Efficiency and French Law

The resistance of French civil law to EAL has been the object of academic discussion for some time.[1] But that discussion gained new vigor with the publication of the World Banks 2004 and 2006 *Doing Business* Reports.[2] Both these reports are based on 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 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 regressive

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[1] U. Mattei, Comparative Law and Economics (Ann Arbor: U of Michigan Press, 1997), at 23-4; R. Posner, *The Future of the Law and Economics Movement in Europe* 17 Int'l Rev. of L. & Econ. 3 (1997), at 5. As recently as in 1991, Cooter & Gordley claimed (*Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 Int. Rev. of L.& Econ. 261 (1991)) that they "were unable to identify an active law and economics scholar in France." The first, and rather summary EAL account of French private law in French indeed was published that same year: B. Lemmenicier, Economie du droit (Éditions Cujas, Paris, 1991). See also the reports to the effect that, while EAL has made some inroads into European legal education, it has yet to make its way into actual lawmaking: K. Grechenig & M. Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 Hastings Int'l & Comp. L. Rev. 295, 298 (2008). But see: E. Mackaay, L'analyse économique du droit (Thémis and Bruylant, 2000), at 20-22.

[2] *Doing Business in 2004: Understanding Regulation* and *Doing Business in 2006: Creating Jobs*, both available at http://www.doingbusiness.org.

[3] For a good survey of the Legal Origins literature, see: T. Beck & R. Levine, "Legal Institutions and Financial Development" in C. Menard & M. Shirley, eds., Handbook of New Institutional Economics, 251-278 (2005). See also the more recent: R. La Porta *et al.*, *The Economic Consequences of Legal Origins*, 46 J. Econ. Lit. 285 (2008).

[4] *Civil Law Systems in Question—On the World Bank's Doing Business Reports*. For an overview of the reaction of the French press to the *Doing Business* Reports, see I. Lee, *Le marché du droit: observations néoclassiques sur les rapports* Doing Business *et la rivalité common law - droit civil*, in J.-F. Gaudreault-DesBiens et al., eds., Convergence, concurrence et harmonisation des systèmes juridiques (Journées Maximilien-Caron 2008) 78 (Thémis 2009), at note 2.

[5] *Les droits* follows up on another document, F. Rouvillois, ed., Le modèle juridique français : un obstacle au développement économique ? (Paris : Dalloz, 2005) (hereafter "*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: E. Mackaay, *Est-il possible d'évaluer l'efficience d'un système juridique?*, in J.-F. Gaudreault-Desbiens et al, supra note 4, 21, at 23.

analysis, the kind of analysis on which the 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. It is then argued that that process was flawed as far as the particular analysis contained in the 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 the inaccuracies or half-truths concerning French rules 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. That 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 that it deserves, however, at least in North-American academic circles. No doubt this is in large part due to language: as 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 towards 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 it would have been worth clarifying is that between law and its cultural context. The World Bank's Reports indeed seemingly 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 socio-cultural reasons, traditionally been disinclined towards EAL that (2) the French legal system as a whole would be inefficient. If such a nexus indeed can be established then the fact that the Reports confirm one of these two propositions, whereas the other is well-established, can only bolster their credibility. And conversely, of course, an argument undermining that nexus would serve to deprive the Reports of said credibility boost. As an argument establishing law's autonomy from its cultural context is just such an argument, it is one which would have been worth exploring in *Les droits*.

[6] *Les droits* is not the only text in which these issues are confused. See, *e.g*., Mattei, supra note 1, Chap 3.

The following discussion is structured around those distinctions. The French's traditional resistance to EAL, the efficiency of the French legal system, and the merits of analyzing French law from an EAL perspective are discussed as three separate issues, in Parts I, II, and III respectively. Part I describes various cultural reasons for the French's traditional resistance to EAL. While the existence of that resistance is well-established, as just suggested, many questions remain as to the proper explanation for it.[7] Part II draws on various arguments presented in *Les droits* and elsewhere with a view to casting doubt on the possibility of assessing, let alone comparing, the efficiency of entire legal systems, be they the French or any other. Part III clarifies that the objections raised in Part II do not entail that French law is somehow unsuited to being analyzed from an economic perspective.

