

In its 2004 and 2006 Doing Business reports, the World Bank endorsed the conclusions advanced in the 'legal origins' literature, according to which legal systems belonging to the common law tradition better foster economic performance than systems belonging to the civil law tradition, and systems within the French family fare the worst among civil law systems. This article comments on the response offered to those reports by a group of French legal academics. The author suggests that this response would be more effective if it treated as separate issues (1) the traditional resistance of French jurists to the economic analysis of law (EAL), (2) the efficiency of the French legal system, and (3) the merits of analysing French law from an EAL perspective. With respect to the first issue, the author argues that the reasons behind the French jurists' traditional resistance to EAL are largely sociocultural and, accordingly, can be expected to bear directly on French jurists, and French legal thought more generally, but only minimally on the economic pedigree of the French legal system. With respect to the second issue, questions are raised as to the possibility of reliably assessing the relative efficiency of entire legal systems, whether the French or any other. With respect to the third issue, the author notes that the objections raised against economic assessments of entire legal systems do not apply to the more traditional form of EAL, which accordingly remains as valuable a tool for analysing French law as it is for analysing any other body of law.

Keywords: legal origins/World Bank reports/French resistance to EAL/EAL of French law/efficiency of legal systems/comparative law and economics/civil law systems/EAL in civil law countries

1 Introduction

The resistance of French civil law to the economic analysis of law (EAL) has been the object of academic discussion for some time.¹ But that discussion gained new vigour with the publication of the World Bank's 2004 and 2006 *Doing Business* reports.² Both these reports are based on

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1 Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) at 23–4 [Mattei, *Comparative Law*]; Richard Posner, 'The Future of the Law and Economics Movement in Europe' (1997) 17 *Int'l Rev.L.& Econ.* 3 at 5 [Posner, 'Future']; Robert D. Cooter & James R. Gordley, 'Economic Analysis in Civil Law Countries: Past, Present, Future' (1991) 11 *Int'l Rev.L.& Econ.* 261 [Cooter & Gordley, 'Economic Analysis'].

2 World Bank, *Doing Business in 2004: Understanding Regulation* (Washington, DC: World Bank/Oxford University Press, 2004), online: World Bank <<http://www.doingbusiness.org>>; World Bank, *Doing Business in 2006: Creating Jobs* (Washington, DC:

controversial new data produced by a group of 'new institutional economists' intent on comparing the economic efficiency of legal systems. According to these scholars, also known as the 'legal origins' scholars, a country's economic performance would be linked to its legal system's belonging to the common law or the civil law tradition. In particular, systems belonging to the common law tradition would be significantly more effective at fostering economic growth, and, among civil law systems, those within the French family would fare worst.³

As expected, the French were quick to react. In 2006, the Société de législation comparée published *Les droits de tradition civiliste en question : À propos des Rapports Doing Business de la Banque Mondiale* (hereafter *Les droits*),⁴ a response to the World Bank's Reports from a select group of French legal academics known as the Association Henri Capitant des amis de la culture juridique française.⁵ The first of that document's four parts is devoted to methodology. The reader is there reminded that regression analysis, the kind of analysis on which the *Doing Business* reports are based, establishes correlations rather than causal relations; that, as such, it offers a very weak form of testing; and that the force of its conclusions hence largely rests on the process by which the opening hypotheses have been selected. The authors then argue that this process was flawed as far as the particular analysis contained in the *Doing Business* reports is concerned, as the opening hypotheses were highly biased in favour of common law systems. The second part of *Les droits* focuses on the data used in the 2004 report as it pertains to the French system. Each of the seven chapters of that report is meticulously combed through, and inaccuracies or half-truths about French rules

World Bank/Oxford University Press, 2006), online: World Bank <<http://www.doingbusiness.org>>.

- 3 For a recent survey of the legal origins literature, see volume 57 (2009) of the *American Journal of Comparative Law*.
- 4 Association Henri Capitant des amis de la culture juridique française, *Les droits de tradition civiliste en question : à propos des Rapports Doing Business de la Banque Mondiale* [Civil Law Systems in Question : On the World Bank's *Doing Business* Reports] (Paris: Société de législation comparée, 2006) [*Les droits*]. For an overview of the reaction of the French press to the *Doing Business* reports see Ian Lee, 'Le marché du droit : observations néoclassiques sur les rapports *Doing Business* et la rivalité common law – droit civil' in Jean-François Gaudreault-Desbiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (Montreal: Éditions Thémis, 2009) 77 at n. 2 [Lee, 'Le marché du droit'].
- 5 *Les droits* follows up on another document: Frédéric Rouvillois, ed., *Le modèle juridique français : un obstacle au développement économique?* (Paris: Dalloz, 2005) [Rouvillois, *Le modèle juridique français*], itself more a discussion of than a response to the 2004 and 2005 *Doing Business* reports. For a review of the French response more generally see Ejan Mackaay, 'Est-il possible d'évaluer l'efficacité d'un système juridique?' in Jean-François Gaudreault-Desbiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (Montreal: Éditions Thémis, 2009) 21 at 23.

and regulations are exposed and corrected. The third part outlines some intrinsic benefits of the French system, economic or otherwise, not discussed in the World Bank's reports – the implicit suggestion being that the reports are unduly focused on a limited number of unrepresentative elements of that system, to the detriment of the overall picture. The fourth and final part presents the 'intrinsic worth of law' as distinct from, and more important than, its economic worth. This last argument clearly is put forward as an argument 'in the alternative'; that is, it aims to demonstrate that even if it were concluded, *contra* the arguments of the first three parts, that the French system really is inefficient, efficiency is far from the only or even the highest-ranking value when it comes to assessing the merits of legal systems.

Les droits has yet to receive the attention it deserves, however, at least in North American academic circles. No doubt this is due in large part to language: because the French text has yet to be translated into English, it remains inaccessible to most North American academics. Hopefully the present English-language discussion of it will go some way toward remedying that situation. Somewhat irreverently, I propose to pick the text apart, to retain only what I take to be its strongest elements, to suggest additional lines of argument, and to restructure the entire discussion in an attempt to bolster its effectiveness.

