360>> at 13. This definition may not be shared by the majority of scholars, who still consider competition law or economic regulation to be classical law and economics topics.

<sup>2</sup> The neoclassical paradigm rests on a number of assumptions; primarily, actors are assumed to behave rationally and wealth or welfare maximisation serves as the main framework of analysis.

<sup>3</sup> L. Kaplow and S. Shavell, *Fairness versus Welfare* (Cambridge: Harvard University Press 2002).

<sup>4</sup> The question of what can be considered mainstream today has been recently investigated by A. Hatzis, *Norms and Values in Law and Economics* (London: Routledge 2008).

<sup>5</sup> H. Kerkmeester, 'Methodology: General' in B. Bouckaert and G. De Geest (eds.) *Encyclopedia of Law and Economics* (Cheltenham: Edward Elgar 1999) 383 at 384.

or that it ‘relies on the standard economic assumption that individuals are rational maximizers ...’.<sup>6</sup>

This essay takes a critical stand on mainstream L&E as defined above and demonstrates that the *narrow focus* on efficiency and rational choice theory pays a disservice to what could be a fruitful and truly interdisciplinary study of the legal phenomenon. It is further argued that an approach here termed as ‘eclecticism’ is most desirable where eclecticism is understood to mean a paradigm open to different methodologies, doctrines, and styles. Finally, it is shown that L&E scholars to a certain extent already practise eclecticism; hence, the real issue may be more a question of acknowledging its endorsement rather than advocating for it. The main thesis of this essay is thus twofold and investigates whether: (1) eclecticism constitutes a better paradigm for L&E scholarship and (2) legal-economic scholars already employ an eclectic paradigm to some extent.

The essay is structured as follows: After this brief introduction, section 2 provides an overview of the history of law and economics, which serves to show that since its origin the field has rested on a paradigm broader than that of the mainstream and that new trends tend to embrace a broader paradigm as well. In section 3, the main problems inherent to the mainstream paradigm are discussed and grouped into two categories: ‘lacunae’ and ‘anomalies’. Further, in section 4, efficiency as a supreme normative criterion is criticised. Section 5 briefly addresses the potential problems related to eclecticism. In this context, Ronald Coase’s critique of institutional economists comes to mind: he maintained they were being anti-theoretical.<sup>7</sup> Could eclecticism also be criticised for analogous reasons? With an assessment of all the arguments, the essay concludes that there is no justification to keep the focus of L&E only on efficiency and to restrict the mode of analysis to rational choice theory; eclecticism in L&E can, and arguably already does, constitute an important building block of contemporary legal scholarship.

## 2 A brief history of law and economics

A discussion of the history of L&E is founded on a paradox: Tracing the origins of L&E largely depends on how the field is defined, and yet defining the field also depends on how its history is perceived. The paradox is

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<sup>6</sup> F. Parisi, ‘Positive, Normative and Functional Schools in Law and Economics’ in J.G. Backhaus (ed.) *The Elgar Companion to Law and Economics* (Cheltenham: Edward Elgar 2005) 58 at 61.

<sup>7</sup> R.H. Coase, ‘The New Institutional Economics’ (1984) 140 *Journal of Institutional and Theoretical Economics* 229.

overcome by acknowledging at the outset that the definition of L&E as a field of study and its history are as much intertwined as contested subjects.

While L&E is commonly associated with the Chicago School, here it is contended that this field of study is much broader and its origins date back at least to Hume, if not to Plato, as some have argued.<sup>8</sup> L&E is generally characterised as being instrumentalist and consequentialist because under this approach the law is studied in relation to its effects;<sup>9</sup> more specifically, most L&E scholars view the law as a system of incentives that to different degrees shape people's behaviour and accordingly may or may not achieve certain goals. Given this point of departure, one can understand why David Hume has been considered by many to be one of the forerunners of L&E;<sup>10</sup> a convincing example of the nexus between Hume's thought and the L&E approach is found in his *Treatise of Human Nature*, where the origin of government is explained as instrumental to achieve cooperation within a large group of self-interested people that without government would fall victim to collective action problems.<sup>11</sup> Cesare Beccaria, Jeremy Bentham, and Adam Smith follow suit and are widely referred to as the most notable forerunners of the economic analysis of law. As is well known, these thinkers have studied the legal apparatus through the analytical lenses of utilitarianism: Beccaria is best known for his *On Crime and Punishment*, where he stressed the deterrent function of the sanctions, a revolutionary concept in his own time; Bentham is remembered for his work on criminal law and more generally for being 'the first economist of non-market behaviour.'<sup>12</sup>

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<sup>8</sup> The following quote from Plato's *Nomoi* seems to capture best the nexus between Plato's thought and contemporary L&E scholarship: 'This is what the law-maker must often ask himself: What is my purpose? Do I indeed achieve this or rather miss my goal?', as quoted by Drechsler, Plato, in J. G. Backhaus (ed.) *The Elgar Companion to Law and Economics*, above n. 6 at 635.

<sup>9</sup> This conceptualisation is close to that of Keith N. Hylton, who has argued that L&E 'views law from an instrumentalist perspective. That is a perspective that seeks to determine the function of law and the manner in which it solves the social problems thrown before it.' K.N. Hylton, 'Calabresi and the Intellectual History of Law and Economics,' *Working Paper Series Law and Economics 04-04*, Boston University, School of Law (2004) at 1.

<sup>10</sup> See for instance E. Mackaay, 'History of Law and Economics', in and De Geest (eds.) above n. 5, 65.

<sup>11</sup> D. Hume, *A Treatise of Human Nature* (1739) Book III(ii) 7, available at: <<http://etext.library.adelaide.edu.au/h/hume/david/h92t/>>.

<sup>12</sup> R.A. Posner, 'The Law and Economics Movement: From Bentham to Becker', quoted in F. Parisi and C.K. Rowley (eds.) *The Origins of Law and Economics: Essays by the Founding Fathers* (Cheltenham, U.K. and Northampton, MA: Elgar 2005) 328.

