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Review

NEW WRINKLES IN LAW . . . AND ECONOMICS

PAUL H. BRIETZKE*

Comparative Law and Economics, by Ugo Mattei. Ann Arbor: University of Michigan Press, 1997. Pp. 266, \$49.50.

Economics and the Law: From Posner to Post-Modernism, by Nicholas Mercuro & Steven G. Medema. Princeton: Princeton University Press, 1997. Pp. 235, \$29.95.

How is the bewildered analyst to “do” law these days? Thirty years ago, the answer seemed clear enough: through a neatly-overlapping positivism, doctrinalism (including a rather strict *stare decisis*), and conventionalism (the professional understandings of the legal community), perhaps with a bit of legal realism and socio-legal analysis thrown in. Much of law is still taught and practiced in this vein, and judges sometimes make us nostalgic by reaching decisions they do not like because they feel bound by precedent, but this post-New Deal consensus over legal analysis has well and truly collapsed.¹ Consider almost any recent Supreme Court decision,

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1. Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27 (1993) (the “relatively secure and stable” specialty that was the jurisprudence of the 1960s and 1970s is typified by Charles Fried—“there is a distinct . . . legal method . . . [which] yields a distinct set of answers more or less out of itself”). See PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW 1* (1995) (Italian Renaissance legal philosopher Baldus admitted to being “dazzled by the authorities”); *id.* at 2 (quoting a 1599 statement by William Fulbecke that “the words or terms are harsh and obscure, the style no whit delightful, the method none at all”); BAILEY KUKLIN & JEFF STEMPL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 158-62 (1994) (discussing the Harvard Legal Process School and an analytic jurisprudence, which derives from positivism); *id.* at 168 (these and related approaches “continue . . . to exert considerable influence in academia, politics, and adjudication”); UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 82 (1997) (discussing a “dogmatic reasoning,” concerned only with the intrinsic coherence of a particular construct and its relation to the whole body of law); NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 5 (1997) (“conventional . . . theory still exists, but law no longer develops in a self-contained, autonomous manner”); *id.* at 8 (quoting Fisher, Horwitz, and Reed) (“law was like geometry,” an uncontroversial, complete,

especially from the standpoint of advising a client about its applications. Jurisprudence and constitutional theory have become exciting and densely-populated fields as a result of this dissensus, but students, practitioners, and even many would-be treatise writers are left rather bewildered by our postmodern² dilemma. This dilemma fragments the understandings of the

and elegant reasoning from axioms to corollaries, which severed law from the main body of American intellectual life); William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1931, 1983 (1995) (discussing an a priori reasoning and a "telephone-book approach" as a scholarly paradigm); Minda, *supra*, at 31, 32 (under traditional jurisprudence, "rogue judges" who tried to legislate were controlled through a respect for procedure, principled decisions, and self-restraint); William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 HOFSTRA L. REV. 1, 7 (1996) (quoting Theodore Lowi) (New Deal progressivism became vacuous and was replaced by an "interest-group liberalism"); Rogers Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988) (citing David O'Brien) ("despite its hegemony," jurisprudence was unable to unify public law "into an influential intellectual discipline").

