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THE SECOND WAVE OF COMPARATIVE LAW AND ECONOMICS?†

I wish to lay out the emerging trends in law and economics as a call to give up what was so appealing about the first wave of law and economics – namely the illusion of resolution, certainty and mastery over complex legal issues – in favour of greater partiality, imperfection, and multiplicity, but also greater wisdom. The emerging law and economics – what I am calling the second wave of law and economics – is a humbler endeavour, one that shows greater respect for the complexity of law. And one that promises, I believe, to have more to say to legal scholars, jurists, and legislators as a result.[1]

1 *From Posner to Hadfield*

A THE FIRST WAVE OF LAW AND ECONOMICS AND ITS SEPARATION FROM COMPARATIVE LAW

In 1970, two future giants of comparative law and of law and economics, respectively, had their offices side by side at the University of Chicago. Hein Kötz, then a young visiting professor, was about to publish his soon-to-be seminal treatise on comparative law,[2] including the famous (and later controversial) presumption of functional equivalence between doctrinally different legal systems.[3] At the same time, Richard

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1 Gillian Hadfield, 'The Second Wave of Law and Economics: Learning to Surf' in Megan Richardson & Gillian Hadfield, eds., *The Second Wave of Law and Economics* (Sydney, NSW: Federation Press, 1999) 50 at 50 [Hadfield, 'Second Wave'].

2 Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (Tübingen: Mohr Siebeck, 1971); 3d ed. trans. by Tony Weir as *Introduction to Comparative Law* (Oxford: Oxford University Press, 1998) [Zweigert & Kötz, *Introduction*].

3 Zweigert & Kötz, *Introduction*, ibid. at 39–40; for discussion see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 339 at 369–72 [Michaels, 'Functional Method']. The presumption of similarity is actually Zweigert's idea more than that of Kötz, who expressed some doubts; see, on the one hand, Konrad Zweigert, 'Méthodologie du droit comparé' in Faculté de droit et des sciences économiques de Toulouse, *Mélanges offerts à Jacques Maury*, vol. 1 (Paris: Dalloz, 1960) 579; and, on the other hand, Hein Kötz, 'The Common Core of European Private Law: Presented at the

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Posner was busy preparing the first edition of his book on the economic analysis of law.[4] Posner apparently found common ground:

> You keep telling me, Hein, that different legal systems, despite the great differences in their historical development and conceptual structure, often produce the same solutions for the same problems of life. What better explanation is there for this phenomenon than that all judges draw their inspiration from the same secret root of economic logic?[5]

This close proximity between functionalist comparative law and economic analysis is not surprising.[6] After all, economic analysis is in essence a refined functional method, one that measures legal rules not by their doctrinal consistency but by their ability to fulfil societal needs. And yet not much came of the mutualities.[7] Posner's book was central to what can be called the first law and economics movement, but comparative law is absent from it.[8] On the other hand, even though Kötz has strongly endorsed

Third General Meeting of the Trento Project' (1998) Hastings Int'l.& Comp.L.Rev. 803 at 807.

4 Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1973).

5 Reported in Hein Kötz, 'Alte und neue Aufgaben der Rechtsvergleichung' (2002) 57 Juristenzeitung 257 at 262–3.

6 See references in Michaels, 'Functional Method,' supra note 3 at 354. See also Florian Faust, 'Comparative Law and Economic Analysis of Law' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 837 at 846.

7 Thomas Ulen, 'Firmly Grounded: Economics in the Future of Comparative Law' [1997] Wis.L.Rev. 433 at 455 ('Comparative law has been largely immune from law and economics'); Raffaele Caterina, 'Comparative Law and Economics' in Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham, UK: Edward Elgar, 2006) 161 at 161 ('comparative law and economics is still a relatively marginal field').

8 Since then, Posner's position toward comparative law has been somewhat inconsistent. On the one hand, he has suggested rather daring ideas of functional equivalence between English barristers and US judges in Richard A. Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon Press, 1996) at 21–30. On the other hand, he has been very critical of the use of comparative law in constitutional interpretation, because it ignores important social and historical differences. See Richard A. Posner, 'No Thanks, We Already Have Our Own Laws' *Legal Affairs* (July/August 2004), online: Legal Affairs <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp>; Richard A. Posner, 'Foreword: A Political Court' (2005) 119 Harv.L.Rev. 31 at 84–90 (criticizing the use of foreign law in *Roper v. Simmons* as 'flirt[ing] with the idea of universal natural law' at 86) [Posner, 'Political Court']; Richard A. Posner, 'Enlightened Despot' Book Review of *The Judge in a Democracy* by Aharon Barak, *The New Republic* (23 April 2007) 53 at 54–5. Yet although he argues that 'foreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices, like other American judges and lawyers, are largely ignorant' ('Political Court' at 86), Posner seems to see no similar problems for the executive when he advocates the use of comparative law in the area of anti-terrorism law: Richard A. Posner, 'We Need Our Own MI5' *Washington Post* (15 August 2006) A13.