The text is most vulnerable, I would argue, in the distinctions that it neglects to make. One such distinction is that between the economic analysis of law and the economic analysis of legal systems.⁶ Whereas the World Bank's claims pertain to the efficiency of legal systems, *Les droits* at times reads as an attack on EAL writ large. And as it is weakest in this last iteration, the persuasiveness of both iterations ends up being unnecessarily diminished. Another distinction that would have been worth clarifying is that between law and its cultural context. The World Bank's reports, indeed, seem to have gained much credibility from the fact that they appeared to be confirming what could already be intuitively inferred from the long-standing and well-documented resistance of French jurists to EAL. That is, many seem to think that it should naturally follow from the fact that (1) French jurists have, for sociocultural reasons, traditionally been disinclined toward EAL that (2) the French legal system as a whole would be inefficient. If such a nexus can indeed be established, then the fact that the *Doing Business* reports confirm one of these two propositions, while the other is well established, can only bolster the reports' credibility. And conversely, of course, an argument undermining that nexus would serve to deprive the reports of the said credibility boost. As an argument establishing law's autonomy from its cultural context is

⁶ *Les droits* is not the only text in which these issues are confused. See, e.g., Mattei, *Comparative Law*, supra note 1 at c. 3.

just such an argument, it is one that would have been worth exploring in *Les droits*.

The argument presented below, therefore, is structured around those distinctions. French jurists' traditional resistance to EAL, the efficiency of the French legal system, and the merits of analysing French law from an EAL perspective are discussed as three separate issues in Parts II, III, and IV respectively. Part II concedes that French jurists have traditionally resisted EAL, and explores the reasons for that resistance. The nature of these reasons is crucial, as it will determine whether or not a nexus between that resistance and the relative efficiency of the French legal system can in fact be established. It is found that the reasons largely are sociocultural; that they accordingly can be expected to bear directly on French jurists, and French legal thought more generally, but only minimally on the economic pedigree of the French legal system; and that the nexus between the jurists' resistance and the system's efficiency hence cannot be satisfactorily established. Part III picks up on the last point by way of a much broader argument about the legal origins project and, in particular, the difficulties involved in assessing, let alone comparing, the efficiency of entire legal systems, whether the French or any other. My claim in Part III is that legal systems are such complex and tightly knit phenomena that conclusions as to their overall relative efficiency are likely to prove unreliable. Part IV nonetheless warns against throwing out the baby with the bath water: it clarifies that the objections raised in Part III do not apply against the traditional (more restrained and less descriptive) EAL and that, accordingly, there is no reason to think that French law would be less well suited than any other law to analysis from an economic perspective.

II *The French jurists' resistance to EAL*

That French jurists would resist analysing law from an economic perspective is, in my view, not surprising in the least. Many of the various socio-cultural factors accountable for that resistance have already been noted by others. Among them is the ideological factor: EAL is commonly associated (rightly or wrongly) with some combination of conservatism, capitalism, materialism, and Americanism, which large segments of the French population find objectionable.⁷ Other, more interesting, factors include the fact that French economic expertise has traditionally concentrated in macro- rather than micro-economics;⁸ the traditional resistance to

7 Cooter & Gordley, 'Economic Analysis,' supra note 1. See, e.g., *Les droits*, supra note 4 at 119–20.

8 Mattei, *Comparative Law*, supra note 1 at 92.

interdisciplinarity in French legal education⁹ and in the French legal profession;¹⁰ a general distaste for instrumental reasoning¹¹ and the attendant blurring of conceptual categories;¹² and a consequent preference, when it comes to law, for a form of reasoning geared toward internal coherence.¹³ I will not rehash these factors here, otherwise than to suggest that they might be tied by a common theme, namely, a particular conception of the relation of facts to ideas. As I have explored that theme elsewhere,¹⁴ the present discussion will be limited to summarizing the findings of this earlier exploration and reflecting on how they might apply in the present context. The usual disclaimer found in all cultural discussions applies here as well: the following is a description of dominant cultural traits, that is, traits that, while not characteristic of all French jurists, arguably are sufficiently present among them to be considered representative of French legal culture writ large, or at least of French legal orthodoxy. References to 'French legal culture,' 'French legal thought,' 'French jurists,' and so on should accordingly be read as references to French legal orthodoxy.

French legal thought is heavily indebted to Cartesian dualism, according to which facts and ideas make up two tightly distinct spheres that are conceptual opposites of one another. As products of the intellect, ideas can aspire to being perfectly logical, rational, orderly; in contrast, facts considered on their own are contingent, arbitrary, hopelessly untidy. Beyond being conceptual opposites, the factual and ideal realms clearly also are hierarchically structured: the ideal realm is the superior realm, that toward which we must tend, whereas the factual realm is the inferior realm, that from which we must distance ourselves. What distinguishes humans from animals, according to Descartes and his followers, is precisely that humans, unlike animals, have intellectual power; they have the power to tend toward intellectual perfection and to distance themselves from factual imperfection. Humans have the capacity, and in fact the duty, to force ideas upon the factual realm so as to tame it, so as to

9 Michael Trebilcock, speech at book launch for Ejan Mackaay & Stéphane Rousseau, *Analyse économique du droit*, 2d ed. (Montreal: Thémis, 2008) (24 April 2008) at 8 [Trebilcock, 'Mackaay & Rousseau speech'].

10 Posner, 'Future,' supra note 1 at 5.

11 H. Muir-Watt, 'Les forces de résistance à l'analyse économique du droit dans le droit civil' in Bruno Deffains, ed., *L'analyse économique du droit dans les pays de droit civil* (Paris: Éditions Cujas, 2002) 37 at 42–3 [Muir-Watt, 'Les forces de résistance']; Alain Strowel, 'Utilitarisme et approche économique dans la théorie du droit. Autour de Bentham et Posner' (1992) 37 Arch.phil.droit 143.

12 Posner, 'Future,' supra note 1 at 7; Cooter & Gordley, 'Economic Analysis,' supra note 1 at 262; Bruno Oppetit, 'Droit et économie' (1992) 37 Arch.phil.droit 17 at 26.

13 Muir-Watt, 'Les forces de résistance,' supra note 11 at 39–42.

14 Catherine Valcke, 'Comparative History and the Internal View of French, German, and English Private Law' (2006) 19 Can.J.L. & Jur. 133.

infuse it with intelligibility and thereby move it a little closer to perfection. This reasoning lay very close to the heart of the French Revolution: the messy and corrupt institutions inherited from France's feudal past were to be wiped clean and replaced by the ideal political system dreamed up by Rousseau and his fellow intellectuals.¹⁵ The course of history was to be changed through the sheer power of the intellect.

At the same time, the order that the human intellect is to impose upon the factual realm is not just any order. It is the natural order, the order that naturally exists within that realm. Following Aristotle, French jurists indeed tend to view the nature of each thing, and thus its place in the overall order of things, as determined principally by that thing's essence.¹⁶ The role of humans under that conception thus is not to impose upon nature some arbitrary order external to it but, rather, to force it to conform to its own, implicit order, which only the human intellect is capable of detecting and articulating.