In the 1950s, Arthur Schlesinger's "vital center," Daniel Boorstin's "infra-ideological consensus," and "the twin superstitions of exceptionalism and progress . . . had the effect of marginalizing ideological strife." David Levering Lewis, *Phi Beta Kappa and the New Scholarship*, THE KEY REP. 4 (Autumn 1994). This was the America of Norman Rockwell, *Ozzie and Harriet*, "Jim Crow, the third degree and the chain gang, the rotten borough. . . ." Bernard Schwartz, *How Justice Brennan Changed America*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 11 (E.J. Rosenkranz & Schwartz eds., 1997). In the 1960s, "Right and Left acquired apparently incommensurable values, and the language and motives of everybody became suspect." Lewis, *supra*, at 5. Conservatives see the legacy of the 1960s as an undermining of security, solidarity, family values, and other values and institutions, and a replacing of these values with a moral relativism and an ideology of liberty as a license to practice unbridled individualism. Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1018 (1994). See MERCURO & MEDEMA, *supra*, at 12 (discussing the 1960s death of law turmoil); *id.* (quoting Owen Fiss on the 1960s "rejection . . . of law as a public ideal" and as a "process for interpreting and nurturing a public morality"). Liberals argue that we are now better off because the 1950s consensus was founded on racism, sexism, and a McCarthyite suppression of dissent. McClain, *supra*, at 1030. In any event, the collapse of consensus caused a marked lengthening of law review articles: the foundations must now be re-laid for each argument. Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Re-Examining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 201 (1991) (citing G. Edward White).

2. "Postmodernism" is difficult to define because its purposes and effects are in the eye of the beholder. See ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 307 (2d ed. 1992) (instead of creating order and stability out of contingency and transience, postmodernism mirrors the latter qualities); *id.* at 307-08 (freed from a traditional culture, morality, and the imperative to present itself as a doctrinal system developed through reason, postmodern law becomes highly localized as to subject matter); GOODRICH, *supra* note 1, at 11 (discussing the "postmodern sense . . . that things are not going well," and that we thus need to rethink institutions and laws); KUKLIN & STEML, *supra* note 1, at 183-84 (postmodernism is a rejection of modernism; knowledge is mediated through a changeable culture, history, and language, and it is thus contingent, contextual, and "local"; and truth is thus a social construction and non-transparent); MERCURO & MEDEMA, *supra* note 1, at 13 (postmodernism seeks to fill the void left by legal realism); Stephen A. Gardbaum, *Law, Politics, and the Claims*

legal community into such variants as critical legal studies, critical race theory, feminism, and some amalgam of hermeneutics or a literary criticism, deconstruction and post-structuralism, semiotics, and/or a narrative jurisprudence.³

This *Kulturkampf* is no spectator sport. Through a lawyers' version of Heisenberg's uncertainty principle,⁴ we constantly change the rules of the legal analysis "game" with what we do in classrooms, courtrooms, and journals; our interpretations are part of the law (or economics) we purport merely to describe.⁵ It is unfortunate that, driven by the intellectual

of Community, 90 MICH. L. REV. 685, 706-07 (1992) (values are not universal; but are constituted at the level of the community, and all discourse, argumentation, and legitimation are thus local); Donald R. Kelley, *Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence*, 14 J. HIST. PHIL. 267 (1976) (the "specialization and fragmentation of knowledge" in much of formal philosophy); Minda, *supra* note 1, at 53 ("Judging by the general academic uproar, postmodernism is responsible for the multitude of ills of the modern university—multicultural curricula, political correctness, affirmative action, restrictions on hate speech, and the general lack of interest in the classics of Western culture."); *id.* at 53-54 (this creates a "postmodern melancholia" in law schools, a cause and effect of deterministic demonstrations "that law is simply politics, economics, gender hierarchy, or literature"); *id.* at 55 (the "problematic and paradoxical explanations" of a postmodernism are confounded by its own theory and practice); *id.* at 56 (citing JEAN FRANÇOIS LYOTARD in *THE POSTMODERN CONDITIONS: A REPORT ON KNOWLEDGE* xxiv (Geoff Bannington & Brian Massumi trans. 1984) (postmodernism rejects meta-narratives in favor of complex and local multi-narratives which lack fixed foundations); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 751 (1993) (postmodernism's perceived lack of authoritative standards nurtures the turn to religion). Some would argue that this "susceptibility of intellectual life to fads is a perennial scandal." WILLIAM A. GALSTON, *JUSTICE AND THE HUMAN GOOD* 1 (1980). *But see* Collier, *supra* note 1, at 202 (quoting Paul Brest *Interpretation and Interest*, 34 STAN. L. REV. 765, 765 (1982) (a self-congratulatory and complacent jurisprudence should be attacked). The outcomes are recurrent intellectual clashes, and there have been few attempts to join forces politically or to move towards a new and stable consensus jurisprudence. MERCURO & MEDEMA, *supra* note 1, at 5 (citing Martha Minow, *Law Turning Outward*, TELOS, Fall 1987, at 73, 79-100); Smith, *supra* note 1, at 90.