law and economics, it is almost never used in comparative law.[9] Perhaps early law and economics scholars were not very interested in comparative law, possibly because their aprioristic approach to legal problems – in this respect not unlike that of natural lawyers[10] – had little use for the actual content of, and differences among, existing legal systems.[11] Functionalist comparative lawyers could perhaps have used efficiency analysis as the standard, the *tertium comparationis*, against which different legal systems should be measured (although efficiency is only one of various goals of the law with which economics can help).[12] In contrast, however, they were far less interested in thoroughly methodical functionalist comparative law than one would think. Perhaps even functionalist comparative lawyers feel that

9 The most important exception is Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997). Most of the articles in the three volumes of Gerrit de Geest & Roger van den Bergh, eds., *Comparative Law and Economics* (Cheltenham, UK: Edward Elgar, 2004), were written by economists. Even Kötz uses law and economics only occasionally.

10 Mattei, *Comparative Law and Economics*, ibid. at 27–67. Ralf Michaels & Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 Am.J.Comp.L. 843 at 874–5. The opposition between natural law and comparative law has been noticed before: Ralf Michaels, 'Im Westen Nichts Neues' (2002) 66 RabelsZ. 97 at 100; Catherine Valcke, 'Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems' (2004) 52 Am.J.Comp.L. 713 at 721-4. For a historical discussion see Charles Donahue, 'Comparative Law before the Code Napoléon' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 3 at 22–31.

11 Some comparative law remarks exist in other law and economics books, though typically quite generally and only as an afterthought. See, *e.g.*, Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge, MA: Belknap/Harvard University Press, 2004) at 55, 164–5, 204–5, 223, 243, 247, 249, 267, and elsewhere.

12 Mattei, *Comparative Law and Economics*, supra note 9 at 94, 97, 182–199; but for criticism see, *e.g.*, Anne Peters & Heiner Schwenke, 'Comparative Law Beyond Post-modernism' (2000) 49 I.C.L.Q. 800 at 829 ('reductionist view of the law and its role in society'); Anne van Aaken, 'Vom Nutzen der ökonomischen Theorie für das öffentliche Recht: Methode und Anwendungsmöglichkeiten' in Marc Bungenberg *et al.*, eds., *Recht und Ökonomik* (Munich: Beck, 2004) 1 at 22 ('Here also, no criteria can be prescribed to assess why certain legal solutions are "better" or "more adequate"; these reasons can be immanent to the law'.); Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 Brook.J.Int'l L. 405 at 425–8 (criticizing efficiency as ambiguous, non-neutral, and distorted). The idea of establishing an ideal law against which actual legal systems should be measured was proposed most explicitly by Gustav Radbruch, 'Über die Methode der Rechtsvergleichung' [1905/1906] in Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (Tübingen: Mohr Siebeck, 1971) 52; see brief discussion in Michaels, 'Functional Method,' supra note 3 at 345. On the role of this *tertium comparationis* in comparative law see Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 305 at 310–5.

law and economics, at least in its first generation, is simply too abstract to provide proper grounding.

B THE FIRST WAVE OF COMPARATIVE LAW AND ECONOMICS

The real impetus for comparative law and economics, therefore, has come not from traditional law and economics but instead from economics. A group of economists around Harvard economist Andrei Shleifer, often referred to by the acronym LLSV, found comparative law, almost by accident, to be a powerful explanatory tool. I am, of course, referring to the so-called legal origins literature.[13] That literature replaces abstract modelling with empirical enquiry and posits, in essence, that the origins of a country's legal system in one or the other legal family affects its economic success and that, by and large, common law systems do better in this sense than civil law systems. The unprecedented influence of this thesis and the ensuing literature has filled us comparative lawyers with amazement (and, perhaps, envy), because, from a comparative law perspective, the literature is deeply deficient in many ways. This is not the place to discuss all of these problems.[14] For the purposes of this comment, it suffices to point to three key problems.

The first problem is the simplistic, wholesale concept of law and legal systems that the literature adopts. Essentially, all legal systems are reduced to the question of whether they belong to the civil law or the common law family. From this perspective, the United Kingdom and Germany – both member countries of the European Union – should be dissimilar, while China and Cameroon should be similar. This flies in the face of our insight in comparative law, where we have understood that the distinction between civil law and common law has traditionally been widely exaggerated,[15] especially compared to the far more important difference

13 For a very accessible recent article surveying and evaluating the literature, authored by some of the main proponents of the legal origins thesis, see Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 J.Econ.Lit. 285 [La Porta *et al.*, 'Economic Consequences'].

14 For some such perspectives from comparative law see Mathias M. Siems, 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology' (2006) 16 Int'l Co.& Com.L.Rev. 300; Christoph Kern, *Justice Between Simplification and Formalism: A Discussion and Critique of the World Bank Sponsored Lex Mundi Project on Efficiency of Civil Procedure* (Tübingen Mohr Siebeck, 2007); Association Henri Capitant, ed., *Les droits de tradition civiliste en question*, 2 vols. (Paris: Société de législation comparée, 2006); Guy Canivet, Marie-Anne Frison-Roche, & Michael Klein, eds., *Mesurer l'efficacité économique du droit* (Paris: LGDJ, 2005). At the 2009 AALS Annual Conference, a panel organized jointly by the sections on comparative law and on law and economics discussed some of these questions.