Adam Smith's passage on the 'invisible hand', from his celebrated *The Wealth of Nations*, is widely recognised as being one of the first articulations of the principle of the good functioning of the free market. The work of Smith, however, has been interpreted and invoked in different ways and these differences are emblematic of the heterogeneity of thinking that characterises contemporary L&E and, more generally, economics.<sup>13</sup> Some authors have mainly focused on the parts of the *Wealth of Nations* more closely related to rational choice analysis to the extent that some today talk of a 'Chicago Smith.'<sup>14</sup> The words of George Stigler capture this approach well:

So Smith was successful where he deserved to be successful – above all in providing a theorem of almost unlimited power on the behavior of man. His construct of the self-interest-seeking individual in a competitive environment is Newtonian in its universality. That we are today busily extending this construct into areas of economic and social behavior which Smith himself gave only unsystematic study is tribute to both the grandeur and the durability of his achievement.<sup>15</sup>

In contrast, others consider the entire body of Smith's oeuvre to be relevant for L&E, including *The Theory of Moral Sentiments* and *Lectures on Jurisprudence*, in which the humanistic and moral underpinnings of Smith's philosophy are emphasised.<sup>16</sup> For instance, it has been noted that 'Adam Smith was not an economist offering a materialist vision of humankind's progress based on the *homo economicus* assumption. Smith was a moral philosopher modelling a complex coevolution of individuals within a

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<sup>13</sup> For an overview, see R.P. Malloy and J. Evensky, *Adam Smith and the Philosophy of Law and Economics* (Dordrecht, London: Kluwer 1994); for an analysis of different understandings of Smith within the Chicago School see S.G. Medema, 'Adam Smith and the Chicago School' *Working Paper Series* (August 2007); available at SSRN: <<http://ssrn.com/abstract=902220>>.

<sup>14</sup> J. Evensky, "'Chicago Smith" versus "Kirkaldy Smith"' (2005) 37 *History of Political Economy* 197-203, also quoted in S.G. Medema, above n. 13.

<sup>15</sup> G. Stigler, 'The Successes and Failures of Professor Smith' (1976) 84 *Journal of Political Economy* 1199 at 1212.

<sup>16</sup> R.P. Malloy, 'Invisible Hand or Sleight Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics' (1988) 36 *The University of Kansas Law Review* 209; for a reply to Malloy see R.A. Posner, 'The Ethics of Wealth Maximization: Reply to Malloy' (1988) 36 *The University of Kansas Law Review* 261; R.P. Malloy, 'The Merits of the Smithian Critique: A Final Word on Smith and Posner' (1988) 36 *The University of Kansas Law Review* 267. Scholars belonging to what McCloskey has named the Old Chicago School (e.g. Frank Knight, Jacob Viner, and Ronald Coase) may also be considered to have subscribed to such a broader interpretation of Smith's philosophy; for a discussion see S.G. Medema, above n. 13; in this context see for instance the essay of Coase: R.H. Coase, 'Adam Smith's view of man' (1976) 19 *Journal of Law and Economics* 529.

*simultaneous system of social, political, and economic institutions*. He believed that this model would contribute to our understanding of the flow of humankind's history and its prospect' (emphasis added).<sup>17</sup> Different views on Smith's role in the history of L&E clearly reveal the contrasting ways of conceptualising this field of study. Given the main thesis defended in this essay, it should come as no surprise that here Smith's entire work is considered of value for L&E, including, for instance, his concerns with regard to individual liberty and human dignity.

During the mid-19<sup>th</sup> and the early-20<sup>th</sup> centuries, the relationship between law and economics was also widely studied, though in a more heterogeneous and cosmopolitan fashion than it has been during the Chicago era. In this context, worthy of mention is the German historical school, active in Europe, as well as institutional economists in the U.S.<sup>18</sup> These schools of thought and their relationship with L&E have been studied by Heath Pearson, who has brought to light a link that had gone largely unnoticed;<sup>19</sup> here it suffices to mention the scholarly focus on the allocation of property rights, along with the functioning of legal institutions, their influence on the economic system, and the detachment from the concept of efficiency. In relation to the latter, institutionalists argued that efficiency should not be used as a supreme normative criterion to determine the allocation of rights: 'because efficiency is a function of rights and not the other way around, it is circular to maintain that efficiency alone can determine rights.'<sup>20</sup>

While John Commons, considered by some to be the founding father of institutional economics, was one of the first to use the catch phrase 'Law and Economics' in an article published in the *Yale Law Journal* in 1925,<sup>21</sup> it is undeniable that 'it is the Chicago School that is primarily responsible for the mushrooming of the economic analysis of law in law schools, economics

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<sup>17</sup> Evensky, above n. 14, at 203.

<sup>18</sup> For an author arguing that this group of scholars constituted an important building block in the L&E movement see H. Hovenkamp, 'The First Great Law & Economics Movement' (1990) 42 *Stanford Law Review* 993. For a critical view on this reading of the history of L&E see N. Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press 1995).

<sup>19</sup> H. Pearson, *Origins of Law and Economics: The Economists' New Science of Law, 1830-1930* (Cambridge: Cambridge University Press 1997); note also that institutionalists shared several similarities with legal realists; for a discussion of the relationship see N. Mercuro and S.G. Medema, 'The Jurisprudential Niche of Law and Economics' chapter 1 in *Economics and the Law: From Posner to Postmodernism and Beyond* (Princeton, New York: Princeton University Press 2006, 2<sup>nd</sup> edition).

<sup>20</sup> S.G. Medema, N. Mercuro, and W.J. Samuels, 'Institutional Law and Economics' in Bouckaert and De Geest (eds.), above n. 5, 418 at 440.

<sup>21</sup> J.R. Commons, 'Law & Economics' (1925) 34 *Yale Law Journal* 371.

departments, and courtrooms across the US and even around the world.<sup>22</sup> The Chicago School, as noted elsewhere, has a metageographical connotation in that it evokes a certain way of thinking, most importantly laissez-faire, generally endorsed by mainstream L&E scholars.<sup>23</sup> Yet it is unquestionable that Chicago as a geographical location has written an important page in the history of L&E, largely because of the prominent scholars holding a position at the University of Chicago's Department of Economics; among these have been Frank Knight, Milton Friedman, Aaron Director, Ronald Coase, Gary Becker, George Stigler, and Richard Posner, as well as Armen Alchian, Harold Demsetz, and Cass Sunstein.

In 1946, L&E received an important boost when Aaron Director was hired at the Law School; he established for the first time a programme in L&E and in 1958 founded the *Journal of Law and Economics*. As is widely known, one regular contributor to the journal was no less than Ronald Coase, who in 1959 therein published 'The Federal Communication Commissions,' where he first articulated his idea that later became known as the Coase Theorem. In the following year he published 'The Problem of Social Costs,' the article with which the Coase Theorem is most commonly associated, and in 1964 Coase became the editor of the journal. The ideas underpinning the Coase Theorem – never actually formalised as a theorem by Coase – are key concepts in L&E scholarship and have generated rich intellectual debates as well as earning Coase the Nobel Prize in economics in 1991.<sup>24</sup> It is important to remember that Coase by drawing attention to the concepts of transaction costs<sup>25</sup> and the reciprocal nature of the harm has revolutionised the way of thinking in L&E.

Yet the hard-core of the Chicago School, at least if we subscribe to the view that Chicago represents 'the extreme vanguard of neoclassicism,'<sup>26</sup> is constituted by the trio George Stigler, Gary Becker, and Richard Posner. The latter is by now an icon of the L&E movement, and to some extent his

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<sup>22</sup> S.G. Medema, 'Chicago Law and Economics' *Working Paper Series* (June 2003), at 2; available at SSRN: <<http://ssrn.com/abstract=560941>>.