3. KUKLIN & STEMPL, *supra* note 1, at 173, 181; Minda, *supra* note 1, at 43-44, 46-47, 53; *id.* at 56 (quoted in *infra* note 85).

4. In 1927, Werner Heisenberg discovered a consequence of quantum mechanics: it is impossible simultaneously to measure the position and momentum of a subatomic particle with more than a strictly limited precision. THE HARPER DICTIONARY OF MODERN THOUGHT 652 (Alan Bullock & Oliver Stallybrass eds., 1977) ("uncertainty principle" entry by Michael V. Berry) [hereinafter MODERN THOUGHT]. Any attempt to fix a position by interposing a slit in the particle's path will produce diffraction: an alteration in direction and thus momentum. *Id.*

5. MATTEI, *supra* note 1, at 9. *See* RUEBEN ABEL, *MAN IS THE MEASURE: A CORDIAL INTRODUCTION TO THE CENTRAL PROBLEMS OF PHILOSOPHY* 122 (1976) (Karl Mannheim's *Ideology and Utopia* shows that it is impossible to conceive of an absolute truth independent of person, context, and historical experience); ROBERT N. BELLAH, ET AL., *THE GOOD SOCIETY* 136 (1991) ("The fundamental flaw in the notion that government exists to maximize the satisfaction of individual interests is that what people value is itself shaped by their institutional experience."); *id.* at 157; ROBIN MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH*

excitement of teasing out new insights and the premium placed on an academic originality, postmodernism has gripped our imagination before the insights from a modernism have been fully incorporated into legal analysis: those of Max Weber, a law and economics, a comparative law, a civic republicanism, etc. The poor, here and in Eastern Europe and the Third World, would not be attracted to postmodern declamations against “post-industrial processes of commodification, bureaucratization, consumerization, and saturation.”⁶ Rather, the poor seek the commodities and the consumerism that a modernism can bring. The real danger is not saturation or a false consciousness, but that bureaucrats cannot or will not serve the interests of the poor effectively.

The harshest and most telling criticisms of law and economics come from the postmodernists, whose diverse enterprises are most threatened by the “market power” that Judge Posner and the Chicago Company display in legal analysis. The elaborate, nuanced, and ambitious books under review take postmodern and other criticisms into account during credible and distinctive attempts to make economics into a more realistic force for a legal modernism. These books should interest all legal analysts, especially those who pine for something more than a jurisprudence of hunches but who also try to ignore law and economics. Alas, it can no longer rationally be ignored: drawing on an intellectual history of more than two hundred years, law and economics rapidly grew from a small, and esoteric specialty and into a major movement. Like species of postmodernism, it proposes a complete

TO THEORY AND PRACTICE 66 (1990) (like economic forecasting, outcomes in law and economics are limited by the variables considered and the weight given them); MATTEI, *supra* note 1, at 10 (our choice of an observation point is a value judgment, which conditions our observations and which has no objective existence in the outside world—“a bomb in the roots of the whole scholarly tradition of economics”); *id.* (lawyers have always sold the “ought” as if it were the “is,” by pretending merely to describe what they are framing); MERCURO & MEDEMA, *supra* note 1, at 165 (indistinguishable from political or historical analysis, law is rationalization rather than rational analysis in the CLS canon); *id.* (for CLS “structuralists,” “one cannot study human activity from outside of the activity itself”); *id.* at 169. MARGARET JANE RADIN, CONTESTED COMMODITIES 222 (1996) (“‘Preferences’ bring law into being, but law also makes and changes ‘preferences’.”); *id.* (market rhetoric brings about “those very motivations and characteristics it presupposes and reifies”); Ewald, *supra* note 1, at 194 (law is “part of a larger framework of cognition, and it both shapes and reflects the metaphysics and the sensibilities of the age”).