15 See especially Reinhard Zimmermann, 'Der europäische Charakter des englischen Rechts: Historische Verbindungen zwischen civil law und common law' (1993) 1 Z.Eu.P. 4; James Gordley, 'Common law und civil law: eine überholte Unterscheidung' (1993) 1 Z.Eu.P.

between the laws of Western and non-Western, or developed and developing, countries.

The second problem relates to the effect that law has on society in general and on economic development in particular. Katharina Pistor and Curtis Milhaupt have caricatured the perspective of LLSV as 'good law + good enforcement = good economic outcomes.'[16] This crude connection between law and society has functional roots and exists in comparative law as well; Zweigert and Kötz say, somewhat carelessly, that 'law is social engineering.'[17] In practical comparative law, however, we are much more suspicious about a direct causal connection between legal transplants and economic consequences.[18] Alan Watson has argued, forcefully, that transplants actually have almost no effect on general society but merely take place among elites.[19] Others who see more of such an effect urge us, generally, that the way in which a legal system is received and its interaction with existing local conditions are crucial elements.[20] In addition, we view the development of the law as a much more fluid process, not predefined by some moment or event centuries ago, whether in the thirteenth century or the nineteenth.

The third problem may be the most important one. LLSV, for all their emphasis on legal origins, ultimately do not take the law seriously. In a recent survey article they 'adopt a broad conception of legal origin as a style of social control of economic life (and maybe of other aspects of life as well)' and suggest that 'common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired

498. For the strongest opposition see Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 I.C.L.Q. 52.

16 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 5.

17 Zweigert & Kötz, *Introduction*, supra note 2 at 45. Comparatists have borrowed the idea of the lawyer as social engineer from the early days of sociological jurisprudence; see Roscoe Pound, 'The Theory of Judicial Decision' (1923) 36 Harv.L.Rev. 940 at 954–8.

18 See Michaels, 'Functional Method,' supra note 3 at 351.

19 *E.g.*, Alan Watson, *Society and Legal Change*, 2d ed. (Philadelphia: Temple University Press, 2001). Watson is often misunderstood as proposing that no connection exists between law and society; see, *e.g.*, Lawrence Friedman, 'Some Comments on Cotterell and Legal Transplants' in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001) 93. Actually, what he says is that legal rules travel easily and with no necessary connection to society, a claim widely shared by anti-formalists who assign limited importance to formal rules.

20 See Daniel Berkowitz, Katharina Pistor, & Jean-François Richard, 'The Transplant Effect' (2003) 51 Am.J.Comp.L. 163; Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 441 at 459–61.

allocations.'[21] This notion is deeply problematic. The problem is not only that the facile equation of codification (as characteristic of the civil law) with government regulation is deeply flawed, since the most important function of codes is to systematize, not to regulate.[22] More importantly, the quoted passage makes it clear that what LLSV really care about are not legal origins but the degree of deregulation, which they perceive to be the main motor of economic success. Now, the degree of deregulation may indeed be the main motor of economic success, and the degree of deregulation may also be correlated to the civil or the common law. But if the real focus of the research is the degree of deregulation, legal origins are little more than a placeholder.

C GILLIAN HADFIELD'S NEW APPROACH

Gillian Hadfield sees many of the same problems, and this is one reason that her work in general, and her new and thought-provoking article in particular,[23] is so promising to comparative lawyers. Elsewhere, Hadfield has supported a 'second wave of law and economics' – one less theoretical and more empirical, more humble, more grounded in the law.[24] In her new article, she seems to suggest something similar for comparative law and economics, and thereby comes close to many findings of comparative lawyers. Like traditional comparative lawyers, she criticizes the focus on the common law/civil law distinction as a distinction between case law and legislation as too simplistic and misleading: 'there clearly are differences between common law and civil code regimes, and within each category, but the conventional focus on sources of law obscures rather than illuminates most of them.'[25] Like traditional comparative lawyers, she is critical of the way in which LLSV believe law influences society and economy (though not, probably, of the more general idea of a general impact of law on society):

> this approach [of LLSV] treats what is essentially a behavioral difference – the extent to which judges' decisions are determined by rules as opposed to their independent judgment and discretion at the time of decision – as if it were an institutional difference, as if the choice to establish a common law system, of itself, generated independent judicial behavior while the choice to adopt a civil law regime, of itself, constrained the actions of judges so that they merely implement rules written into a code.[26]

21 La Porta *et al.*, 'Economic Consequences,' supra note 13 at 286.
22 See Nils Jansen & Ralf Michaels, 'Private Law and the State – Comparative Perceptions and Historical Observations' (2007) 71 RabelsZ. 345 at 377–82.
23 Gillian K. Hadfield, 'The Levers of Legal Design: Institutional Determinants of the Quality of Law' (2008) 36 J.Comp.Econ. 43 [Hadfield, 'Levers of Legal Design'].
24 Hadfield, 'Second Wave,' supra note 1.
25 Hadfield, 'Levers of Legal Design,' supra note 23 at 44.
26 Ibid.