I. French Culture and EAL

That the French would resist analyzing 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, Americanism, which large segments of the French population find objectionable.[8] Other, more interesting, factors include the fact that French economic expertise has traditionally concentrated in macro- rather than micro-economics;[9] the resistance to inter-disciplinarity in French legal education[10] and in the French legal profession,[11] the French's general distaste for instrumental reasoning[12] and attendant blurring of conceptual categories,[13] and their consequent preference, when it comes to law, for a form of reasoning geared towards internal coherence.[14] I will not rehash these 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,[15] the present discussion will be limited to summarizing the findings of that earlier exploration and reflecting on how they might apply in the present context.

Following Cartesian dualism, the French tend to view facts and ideas as making up two tightly distinct spheres that are conceptual opposites of one another. As product of the intellect, ideas can aspire to being perfectly logical, rational, orderly; in contrast,

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[7] R. Cooper Dreyfuss, *Games Economists Play* 53 Vanderbilt Law Review 1821, 1823 (2000).
[8] Cooter & Gordley, *supra* note 1. See, e.g., *Les droits* at 119-20.
[9] Mattei, supra note 1, at 92.
[10] Trebilcock, Speech at Mackaay & Rousseau book launch, April 24, 2008, at 8.
[11] Posner, *supra* note 1, at 5.
[12] 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 37 (Paris, Editions Cujas, 2002), at 42-3; A. Strovel, Utilitarisme et approche économique dans la théorie du droit—Autour de Bentham et Posner, 37 Arch. phil. drt 143.
[13] Posner, supra note 1, at 7; Cooter & Gordley, supra note 1, at 262; B. Oppetit, Droit et économie, 37 Arch. phil. drt 17, at 26.
[14] Muir-Watt, supra note 12, at 39-42; Grechenig and Gelter (*supra* note 1, at 339) report the same with respect to German law.
[15] C. Valcke, Comparative History and the Internal View of French, German, and English Private Law, XIX Can J. of L. & Juris. 133 (2006).

facts considered on their own are contingent, arbitrary, hopelessly untidy. Beyond being just conceptual opposites, the factual and ideal realms clearly also are hierarchically structured: the ideal realm is the superior realm, that towards 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 towards 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 infuse it with intelligibility and thereby move it a little closer to perfection. This reasoning very much lies at 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.[16] The course of history was to be changed through sheer power of the intellect.

At the same time, the order which 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, the French indeed tend to view the nature of each thing, and thus its place in the overall order of things, as principally determined by that thing's essence.[17] The role of humans under that conception hence 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 arguably informs French thought to this day.[18] The love of order is palpable in all aspects of French society. Most blatantly in the two-part structure imposed on all academic presentation, of course, but also in fields as remote from academia as nutrition and gardening, to name only those examples. In traditional French cuisine, each food group is offered as a separate dish; French gardens are known for their flawless geometrical configurations, free of 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. The same reverence for natural categories informs the compartmentalized court structure of the

[16] Tocqueville's critique of the French Revolution is quite eloquent in this respect: "When one studies the history of our revolution, one sees that it was driven precisely by the same spirit that drove the writing of so many abstract books on government. The same lure for general theories …; the same disdain for existing facts; the same confidence in theory; the same taste for originality, ingenuity and novelty in institutions…" A. de Tocqueville, L'ancien régime et la révolution (Flammarion: Paris, 1988), at 238 (my translation).

[17] This juxtaposition of Aristotle and Descartes may seem odd as 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. Yet, the intellectual structure being imposed under Descartes is not just any structure either, but rather that which naturally results from the operation of the innate intellectual pre-dispositions 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 arguably are not that far apart. In any event, whether they are or not matters little here. All that is needed for present purposes is the demonstration that French thought really does combine Cartesian and Aristotelian influences. Whether this combination is consistent or inconsistent is a separate matter.

[18] Fouillee

French legal system, moreover, which insures that administrative, constitutional, civil, and criminal law matters be adjudicated by separate courts staffed with distinct groups of individuals.

If this is an apt representation of the "French spirit,"[19] 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 consistent among themselves, the merit of legal rules is assessed through their consistency with the other rules, not through their social consequences--policy considerations indeed are seen as largely irrelevant. Various categories of rules naturally emerge which pertain to the various ideals composing the basic set, and all modifications brought to the rules are geared towards 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, it is best, the French believe, 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. Indeed, jurists and economists rarely commingle in France,[20] 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.[21] 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 extremely rare for one and the same individual to combine degrees in law and in economics, as it is for any other disciplinary combination. In sum, interdisciplinarity is generally frowned upon because it involves a blurring of categories and a clash of methodologies.[22]

It has been argued that the French resistance to EAL pertains to a general resistance to theoretical analysis in law.[23] We are now in a position to assess that argument. It is untenable, I would suggest, for the simple reason that French jurists are in no way disinclined towards such analysis, quite the opposite. Anybody familiar with the

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[19] Fouillee, Tocqueville, supra note 16, at 239.