6. Minda, *supra* note 1, at 55 (quoting Steve L. Winter). See MATTEI, *supra* note 1, at 227 (terming law and economics a jurisprudence of modernization in the Latin American context); Paul H. Brietzke, *Administrative Law and Development*, 26 HOW. L.J. 645, 668 (1983) (Max Weber’s emphasis on professionalized hierarchies constrained by precise and impersonal rules, in a fairly activist state); Minda, *supra* note 1, at 30, 35, 55 (postmodernism ruptures the modernist vision of jurisprudence, and also sows the seeds and the energy for future intellectual development); see generally *infra* note 20 and accompanying text (civic republicanism); *infra* notes 31-40 and accompanying text (comparative law).

change of legal focus—on making the pie bigger rather than distributing it more justly. Unlike postmodernism, much of law and economics tries to assist lawyers and judges in solving everyday problems.⁷

I. SCHOOLS OF THOUGHT

“You can’t tell the players without a scorecard,” or so vendors at a baseball game say, and the Mercurio and Medema book under review provides team scorecards and much more: intellectual histories and outlines of the dominant styles of play by the Chicago School and its New Haven opponents, the public choice school and its civic republican opposition, institutional and neoinstitutional economics, and critical legal studies as a postmodern counterweight to the various economics enterprises. Mercurio and Medema do not argue for or against these competing (rarely complementary) schools; they expect the “marketplace of ideas” to determine what becomes permanent in jurisprudence. This approach is open to two objections. First, Mercurio and Medema devote two lengthy chapters to institutional and neoinstitutional economics. This is certainly justified by the complexity and relevance of the analyses presented, but it tends to exaggerate the actual influence of these schools. Second, leaving judgments to a marketplace of ideas (a naturalistic fallacy) ignores a central conclusion from New Haven: markets fail so regularly that they cannot be trusted automatically to generate socially-useful results.⁸ This is particularly true of

7. MATTEI, *supra* note 1, at 3, 5, 105, 118; MERCURIO & MEDEMA, *supra* note 1, at 3-4. See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) (law and economics is an expansive program, the likes of which “eluded Bentham, Comte, and Marx”); MATTEI, *supra* note 1, at 89 (like legal realism, law and economics gained “substantial weight in the overall legal system in a relatively short time” by playing a “significant role in legal education,” but dominance would require the replacement of the older generation of judges); MERCURIO & MEDEMA, *supra* note 1, at 3 (law and economics is “the application of economic theory (primarily microeconomics and the basic concepts of welfare economics) to examine the formation, structure, processes, and economic impact of law and legal institutions”); *id.* (quoting a 1937 statement by Samuel Herman (“[T]he law of a state never rises higher than its economics . . . a realistic and tempered instrument for solving the major judicial questions of our time”)); *id.* at 171 (quoting Neil Duxbury) (defining law and economics “is like trying to eat spaghetti with a spoon”); Collier, *supra* note 1, at 192.