And, finally, as a lawyer, Hadfield takes the law seriously. The 'greater respect for the complexity of law' she calls for[27] is exactly what comparative lawyers think is necessary for good comparative law, and what they need to be reflected in more advanced methods they may want to adopt.

Not surprisingly, then, there is much more for classical comparative lawyers to like in Hadfield's article. Her finding that legal rules will play out differently in different circumstances displays sensitivity to what we comparative lawyers call, somewhat vaguely, 'legal culture.'[28] When she moves the focus away from sources of law and towards the institutional aspects in the law, she follows the move in comparative law, not yet fully completed, from law in the books to law in action.[29] (Indeed, if there is a difference between civil and common law, it is probably stronger in procedural law than in substance).

If this comment is nonetheless somewhat critical, this is therefore not meant to suggest that Hadfield's project is a failure. We comparative lawyers badly need more methodological foundations, and an economic method along her suggested lines sounds promising. In fact, it is precisely because such a method is needed that I want to push Hadfield further along. I will therefore ignore a criticism that has been voiced against the legal origins thesis and that could also be made against her research: that the focus is too exclusively on economic success, efficiency, and social welfare and not sufficiently on other values such as justice or cultural integrity. That criticism, which would ultimately invalidate all comparative law and economics, strikes me as quite weak: even if one believes that economics does not yield a full picture, it is not quite clear why the picture it does yield should not be of use. Instead, I want to analyse Hadfield's article through the lens of the modern functional method in comparative law, which has learned from its criticism. The question remains, I think, whether she can ultimately overcome the three shortcomings she has identified in the LLSV literature and in Chicago law and economics: the focus on broad general features, the simplistic connection between law and social change, and the simplistic view of law.

27 Hadfield, 'Second Wave,' supra note 1 at 50.

28 Perhaps the most elaborate analysis is Roger Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate, 2006). For my own summary see Ralf Michaels, 'Rechtskultur' in *Handwörterbuch zum Europäischen Privatrecht* [forthcoming].

29 Roscoe Pound, 'Law in the Books and Law in Action' (1910) 44 Am.L.Rev. 12; see also Mathias Reimann, 'The Progress and Failure of Comparative Law' (2002) 50 Am.J.Comp.L. 671 at 675–6, 679–80 [Reimann, 'Progress and Failure']. For a somewhat parallel criticism of LLSV see 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 – First International Scientific Conference on Law and Economics at the University of St. Gallen* (Zurich: Schulthess, 2006) 7 at 19–21.

II *Beyond the common law/civil law distinction*

Let me start with the civil/common law dichotomy that lies at the base of LLSV and of much traditional comparative law, and with the implicit bias in favour of the common law. Hadfield goes beyond the dichotomy in important ways. First, she focuses on a number of factors beyond the stereotypical characteristics of civil and common law (codification vs. case law, judicial constraints vs. judicial discretion). Second, she explicitly (and admirably) aims at avoiding any bias in the evaluation of legal systems. Quite frequently she points out that certain features traditionally understood as typical of the civil law may be of equal or even superior value to those of the common law.

If then, in the end, it still feels as though the common law comes out, by and large, as superior, the reason may be that indeed it is; but the reason may also lie in the particular questions Hadfield asks. Here she faces a challenge familiar from critiques of functionalist comparative law.[30] Functionalists hope to achieve neutrality and objectivity with the idea of functional equivalence: problems are to be formulated in a neutral language, and legal solutions from different legal systems are measured according to their functionality.[31] This presumes that problems are universal and can be formulated in a neutral way. In reality, however, many apart from the most general problems are contingent on the respective framework within which they emerge. This framework may be extra-legal: a society in which water is scarce will treat water rights differently from one that has too much water; 'the' problem of how to distribute existing water is not really the same problem in both societies. But the framework may be internal to the law, too. For example, US tort law faces the problem of how to estimate future costs arising from an injury. This may look like a universal problem until we realize that it appears within the framework of peculiarities of US law: the relative lack of social security and the high costs of future litigation over costs. In this sense, all micro-comparison – the comparison of individual rules and institutions – must turn into macro-comparison, because these rules and institutions can be understood only with respect to their place in the entire legal system.[32]

The problem among traditional comparative lawyers is that each of us tends to adopt the perspective of our own legal system. Theoretically, that

30 See Michaels, 'Functional Method,' supra note 3 at 367–9.

31 See, e.g., Reinier R. Kraakman *et al., The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2004) [Kraakman *et al., Anatomy of Corporate Law*].