<sup>23</sup> A. Arcuri and R. Pardolesi, 'Analisi Economica del Diritto' (Economic Analysis of Law) in *Enciclopedia Giuridica* (Milan: Giuffrè 2002) 7.

<sup>24</sup> The Nobel Prize was also awarded for Coase's theory of the firm; R.H. Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

<sup>25</sup> In this context, it is ironic that a world of zero transaction costs has been named Coasean; in 'The Problem of Social Costs', transaction costs are taken into account and their role is discussed from the outset; furthermore, Coase has stressed how removed it is from reality to characterise a world of zero transaction costs as Coasean; see his 'Notes on the Problem of Social Costs' in R.H. Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press 1988).

<sup>26</sup> W.J. Samuels, 'The Chicago School of Political Economy: A Constructive Critique,' in W.J. Samuels (ed.), *The Chicago School of Political Economy* (New Brunswick: Transaction Press 1993) 1 at 4.

work in L&E is a continuation of the research agenda promoted in the field of economics by Gary Becker, who was awarded the Nobel Prize in economics in 1992 for ‘having extended the domain of microeconomic analysis to a wide range of human behavior and interaction, including non-market behaviour.’ To gain a sense of Posner’s approach and of his outspoken imperialistic ambitions, consider this passage in his celebrated *Economic Analysis of Law*: ‘... [y]ou name the legal field and I will show you how a few fundamental principles of price theory dictate its implicit economic structure.’ From here emerges the distinction, articulated by Posner himself, between old and new L&E, where the former refers to the economic study of areas such as antitrust and economic regulation and the latter to any field of law ranging from tort to family law. With Judge Posner and the hardcore Chicago School, we witness the ‘consecration’ of the mainstream paradigm. Because this part of history is well known, I will note only in passing that Posner is as much admired as contested; unsurprisingly, his assessment in terms of wealth maximization of delicate issues such as slavery, trade in babies, and forms of segregation has attracted the fiercest critiques.<sup>27</sup>

At the risk of sounding repetitive, it is worth emphasising that equating Posnerian analysis with the Chicago School is as reductivist as equating L&E with it. Even if much research in L&E is close to the approach endorsed by Posner, many groups of L&E scholars employ a far broader paradigm: think of institutionalists, neo-institutionalists, Austrians, and the emergence of a group of self-described behavioural L&E scholars.<sup>28</sup> The role of these schools of thought within the L&E intellectual enterprise has been widely discussed.<sup>29</sup> While controversies remain in relation to what should and should not be included in the domain of L&E analysis, it is a fact that the majority of self-described L&E scholars have opted for an inclusive approach that reaches far beyond the Posnerian L&E paradigm. To

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<sup>27</sup> R.P. Malloy, ‘Is Law and Economics Moral? Humanistic Economics and a Classical Liberal Critique of Posner’s Economic Analysis’ (1990) 24 *Valparaiso University Law Review* 147. See also A.A. Leff, ‘Economic Analysis of Law: Some Realism about Nominalism’ (1974) 60 *Virginia Law Review* 451. Here we read that ‘the closest analogue to the *Economic Analysis of Law* is the picaresque novel’ but also that the book is constituted by ‘four hundred pages of tunnel vision.’

<sup>28</sup> There are also scholars who do not belong to any schools of thought, who adopt an approach more open than the one endorsed by Posner, and who are considered to be highly significant scholars in L&E; think for instance of Guido Calabresi. In this respect, some have talked of a New Haven school; however, Calabresi and other scholars working at Yale have been sceptical with regard to such a label.

<sup>29</sup> See for instance Mercurio and Medema, above n. 19, and for a short overview E. Mackaay, ‘Schools: General’ in Bouckaert and De Geest (eds.), above n. 5, 402-415 and also Mackaay, above n. 10.

paraphrase Jacob Viner and define L&E as ‘what L&E scholars do,’<sup>30</sup> we may conclude that the contemporary L&E paradigm is indeed much broader than that of the mainstream.

In the following sections, the main ideas behind rational choice theory and efficiency are discussed, and a number of arguments are presented, showing why a paradigm resting *only* on these notions is not able to exhaust the L&E camp of investigation.

### 3 Anomalies and lacunae in rational choice theory

Though it has been variously defined,<sup>31</sup> most scholars agree that rational choice theory, based on methodological individualism, assumes individuals to have transitive preferences and to maximize expected utility under constraints.<sup>32</sup> The subject of rational choice theory is also known as *homo oeconomicus* or, in the playful words of Chicago economist Deirdre McCloskey, Max U:<sup>33</sup>

... among the most surprising and irritating features of economics (when people figure out what is going on) is its obsessive, monomaniacal focus on a Prudent model of humanity. It’s hard for outsiders to believe. Everything, simply everything, from marriage to murder is supposed by the modern economist to be explainable as a sort of Prudence. Human beings are supposed to be calculating machines pursuing Prudence and Price and Profit and Property and Power—“P

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<sup>30</sup> Jacob Viner stated that Economics is what economists do; while at first glance this definition may appear to be a parody, it is in my view among the most accurate.

<sup>31</sup> Korobkin and Ulen have identified various versions of rational choice theory and have built a taxonomy including thin and thick versions. The thinnest version, endorsed by a young Richard Posner, posits that ‘man is a rational maximizer of his ends;’ this version, however, is tautological and in fact nonfalsifiable. The utility maximization version is falsifiable only in terms of decision-making behaviour (for instance, because manifestation of preferences has been shown to be nontransitive), while the self-interest version, which assumes that people maximize their own utility (other-regarding behaviour is thereby excluded), is instead testable on substantive behaviour and it seems to be the version most used in L&E. Finally, people can maximize material welfare; while the latter is the easiest version to test, it is also the easiest to prove wrong; more generally, see R.B. Korobkin and T.S. Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumptions from the Law and Economics’ (2000) 88 *California Law Review* 1051.

<sup>32</sup> T.S. Ulen, ‘Rational Choice Theory in Law & Economics’ in Bouckaert and De Geest (eds.), above n. 5, 790-818 at 792; in this essay I will adhere to the self-interest version of rational choice theory discussed in Korobkin and Ulen, above n. 31 at 1064.