8. MERCURIO & MEDEMA, *supra* note 1, at ix, 24, 80. See KUKLIN & STEMPL, *supra* note 1, at 168-69 (“the most influential of the post-Legal Process trends in the law,” law and economics has added more voices as it matured, and some voices call for government interventions to correct market failures or market-based harms). MALLOY, *supra* note 5, at 60-68 (describing conservative, liberal, Left communitarian and neo-Marxist, libertarian, and classical liberal schools of law and economics); MATTEI, *supra* note 1, at 140. See *infra* note 37 and accompanying text. MERCURIO & MEDEMA, *supra* note 2, at 171 (schools of law and economics have “competing methodologies and perspectives which are not always easily distinguishable”). But see also Minda, *supra* note 1, at 56 (quoting Matthew Finkin scholarship must report all evidence, neither distort nor ignore, and then “rise or fall on the cogency of the

the marketplace of ideas:⁹ for example, and like major league baseball franchises, the supply of federal judgeships is narrowly restricted. The dominance over these scarce judgeships by Chicagoans (or the underrepresentation of other jurisprudential schools) enables them to earn economic rents¹⁰ for their approach—and for those who helped appoint them.

Mercuro and Medema correctly conclude that the Chicago School is “mainstream” and dominates a law and economics scholarship.¹¹ We can summarize the Chicago approach as a drawing of three conclusions from three assumptions: *If* we assume almost everyone to be economically rational, *if* almost all of their relations are like exchanges in markets, and *if* markets almost never fail (are the most nearly perfect social institutions), *then* (by definition) these rational relations are efficient—involve the least waste of scarce resources. It *then* follows that these efficient relations should be enforced as cheaply as possible, under the common law, and *then* (by definition) statutory and regulatory interventions in these efficient relations will be inefficient and serve to reduce society’s wealth. In other words, society is so simple and monolithic that it can be coordinated by isolated and fragmented contracts and markets, provided that the common law fully and clearly specifies the parties’ rights.¹²

reasoning, on the closeness of fit of the argument to the evidence”).

9. See Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997); see *infra* note 39 and accompanying text.

10. On such rent-seeking behavior see *infra* note 16 and accompanying text.

11. MERCURO & MEDEMA, *supra* note 1, at 51.

12. Compare MATTEI, *supra* note 1, at 227-28 (“Western Assumptions of Law and Economics”), and MERCURO & MEDEMA, *supra* note 1, at 57-60, 67 (“Fundamental Building Blocks of the Chicago Approach”) with Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 752 (1992) (discussed in the text) [hereinafter *Urban*]. See MATTEI, *supra* note 1, at 44 (“For generations of economists, the institutional foundation of the ‘market’ has been an imaginary system conceived by a few natural law professors.”); *id.* at 63 (comparing A.C. Pigou’s centralized regulation with the Chicagoan Coase’s decentralized enforcement of property rights by common-law courts, and concluding that neither Pigou’s pure absence of a market nor Coase’s pure market is possible in the real world); MERCURO & MEDEMA, *supra* note 1, at 19 (discussing Posner’s Chicagoan wealth maximizing principle as a Kaldor-Hicks efficiency, a strict Pareto efficiency being an impossible criterion to satisfy in the real world); *id.* at 53 (citing Edmund Kitch) (the legal system will always intervene in economic systems, so Chicagoans are keen to do it right); *id.* at 54-55 (Chicagoans do this by elaborating and extending Adam Smith’s insights, and through the ahistorical, empirical, and mathematical analyses common in a neoclassical economics); *id.* at 59 (for Posner, wealth maximizing amounts to influencing individuals so as to maximize output); *id.* at 61-74 (Chicago at work, described in terms of positive analyses of the efficiency of the common law and the normative determining of efficient rules to guide judges); *id.* at 64 (quoted and discussed in *infra* note 66); *id.* at 67-69 (the Coase theorem treated as a Chicago centerpiece and as conducive to the “legal flypaper effect—the right sticks where it hits—since transaction costs preclude bargaining to a

Put thus, fairly I think, there are many things wrong with the Chicago paradigm, from a jurisprudential and even from an economic perspective. Some of the jurisprudential and most of the economics critiques are given creatively and in detail by Mercurio and Medema, particularly while contrasting the ideas of rival schools. The New Haven (a.k.a. the Yale) School, for example, sees market failures as ubiquitous, and sees interventions under an administrative law as justified by these failures and as superior to common law processes. Compared to Chicago, different conclusions follow from different assumptions, which often seem to be based on Bruce and Susan Rose-Ackerman's fondness for the New Deal. The Chicago School thus comes across as favoring status quo distributions of wealth and power which lack a strong normative justification,¹³ and as "an ideological smokescreen for a reactionary assault on the American activist state."¹⁴