32 Michaels, 'Functional Method,' supra note 3 at 375; Ralf Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 Mich.J.Int'l.L. 1003 at 1022–7.

should not be the concern for an economic analysis, but things are not that easy. Anne van Aaken, for example, suggests that 'liability for others,' proposed by Zweigert and Kötz as a system-neutral formulation,[33] is too narrow a definition of the legal problem of agency, and that it should be replaced by the economic concept of principal–agent relationship.[34] But does this not run the risk of merely replacing the bias of one legal system with the bias of one discipline, in this case economics? And, moreover, given that this discipline has such strong roots in US thought, which, in turn, is inevitably influenced by US circumstances and US law, do we not risk ending up with something of the same bias? Teemu Ruskola, for example, has argued that the principal–agent relationship is viewed as a problem only in the United States, while in China it is viewed as a solution.[35] Though this may be overstating a difference,[36] it suggests how the way in which we formulate problems is influenced by our own background and that, rather than searching in vain for a neutral perspective, we ought to accept the contingency of our own perspective and make the best of it.

Arguably, we find some of the same problems in Hadfield's paper. Hadfield's main concern is with the incentives for judges to optimally adapt the legal system to changed societal changes. Her concept of 'systemic legal human capital' – the learning that exists within the law as such, beyond individual judges – is highly interesting; it correlates, at least to some extent, with ideas of legal knowledge as formulated by cultural studies of the law (though that concept is probably less instrumental).[37] It is less clear, at least from a comparative law perspective, why Hadfield focuses on the creation of this capital (and the adaptation of the law) only in courts. R.C. van Caenegem argues, albeit somewhat simplistically, that legal systems in the civil law tradition place less emphasis on the judge: French law is more about legislators, German law about

33 Zweigert & Kötz, *Introduction*, supra note 2 at 45.

34 Anne van Aaken, 'Vom Nutzen der ökonomischen Theorie des Rechts für die Rechtsvergleichung' in Brigitta Jud *et al.*, eds., *Jahrbuch junger Zivilrechtswissenschaftler 2000: Prinzipien des Privatrechts und Rechtsvereinheitlichung* (Stuttgart: Boorberg, 2001) 127 at 148–9; see also, *e.g.*, Kraakman *et al.*, *Anatomy of Corporate Law*, supra note 31 at 2–3, 21–2.

35 Teemu Ruskola, 'Legal Orientalism' (2002) 101 Mich.L.Rev. 179 at 190 n. 43.

36 For example, the distinction between ownership and control in US corporate governance was, of course, also developed as a solution to a problem. See Herbert Hovenkamp, 'Neoclassicism and the Separation of Ownership and Control' (U Iowa Legal Studies Research Paper No. 08-52, 11 December 2008), online: Social Science Research Network <http://ssrn.com/abstract=1315003> .

37 See, *e.g.*, David Gerber, 'Globalization and Legal Knowledge: Implications for Comparative Law' (2001) Tul.L.Rev. 949; Annelise Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56 Am.J.Comp.L. 605.

academics.[38] If this is true, at least to some degree, it would be too narrow to compare only judges and litigation in different legal systems. Even if the judiciary in a career judiciary system creates less legal human capital than that in a capstone legal system, the difference may be balanced by other institutions, so that the legal system as a whole may still create about the same amount of legal human capital. Hadfield acknowledges as much when she finds that in some systems information may be cheaper for legislators than for courts to gather,[39] but the possibility does not (yet?) have an important impact on the formulation of her research questions.

Indeed, the one issue on which Hadfield purports to find one type of solution clearly superior raises doubts about the contingency of her question:

> What does seem clear is that better judicial information processing is unambiguously good and that wider distribution of judicial information (about cases and about judges) promotes higher quality law provided that this wider distribution is effective, over time, at extracting expertise from a mix of good and bad information.[40]

Indeed, if (a big if!) we neglect the costs of judicial information processing, this seems unambiguously good for the quality of the judiciary. But it need not necessarily be good for the law at large. First, it need not be good for another function of law in general and courts in particular: the quick and efficient resolution of cases, which may be better served by more formal and restrictive rules.[41] Second, better judicial information processing is likely to empower judges over other institutions, and this need not necessarily be good for the legal system at large. The fact that French decisions are anonymous and short is no historical accident; it was a deliberate choice in reaction to a judiciary that was considered corrupt.[42] For similar reasons, current suggestions to strengthen the Chinese judiciary may hold their own problems.[43] Traditionally, the

38 R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge: Cambridge University Press, 1987).

39 Hadfield, 'Levers of Legal Design,' supra note 23 at 62–3.

40 Ibid. at 69.

41 Bernd Hayo & Stefan Voigt, 'The Relevance of Judicial Procedure for Economic Growth' (CESifo Working Paper Series No. 2514, 19 December 2008), online: Social Science Research Network <http://ssrn.com/abstract=1318292>. The paper aims at refuting Simeon Djankov *et al.*, 'Courts' (2003) 118 Q.J.Econ. 453 (arguing that formalist procedural law is inefficient and bad for economic progress).