<sup>33</sup> D. McCloskey, *The Secret Sins of Economics* (Chicago: Prickly Paradigm Press, LLC 2002) available at <<http://www.prickly-paradigm.com/paradigm4.pdf>>.

variables,” you might call them. P-obsession begins with Machiavelli and Hobbes, is continued by Bernard Mandeville (the early eighteenth-century Dutch-English spy and pamphleteer), is systematized by Jeremy Bentham (the utilitarian economist flourishing in the early nineteenth century), and is finally perfected by twentieth-century economists, including that same Paul Samuelson (b. 1915), who fully formalized the notion in a curious character known as Max U, and the great Gary Becker (b. 1930), who went about as far as he could go.<sup>34</sup>

The problem with using rational choice theory as the sole mode of analysis is that empirical observation shows that people’s behaviour is often different from what the theory predicts.<sup>35</sup> Think for instance of people who return objects to lost-and-found or make donations to human rights organisations. This type of behaviour seems to contradict the predictions that would be derived from rational choice theory, because for a self-interested person there is no advantage in returning items to lost-and-found or in making a donation, whereas she or he incurs costs such as the time spent in returning the item or the money donated. This type of action may be explained by the fact that human behaviour is shaped by ethics, morals, and altruism, and not only by self-interest; thus, rational choice theory emerges as an inadequate explanatory framework.

In spite of the apparent contradictions, however, one may also argue that the fact that an individual returns an item to lost-and-found is compatible with rational choice theory because the person derives a number of benefits from such an action, such as praise from other people and the reputation of being a good neighbour and so on, which outweigh the costs of returning the object. The point here is that whatever explanation we believe to be correct, rational choice proves to be a poor analytical tool because its predictive power is low. The problems related to the exclusive employment of rational choice theory are diverse: in the first case, an *anomaly* in behaviour proves the theory false, at least in certain settings, and its predictive power low, and accordingly it calls for its abandonment or at best adjustment. In the second case, even though the theory is believed to be correct, exclusive focus on it diverts attention from relevant questions, thus

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<sup>34</sup> *Id.* at 22-23.

<sup>35</sup> A standard defence of rational choice theory is provided by Milton Friedman’s reasoning about the role of assumptions in positive economics. The thrust of his argument is that it is not relevant whether the assumptions are realistic; as is well captured in one of his most quoted passages, what counts is the predictive power of the model: ‘the more significant the theory, the more unrealistic the assumptions.’ Note, however, that current analysis centres around the arguments that models based on rational choice theory often have low predictive power. Thus, Friedman’s argument does not apply in this context; see for example M. Friedman, ‘The Methodology of Positive Economics’ in M. Friedman, *Essays in Positive Economics* (Chicago: University of Chicago Press 1953).

generating serious *lacunae* in the field of study. Let me begin by briefly explaining the latter issue and its relation to the discovery of social norms.

### 3.1 Lacunae and the discovery of social norms in L&E: a paradigmatic example

Social norms, i.e. norms that are socially enforced, have long been neglected by many L&E scholars. This may be due to the exclusive focus on rational choice theory, which ‘suppressed the role of socialization and, as a result, exaggerated the role of law.’<sup>36</sup> For instance, the most celebrated article by Ronald Coase, ‘The Problem of Social of Costs’, centred on the example of a farmer and a rancher who behave in an ‘un-socialized’ manner. In the words of Robert Ellickson, ‘his discussion misleadingly implied that rural neighbors in fact would look to formal law to determine who bears the risk of trespass by livestock. In fact, they rarely do. These neighbors have continuing relationships, ... As a result, in this context neighbors apply social norms rather than turning to the legal system.’<sup>37</sup> Ellickson bases his critique on his well-known field study of Shasta County cattlemen, who rely on an informal set of social norms to solve disputes rather than look at the formal set of rules.<sup>38</sup> It is important to note that Ellickson’s analysis is not an attack on rational choice theory: on the contrary, he seems to endorse the core of it; if it is critical of anything in L&E, it is L&E’s lack of attention to important social phenomena such as informal norms. To oversimplify somewhat, it may be said that following the publication of *Order without Law* – in which Ellickson espoused his theory of social norms – L&E has discovered social norms, thus beginning to fill an important gap.<sup>39</sup>

The example discussed is not meant to focus on the issue of social norms as such but is aimed at drawing attention to the general point that lacunae are often generated by the lack of interest in facts and history. While rational choice theory is not in itself questioned, it is fair to say that Ellickson’s main findings were possible thanks to his painstaking field-study of cattlemen behaviour in Shasta County (and, one may add, to his intimate knowledge of cattlemen culture, given that his father, as a young man, ran cattle in North Dakota). Unfortunately, this type of study rarely takes place

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<sup>36</sup> R. Ellickson, ‘Law and Economics Discovers Social Norms’ (1998) 27 *Journal of Legal Studies* 537 at 540.

<sup>37</sup> *Id.* at 540.

<sup>38</sup> R. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass: Harvard University Press 1991).

<sup>39</sup> Among the scholars who have engaged in the study of social norms in relation to L&E, Robert Cooter and Eric Posner figure most prominently.

in mainstream L&E.<sup>40</sup> In other words, it is *the monomaniacal focus* on rational choice theory and the related idolatry of mathematical models that keep L&E scholars removed from reality. The study of facts, not to mention how the law operates in practice, are rendered unnecessary for scholars who endorse the mainstream paradigm. Once hailed as the ‘worldly philosophers,’ these experts are now losing their pragmatic dimension, with the danger of building up a body of knowledge so disconnected from the real world that it will have little value, if any, to the policymaker.

McCloskey has argued that the obsession with the Prudent model of humanity in economics is a venial sin. More weighty sins in her view are institutional and historical ignorance, not to mention the true and secret sins of economics: namely, the focus on qualitative theorems and statistical significance. Yet these sins appear to be intimately correlated; has the obsessive focus on rational choice theory not eventually overshadowed the importance of institutional and historical analysis? Is the idolatry of elegant mathematical models not the offspring of the monomaniacal focus on the stylised Prudent man?<sup>41</sup>

It should be clear by now that the critique of rational choice theory in this context is not so much about its validity but about its usefulness to formulate research questions, to understand real-life problems, and to offer viable solutions. When looking for effective policy tools to achieve certain goals, it is crucial to know the actual conditions that influence a community’s behaviour; it is then a question of identifying the incentive structure of the law in concrete cases and to investigate the facts. It follows that the lack of attention to reality, which the obsession with rational choice theory has generated, is to be judged as unfortunate at best. Let me now turn to the more direct critique of rational choice theory: namely, that in a

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<sup>40</sup> See for instance R. Harris, ‘The Uses of History in Law and Economics’ (2003) 4 *Theoretical Inquiries in Law* 659 also available at SSRN: <<http://ssrn.com/abstract=454501>>; the author investigates why until recently L&E was somewhat ahistorical.