[20] Mattei, supra note 1, at 92.

[21] See Lombardo's comparison (S. Lombardo, Regulatory Competition in Company Law in the European Community 18 (2002)) of the European with the North-American situation, where "US corporate law professors are not legal scholars but economists whose field of research is law." The same compartmentalization appears to prevail in Germany: Grechenig & Gelter, supra note 1, at 297, 305.

[22] 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 any interest from French educators.

[23] Mattei, supra note 1, at 85-6; A. N. Hatzis, *The Anti-Theoretical Nature of Civil Law Contract Scholarship and the Need for an Economic Theory*, 2 Commentaries in Law & Economics 1 (2003), esp. at 15, 34

traditional French treatise knows that a heavy dose of theory is part and parcel of standard doctrinal analysis in French law. Only, French jurists are, like their German colleagues,[24] 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 purpose 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 indeed is to theorizing from a perspective foreign to law, not to theorizing *per se*, that French jurists object: it is the interdisciplinary dimension of EAL, as just suggested, that bars it from penetrating French law, not its theoretical dimension.

Yet, the general aversion towards interdisciplinarity is only part of the explanation. 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,[25] the French objection would here be methodological as well as substantive. The French certainly endorse the substantive critique that some variables simply are misrepresented from the moment that they are reduced to a monetary/utility value, but their objection clearly extends to the reducing act itself, as it itself entails reaching across, and thus blurring, natural categories.[26]

The second aspect of economics that particularly troubles the French pertains to the fact that, in economic reasoning as in functionalist reasoning more generally, the relationship of facts to ideas is reversed from what it is in Cartesian, deontological, thought. Micro-economics has the facts--the given of endogenous individual preferences--drive the analysis[27]; under deontological reasoning, individual preferences are what is to be molded rather than what is to be accommodated. In other words, the French consider that it is social reality that should adapt to theory, not the other way round, as occurs in micro-economics. They indeed tend to be uncomfortable with such fundamental economic notions as "optimality," "aggregation," "balancing," "marginality", etc…, all of which were devised to accommodate fact-driven analyses and consequently smack of fuzziness, compromise, ambivalence, of a form of evaluation that can only be relative or comparative.[28] They much prefer the clean and absolute, all or nothing categories of deontological reasoning,[29] and strongly believe in the educational

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[24] "[T]he law as it should be is part of … the law as it is." Heck, cited in Grechenig & Gelter, supra note 1, at 355, note 364.

[25] R. Dworkin, *Why Efficiency?*, Hofstra L. Rev. 8 (1980).

[26] See, *e.g.*, *Les droits*, at 115ff (see in particular the *One size fits all* discussion at p. 123.)

[27] M. Trebilcock, *The Lessons and Limits of Law and Economics* in P. Noreau, ed., In the Eye of the Beholder, 113 (Themis, 2006), at 136.

[28] Muir-Watt, supra note 1, at 42-3.

[29] "The importance of categories" Muir-Watt, supra note 12, at 43. More precisely, Oppetit (supra note 13, at 26) insists on the importance of *natural* categories. The French's objection to EAL, as here described, accordingly is stronger than the German objection, described by Michaels (*The Second Wave of Comparative Law and Economics*, LIX Univ. Toronto L. J. 197, 209 (2009)) 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." 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,

vocation of law: the law ought to discipline, not pamper to, deviant individual preferences, in their view.[30] Not surprisingly, Tocqueville reports that French society has traditionally held philosophers, "immersed in abstract ideas," in much higher regard than economists, "who descend closer to the facts."[31] And within economics, the French preference for the molding over the accommodating of individual preferences has naturally resulted in welfare economics being privileged over micro-economics.[32]

In sum, the French objection to EAL is double: it pertains to the blurring of the "law" and the "economics" categories as well as to the inherent nature of economics as a discipline fundamentally rooted in functionalism, thus premised on the possibility of reaching across categories of variables and on a conception of the relation of facts to ideas that is the opposite of what it is in deontological reasoning.