42 John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968) at 350–62.

43 See, *e.g.*, Benjamin B. Liebman, 'China's Courts: Restricted Reform' (2007) 21 Colum.J.Asian Law 1; Zhou Suli, 'Political Parties in China's Judiciary' (2007) 17 Duke J.Comp.& Int'l L. 533.

function of Chinese judges has been quite different from that of Western judges; legal human capital was created elsewhere, and we might well want to strengthen the processes in these other institutions instead of focusing on the judiciary.

I hope my point becomes clear: I am not saying that French legislators and German scholars are the same as common law courts, in any way; at best they are functionally equivalent. Legal sources compete for influence within each legal system, and in different systems, different sources win.[44] Nor am I suggesting that all legal systems ultimately have the same quality. I am not even sure to what extent a comparison of courts and legislators with respect to their ability to create human legal capital would be possible. I am only saying that if courts in England and legislators in France are, to some extent, functionally equivalent, then comparing English and French courts becomes problematic, in view of the requirement to compare institutions with similar functions rather than institutions with the same name. This is a problem that traditional comparative law has never fully resolved, and one that can perhaps not be resolved but only acknowledged, but it is likely one that can mar economic comparisons, too.

III *The quality of law*

There is another way in which Hadfield's approach perhaps does not completely resolve the problems with the legal origins literature. LLSV have been rightly criticized for accepting a causal relationship between legal origins and economic success when what they show is merely a correlation between a very broad categorization (civil vs. common law) and relative economic success. (Mark West, in an infamous paper, has suggested that one could similarly show that legal origins have an impact on success in soccer World Cups, for which the civil law equips better than the common law.)[45] Hadfield, by contrast, suggests instead a multitude of factors that should be analysed. This suggestion includes both a descriptive and a normative claim. The descriptive claim is that individual determinants contribute to a legal system's ability to adapt,[46] which in turn is crucial for its ability to create social welfare.[47] The normative claim is 'that the choice facing transition and developing economies is not between writing codes or borrowing volumes of caselaw. Rather, it is

44 Mattei, *Comparative Law and Economics*, supra note 9 at 110–21.

45 Mark D. West, 'Legal Determinants of World Cup Success' (2002), online: Social Science Research Network <http://ssrn.com/abstract=318940>.

46 Hadfield, 'Levers of Legal Design,' supra note 23 at 57–69.

47 Ibid. at 45, 46. Hadfield leaves for future research the effect on economic welfare: ibid. at 70.

a series of choices about institutional attributes, many of which are under legislative and executive control.'[48] I think this is promising, but I see two problems.

A first problem concerns the relation between law and social welfare and, thus, the question of what constitutes 'quality of law.' Hadfield's assumption that legal rules should be 'adapted to new welfare-relevant information about the environment'[49] rests in a post-realist understanding of law as directly responsive to society.[50] In such an understanding, adaptability of the law (to outside influences) must be preferred over stability, more judicial information about social welfare is better than less, and so on. But this understanding, although most attractive both for an economic and for a functionalist perspective, is far from obvious. In a traditional civil law understanding, legal argument is intrinsic to the law; adaptation of legal rules should take place with regard to the legal system, not to societal requests. Hadfield herself cites a German scholar of the nineteenth century for this distinction:

> A rule of law may be worked out either by developing the consequences that it involves, or by developing the wider principles that it presupposes ... The more important of these two methods of procedure is the second, i.e., the method by which, from given rules of law, we ascertain the major premises they presuppose.[51]

48 Ibid. at 71.

49 Ibid. at 46.

50 The idea of responsive law is, of course, Nonet and Selznick's. See Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, 2d ed. (New Brunswick, NJ: Transaction, 2001). Cf. Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 Am.J.Comp.L. 769.

51 Hadfield, 'The Quality of Law: Judicial Incentives, Legal Human Capital and the Evolution of Law' (2007) [unpublished, archived at Selected Works of Gillian K. Hadfield, online: Berkeley Electronic Press Inc. <http://works.bepress.com/ghadfield/6>] at 27 n. 9 (citing Henry Merryman, who in turn cites Rudolf Sohm, without giving an exact reference) [Hadfield, 'Quality of Law']. Interestingly, although the idea of emphasizing systematic coherence over individual assessment of consequences is not anathema to German legal thought, especially of the time, Merryman's quote does not support it. The quoted passage, which is actually from Rudolph Sohm, *The Institutes of Roman Law*, trans. J.C. Ledlie, 3d ed. (Oxford: Oxford University Press, 1907) at 30, contains a consequential mistranslation: 'consequences' is, in the German original, '*Folgesätze*'; 'principles' is '*Obersätze*.' See Rudolf Sohm, *Institutionen des römischen Rechts*, 13th ed. (Leipzig: Duncker & Humblot, 1908) at 31–2. Thus, in fact, Sohm is here comparing not realist and formalist approaches but merely induction and deduction, and all he is saying is that he considers induction more important because it has the potential to enrich the law. More importantly, the quoted passage is not only mistranslated but also out of context. If it may look like empty formalism, a slightly earlier passage discards any such suspicion. Displaying a

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. Judges should not, on this view, have to address the social consequences of their decisions directly, because this would make their job overly complex. Such a view of the law and the role of legal argument is harder to maintain for US law. It is possible only in a legal system with a high degree of systematicity – for example, German law. In such a system, a career judiciary may actually be attractive, because judges in such a system need less practical experience and more good understanding of the law.