<sup>41</sup> On this issue, an anonymous referee has counter-argued that the real problem is related to *deductive* reasoning rather than to rational choice theory. Let me note on this point that what I criticise is not the use but the *abuse* of mathematics: in other words, the use of mathematics for its own sake. On the question of deduction, McCloskey has already pointed out that ‘if there is an elegant and exact formula ... why not use it? Of course, any deduction depends on the validity of the premises. ... But likewise any induction depends on the validity of the data. ... Any calculation depends on the validity of the inputs and assumptions. Garbage in, garbage out. ... So mathematics, too, is not the sin of economics, but in itself a virtue. Getting deductions right is the Lord’s work, if not the only work the Lord favors. Like all virtues it can be carried too far, and be unbalanced with other virtues, becoming the Devil’s work, sin.’ McCloskey, above n. 33, at 16.

number of cases it is invalid and accordingly should not be employed to study such cases.

### **3.2 Anomalies: a journey into systemic irrationality and other forms of rationality**

‘Imagine that you have decided to see a play where admission is \$10 per ticket. As you enter the theater you discover that you have lost a \$10 bill. Would you still pay \$10 for a ticket for the play?’<sup>42</sup> In a famous thought experiment, 88% of the subjects answered this question positively. Rational choice theory would predict the same to happen under the alternative scenario in which you have decided to see a play, have already paid the admission price of \$10, and when entering the theatre you discover that you have lost the ticket; in fact, the costs and benefits remain the same within the two scenarios. However, to this second question, only 46% of the people answered that they would pay \$10 for another ticket to see the play. The authors of this experiment, Amos Tversky and Daniel Kahneman, well known for their research in behavioural science,<sup>43</sup> have shown in a number of comparable experiments that the way questions are framed, and more generally, the context in which decisions are taken, strongly influence people’s behaviour.<sup>44</sup> Along similar lines, an unusually rich body of behavioural science literature has shown that people systematically deviate from the behavioural predictions of rational choice theory.<sup>45</sup>

To name just a few of these systematic deviations, consider the status quo bias, the endowment effect, framing effects, hindsight bias, the use of availability heuristics, addictions, and visceral cravings. On the one hand, the use of some heuristics can be seen as overall rational, even if leading to choices that apparently conflict with the predictions of rational choice theory; in particular when choices need to be taken in the presence of complexities and ambiguities, heuristics are employed as devices to make everyday decision-making manageable. On the other hand, observed behaviours such as those classifiable as addiction or visceral cravings are arguably irrational. A few examples are used in the following analysis to illustrate how this wealth of evidence generates interesting insights for the

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<sup>42</sup> A. Tversky and D. Kahneman, ‘The Framing of Decisions and the Psychology of Choice’ (1981) 211 *Science* 453 at 457.

<sup>43</sup> Their seminal work in behavioural science is on prospect theory; D. Kahneman and A. Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’ (1979) 47 *Econometrica* 263.

<sup>44</sup> *Id.*

<sup>45</sup> For an overview see C.R. Sunstein (ed.), *Behavioral Law and Economics* (Cambridge: Cambridge University Press 2000).

legal-economic scholar and how complete reliance on rational choice theory may lead policymakers to adopt inefficient policies.

In the context of contracts, for instance, rational choice theory predicts that if default terms are set inefficiently, parties can easily contract around them and reach an efficient allocation of resources. However, a number of studies have demonstrated that default terms are ‘sticky,’ a conclusion in contrast with the above-mentioned prediction.<sup>46</sup> Interesting evidence in this regard is provided by a kind of ‘natural experiment’ in which two States in the U.S. adopted insurance programmes for motorists, which were almost identical but with different default rules.<sup>47</sup> Pennsylvania adopted as default rule a programme with a relatively high premium and a right to sue, whereas New Jersey offered a programme that lacked such a right, coupled with a relatively low premium. In both cases, purchasers were allowed to change the conditions of the programme offered (e.g. by paying a lower premium and selling the right to sue and *vice versa*). One can plausibly expect that preferences are equally distributed in the two States and thus a comparable number of people would choose the same arrangement, irrespective of the default rule. Surprisingly, however, in both States most people accepted the default rule and did not contract around.<sup>48</sup>

Such an ‘anomaly’ in behaviour has been explained by the status quo bias: namely, the fact that people’s preferences tend to be biased in favour of the status quo.<sup>49</sup> In this context, it has been noted how fallacious it may be to judge the efficiency of default terms on the basis of how frequently these terms are contracted around.<sup>50</sup> In the U.S., for example, the default rule in employment contracts is ‘at will’ dismissal and this term is rarely contracted around. While followers of rational choice theory interpret this data as evidence that the term is efficient for the majority of the people, studies showing the importance of status quo bias for default rules interpret the data in the sense that the default rule may swamp ‘a preference many parties would otherwise have for a “just cause” term.’<sup>51</sup> As a normative implication, Korobkin and Ulen suggest: ‘At a minimum, the status quo bias demands that lawmakers seeking to promulgate majoritarian default terms look for evidence other than what terms are adopted in a market with an

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<sup>46</sup> See for instance C.R. Sunstein, ‘Switching the Default Rule’ (2002) 77 *New York University Law Review* 106-134.

<sup>47</sup> The case is discussed both in Sunstein, above n. 46, at 114; C.R. Sunstein and R.H. Thaler, ‘Libertarian Paternalism is Not an Oxymoron’ (2003) 70 *University of Chicago Law Review* 1159.

<sup>48</sup> Only 20% of people in New Jersey and 25% of people in Pennsylvania contracted around the default rule; see Sunstein, above n. 46.

<sup>49</sup> W. Samuelson and R.J. Zeckhauser, ‘Status quo bias in decision making’ (1988) 1 *Journal of Risk and Uncertainty* 7.

<sup>50</sup> Korobkin and Ulen, above n. 31, at 1114.

<sup>51</sup> *Id.*

existent default for indications as to what terms the majority would prefer.<sup>52</sup> More generally, Tversky and Khaneman have argued that ‘... [w]hen framing influences the experience of consequences, the adoption of a decision frame is an ethically significant act.’<sup>53</sup> This is surely a meaningful insight for legal-economic scholars in rethinking a number of issues in contract, tort, and public law.

Another illustration of the importance of embodying behavioural science into the L&E enterprise is the study of policies targeting behaviours that are manifestly irrational because they are dictated by addiction, visceral cravings, and the like. For instance, to reduce drug-related crime, rational choice theory predicts that either the sanctions or the frequency of criminal apprehension should be increased.<sup>54</sup> However, drug-addicted criminals have seldom been deterred by draconian criminal measures.<sup>55</sup> Similarly, it has been observed that campaigns against unsafe sex aimed at stopping the spread of HIV/AIDS have had little effect on people’s behaviour. This data can be read in relation to the fact that people have sexual cravings and when confronted with certain situations are not able to control themselves.<sup>56</sup>

Finally, to approach the economic realm more closely, irrationality has been detected in a number of purchasing behaviours. Particularly significant are time inconsistencies where short-term and long-term preferences contrast and situations where people lower their perception of risk under circumstances created by aggressive selling techniques; subsequently, they conclude contracts that are not in their best interest.<sup>57</sup> In

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<sup>52</sup> *Id.*

<sup>53</sup> Tversky and Khaneman, above n. 42, at 458.