II. The Efficiency of the French (or Any Other) Legal System

As suggested in the Introduction, however, the fact that French jurists have, for socio-cultural reasons, not been favourably inclined towards EAL has little or no implication for the efficiency of the French legal system. For the fact that French legal rules and institutions might have been crafted in complete disregard of consequences says nothing about the nature of the consequences that did in fact ensue. The flurry of recent academic articles praising the efficiency of Roman law (in which French law incidentally is rooted) if anything 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.[33] 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

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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.)

[30] "The vocation of law is to elevate human conscience towards values that in fact transcend the quest for gain." Muir-Watt, supra note 12, at 40 (my translation). See also: *Les droits*, at 29; O. Tournafond, *Présentation*, in *Le modèle juridique français*, at 35.

[31] Muir-Watt, supra note 12, at 249.

[32] At the very same time as Adam Smith was extolling the virtues of the spontaneous order of the market (The Wealth of Nations, 1759), 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, supra note 16, at 254-55. See also the citations to Quesnay, de la Rivière, and Baudeau, id. at 252-53. On France's history of "hostility towards any form of political or economic individualism," more generally, see: P. Birnbaum, La France imaginée (Paris: Fayard, 1998), esp. 137-94.

[33] R.A. Epstein, *The Many Faces of Fault in Contract Law : Or How to Do Economics Right, without Really Trying*, John M. Olin Law & Economics Working Paper No. 445 (2d series), http://www.law.uchicago.edu/Lawecon/index.html at 18 ("It may seem odd that modern rules based on ancient Roman classifications generate highly efficient solutions. But it only proves that finding the efficient standard of fault is a task best left to those who do economics without really trying."); J.Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 Yale L. J. 1841; J.J. del Granado, *The Genius of Roman Law from a Law and Economics Perspective*; http://ssrn.com/abstract=1293939; Hatzis, *supra* note 23, at 11-13. On the necessary dissociation of efficient law from efficiency-minded law makers more generally, see: R. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 Ratio Juris 66 (2004), at 68; B. Deffains, *Réglementation et inefficacité: quelle correlation?*, in *Le modèle juridique français*, at 63 (discussing Robert Cooter's work).

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 French law 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 Reports, and that on which *Les droits* is in fact most effective.

Focusing 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 Reports' conclusions are based, namely, the findings of the Legal Origin 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 regressive analysis can do no more than to 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.[34] What 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.[35] 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,[36] whether the "civil law" and "common law" labels have been misused[37], and whether some legal systems weighing against the Report's conclusions have been conveniently excluded

[34] *Les droits*, at 18-21, 29-35; M. West, *Legal Determinants of World Cup Success* (2002), John M. Olin Center for Law & Economics (University of Michigan), Paper #02-009 (http://ssrn.com/abstract=318940);
[35] *Les droits*, at 22-26; Michaels, supra note 29, at 204-07; J. Armour et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, esp. 36-42 (2008), ECGI Law Working Paper No. 108/2008, http://ssrn.com/abstract=1094355, at 10; Jamin contribution in Canivet et al., supra note 47.
[36] C.J. Milhaupt & K. Pistor, Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World (Chicago University Press, 2008), at 224-25. It is noted in *Les droits*, that the Reports focus exclusively on dispute resolution, ignoring the long-term benefits of dispute prevention, as are in France achieved through the code system (facilitating *ex ante* knowledge of the laws—pp. 81-86, 105-06), the institution of the notary (*ex ante* formalization of evidence and consequent *ex post* reduction of number of disputes—pp. 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—p. 42). See also the contributions of Teyssié, Pages, and Betbèze in Canivet et al, supra note 47, those of Rouvillois, Reynis and Deffains in *Le modèle juridique français*, as well as N. Parent, *Le notariat : un obstacle ou un ferment utile à la culture économique ?*, in J.-F. Gaudreault-Desbiens *et al*, *supra* note 4, at 167.
[37] Milhaupt & Pistor, *supra* note 36, at 173-75; K. Dam, The Law-Growth Nexus: The Rule of Law in Economic Development (Washington D.C., Brookings Institute Press, 2006), chap. 2; F. Cross, *Identifying the Virtues of the Common Law*, 15 Sup. Ct. Econ. Rev. 21 (2007); G. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, 36 J. Comp. Econ. 43, 44 (2008), referring to Mattei, supra note 1, Chap. 3; Michaels, supra note 29; R. Rouvillois, *Une méthode innovante mais défaillante* in *Le modèle juridique français*, at 15 ; L. Cohen-Tanugi, *Droit civil contre* common law: *un faux débat*, in *Le modèle juridique français*, at 25. As Ian Lee has pointed out (supra note 4, at 80-82), however, this criticism is more easily levelled at the Legal Origins literature than at the Reports themselves. In any event, this is not an objection which the French ought to pursue too far, as the French legal system may not end up faring any better in a system-by-system assessment.