This combination of Cartesian intellectual order and Aristotelian essentialism is palpable in many historical and contemporary artefacts of French legal culture. While perhaps most blatant in the rational structure of the Civil Code, it is also reflected in the strict delineation of the legislative, judicial, and doctrinal roles; in the style of judicial opinions; in the two-part structure imposed on all academic presentations; and in the compartmentalized structure of the court system, which ensures that administrative, constitutional, civil, and criminal law matters are adjudicated by separate courts staffed with distinct groups of individuals.¹⁷

15 See Tocqueville's critique: Alexis de Tocqueville, *L'ancien régime et la révolution* (Paris: Flammarion, 1988) at 238 [Tocqueville, *L'ancien régime*].

16 Admittedly, Descartes believed that humans impose their intellectual structure upon the natural world, whereas Aristotle viewed that structure as already existing within that world, in the form of essences. But the intellectual structure being imposed under Descartes is not just any structure either. Rather, it is that which naturally results from the operation of the innate intellectual predispositions of humans, which they in turn inherited from the Creator. As the Creator also created nature, there is a sense in which the structure that will emerge from the human intellect is certified as 'true,' as corresponding to that which He infused in nature at the moment of its creation. Under that view, Descartes and Aristotle are not that far apart. But whether they are or not matters little in the end, as all that is needed for present purposes is the demonstration that French legal thought really does comprise Cartesian and Aristotelian influences. Whether this combination is consistent or inconsistent is a separate matter.

17 The same combination of intellectual order and essentialism arguably is present beyond law, in areas of social life as varied as nutrition and gardening, for example. In traditional French cuisine, each food group is offered as a separate dish; French gardens are known for their flawless geometrical configurations, free from any form of spontaneous intermingling between the different plant species. In both cases, the inherent nature of each food, of each plant, determines its position in the overall structure, and category blurring is carefully avoided.

If this is an apt representation of the 'French spirit'¹⁸ as it relates to law, then the resistance to EAL is hardly surprising. Each of law, economics, and the other academic disciplines is seen as possessing its own distinctive logic, which logic is deemed 'right' or 'true' – and hence not to be tampered with – inasmuch as it can be derived from the discipline's own inherent purpose. Under that view, law is, like philosophy, informed by a deontological logic. That is, some moral ideals have been identified as those that ought to ground the legal system, and all legal rules have been derived, through logical deduction, from that basic set. As all rules logically derived from the same ideals can be expected to be mutually consistent, the merit of legal rules is assessed through their consistency with the other rules, not through their social consequences, and policy considerations, indeed, are seen as largely irrelevant. Various categories of rules naturally emerge that pertain to the various ideals composing the basic set, and all modifications brought to the rules are geared toward improving their internal consistency. In contrast, economics abides by the logic of functionalism: policies are assessed and classified by appeal not to some kind of intrinsic criteria but, rather, to the social consequences that they bring about. Given this fundamental difference in reasoning, French academics generally believe that it is best to keep law in the hands of the jurists and economics in the hands of the economists. What is more, there is no reason to think that some form of cooperation between these two groups could benefit either one. Indeed, jurists and economists rarely commingle in France,¹⁹ and the educational system is structured in such a way as to minimize cross-disciplinary inputs. While economics and law both appear, alongside other disciplines, within the basic law curriculum, they are taught in separate classes, with different sets of materials, and by different instructors, themselves differently educated.²⁰ All subjects are taught didactically, moreover, so as to allow the instructor to unfold for the students the logic inherent in each. Not surprisingly, it is unusual for one and the same individual to combine degrees in law and in economics (or any other disciplinary combination). In sum, interdisciplinarity is generally frowned upon because it involves a blurring of categories and a clash of methodologies.²¹

18 Tocqueville, *L'ancien régime*, supra note 15 at 239.

19 Mattei, *Comparative Law*, supra note 1 at 92.

20 See the comparison in Stefano Lombardo, *Regulatory Competition in Company Law in the European Community* (Frankfurt: Peter Lang, 2002) at 18, of the European situation with that in the United States, where 'corporate law professors are not legal scholars but economists whose field of research is law.'

21 This arguably also explains why 'project teaching,' the teaching of a variety of subject matters through a common 'project,' while becoming increasingly popular in North American primary and secondary schools, has yet to attract the interest of French educators.

It has been argued that the French resistance to EAL pertains to a general resistance to theoretical analysis in law.²² We can now see that that argument is untenable. Anybody familiar with the traditional French treatise knows that a heavy dose of theory is part and parcel of standard doctrinal analysis in French law. But French jurists, like their German colleagues,²³ are mostly interested in theory that can be done in and through standard legal analysis. As philosophy follows the same deontological logic as law, philosophical writings are commonly drawn upon for the purposes of explaining and justifying legal rules. In contrast, very little attention is paid to economics, whose radically different, functionalist logic is considered unsuited to properly 'legal' analysis. It is indeed to theorizing from a perspective foreign to law, not to theorizing per se, that French jurists object: it is the interdisciplinary dimension of EAL, not its theoretical dimension, that bars it from penetrating French law.

Yet the general aversion to interdisciplinarity only is one part of the story. As the French jurists' resistance is much stronger against economics than against any other non-law discipline, that resistance clearly has as much to do with economics itself as with the fact that economics differs from law. It arguably has to do, first, with the fact that economics involves the aggregation of a great variety of factors reduced to a common currency, be it money or utility. Whereas it is a standard critique of economics that not all factors can be so reduced, the French objection would here be methodological as well as substantive. French jurists certainly endorse the substantive critique to the effect that some variables simply are misrepresented from the moment they are reduced to a monetary/utility value, but their objection clearly extends to the reducing act itself, as it entails reaching across, and thus blurring, natural categories.²⁴

The French jurists' particular resistance to economics also has to do with the fact that in economic reasoning, as in functionalist reasoning more generally, the relationship of facts to ideas is reversed from that which obtains in Cartesian, deontological, thought. In micro-economics, the facts – the given of endogenous individual preferences – drive the analysis;²⁵ under deontological reasoning, individual preferences are what is to be moulded rather

22 Mattei, *Comparative Law*, supra note 1 at 85–6; Aristides N. Hatzis, 'The Anti-theoretical Nature of Civil Law Contract Scholarship and the Need for an Economic Theory' (2003) 2 *Comment.L.& Econ.* 1, esp. at 15, 34.

23 Kristoffel R. Grechenig & Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 31 *Hastings Int'l & Comp.L.Rev.* 295 at 355, n. 364.