<sup>54</sup> G. Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 *The Journal of Political Economy* 169.

<sup>55</sup> This and the following example draw on those discussed by R.B. Korobkin and T.S. Ulen, above n. 31.

<sup>56</sup> Contrary to this interpretation, Richard Posner has argued that for some people the benefits of engaging in unsafe sex are higher than its costs; see R. Posner, *Sex and Reason* (Harvard: Harvard University Press 1992); Korobkin and Ulen have argued for the plausibility of the visceral craving explanations; in their words, people ‘are not sufficiently prepared for the magnitude of the cravings when the craving arise, and they engage in unsafe sex despite their better judgment;’ Korobkin and Ulen, above n. 31, at 1118. Their arguments differ in important respects; most prominently, Korobkin and Ulen rely upon a number of empirical studies that show the existence of cravings; the problem is that if one adheres to rational choice theory as Posner does, in order to come up with specific policy advice one should know the individual costs and the benefits *ex ante*: namely, engage in an investigation of the group of people that derive relatively high benefits from unsafe sex. Paradoxically, this type of study would come very close to what behavioural science already does.

<sup>57</sup> P. Rekaiti and R. van den Bergh, ‘Cooling-off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Perspective’ (2000) 23 *Journal of Consumer Policy* 371 at 376.

this context, some legal-economic scholars have argued that in certain contracts it may be efficient to mandate cooling-off periods.<sup>58</sup>

While undoubtedly interesting, it is beyond the scope of this essay to compile a complete review of the studies showing the large and systematic deviations of human behaviours from the predictions of rational choice theory. The examples discussed above should nevertheless suffice to convince the sceptical reader that if L&E were to rely exclusively on rational choice theory, in many instances it would be inopportune at best to derive policy implications from the L&E analysis. By employing, next to rational choice theory, insights from behavioural science, L&E is gaining in terms of accuracy and predictive power.

Last but not least, it is worth highlighting that rational choice theory, in spite of all the criticism, does offer compelling insights into many circumstances and occasionally brings to light factually true points. For instance, the law of supply and demand represents well the dynamics of many markets and, by understanding these mechanisms, lawyers can better design a number of regulations in disparate domains, ranging from environmental to competition law. This last observation is to clarify the point that defending the thesis that the mainstream paradigm is too narrow does not imply a rejection of rational choice theory; rather, it is suggested that other theories may well enrich the analytical apparatus of L&E by offering new venues for studying problems when the application of rational choice theory would either be unuseful and uninteresting or even fallacious.

#### **4 Efficiency versus other values: an old and ongoing debate**

Efficiency is a concept widely used in L&E both for positive and for normative analysis.<sup>59</sup> In this essay, I focus on the use of efficiency only as a normative criterion<sup>60</sup> and I defend the thesis that (1) advocates of efficiency

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<sup>58</sup> *Id.*

<sup>59</sup> The divide between positive and normative analysis refers to what is called 'Hume's guillotine', which distinguishes 'is statements' from 'ought statements.' For a discussion of different schools in Law and Economics practicing either positive or normative economics, see F. Parisi, above n. 6. In this context it is worth mentioning that Judge Richard Posner has articulated what is perhaps the most influential hypothesis in the realm of positive analysis: the efficiency of the common-law hypothesis.

<sup>60</sup> Some may counter-argue that efficiency has been used most prominently in the context of positive analysis, where the question is whether certain norms are efficient. However, based on the fact that a considerable number of studies focus on this positive question, coupled with the belief that L&E can provide useful insights to the policymaker, it is fair to conclude that L&E endorses efficiency as the privileged normative criterion. Let me further note that the rigid divide between positive and normative analysis is not endorsed here; the milder perspective, which

as the best normative criterion have failed to defend their view convincingly and that (2) L&E would benefit by also focusing on criteria other than efficiency. The first part of the thesis is based on previous literature. The debate about whether efficiency should be the sole or at least the highest value for policymakers has kept many scholars busy in L&E and in neighbouring disciplines, and to summarise the debate accurately would be overambitious for the present work; thus, only the most important arguments will be mentioned. The second part of the thesis is built around a concrete example, and its analytical depth is, accordingly, modest. However, bringing the debate down to earth is important because the discussion on efficiency has too often focused on sophisticated theoretical questions and has lost sight of simpler issues. Framing the problem around efficiency in simple terms may enrich a debate that otherwise risks becoming relegated to the ivory tower of academia.

Let me begin this brief review of the literature by noting that efficiency has several meanings: the ones most widely employed by economists are the Pareto and Kaldor-Hicks criteria. A state of the world is Pareto superior to another if at least one person can be made better off without anybody being made worse off; Pareto optimality is reached when it is not possible to move to another state of the world without making at least one person worse off. The criterion may recall to some lawyers the rule of unanimity or consensus and indeed these ideas are similar.<sup>61</sup> To use such a criterion, it is not necessary to make interpersonal comparisons of utilities, which is considered a great virtue by many economists; the drawback in terms of operability, however, is major. Especially in areas such as public or tort law, it is difficult to conceive of changes in rules to the satisfaction of everybody, which in turns implies that adopting Pareto optimality as a normative criterion does plausibly lead to a paralysis of the legal system. For

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acknowledges the mutual interplay of facts and values, appears instead to be more plausible. This thesis has been discussed at length in M. Blaug, *The Methodology of Economics: Or, How Economists Explain* (Cambridge: Cambridge University Press 1992, 2<sup>nd</sup> ed.) at 112-134.

<sup>61</sup> However, the Pareto optimum and consensus cannot be considered identical. Take for instance the practice of consensus in international law: It is shared knowledge that this rule is operable because social norms of political deference are in place. In other words, States that would prefer a solution different from the one proposed may still give consent because their stakes in the matter are not crucial. However, they expect that other States will behave in a similar manner and therefore consensus may be reached in areas of interest to them even if the solution is not the one preferred by some States. In this sense, under consensus, we observe a form of indirect compensation of losses in the long term. For an example of this dynamic in the context of the World Trade Organization, see P. Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press 2005) at 148-50.

this reason, the Kaldor-Hicks criterion is the one most applied by L&E scholars. An allocation of resources is Kaldor-Hicks efficient if following a change in the status quo the gainers benefit more than the losers do; gainers should be able to compensate the losers and still find the change desirable, although the compensation is only potential in nature. In other words, Kaldor-Hicks efficiency is a form of wealth maximization. While problematic in terms of interpersonal comparisons of utility,<sup>62</sup> Kaldor-Hicks is surely more practical.