from the analysis.[38] Other questions pertain to the coding method,[39] to its transparence,[40] and to the reliability of the data used.[41] On the substantive front, finally, counter-examples have been raised which significantly weaken the central thesis. For example, historical investigations have revealed that high economic growth has, in the case of some legal systems, taken place during periods of high statutory, not judicial, activity.[42]

Admittedly, these criticisms are not all equally forceful, and in the case of some of them, it may be that they are 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 Origin scholars have so far focused exclusively on the judiciary and accordingly missed important non-judicial levers of legal change (v.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.[43] But that same response clearly is unavailable to the World Bank, which has embodied the Legal Origin analysis into its annual statements of policy and thereby signaled to the world that it considers that analysis sufficiently conclusive to be acted upon.[44] In sum,

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[38] The authors of *Les droits* deplore (at 107-111; see also Issa-Sayegh in *Le modèle juridique* français, at 129) 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. Positive reports on the OHADA from the UN, the US Department of Commerce, and in other World Bank documents, are discussed at 108-09.

[39] Armour et al., supra note 35, at 9-11; M.M. Siemms, *The End of Comparative Law*, 2 J. Comp. L. 133 (2007); K.E. Davis & M.B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 Law & Soc. Inq. 1095 (2007), at 1112-15.

[40] Davis & Kruse, supra note 39, at 1103-05.

[41] The chapter-by-chapter analysis of the Reports conducted in *Les droits* is most damning in this respect. On the *Starting a Business* chapter, for example, it is reported (at 36) that, following some French critiques on the 2004 Report, the following corrections were made in the 2005 Report: under "number of procedures," the number was revised from 10 to 7; under "number of days," from 53 to 49, and then to 8; under "minimum set up cost," from 3 to 1.1 % of *per capita* income; under "minimum requisite capital," from 32.1 to 0 % of *per capita* income. As noted in *Les droits* (*ibid*.), it is the magnitude of these revisions, in the absence of any major change in the legal rules, which 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: H. Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.'s "Anti-Director Index" under Consistent Coding*, http://ssrn.com/abstract=894301; Davis & Kruse, supra note 39, at 1111ff; B. Du Marais, Des indicateurs pour mesurer le droit? (Paris : Documentation française, 2006), at 39; Parent, supra note 36.

[42] J. Armour *et al*., *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, August 2009, http://ssrn.com/abstract=1431008; S. Deakin, *Legal Origin, Juridical Form and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company*, 7 Socio-Economic Review 35, esp. 55ff (2009); M. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 Harv. L. Rev. 460, 484-5 (2006); Dam, supra note 37; Armour et al., supra note 35, at 36-42; Lee, supra note 4, at 86-7.

[43] G. Hadfield, *Strategy of Methodology: The Virtues of Being Reductionist for Comparative Law*, LIX Univ. Toronto L.J. 223 (2009). The fact that the Legal Origins thesis undergone several modifications since its inception (J. Reitz, Toward a Study of the Ecology of Judicial Activism?, LIX Univ. Toronto L.J. 185 (2009), text following note 25), and that the latest version (supra note 3) is far more nuanced than the earlier ones, confirms that its protagonists may view the debate as still open.

[44] Davis & Kruse, supra note 39, at 1115. In one of the 2006 Reports (*Doing Business in 2007: How to Reform*. (Washington, DC: World Bank), at 4-5), the authors claim to have "inspired or informed" forty-eight legal reforms around the world, cited in Davis & Kruse, supra note 39, at 1096.

whereas the charge of incompleteness could easily be dismissed as premature by the Legal Origin scholars, the same charge is both timely and effective when leveled--as it is in *Les droits*--at the World Bank's Reports.[45]

But it may be that the French case can be made stronger still. Beyond just discrediting the findings of the Legal Origin scholars to date, it may be possible to cast doubt on the viability of their entire project. This might be done, I would suggest, by seizing on what is both the strength and the Achilleas' heel of economic analysis as applied to complex social phenomena, namely, its proceeding precisely from the disaggregation of these phenomena into their various components so as 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 matter 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,[46] which may or may not be true, or may be more or less true, depending on the phenomenon. The question that the French might naturally want to raise, then, is whether that assumption is at all tenable when it comes to studying legal systems. 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 is 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 has to do with their high level of complexity, as well as with the high degree of deliberation and rational planning that goes into their construction. That is, insofar as legal systems—Continental ones in particular—might have been consciously designed to be internally coherent, they would be, not just highly complex systems, but in fact highly complex systems whose elements are particularly tightly interconnected. It has indeed been said of law that it is a system in which the relations tying the various elements are perhaps as important as the elements themselves.[47] If so, the sum-of-its-parts assumption of economics is particularly troubling when it comes to law.