24 See, e.g., *Les droits*, supra note 4 at 115ff; see in particular the 'One size fits all' discussion at 123.

25 Michael Trebilcock, 'The Lessons and Limits of Law and Economics' in Pierre Noreau, ed., *In the Eye of the Beholder* (Montreal: Thémis, 2007) 113 at 136 [Trebilcock, 'Lessons and Limits'].

than what is to be accommodated. In other words, French jurists consider that it is social reality that should adapt to theory, not the other way round, as occurs in micro-economics. Indeed, they tend to be uncomfortable with such fundamental economic notions as 'optimality,' 'aggregation,' 'balancing,' 'marginality,' and so on, all of which were devised to accommodate fact-driven analyses and consequently smack of fuzziness, compromise, ambivalence, and a form of evaluation that can only be relative or comparative.²⁶ They much prefer the clean and absolute, all-or-nothing categories of deontological reasoning²⁷ and strongly believe in the educational vocation of law: the law ought to discipline, not pander to, deviant individual preferences, in their view.²⁸ Not surprisingly, Tocqueville reported that the French elites traditionally held philosophers, 'immersed in abstract ideas,' in much higher regard than economists, 'who descend closer to the facts.'²⁹ And within economics, the preference for the moulding over the accommodating of individual preferences has naturally resulted in welfare economics' being privileged over micro-economics.³⁰

In sum, the French objection to EAL is double: it pertains to the blurring of the 'law' and 'economics' categories as well as to the inherent nature of economics as a discipline fundamentally rooted in functionalism, and thus premised on the possibility of reaching across categories of variables and

26 Muir-Watt, 'Les forces de résistance,' supra note 11 at 42–3.

27 'The importance of categories': ibid. at 43. More precisely, Oppetit, 'Droit et économie,' supra note 12 at 26, insists on the importance of *natural* categories. The French objection to EAL, as here described, is accordingly stronger than the German objection, described by Ralf Michaels as follows: 'The underlying idea is not that the impact of law on society does not matter but, rather, that law performs its function for society best if it is intrinsically coherent.' Ralf Michaels, 'The Second Wave of Comparative Law and Economics' (2009) 59 U.T.L.J. 197 at 209 [Michaels, 'Second Wave']. So described, the German objection engages functionalism on its own terms; it pertains to *how* law can be made more efficient, not to *whether* it ought to be made so, whereas the French objection arguably pertains to the latter. (Of course, if law's 'function' there is defined as 'serving as an ideal to which social reality can adapt,' the divide between functionalist and deontological thought is eliminated, and so is that between the French and German objections.)

28 'The vocation of law is to elevate human conscience towards values that in fact transcend the quest for gain': Muir-Watt, 'Les forces de résistance,' supra note 11 at 40 [translated by author].

29 Tocqueville, *L'ancien régime*, supra note 15 at 249.

30 At the very same time that Adam Smith was extolling the virtues of the spontaneous order of the market (in *The Wealth of Nations*, 1776), French economists were arguing in favour of 'communal property, the right to employment, absolute equality, ... regulatory tyranny, and the complete absorption of the personality of the citizens into the body politic.' Morelly, *Le Code de la Nature* (1755), cited in Tocqueville, *L'ancien régime*, supra note 15 at 254–5 [translated by author].

on a conception of the relation of facts to ideas that is the opposite of that embraced in deontological reasoning.

III *The efficiency of the French (or any other) legal system*

As suggested in Part I above, the fact that French jurists have, for sociocultural reasons, not been favourably inclined toward EAL has little or no implication for the efficiency of the French legal system. The fact that French legal rules and institutions may have been crafted with complete disregard for their consequences says nothing about the nature of the consequences that did in fact ensue. If anything, the flurry of recent academic articles praising the efficiency of Roman law (in which French law, incidentally, is rooted) confirms that it is perfectly possible for law to be efficient despite the legal actors' never having explicitly, or even consciously, turned their mind to efficiency promotion.³¹ It thus seems that, whereas the authors of *Les droits* neglect to distinguish between efficient law and efficiency-minded legal actors, it might have been wise for them to capitalize on that distinction – that is, to concede that French legal actors have not been efficiency minded yet insist that the efficiency of the French legal system is a separate issue, and then focus the discussion more squarely on that last issue. After all, that is the one and only issue addressed in the World Bank's *Doing Business* reports, and that on which *Les droits* is in fact most effective.

If we focus exclusively on the issue of the efficiency of French law, then, an argument in two moves comes to mind. The first move, clearly, is to discredit the findings on which the World Bank reports' conclusions are based, namely, the findings of the legal origins literature to date. This has already been achieved with a certain measure of success by many scholars, including the authors of *Les droits*. On the methodological front, it has been noted that regression analysis can do no more than establish that a given set of data 'is not incompatible' with the hypothesis tested and that it therefore amounts to a very weak form of testing, one that is at any rate largely ineffective at constraining the salience naturally accruing to opening hypotheses.³² What

31 Richard A. Epstein, 'The Many Faces of Fault in Contract Law: Or How to Do Economics Right, without Really Trying' (University of Chicago Law School John M. Olin Law & Economics Working Paper No. 445, December 2008) at 18, online: University of Chicago Law School <<http://www.law.uchicago.edu/Lawecon/wp401-450>>; James Q. Whitman, 'The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence' (1996) 105 Yale L.J. 1841; Juan Javier Del Granado, 'The Genius of Roman Law from a Law and Economics Perspective' (Berkeley Program in Law & Economics Working Paper, 2 November 2008), online: Social Science Research Network [SSRN] <<http://ssrn.com/abstract=1293939>>.

32 *Les droits*, supra note 4 at 18–21, 29–35; Mark D. West, 'Legal Determinants of World Cup Success' (Michigan Law and Economics Research Paper No. 02-009, 2002), online: SSRN <<http://ssrn.com/abstract=318940>>.

is more, the main opening hypothesis in this case – that the efficiency of a legal system directly relates to its capacity to adapt to new circumstances, which capacity in turn directly relates to the degree of power enjoyed by the judges – happens to strongly favour common law systems.³³ Questions have also been raised about the choice of parameters: whether the studies were set so as to privilege short-term over long-term efficiency,³⁴ whether the ‘civil law’ and ‘common law’ labels have been misused,³⁵ and whether some legal systems weighing against the reports’ conclusions have been conveniently excluded from the analysis.³⁶ Other questions pertain to the coding