Even if we grant that the quality of law lies in its adaptation to society, a follow-up problem emerges. The legal origins thesis, as crude as it is, is at least straightforward: it suggests a simple relation between one cause (legal origin) and one effect (economic success). In this way, it can make a suggestion that is at least *prima facie* plausible: once a system has been set on a track (civil law or common law), much of its future development will rest on a certain path dependency.[52] If Hadfield, by contrast, suggests that various determinants contribute to such success and can be altered in isolation, she may underestimate the problem of interconnectedness among these determinants. Is it not the case that the 'series of choices about institutional attributes' provides choices that are at least in part interconnected? Will not, for example, the establishment of a career judiciary more likely lead to a system of specialized courts, and vice versa? Early functionalist comparatists viewed individual legal institutions as relatively independent responses to relatively independent problems. Today we know that legal institutions often stand in close and complicated relation with other institutions and with the legal system at large.[53] It may be possible to master this complexity in institutional design. Yet it may well be the case that institutional choices for any one legal system lead to unintended and quite idiosyncratic consequences because of the particular setup of that particular legal system. As comparative lawyers, we agree with LLSV (and

strong influence from the work of an important precursor of legal realism, Rudolf von Jhering, on the struggle of law (to which he refers), Sohm writes (at 29–30),

> The idea of justice, which is the vital principle of law, requires that the considerations of practical utility inherent in the relations of life shall be taken into account . . . He alone can claim to have obtained a real vision of the law, of justice and of injustice, to whom life has revealed itself in its fullness . . . It is the foremost function of the 'logical' interpretation to show clearly the real contents of a rule of law by means of a true perception of its actual conditions and effects; in other words, a logical interpretation should be, above all things, practical, it should exhibit the *material* significance of the rule . . .

52 The claim is only *prima facie* plausible, however. Critics have rightly pointed out that the relevant decisions with respect to economic law were taken long after civil and common law diverged, and were probably largely independent of that divergence.

53 *Cf.* Michaels, 'Functional Method,' supra note 3 at 375.

Hadfield) that 'law matters.' Unlike them, perhaps, we are less sure that we know exactly how it matters.

IV *The complexity of comparative law*

This leads me to a last and most important point, one that underlies both other points of criticism. Hadfield rightly blames LLSV for not taking the law seriously, and she overcomes this criticism in her own work. However, she herself does not always take comparative law as seriously as would be good for her work – the existing and important differences between legal systems not only in their results and values but also in their ways of arguing.

I believe the actual knowledge that we have in comparative law is greater than what Hadfield uses or acknowledges. Although Hadfield's understanding of comparative law is infinitely greater than that of LLSV, there is still more disciplinary knowledge that she could use. Hadfield, for example, draws 'primarily on comparative law treatises and information available from the websites of governments, courts and agencies in different countries, together with conventional professional understandings of how legal systems in these countries operate.'[54] Based on this information, it is understandable that she thinks that 'our comparative knowledge of the details of existing systems – particularly given the heavy focus on conventional distinctions between code and common law sources of law – is relatively thin.'[55] However, her claim that 'there has been relatively little attention to systematic comparative analysis of the finer institutional features of legal regimes and almost none that attempts to operationalize the extent of differences for analytical purposes'[56] appears exaggerated. Although this heavy focus on the distinction between code and common law sources does exist in the law and economics literature, comparative law has produced broader knowledge on many of the aspects she names. Our knowledge of judicial control of

54 Hadfield, 'Levers of Legal Design,' supra note 23 at 52.

55 Ibid. at 45. Hadfield lists the following (at 45–6):

> the organization of the courts and the extent to which jurisdiction is general or specific; the organization of the judiciary and the extent to which judicial careers are organized on a bureaucratic career model or what I call a 'capstone' model, the crowning achievement of legal practice; the mechanisms of information distribution and the extent to which information is distributed to a broad public audience or a more confined professional audience; the procedures followed in finding facts and shaping the issues in adjudication; the role of public versus private entities in the enforcement of judgments (damages); and the degree to which the mechanisms by which legal services are produced, priced and distributed are competitive or professionally-controlled.

56 Ibid.

procedure in civil law systems has moved beyond John Langbein's seminal article from 1985, which Hadfield cites.[57] Studies about judicial careers exist,[58] as do analyses of the organization and control of lawyers.[59] Much of this knowledge is soft and lacks the rigour that social scientists are used to. At the same time, it should add a richer picture and prevent the *a priori* approach to law and economics that Hadfield herself rightly objects to.