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 that claim is true, it loses much of its power once it is realized that civil law systems in fact have been consciously designed so as to direct

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[45] C. Ménard & B. Du Marais, *Can We Rank Legal Systems According to Their Economic Efficiency?*, in P. Nobel & M. Gets, eds., New Frontiers of Law and Economics 7 (Zurich: Schulthess Juristische Medien, 2006), at 20. (The fact that, as noted in *Les droits* (at 14-15), the Legal Origin scholars also are the authors of the Reports here is immaterial.)

[46] Indeed, the efficiency reading obtained by aggregating the various component studies can be considered a reliable reading of the phenomenon as a whole only if that phenomenon can itself be properly viewed as the aggregation of the various components. See H. Muir Watt, *Comparer l'efficience des droits?*, in P. Legrand, ed., Comparer les droits, résolument 433 (Paris: PUF, 2009), at 441.

[47] "Le droit ne peut que difficilement être saisi morceau par morceau … Whereas regulation is an accumulation of normative dispositions, law is a whole, characterized not so much be the rules as by the relations established between them…" M.-A. Frison-Roche, *L'idée de mesurer l'efficacité économique du droit*, in G. Canivet et al., Mesurer l'efficacité économique du droit 19 (Paris : LGDJ, 2005), at 29. See also: H. Muir-Watt, *Les réactions françaises à « Doing Business »*, in Gaudreault-Desbiens *et al.*, *supra* note 4, 67, at 72-3.

towards the legislators and the scholars, and away from the judges, the task of changing the law.[48] 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 judgements are so thin on arguments and justifications (which admittedly play an essential role in legal change[49]) is that they count on the scholars to fill those in. Of course, the enlightened economist will respond, as above,[50] 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 when studying the three roles in isolation from one another is sufficiently serious to cause the first step to be 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 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 thus individually rewarded.[51] But whether that is or not the case of course entirely depends on the cultural background: in the context of a legal culture that praises judicial creativity, 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.[52] Assessing the incentive structure of anonymous judging in isolation from 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 is likely so great as to cause the disaggregated component studies to be not worth doing.

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,

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[48] See Luppi and Parisi's critique of Posner's arguments in this regard: B. Luppi & F. Parisi, Judicial Creativity and Judicial Errors: An Organizational Perspective: http://ssrn.com/abstract=1344399, at 2.
[49] Mattei, supra note 1, at 23-4.
[50] Hadfield, supra note 43.
[51] Posner, as discussed in Luppi & Parisi, supra note 48.
[52] This is just one example of "unintended cultural consequences of public policy" of the kind described by Richard Pildes. R. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 Mich. L. Rev. 936 (1991) ("[T]he very structure of cost-benefit analysis runs roughshod over these [cultural] understandings, for it requires that they be reduced to some single, common dimension before being aggregated, commensurated, and weighed against costs.").

which in turn are aggregated to produce group analyses, and so on. At each level, new relations of inter-component dependence may be discovered which would force a redefinition of the components and the 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.[53] 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 claim sketched here accordingly is one of degree. It is not that legal systems, as specifically *legal* phenomena, are by nature categorically unsuited to economic analysis. Rather, it is 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 would here be refractory to economic analysis. Nonetheless, the level of difficulty may be so high as to be insurmountable. If so, it might be best, as has been suggested,[54] to abandon the Legal Origins project altogether and content ourselves, for purpose of understanding entire legal systems, with the kind of thick descriptions offered by the "softer" social sciences.