- 33 *Les droits*, *ibid.* at 22–6; Michaels, ‘Second Wave,’ *supra* note 27 at 204–27; John Armour *et al.*, ‘Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis’ (University of Cambridge Centre for Business Research Working Paper & European Corporate Governance Institute – Law Working Paper No. 108/2008, 2008) at 36–42, online: SSRN <<http://ssrn.com/abstract=1094355>>.
- 34 Curtis J. Milhaupt & Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (Chicago: University of Chicago Press, 2008) at 224–5. It is noted in *Les droits*, *ibid.*, that the *Doing Business* Reports focus exclusively on dispute resolution, ignoring the long-term benefits of dispute prevention, such as are achieved in France through the code system (facilitating *ex ante* knowledge of the laws: *ibid.* at 81–6, 105–6), the institution of the notary (*ex ante* formalization of evidence and consequent *ex post* reduction of number of disputes: *ibid.* at 89–90, 106), and some of the very same business regulations that cause France to be ranked so low in the reports (*ex ante* filtering out of unviable businesses and consequent saving of wasted investment expenditures: *ibid.* at 42). See also the contributions of Teyssié, Pages, and Betbèze in Guy Canivet *et al.*, *Mesurer l’efficacité économique du droit* (Paris: LGDJ, 2005), those of Rouvillois, Reynis, and Deffains in Rouvillois, *Le modèle juridique français*, *supra* note 5, as well as Nathalie Parent, ‘Le notariat: un obstacle ou un ferment utile à la culture économique?’ in Jean-François Gaudreault-Desbiens *et al.*, eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (Montreal: Éditions Thémis, 2009) 167.
- 35 Kenneth Dam, *The Law–Growth Nexus: The Rule of Law in Economic Development* (Washington DC: Brookings Institution Press, 2006) at c. 2; Frank B. Cross, ‘Identifying the Virtues of the Common Law’ (2007) 15 *Sup.Ct.Econ.Rev.* 21; Gillian K. Hadfield, ‘The Levers of Legal Design: Institutional Determinants of the Quality of Law’ (2008) 36 *J.Comp.Econ.* 43 at 44, referring to Mattei, *Comparative Law*, *supra* note 1 at c. 3; Michaels, ‘Second Wave,’ *supra* note 27; Laurent Cohen-Tanugi, ‘Droit civil contre common law: un faux débat’ in Frédéric Rouvillois, ed., *Le modèle juridique français : un obstacle au développement économique?* (Paris: Dalloz, 2005) 25. As Ian Lee has pointed out, however, this criticism is more easily levelled at the legal origins literature than at the *Doing Business* reports themselves: Lee, ‘Le marché du droit,’ *supra* note 4 at 80–2.
- 36 The authors of *Les droits*, *supra* note 4 at 107–11, deplore the reports’ silence as to the success of the 1993 Treatise between France and some African countries (OHADA), which designated French business law as the law applicable in these countries with respect to business transactions. See also J. Issa-Sayegh, ‘Peut-on perfectionner le système sans aller vers la *common law*? L’exemple de l’OHADA’ in Frédéric Rouvillois, ed., *Le modèle juridique français : un obstacle au développement économique?* (Paris: Dalloz, 2005) 129. Positive reports on the OHADA from the United Nations,

method,³⁷ to its transparency,³⁸ and to the reliability of the data used.³⁹ On the substantive front, finally, counter-examples have been raised that significantly weaken the central thesis. For example, historical investigations have revealed that in the case of some legal systems, high economic growth has taken place during periods of high statutory, not judicial, activity.⁴⁰

Admittedly, these criticisms are not all equally forceful, and some of them may be forceful against one or the other, but not both, of the legal origins literature and the World Bank's reports. Take for example the criticism that the legal origins scholars have so far focused exclusively on the judiciary and have thus missed important non-judicial levers of legal change (*e.g.*, legislators and academic writers in civil law systems). These scholars could legitimately respond that in handling complex social phenomena, it is standard (and best) economic practice to study the various components one at a time, and that, while they have yet to study non-judicial factors, they recognize that such a study is necessary in order to complete their analysis.⁴¹ But that same response clearly is

the US Department of Commerce, and in other World Bank documents are discussed in *Les droits*, supra note 4 at 108–9.

37 Mathias M. Siemms, 'The End of Comparative Law' (2007) 2 J.Comp.L. 133; Kevin E. Davis & Michael B. Kruse, 'Taking the Measure of Law: The Case of the Doing Business Project' (2007) 32 Law & Soc.Inquiry 1095 at 1112–5 [Davis & Kruse, 'Taking the Measure'].

38 Davis & Kruse, 'Taking the Measure,' *ibid.* at 1103–5.

39 In the 'Starting a Business' chapter of *Les droits*, for example, it is reported that following some French critiques on the 2004 *Doing Business* report, the following corrections were made in the 2005 report: under 'number of procedures,' the number was revised from ten to seven; under 'number of days,' from fifty-three to forty-nine, and then to eight; under 'minimum set-up cost,' from 3 per cent to 1.1 per cent of *per capita* income; under 'minimum requisite capital,' from 32.1 per cent to 0 per cent of *per capita* income. *Les droits*, supra note 4 at 36. As noted in *Les droits*, the magnitude of these revisions, in the absence of any major change in the legal rules, is most striking here, for it is such as to cast real doubt on the soundness of the method used to collect the data in the first place. See also Holger Spamann, 'On the Insignificance and/or Endogeneity of La Porta et al.'s "Anti-Director Index" under Consistent Coding' (Harvard Law School John M. Olin Center Discussion Paper No. 7 & ECGI – Law Working Paper No. 67/2006, March 2006), online: SSRN <<http://ssrn.com/abstract=894301>>; Bertrand Du Marais, *Des indicateurs pour mesurer le droit?* (Paris: Documentation française, 2006) at 39.

40 John Armour *et al.*, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (ECGI – Law Working Paper No. 129/2009 & Centre for Business Research, University of Cambridge Working Paper No. 382, August 2009), online: SSRN <<http://ssrn.com/abstract=1431008>>; Simon Deakin, 'Legal Origin, Juridical Form and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company' (2009) 7 Socio-Econ.Rev. 35, esp. at 55ff; Mark J. Roe, 'Legal Origins, Politics, and Modern Stock Markets' (2006) 120 Harv.L.Rev. 460 at 484–5.

41 Gillian Hadfield, 'The Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law' (2009) 59 U.T.L.J. 223 [Hadfield, 'Strategy of Methodology'].

unavailable to the World Bank, which has embodied the legal origins analysis into its annual statements of policy and thereby signalled to the world that it considers this analysis sufficiently conclusive to be acted upon.⁴² In sum, whereas the charge of incompleteness could easily be dismissed as premature by the legal origins scholars, the same charge is both timely and effective when levelled – as it is in *Les droits* – at the World Bank's reports.⁴³

But I would suggest that the French case can be made stronger still. Beyond simply discrediting the findings of the legal origins scholars to date, it may be possible to cast doubt on the viability of the project as a whole. This would entail seizing on what is both the strength and the Achilles' heel of economic analysis as applied to complex social phenomena, namely, its proceeding from the disaggregation of such phenomena into their various components to allow for the successive study of each component in isolation from the others. The disaggregative method of economics clearly is a strength insofar as it brings scientific rigour to the study of human behaviour – a subject that too often eludes serious testing. At the same time, that method assumes, even if only preliminarily, that the phenomenon under study can be conceived as just the sum of its parts,⁴⁴ which may or may not be true, or may be more or less true, depending on the phenomenon. The question that the authors of *Les droits* should have raised, then, is whether that assumption is at all tenable when it comes to studying legal systems (any legal system, not just the French). Perhaps it can be shown to be sufficiently weak as to make the analysis not worth pursuing. If so, little more would be needed for the French to rest their case. Given time and space (and expertise) constraints, the following are just some preliminary thoughts on how such a claim might proceed.

