

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.

* Dr. Alessandra Arcuri is Assistant Professor, Rotterdam Institute of Law and Economics (RILE), Department of International Law, School of Law, Erasmus University Rotterdam. Email: acuri@frg.eur.nl. The author wishes to thank an anonymous referee, Giuseppe Dari-Mattiacci and the editorial board of the *Erasmus Law Review* for thoughtful comments; the usual disclaimer applies.

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;¹ 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,² 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.³ 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.⁴ 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’⁵

¹ 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.

² 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.

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

⁴ 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).

⁵ 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 ...’.⁶

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.⁷ 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

⁶ 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.

⁷ 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.⁸ L&E is generally characterised as being instrumentalist and consequentialist because under this approach the law is studied in relation to its effects;⁹ 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;¹⁰ 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.¹¹ 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'.¹²

⁸ 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.

⁹ 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.

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

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

¹² 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.¹³ 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'.¹⁴ 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.¹⁵

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.¹⁶ 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

¹³ 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>>.

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

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

¹⁶ 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).¹⁷ 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-19th and the early-20th 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.¹⁸ 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;¹⁹ 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.'²⁰

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 1925,²¹ 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

¹⁷ Evensky, above n. 14, at 203.

¹⁸ 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).

¹⁹ 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, 2nd edition,).

²⁰ 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.

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

departments, and courtrooms across the US and even around the world.²² 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.²³ 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 1991.²⁴ It is important to remember that Coase by drawing attention to the concepts of transaction costs²⁵ 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,'²⁶ 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

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

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

²⁴ 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.

²⁵ 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).

²⁶ 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.²⁷

At the risk of sounding repetitive, it is worth emphasising that equating Posnerian analysis with the Chicago School is as reductionist 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.²⁸ The role of these schools of thought within the L&E intellectual enterprise has been widely discussed.²⁹ 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

²⁷ 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.’

²⁸ 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.

²⁹ 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,’³⁰ 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,³¹ most scholars agree that rational choice theory, based on methodological individualism, assumes individuals to have transitive preferences and to maximize expected utility under constraints.³² The subject of rational choice theory is also known as *homo oeconomicus* or, in the playful words of Chicago economist Deirdre McCloskey, Max U:³³

... 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

³⁰ 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.

³¹ 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.

³² 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.

³³ 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.³⁴

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.³⁵ 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

³⁴ *Id.* at 22-23.

³⁵ 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.’³⁶ For instance, the most celebrated article by Ronald Coase, ‘The Problem of Social 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.’³⁷ 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.³⁸ 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.³⁹

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

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

³⁷ *Id.* at 540.

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

³⁹ 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.⁴⁰ 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?⁴¹

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

⁴⁰ 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.

⁴¹ 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?’⁴² 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,⁴³ 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.⁴⁴ 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.⁴⁵

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

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

⁴³ 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.

⁴⁴ *Id.*

⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.⁴⁹ 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.⁵⁰ 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.’⁵¹ 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

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

⁴⁷ 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.

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

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

⁵⁰ Korobkin and Ulen, above n. 31, at 1114.

⁵¹ *Id.*

existent default for indications as to what terms the majority would prefer.⁵² 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.’⁵³ 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.⁵⁴ However, drug-addicted criminals have seldom been deterred by draconian criminal measures.⁵⁵ 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.⁵⁶

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.⁵⁷ In

⁵² *Id.*

⁵³ Tversky and Khaneman, above n. 42, at 458.

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

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

⁵⁶ 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.

⁵⁷ 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.⁵⁸

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 useless 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.⁵⁹ In this essay, I focus on the use of efficiency only as a normative criterion⁶⁰ and I defend the thesis that (1) advocates of efficiency

⁵⁸ *Id.*

⁵⁹ 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.

⁶⁰ 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.⁶¹ 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

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, 2nd ed.) at 112-134.

⁶¹ 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,⁶² Kaldor-Hicks is surely more practical.

Efficiency so understood, however, is susceptible to a number of critiques.⁶³ 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.'⁶⁴ 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.'⁶⁵ 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.⁶⁶ 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.⁶⁷

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

⁶² 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.

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

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

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

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

⁶⁷ 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).⁶⁸ 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.⁶⁹

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!⁷⁰

In addition, on logical grounds – building mainly on mathematical logic theory developed by Gödel in the early 20th 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.’⁷¹ 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

⁶⁸ Kaplow and Shavell, above n. 3 at 5.

⁶⁹ 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.

⁷⁰ White, above n. 69.

⁷¹ 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.⁷² 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.⁷³ 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.’⁷⁴

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.⁷⁵

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

⁷³ 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.

⁷⁴ Malloy, above n. 27 at 159.

⁷⁵ 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.’⁷⁶ 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.’⁷⁷ 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 Korbkin 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.⁷⁸

⁷⁶ 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.

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

⁷⁸ Korbkin 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).⁷⁹ 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.⁸⁰

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.’⁸¹ In the words of Max B. Sawicky, a self-

⁷⁹ 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.

⁸⁰ 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.

⁸¹ 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.’⁸²

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.⁸³

⁸² *Id.*

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