Whether or not the difficulty indeed is insurmountable obviously depends on how distortive disaggregation really is, that is, on how tightly the components of legal systems are interconnected in reality. If Niklaas Luhmann is right in describing legal systems as closed, autopoietic systems whose elements all feed on one another in some systematic and fundamental fashion,[55] the Legal Origins project indeed might be doomed altogether. On the other hand, if legal systems are as the legal realists have described them--as primarily determined by outside social forces and only tangentially conditioned by concerns for internal consistency[56]--there are good reasons to reserve judgment 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 put it, "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."[57]

III. The Economic Analysis of French Law

[53] Luppi & Parisi, supra note 48, at 7.
[54] Michaels, supra note 28.
[55] N. Luhmann, *L'unité du système juridique*, 31 Arch. phil. drt 163.
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[57] Davis & Kruse, supra note 39, at 1116.

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 than the Legal Origins literature—it targets discrete sets of legal rules and/or institutions, as opposed to entire legal systems[58]—and its primary aim tends to be to design ideal rules and institutions rather than provide an accurate picture of actual ones.[59] 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. Each feature will be discussed 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 diversity of the rules involved are not too great, it may indeed be possible to consider these rules as one unified component for purpose of analysis. In the above discussion, the "component studies" are not problematic as such; the problem only arises once 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.[60] In the anonymity in judging example, there is nothing wrong with the creativity incentive analysis of anonymous judging until that analysis is re-positioned into the larger context, which includes legal culture: it is problematic 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 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. As any set of legal rules, however discrete or small, even those made 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,

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[58] Muir Watt, supra note 46, at 436-40. Some traditional EAL texts admittedly cover large sets of legal rules, sometimes entire fields of law. R. Posner, Economic Analysis of Law; M. Polinsky, An Introduction to Law and Economics (Boston: Little, Brown and Company, 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, supra note 39, at 1104; Frison-Roche, supra note 47, at 29.

[59] On the difference between "positive" and "normative" economics, see: M.J. Trebilcock, The Limits of Freedom of Contract (Harvard University Press, 1993), at 2-8; Trebilcock, supra note 27, at 118-35; Posner, supra note 33, at 67.

[60] "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, supra note 39, at 1109.

remain sufficiently identifiable to be useful.[61] One of the most prominent streams of contemporary comparative law literature, the "Common Core" literature, is premised on that very possibility. Common Core comparatists first posit hypothetical fact scenarios that all legal systems are bound to confront, and then proceed to investigate the particular mechanisms which these systems deploy in response to such scenarios. Each such mechanism accordingly is conceptually uprooted from its larger system and gathered with its functional equivalents from the other systems.[62] 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,[63] few would deny that it has yielded some valuable comparative legal knowledge.[64] 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 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 only is problematic if the aim is to provide an analysis of *French* judging. As the problem posed by disaggregation has to do with the bridging of the abstract to the actual, studies that do not purport to reach beyond 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.[65] In contrast, the aim of standard EAL studies tends to be more straightforwardly normative.[66] As one scholar put it, "law and economics is remarkably unconcerned with positive law."[67] Indeed, insofar as extant legal rules are at all discussed in standard EAL, these are highly sanitized versions at best. To the comparative lawyer, the normative bias of EAL is most striking from its disregard for the argument part of judicial decisions, as compared to the fact and conclusion parts.[68] As it is generally accepted that legal systems differ in their forms of

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

[62] 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 supra text accompanying notes 48-49.

[63] Samuel, Michaels, supra note 29; Constantinescu.

[64] Legrand might be one of those few.

[65] "Comparative law and economics tries to develop models that take into account the reality of alternative legal institutions that developed in complex historical contexts and that cannot be understood using the highly simplified conceptions of legal institutions used by economists", Mattei, supra note 1, at xii.

[66] H.T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 42-78 (1992); Granado, supra note 33, at 1.

[67] Mattei, supra note 1, at 87.

[68] It has often been remarked that, in standard EAL casebooks, the argument part of judicial decisions has been edited out so as to leave only the fact and conclusion parts. See, *e.g.*: R.E. Scott & D.L. Leslie, Contract Law and Theory (The Michie Company, 1988).

argumentation, yet may converge on the outcomes of legal disputes,[69] comparative lawyers, whose primary aim is to study legal difference, naturally gravitate towards the arguments and away from the conclusions.[70] A convergence in conclusions indeed might arguably point to some latent universal ideal of justice, one towards which all legal systems would naturally tend, whereas the different forms of argumentation would reflect the particular individuality of each system, its "exceptionalism"[71] in the face of the 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 outcomes[72] than pay attention to actual cross-system differences is most telling as to these scholars' predilection for normative legal analysis.