The reason that the sum-of-its-parts assumption might be difficult to sustain as against legal systems pertains to the high level of complexity of these systems, as well as to the high degree of deliberation and rational planning that goes into their construction. That is, insofar as legal systems – Continental ones in particular – may have been consciously designed to be internally coherent, they will be not just highly complex systems but, in fact, highly complex systems whose elements are particularly tightly

42 Davis & Kruse, 'Taking the Measure,' *supra* note 37 at 1115. The authors of the 2006 *Doing Business* report claim to have 'inspired or informed' forty-eight legal reforms around the world: cited in Davis & Kruse, *ibid.* at 1096.

43 Claude Ménard & Bertrand Du Marais, 'Can We Rank Legal Systems According to Their Economic Efficiency?' in Peter Nobel & Marina Gets, eds., *New Frontiers of Law and Economics* (Zurich: Schulthess Juristische Medien, 2006) 7 at 20.

44 H. Muir-Watt, 'Comparer l'efficience des droits?' in Pierre Legrand, ed., *Comparer les droits, résolution* (Paris: Presses Universitaires de France, 2009) 433 at 441 [Muir-Watt, 'Comparer l'efficience des droits'].

interconnected. It has indeed been said of law that it is a system in which the relations linking the various elements may be as important as the elements themselves.⁴⁵ If that is so, the sum-of-its-parts assumption of economics is particularly troubling when applied to legal phenomena.

Take for example the claim, alluded to above, that the limited discretion of civil law judges causes them to be less efficient levers of legal change than their common law counterparts. Even assuming that this claim is true, it loses much of its power once one realizes that civil law systems have in fact been consciously designed so as to direct toward legislators and scholars, and away from judges, the task of changing the law.⁴⁶ The reason that civilian judges generally stick closely to the written law is that they expect the legislators to modify that law when needed; the reason that their judgments are so thin on arguments and justifications (which admittedly play an essential role in legal change⁴⁷) is that they count on the scholars to fill these in. Of course, the enlightened economist will respond, as above,⁴⁸ that the study of the judicial role here is only a first step, that it needs to be complemented with similar studies of the legislative and the scholarly roles, which studies will then serve to qualify the conclusions provisionally reached in the first step so as to account for the interconnectedness of the three roles. But the point is that such interconnectedness may be so intense that the distortion introduced by studying the three roles in isolation from one another is sufficiently serious to render the first step altogether pointless – that is, that the behaviour of the judges is so strongly determined by the legislative and scholarly factors that it is not worth studying in abstraction from these factors. A more pointed example is offered by the issue of anonymous judging. It has been suggested that anonymity in judging militates against legal change, as it prevents creative judges from being singled out and, hence, individually rewarded for their creativity.⁴⁹ But whether or not that is the case, of course, depends entirely on the surrounding legal

45 Marie-Anne Frison-Roche, 'L'idée de mesurer l'efficacité économique du droit' in Guy Canivet *et al.*, *Mesurer l'efficacité économique du droit* (Paris: LGDJ, 2005) 19 at 29 [Frison-Roche, 'L'idée de mesurer']; H. Muir-Watt, 'Les réactions françaises à "Doing Business"' in Jean-François Gaudreault-Desbiens *et al.*, eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (Montreal: Éditions Thémis, 2009) 67 at 72–3.

46 See Parisi and Luppi's critique of Posner's arguments in this regard: Francesco Parisi & Barbara Luppi, 'Judicial Creativity and Judicial Errors: An Organizational Perspective' (Minnesota Legal Studies Research Paper No. 09-09, 16 February 2009) at 2, online: SSRN <<http://ssrn.com/abstract=1344399>> [Parisi & Luppi, 'Judicial Creativity'].

47 Mattei, *Comparative Law*, supra note 1 at 23–4.

48 Hadfield, 'Strategy of Methodology,' supra note 41.

49 Richard A. Posner, 'From the New Institutional Economics to Organization Economics: With Applications to Corporate Governance, Government Agencies and Legal Institutions' J.Institutional Econ. [forthcoming in 2010], as discussed in Parisi & Luppi, 'Judicial Creativity,' supra note 46.

culture: in a context where judicial creativity is widely praised, obstacles to singling out creative judges indeed operate as disincentives against judicial creativity, but the exact opposite is true where judicial creativity is frowned upon, for anonymity there serves to protect creative judges from collective disapproval.⁵⁰ Assessing the incentive structure of anonymous judging in isolation from the legal culture therefore risks yielding conclusions that, rather than being only partially true, or true pending subsequent qualification, are in fact flat wrong. In both these examples, the factors in play are so tightly interdependent that the distortion resulting from their disaggregation arguably may be so great as to make the disaggregated component studies not worth carrying out.

What is more, the degree of distortion increases dramatically with the level of complexity. With such complex phenomena as legal systems, the initial task of partitioning the phenomenon into a multiplicity of basic components is itself highly complex. These components typically are interdependent in some respects and independent in others. In many cases, moreover, relations of dependence are discovered after the fact, once component studies are already under way. The components must then be redefined, and the preliminary analyses based on the old definitions must be revisited. This succession of disaggregating and redefining operations, moreover, often operates at several levels: where the phenomenon is best partitioned into groups and sub-groups of components, component analyses are aggregated so as to produce sub-group analyses, which in turn are aggregated to produce group analyses, and so on. At each level, new relations of inter-component dependence may be discovered that would force a redefinition of the components and a corresponding revision of the conclusions reached to that point. So with respect to the issue of anonymous judging, for example, it may be that, once the initial analysis of the effect of anonymous judging for judicial creativity has been properly revisited to account for legal culture, further revisions are required to account for the fact that different levels of judicial creativity may be optimal in different written law environments.⁵¹ In sum, the more complex the phenomenon, the greater the number of aggregative levels that must be crossed and the greater the likelihood that the prior disaggregated analyses are misleading.

The argument just sketched clearly is quantitative rather than qualitative. The claim is not that legal systems, as specifically *legal* phenomena, are by nature categorically unsuited to economic analysis; rather, it is

50 This is just one example of 'unintended cultural consequences of public policy' of the kind described by Richard Pildes, 'The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium' (1991) 89 Mich.L.Rev. 936.