In a way, however, we traditional comparative lawyers are not in a good position to blame Hadfield. Comparative lawyers have often been criticized for their lack of method, to some extent with good reason.[60] And yet, many of the scholars who ask for more methodological rigour rarely produce actual comparative studies, and when they do, they do so without the rigour they ask for elsewhere. Somehow, methodological rigour and sensitivity to legal system seem to be, to some extent, mutually exclusive. The reason for this may be that modern comparative law is no longer a pure social science (if it ever was); instead, the discipline has learned from the humanities and from softer social sciences such as anthropology. This means that thick description is sometimes necessary, even if coding of the law is then no longer possible.

v *The second wave?*

By now it should be clear that this is less a critique than an attempt to steer Hadfield into a certain direction. Hadfield's project is extremely

57 Ibid. at 55, citing John Langbein, 'The German Advantage in Civil Procedure' (1985) 52 U.Chi.L.Rev. 823. Reactions to the article are listed in Joachim Zekoll, 'Comparative Civil Procedure' in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1327 at 1355; for an in-depth presentation of German civil procedure see Peter Murray & Rolf Stürner, *German Civil Justice* (Durham, NC: Carolina Academic Press, 2004).

58 *E.g.*, Lee Epstein *et al.*, 'Comparing Judicial Selection Systems' (2001) 10 Wm.& Mary Bill Rts.J. 7; Rafael Jiménez Asensio, ed., *El acceso a la funcion judicial. Estudio comparado* (Madrid: Consejo General del Poder Judicial, 2002); John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge: Cambridge University Press, 2006); Carlo Guarneri, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government' (2006) 24 L.S. 169.

59 See, *e.g.*, Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers in Society*, 3 vols. (Berkeley: University of California Press, 1988–1989); Richard L. Abel & Philip S.C. Lewis, *Lawyers in Society: An Overview* (Berkeley: University of California Press, 1995); John J. Barceló III & Roger C. Cramton, eds., *Lawyers' Practice and Ideals: A Comparative View* (The Hague: Kluwer Law, 1999); John Henry Merryman, David S. Clark, & John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville, VA: Michie, 1994) at 892–935; see also various contributions in the *International Journal of the Legal Profession*.

60 A frequent complaint; for some references see Ralf Michaels, 'Im Westen nichts neues?' (2002) 66 RabelsZ. 97; Reimann, 'Progress and Failure,' supra note 29.

ambitious. The number of elements of legal systems that she wants to analyse is breathtaking (and yet probably insufficient to cover everything); the causal relations she hopes to prove are exciting but numerous (and yet still do not cover the complexity of existing legal systems). Hadfield is aware that her study is, at this point, still somewhat abstract. If this suggests that she thinks further research is necessary, also to refine the framework, then this is laudable. If, however, her position that 'we clearly need to deepen our attention to the specifics of the institutional environments in different countries that affect judicial incentives and the accumulation of legal human capital'[61] suggests that the structure of her approach itself should no longer be open to question, this may unduly limit further research. Zweigert and Kötz, in particular, have emphasized that comparative law may hardly be able to fulfil the rigorous requirements of the social scientist[62] – not only for lack of training but also because of the irreducible importance of 'hunch' in comparative law: often, the most relevant questions and comparisons cannot be identified in the abstract and *ex ante* (as scientific rigour would require) but instead occur once the comparatist becomes engaged in her research. If we start with hypotheses and merely test these, we miss out on too much.

If I had to determine Hadfield's methodical direction, it might look something like this: Where Hadfield focuses on institutional choices in relative isolation, I would want her to focus on their interplay, their mutual dependency. Where she suggests a structural functionalism, I would prefer an equivalence functionalism that focuses on entire legal systems. Where she places great weight on individual actors – judges, lawyers, legislators – and the incentives they face to bring about legal change, I would rather focus on the ability of the legal system *qua* system to evolve. And, finally, where Hadfield focuses on LLSV as an enemy to overcome, I would suggest that she instead view existing comparative law as a friend to collaborate with. It is not certain that such a combination is at all possible. Quite possibly, economics must always remain at a certain level of abstraction in order to maintain its ability to measure causation. Quite possibly, comparative law may be unable to adopt the methods of economics without losing too much of its cultural sensitivity to differences and identities. Yet we need not determine this *a priori*. Comparative law and economics is still young, and who would want to say *ex ante* what is or is not possible without trying?

Here the cycle comes to a close. Posner and Kötz did not influence each other much, in the end. Posner's economic analysis was too abstract

61 Hadfield, 'Quality of Law,' supra note 51 at 28.
62 Zweigert & Kötz, *Introduction*, supra note 2 at 11–2.

to open up for comparative law; Kötz' functionalism was too crude to be of great help. Since then, law and economics has reached a second wave, and Hadfield's article, despite what I view as its potential shortcomings, displays great potential. At the same time, comparative law has matured and moved beyond the focus on a narrowly defined functionalism. Today, we can well speak of a new wave of comparative law, too. And thus, standing on the shoulders of giants from law and economics and from comparative law, we may be able to achieve what these giants ultimately did not: a truly interdisciplinary approach to comparative law. Gillian Hadfield has shown that the economic side is on the best way. We comparative lawyers may have to catch up.

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