So, if the objections raised above against the Legal Origins literature lose much if not all force as against standard EAL, what might still stand in the way of applying EAL to French law? We already explored possible cultural reasons for the French's traditional disinclination towards EAL. But we also explained that such disinclination of French legal actors, at the individual level, should have minimal or no bearing on the efficiency of the French legal system considered as a whole. The same distinction applies with respect to EAL of French law more generally. As Michael Trebilcock forcefully explained,[73] EAL can be a valuable tool with which to analyze 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 within the different legal systems, it remains undeniable that, from an external perspective, "all legal systems can [also] be conceived as massive pricing systems,"[74] systems affecting human behaviour through the structuring of incentives and disincentives to action, with the result that "people of divergent normative perspectives [might] be equally interested in what impact the law is actually having on the behaviour of economic agents."[75] As even a French scholar recognized, "[t]he idea of evaluating the economic efficiency of law … is

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[69] G-R de Groot, *European Education in the 21st Century*, in B. De Witte & C. Forder, eds., The Common Law of Europe and the Future of Legal Education, 285 (1992), at 11; H.P. Glenn, *La civilisation de la* common law, Rev. int. dr. comp. 559, 567; B.S. Markesinis, *Learning from Europe and Learning in Europe* in B.S. Markesinis, ed., The Gradual Convergence 30 (1994).

[70] For a fuller argument, see my *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric* in J.W. Neyers et al., eds., Exploring Contract Law 77 (Hart Publishing, 2009), at 77-79. This is the case even in functionalistic comparative law, where the common function--the common fact scenario to be solved--only serves as a lead-in for the comparison of the different legal mechanisms triggered thereby in the different systems. See supra, text accompanying notes 62-64. On comparative law conceived as the study of legal difference, see

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

[72] Hayek might be the first proponent of that idea. F.A. Hayek, Law, Legislation, and Liberty, vol. I "Rules and Order", 94-143 (Univ. Chicago Press, 1973). For a taste of the contemporary debate, see: Lee supra note 4, at 82-5; Mattei, supra note 1, at 18-21, 118-120; G. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Leg. Stud. 65 (1977); P. Rubin, *Why Is the Common Law Efficient?*, 6 J. Leg. Stud. 51 (1977). For a synthesis and critical assessment of these arguments, see: Trebilcock, supra note 27, at 129-33.

[73] Trebilcock, supra notes 10 and 27. See also Muir Watt, supra note 46, at 436-37.

[74] Trebilcock, supra note 10, at 2.

[75] Ibid. at 4. See also: Posner, supra note 1, at 14; Posner, supra note 33, at 74 ff; E. Mackaay, *Law and Economics: What's in It for Us Civilian Lawyers?*, in B. Deffains & T. Kirat, eds., Law and Economics in Civil Law Countries, vol. 6 of The Economics of Legal Relationships 23 (Amsterdam: Elsevier Science B.V., 2001).

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."[76] 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 be externally analyzed from an economic perspective. Divergent internal and external perspectives certainly can coexist peacefully.

However, the discussion of Section I suggests that the difficult question for the French is not so much *whether* French law can or even should be analyzed from an economic perspective but rather *who* should conduct such an analysis. While they might recognize the intrinsic merits of that analysis,[77] they would, for the reasons given above, still insist that it be conducted by economists rather than lawyers. As one French scholar once remarked in conversation, "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 results of an economic analysis of French law, whether conducted by the lawyers or the economists, will one day be at least taken into account by French lawmakers. For "[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 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."[78] 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."[79] As such, it speaks to all legal systems, particularly those as suffused with rule of law ideals as the French.

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[76] Frison-Roche, supra note 47, at 20-21. In Michaels' words (R. Michaels, *The Functional Method of Comparative Law*, in M. Reimann & R. Zimmermann, The Oxford Handbook of Comparative Law 339 (Oxford: Oxford University Press, 2006), at 365), "[f]unctionalists take an observer's perspective as an alternative to, not a substitute for, the participant's perspective inherent in cultural approaches…"

[77] But see *Les droits*, at 113-24.

[78] Trebilcock, supra note 27, at 158.

[79] Frison-Roche, supra note 47, at 21. "The judge must be impartial … But he must also be clairvoyant, that is, he must control the effects of his decisions and make sure that their effects are those sought be the law." Id., at 21-22; "An assessment of the effectiveness of law to reach the finality ascribed to it by the political cannot ignore that [the efficiency] dimension. It must be first on the agenda of those who evaluate, compare, judge law and, in so doing, remind the holders of juridical power of their roles, of their duties." Id., at 32.