51 Parisi & Luppi, 'Judicial Creativity,' supra note 46 at 7.

that the high level of complexity of legal systems, combined with the intense interconnectedness of their elements, renders such an analysis very difficult. That is to say, it is entire legal systems, not law as such, that is targeted by the argument. Nonetheless, the level of difficulty may be so high as to be insurmountable. If so, it might be best, as has been suggested elsewhere,⁵² to abandon the legal origins project altogether and content ourselves, for the purpose of understanding entire legal systems, with the kind of thick descriptions offered by the 'softer' social sciences.

Whether or not the level of difficulty is in fact so high as to be insurmountable obviously depends on how distortive disaggregation really is, that is, on how tightly the components of legal systems are interconnected in reality. If Niklas Luhmann is right in describing legal systems as closed, autopoietic systems whose elements all feed on one another in some systematic and fundamental fashion,⁵³ the legal origins project indeed may be altogether doomed. On the other hand, if legal systems are as the legal realists have described them – primarily determined by outside social forces and only tangentially conditioned by concerns for internal consistency – there are good reasons to reserve judgement until more has been done. It may be, finally, that some legal systems best fit Luhmann's account while others best fit the realists'. If it is the case that internal consistency has been far more determinative for Continental than for Anglo-Saxon systems, there is good reason to redefine the contours of the legal origins project so as to exclude the former and retain only the latter.

Whatever happens with that project, however, it seems quite clear that the findings it has yielded to date are not sufficiently reliable to be used as a basis for such portentous policy documents as the World Bank's annual reports. As two observers note, 'it is an open question whether the energy and resources invested in [the] legal reforms [induced by the World Bank's Reports] would have been better put to other uses, including medical research, vaccines, distribution of mosquito nets, and sanitation projects.'⁵⁴

IV *The economic analysis of French law*

But even if the claim of the last section can be made out, which remains to be seen, it would not follow that any form of economic analysis of legal rules and/or institutions should similarly be dismissed as unreliable or unviable. The standard EAL literature typically is more narrowly focused

⁵² Michaels, 'Second Wave,' supra note 27.

⁵³ Niklas Luhmann, *A Sociological Theory of Law* (London: Routledge, 1985) at 174–83.

⁵⁴ Davis & Kruse, 'Taking the Measure,' supra note 37 at 1116.

than the legal origins literature – it targets discrete sets of legal rules and/or institutions, as opposed to entire legal systems⁵⁵ – and its primary aim tends to be more normative than descriptive – it aims to design ideal rules and institutions rather than to provide an exact picture of actual ones.⁵⁶ As a result of both these features, the distortive effect of disaggregation can be expected to be much less problematic for standard EAL than it is for the legal origins literature. I will discuss each feature in turn.

Where the analysis focuses upon discrete sets of legal rules – say, the rules relating to the opening of a small business, or those governing the sharing of marriage property upon divorce – as opposed to entire legal systems, the problem posed by disaggregation is much less acute, for the simple reason that much less of it is needed. Provided that the number and the diversity of the rules involved are not too great, it may indeed be possible to consider these rules as one unified component for analytic purposes. In the above discussion, the ‘component studies’ are not problematic as such: the problem arises only when these studies are aggregated so as to produce a global analysis of the system. It is the global analysis that is unreliable – because of the disaggregating moves through which it was produced – not the analyses of the individual components as such.⁵⁷ In the anonymity in judging example, there is nothing wrong with the creativity incentive analysis of anonymous judging until that analysis is repositioned into the larger context, which includes legal culture. That analysis is problematic, in other words, only insofar as it is put forward as an analysis of judging writ large. In sum, as our concern pertains to disaggregation, it naturally does not apply

55 Muir-Watt, ‘Comparer l’efficience des droits,’ supra note 44 at 436–40. Some traditional EAL texts admittedly cover large sets of legal rules, sometimes entire fields of law: Richard Posner, *Economic Analysis of Law*, 7th ed. (New York: Wolters Kluwer, 2007); A. Mitchell Polinsky, *An Introduction to Law and Economics* (Boston: Little, Brown, 1983). Yet, the scope of these studies remains considerably narrower than that of the legal origins literature, which ultimately aims to capture all aspects of legal systems, be they substantive or procedural, canonical or institutional, including such intangible factors as culture, morality, and social structure. Davis & Kruse, ‘Taking the Measure,’ supra note 37 at 1104; Frison-Roche, ‘L’idée de mesurer,’ supra note 45 at 29.

56 On the difference between ‘positive’ and ‘normative’ economics see Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press, 1993) at 2–8.

57 ‘If particular reforms to a country’s regulatory regime will decrease youth unemployment, reduce job-related accidents, or increase the amount of private credit available to businesses, learning that is surely valuable even if no more sweeping generalizations about the connections between regulation and prosperity are possible’: Davis & Kruse, ‘Taking the Measure,’ supra note 37 at 1109.

where the focus is sufficiently narrow that the analysis can proceed without (or with few) disaggregating operations.

Of course, determining what portions of legal systems can properly be considered 'unified components,' amenable to disaggregation-free analysis, is no small matter. Because any set of legal rules, however discrete or small (even those made up of just one rule), is to some extent tied to the other rules and institutions in the system, there is a sense in which even what we might take to be the most basic elements of legal systems in fact cannot, without distortion, be considered severable 'components.' This being so, it clearly remains possible, from a strict functional perspective, to reduce legal systems to a multiplicity of basic determinants that, although far from fixed in number or in contour, remain sufficiently identifiable to be useful.⁵⁸ One of the most prominent streams of contemporary comparative law literature, what is known as the 'common core' literature, is premised on that very possibility. Common core comparatists first posit hypothetical fact scenarios that they assume all legal systems are bound to confront, then proceed to investigate the particular mechanisms that these systems deploy in response to such scenarios. Each of the particular mechanisms, accordingly, is conceptually uprooted from its larger system and gathered with its functional equivalents from the other systems.⁵⁹ Functional equivalence here supplies the neutral common basis upon which such otherwise highly heterogeneous mechanisms can nonetheless be usefully compared. While functionalism in comparative law has been heavily criticized, precisely because it presents legal rules and institutions as self-standing entities,⁶⁰ few would deny that it has yielded some valuable comparative legal knowledge. Thus, while the conceptual interconnectedness of the components of legal systems causes their disentangling to be particularly tricky, some such disentangling nonetheless is feasible from a functional perspective.

The second feature of standard EAL that shelters it from the objections raised in the last section is that it typically aims not so much to describe actual legal rules as to design ideal ones. The analysis of anonymous judging disaggregated from the background of French legal culture, indeed, is problematic only if the aim is to provide an analysis of *French* judging. As the problem posed by disaggregation pertains to the bridging of the abstract to the actual, studies that do not purport to reach beyond

58 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *Am.J.Comp.L.* 343, calls these basic determinants 'legal formants.'