Efficiency so understood, however, is susceptible to a number of critiques.<sup>63</sup> On a point of logic, wealth maximization is problematic because 'it cannot provide a basis for the initial assignment of rights' and because it is 'subject to an informal circularity-of-preference problem that results from its reliance on prices.'<sup>64</sup> In terms of operability, efficiency has been considered an impractical standard because of 'the substantial information requirements that must be satisfied in order to identify efficient legal rules.'<sup>65</sup> Finally, on more philosophical terrain Richard Posner has tried to defend the moral attractiveness of efficiency on Kantian grounds, arguing that consent can be generally assumed when Kaldor-Hicks is employed.<sup>66</sup> However, as Jules Coleman has convincingly demonstrated in his reply to Posner, it cannot be inferred that losers under Kaldor-Hicks would consent to their actual losses.<sup>67</sup>

More recently, a defence of efficiency as a supreme normative criterion has been articulated by Louis Kaplow and Steven Shavell in *Fairness Versus Welfare*, where the authors most prominently argue that a

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<sup>62</sup> Kaldor-Hicks can also be employed to rank social status in terms of utility; however, in this case the criterion has a major conceptual drawback, known as the 'Scitovsky reversal paradox.' In 1941, the well-known economist Tibor Scitovsky demonstrated that if Kaldor-Hicks is used to rank social states cardinally, state X can be Kaldor-Hicks superior to state Y but the reverse will also be true. If Kaldor-Hicks is employed as a wealth maximization criterion, this paradox is avoided. See T. Scitovsky, 'A Note on Welfare Propositions in Economics' (1941) 9 *Review of Economic Studies* 77.

<sup>63</sup> For an excellent overview of the debate, see issue 8 of the *Hofstra Law Review* (1980).

<sup>64</sup> J. Coleman, 'Efficiency, Utility and Wealth Maximization' (1980) 8 *Hofstra Law Review* 509 at 525.

<sup>65</sup> M.J. Rizzo, 'The Mirage of Efficiency' (1980) 8 *Hofstra Law Review* 641 at 658.

<sup>66</sup> R. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 *Hofstra Law Review* 487.

<sup>67</sup> See Coleman, above n. 64, at 533-539; for other critiques of the use of the efficiency criterion see R. Dworkin, 'Why Efficiency? A Response to Professor Calabresi and Posner' (1980) 8 *Hofstra Law Review* 563 and C. G. Veljanovsky, 'Wealth Maximization, Law and Ethics - On the Limits of Economic Efficiency' (1981) 1 *International Review of Law and Economics* 5.

‘welfare-based normative approach should be *exclusively* employed in evaluating legal rules’ (emphasis added).<sup>68</sup> It has been argued that the major drawback of the central claim of the book is that it rests on tautological arguments and thereby is nonfalsifiable.<sup>69</sup>

Nevertheless, the authors do take into account fairness by including tastes for fairness in individual preferences. However, as playfully noted by Mark White:

...the authors do not seem to take these tastes seriously, either omitting them from examples, or saying that they cannot be as strong as ordinary tastes for goods and services. ... But if they do not include tastes for fairness, they are arbitrarily restricting the range of preferences that their analysis takes into account. This makes their main thesis all the more tautological: welfare-maximization maximizes welfare, especially if welfare is based on any (strong) nonwelfarist preferences!<sup>70</sup>

In addition, on logical grounds – building mainly on mathematical logic theory developed by Gödel in the early 20<sup>th</sup> century – it has been demonstrated that a consistent system, such as the welfarist system defended by Kaplow and Shavell, may be incomplete; ‘... [t]hat is, there might exist an indefinite number of relevant policy issues that the system is simply unable to decide.’<sup>71</sup> From this it can be inferred that, in a number of cases, different normative criteria such as welfare and fairness should be jointly employed in order to cope with incompleteness.

After this brief and unavoidably incomplete review of literature on the problematic dimensions of using efficiency as the exclusive normative criterion in L&E, let me briefly discuss one simple example that illustrates the practical relevance of other values for L&E analysis. In 1995, together with the establishment of the World Trade Organization, a number of multilateral Agreements were adopted, among which was the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement). The TRIPS Agreement introduced a system whereby a set of intellectual property rights should be enacted by all WTO Members (152 as of 16 May 2008). Given stark inequalities in technological development between developing and developed countries, it is uncontroversial to expect a redistribution of resources in favour of developed countries as an effect of

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<sup>68</sup> Kaplow and Shavell, above n. 3 at 5.

<sup>69</sup> For a painstaking deconstruction of Kaplow and Shavell’s central argument, see J. Coleman, ‘The Grounds of Welfare – Book Review’ (2003) 112 *The Yale Law Journal* 1511; see also M.D. White ‘Preaching to the Choir: a Response to Kaplow and Shavell’s Fairness Versus Welfare’ (2004) 16 *Review of Political Economy* 507.

<sup>70</sup> White, above n. 69.

<sup>71</sup> G. Dari-Mattiacci, ‘Gödel, Kaplow, Shavell: Consistency and Completeness in Social Decisionmaking’ (2004) 79 *Chicago-Kent Law Review* 497; available at SSRN: <<http://ssrn.com/abstract=470122>>.

the implementation of the TRIPS Agreement. Indeed, economists at the World Bank have estimated a rent transfer to developed countries of US \$41 billion, plausibly coming from developing and least-developed countries that are net importers of technology.<sup>72</sup> To return to the main theme of this section, we should ask whether the question investigated by World Bank economists should be irrelevant for L&E scholars. Why should it be considered so heretic or irrelevant to study the way resources are redistributed? To know that a certain law involves a significant transfer of rents from poor to rich appears an interesting piece of information. Of course, in the specific case of the TRIPS Agreement, an important tension between the values of equity and efficiency may emerge in the sense that poor countries may be better off in the long run by promoting a well-functioning system of intellectual property rights.<sup>73</sup> However, the point is that there seems to be no valid reason to leave outside the scope of L&E questions about how poor countries are affected by an international agreement or, more generally, how certain legal frameworks affect redistribution of resources. In contrast to the theories reviewed in the first part of this section, this argument rests simply on common sense, and yet why not use a little more of it to rethink the L&E paradigm? As one commentator has noted, ‘... [i]mportantly, we should ask, why should any of us promote a theory that cannot simply say slavery, maltreatment of the poor, of Jews, of Blacks, of any human being is wrong.’<sup>74</sup>

It remains to be noted that there may be a number of circumstances in which redistribution – assuming that redistribution is a value – is better achieved by one set of policy tools than by another. For instance, certain domains of tort law may not be the best means to redistribute resources, and accordingly it seems plausible not to focus on redistribution in that area of law. This is because in certain areas of tort law the victims and injurers are random throughout society and do not represent any distinct group. However, as the TRIPS example has demonstrated, it is difficult to defend – as many L&E scholars seem to do – the notion that redistribution should not play a significant role in any area of law but taxation.<sup>75</sup>

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<sup>72</sup> UNDP, *The UNDP Report: Making Global Trade Work for People* (2003) at 207; available at <<http://www.boell.org/docs/UNDPTradeBook2003NEW.pdf>>.