59 From that perspective, it would be a mistake, for example, to gather as functional equivalents common law and civil law judges. The functional equivalent of the (loquacious) common law judge, indeed, is the combination of the (tight-lipped) civil law judge with the (loquacious) civil law scholar. See text accompanying notes 46–7 *supra*.

60 Michaels, 'Second Wave,' *supra* note 27.

the abstract are not affected by it. The trouble with the legal origins literature is that it very much purports to reach beyond the abstract: while its ultimate goal might perhaps be to model the economically ideal legal system, the way there, as revealed by the work to date, clearly involves studying and comparing actual legal systems. In contrast, the aim of standard EAL studies tends to be more straightforwardly normative. Indeed, it is well known that 'law and economics is remarkably unconcerned with positive law.'⁶¹ Insofar as extant legal rules are discussed at all, these are highly sanitized versions at best. To the comparative lawyer, the normative bias of EAL is most striking in the disregard for the argument part of judicial decisions, as compared to the fact and conclusion parts.⁶² As it is generally accepted that legal systems differ in their forms of argumentation yet may converge on the outcomes of legal disputes,⁶³ comparative lawyers, whose primary aim arguably is to study legal difference, naturally gravitate toward the arguments and away from the conclusions.⁶⁴ A convergence in conclusions, indeed, might arguably point to some latent universal ideal of justice, one toward which all legal systems would naturally tend, whereas the different forms of argumentation would reflect the particular individuality of each system, its 'exceptionalism'⁶⁵ in the face of other systems. From a comparative law perspective, therefore, the fact that EAL scholars would rather debate whether efficiency might be the common driving force behind the similarity of outcomes⁶⁶ than pay attention to actual cross-system differences is the most telling sign of these scholars' predilection for normative legal analysis.

So, if the objections raised above against the legal origins literature lose much, if not all, of their force as against standard EAL, what might still stand in the way of applying EAL to French law? We have already explored possible cultural reasons for the French jurists' traditional disinclination toward EAL. But we also explained that such disinclination, at the level of individual legal actors, should have little or no bearing on the

61 Mattei, *Comparative Law*, supra note 1 at 87.

62 In standard EAL casebooks, the argument part of judicial decisions often has been edited out. See, e.g., R.E. Scott & D.L. Leslie, *Contract Law and Theory* (Charlottesville, VA: Michie, 1988).

63 B.S. Markesinis, 'Learning from Europe and Learning in Europe' in B.S. Markesinis, ed., *The Gradual Convergence* (Oxford: Clarendon Press, 1994) 1 at 30.

64 For a fuller argument see Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in Jason W. Neyers et al., eds., *Exploring Contract Law* (Oxford: Hart Publishing, 2009) 77 at 77–9.

65 O.G. Chase, 'American "Exceptionalism" and Comparative Procedure' (2002) 50 *Am.J.Comp.L.* 277.

66 See, e.g., George Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 *J.Legal Stud.* 65; Paul H. Rubin, 'Why Is the Common Law Efficient?' (1977) 6 *J.Leg.Stud.* 51. For a synthesis and critical assessment of these arguments see Trebilcock, 'Lessons and Limits,' supra note 25 at 129–33.

efficiency of the French legal system taken as a whole. The same distinction applies with respect to EAL of French law more generally. As Michael Trebilcock forcefully explains,⁶⁷ EAL can be a valuable tool with which to analyse all law, even that which might not have been consciously designed from that perspective. That is, quite apart from the particular values and conceptions of law that inform the lawmakers in different legal systems, it remains undeniable that, from an external perspective, ‘all legal systems can [also] be conceived as massive pricing systems’⁶⁸ affecting human behaviour through the structuring of incentives and disincentives to action, with the result that ‘people of divergent normative perspectives [may] be equally interested in what impact the law is actually having on the behaviour of economic agents.’⁶⁹ As even a French scholar has recognized, ‘[t]he idea of evaluating the economic efficiency of law ... is not bad in itself because engaging with that aspect of law – law conceived as an instrument – does not entail that it cannot also be something other than that.’⁷⁰ In sum, it is not incoherent for the same body of law to be internally developed by appeal to, say, standards of internal coherence, yet also be externally analysed from an economic perspective. Divergent internal and external perspectives certainly can coexist peacefully.

The discussion in Part II, however, suggests that the question that most troubles French jurists is not so much *whether* French law can, or even should, be analysed from an economic perspective as *who* should conduct that analysis. While they might recognize the intrinsic merits of that analysis, they would, for the reasons given above, still insist that it be conducted by economists rather than by lawyers. As one French scholar once remarked to me, ‘EAL simply is not and never will be *legal* analysis; it remains *economic* analysis (of law), and as such should be carried out by the economists.’

It can nonetheless be hoped that the conclusions of an economic analysis of French law, whether conducted by the lawyers or by the economists, will one day appear on the radar screen of the French lawmakers. For, as Trebilcock rightly observes,

[i]n making contemporary societal choices amongst alternative mechanisms for the allocation of scarce resources, it is important [in law as in all matters] to

67 Trebilcock, ‘Lessons and Limits,’ *ibid.*; Trebilcock, ‘Mackaay & Rousseau speech,’ *supra* note 9.

68 Trebilcock, ‘Mackaay & Rousseau speech,’ *ibid.* at 2.

69 *Ibid.* at 4. See also Posner, ‘Future,’ *supra* note 1 at 14; Richard Posner, ‘Law and Economics in Common Law, Civil Law and Developing Nations’ (2004) 17 *Ratio Juris* 66 at 74ff; Ejan Mackaay, ‘Law and Economics: What’s in It for Us Civilian Lawyers?’ in Bruno Deffains & Thierry Kirat, eds., *Law and Economics in Civil Law Countries* (Amsterdam: Elsevier Science, 2001) 23.

70 Frison-Roche, ‘L’idée de mesurer,’ *supra* note 45 at 20–1 [translated by author].

appreciate the basic array of systemic choices available and the economic, distributional, and other characteristics of each, so that choices are not made in the abstract, but relative to alternatives.⁷¹

In that sense, EAL reaches beyond particular conceptions of law and justice into fundamentals of political accountability: 'it forces the holders of juridical power to account for the use that they make of it.'⁷² As such, it speaks to all legal systems, particularly those as suffused with rule of law ideals as the French.

In sum, there is no need to throw out the baby with the bathwater; in fact, there is every reason to retain the baby. As the above objections against global efficiency analyses of the kind undertaken in the legal origins literature have very little purchase against standard EAL analysis, nothing stands in the way of French lawmakers' benefiting from the same valuable information that contributes to the law-making process elsewhere. Nothing other than personal cultural preferences, that is.

71 Trebilcock, 'Lessons and Limits,' supra note 25 at 158.

72 Frison-Roche, 'L'idée de mesurer,' supra note 45 at 21 [translated by author].

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