<sup>73</sup> One may incidentally note that developed countries have used a relatively lax intellectual property rights standard at a developmental stage. See UNDP, above n. 72 at 207.

<sup>74</sup> Malloy, above n. 27 at 159.

<sup>75</sup> In fact, L&E scholars know very well that important redistributive effects are entailed by the law-making process; they know this because they are all familiar with –when not directly active in the field of – public choice and private interest theories. According to these theories, many regulations are enacted for the benefit of one group in society, rather than to maximize social welfare.

## 5 A defence of eclecticism in L&E

Having shown that the mainstream paradigm is too narrow to exhaust the L&E intellectual camp, it remains to be demonstrated that eclecticism offers a viable alternative. It is pertinent to question whether such an approach would not turn L&E into a ‘degenerate research program.’<sup>76</sup> To respond to this potential critique, let me emphasise the meaning of eclectic: ‘selecting what appears to be best in various doctrines, methods, or styles.’<sup>77</sup> According to this definition, by endorsing eclecticism, L&E would progress by selecting the best doctrines and methods of inquiry; this process would indeed respond to economic logic. Note that rational choice theory may still prove to be the best method in a number of circumstances; hence, subscribing to eclecticism does not imply abandoning this theory altogether. Nevertheless, when it proves to be wrong or not particularly suitable to analyse certain issues, it should be amended or replaced by a theory that is fitter.

The intrinsic character of the law, often aimed at resolving well-defined problems, demands the endorsement of the best methods. From an economic vantage point, the costs of abandoning a universal and elegant method – such as rational choice theory – are plausibly lower than the benefits generated by the adoption of superior modes of analysis, as clearly put by Korobkin and Ulen:

Rational choice theory is descriptively and prescriptively accurate more often than any other single theory of behavior, or so even its critics generally believe. But the elegance and parsimony that a single, universal theory of behavior such as rational choice can provide is of far less importance, if it is of any importance at all, to legal policymaker than to economists. The reason is that most laws are geared toward specific portions of the population or to people who play specific roles. ... There is no doubt that a single, universally applicable theory of behavior is convenient and highly desirable. But if universality is inconsistent with sophistication and realism, legal policymakers are better off foregoing universality and, instead, creating a collection of situation-specific minitheories useful in the analysis of discrete legal problems.<sup>78</sup>

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<sup>76</sup> This is the label chosen by Richard Posner to characterise critical legal studies: ‘Critical legal studies ... illustrates a degenerate research program: the work of the originators did not provide a research program for the next generation, so there was no next generation;’ R.A. Posner, ‘Social Norms, Social Meaning, and Economic Analysis of Law: A Comment’ (1998) 27 *Journal of Legal Studies* 553 at 565.

<sup>77</sup> Merriam-Webster Dictionary <<http://www.m-w.com/dictionary/eclectic>> (accessed October 3 2007).

<sup>78</sup> Korobkin and Ulen, above n. 31, at 1072-1073.

In this essay, several examples have been discussed, from which it can be concluded that contemporary L&E has already endorsed eclecticism, most notably the study of social norms and the growing interest in behavioural L&E. The brief review of the history of L&E has also shown that eclecticism has in a sense always been entrenched in the L&E paradigm, even in the place where mainstream L&E has had its greatest defenders: namely, Chicago. Chicago has hosted different scholars, among whom some such as Coase were open to heterodox ideas. But the most notable example of eclecticism is to be found in the work of the celebrated forerunner of L&E, Adam Smith, as Viner elegantly reminds us: ‘In these days of contending schools, each of them with the deep, though momentary, conviction that it, and it alone, knows the one and only path to economic truth, how refreshing it is to return to *The Wealth of Nations* with its *eclecticism*, its good temper, its common sense, and its willingness to grant that those who saw things differently from itself were only partly wrong’ (emphasis added).<sup>79</sup> Let me conclude by noting that the fact that eclecticism is already present in L&E is perhaps a sign that in the market for ideas this approach has been selected as the fittest.<sup>80</sup>

## 6 Concluding remarks

This essay has defended the thesis that the mainstream paradigm is inadequate for an interdisciplinary enterprise such as L&E, that eclecticism is superior, and that indeed it is already practiced to various extents. To be fair, however, one should acknowledge that a young scholar who focuses on the mainstream paradigm and, even more, builds elegant mathematical models, will achieve an expedited and most probably a better academic career in L&E. Have no illusions in this regard; the most important L&E journals will be more likely to publish your work if it contains some formula, no matter to what extent it is supported by empirical evidence or is relevant for policymaking. The problem is well known among heterodox economists who are reported to ‘complain that they are almost completely shut out by their more influential neoclassical colleagues who dominate most American university departments and prestigious peer-reviewed journals that are essential to gaining tenure.’<sup>81</sup> In the words of Max B. Sawicky, a self-

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<sup>79</sup> J. Viner, ‘Adam Smith and Laissez Faire’ (1927) 35 *The Journal of Political Economy*, 198, at 232; also quoted in Medema, above n. 13 at 18.

<sup>80</sup> A number of well-established and influential L&E scholars have engaged in analyses that endorsed heterodox ideas: three of these are Cass Sunstein, Tom Ulen, and Eric Posner.

<sup>81</sup> P. Cohen ‘In Economics Departments, a Growing Will to Debate Fundamental Assumption’ *New York Times* (New York 11 July 2007) available at <<http://www.nytimes.com/2007/07/11/education/11economics.html>>.

described heterodox economist, ‘ ... [t]he duty of orthodoxy is clear: deny departmental positions and resources to inferior research programs and purify the top journals of incorrect thinking, all understood as maintaining high standards.’<sup>82</sup>

In spite of all this, a number of heterodox ideas are becoming mainstream both in economics and in L&E; this essay has provided a number of important examples in the field of L&E. The opening up of economics to heterodox ideas is perhaps best evidenced by the Nobel Prizes in economics awarded to scholars such as George Akerlof and Daniel Kahneman, who have surely embraced a paradigm broader than consensus methodology. Let me close with the words of Akerlof, which best capture the spirit underlying the main thesis of this essay:

Economic theorists, like French chefs in regard to food, have developed stylized models whose ingredients are limited by some unwritten rules. Just as traditional French cooking does not use seaweed or raw fish, so neoclassical models do not make assumptions derived from psychology, anthropology, or sociology. I disagree with any rules that limit the nature of the ingredients in economic models.<sup>83</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> In G.A. Akerlof, *An Economic Theorist's Book of Tales* (Cambridge: Cambridge University Press 1984) at 2-3.