Reactionary or not, this assault is real and extremely successful in politics as well as in jurisprudence, especially as this assault gets aided and abetted by public choice theory (a.k.a. the Virginia School). Mercurio and Medema skillfully describe how public choice differs from Chicago: what emerges from exchanges and other complex political relations is not necessarily the Chicagoans' efficiency (or wealth maximization); it is simply what emerges from agreements.¹⁵ This argument tends to create an analytical double standard. Chicagoans use one set of economics analyses to show that private transactions are good (efficient), while Virginians (and Chicagoans) use another set of economic analyses to show that political transactions are devoted to the rent-seeking that injures the public. This raises a "conflict between . . . *good politics and sound economics*,"¹⁶ and Virginians and Chicagoans invite us to conclude that politics is at fault. Mercurio and Medema elaborately distinguish *homo economicus* and

more advantageous state").

13. MERCURIO & MEDEMA, *supra* note 1, at 79-82. *See id.* at 83 (citing Steven Shavell that statutes are useful where diffuse norms reduce incentives to sue, for deterrence where those causing the harms cannot compensate victims, where proof of causation problems should be eliminated, for a uniformity of treatment, and typically for lower costs of administration than in common law systems).

14. BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 7 (1983). *See* KUKLIN & STEMPL, *supra* note 1, at 169 (there are many critics of Chicago School conservatism, and of its failures to deal with the complexities of real life).

15. MERCURIO & MEDEMA, *supra* note 1, at 84 (citing James Buchanan).

16. *Id.* at 93 (emphasis in the original). *See id.* at 96-97 (public choice emphasis on rent-seeking through monopoly positions, resource mis-allocations, and especially the wastage of resources in acquiring and maintaining these positions). Perhaps needless to say, the activist antitrust enforcement disdained by Chicagoans and Virginians alike is designed to forestall a similar rent-seeking in "private" markets. This disdain arguably results from another analytical double standard.

contractarian (catallaxy) strains of a public choice,¹⁷ and the authors' thoughtful distinctions are drawn rather too fine here and elsewhere. For example, they argue that public choice opens up the paradigm of neoclassical economics, where political processes are typically taken as given. This is certainly true, but such an opening up occurs in Chicago as well as in Virginia; Chicagoans are less strictly neoclassical than they claim.¹⁸

By Mercurio and Medema's criteria, Chicagoans are Virginians for many purposes, and vice versa. Both Schools confuse a *potentially* activist public law (the New Deal and the civil rights movement come to mind) for the private and essentially reactive law of contracts: African Americans are, for example, "free" to contract themselves out of the consequences of racial discrimination, much as neighboring landowners can contract out of their disputes. Consensual bargaining, perhaps with compensation paid on the side, is being erected into a Kelsenian *Grundnorm* for our entire legal system, and it seems logical to lump Chicagoans and Virginians into a "neoconservative" category. Both Schools claim "classical" liberal (nineteenth century laissez-faire) and libertarian credentials, but some of their analyses and political actions contradict these labels and fit into the Reaganite agenda.¹⁹

17. *Id.* at 87-96. A *homo economicus* public choice seeks to link individual behavior to collective action, through incentive structures which influence choice. *Id.* at 87. This is done through studies of direct and representative democracy—where rational voter ignorance and self-interested legislators are assumed, and bureaucracy. *Id.* at 88-94. Catallaxy public choice focuses on spontaneous coordinations and order, rather than on a maximizing behavior. *Id.* at 94. The differences between these two branches of public choice are subtle, and both argue that policies are fair because they have been unanimously adopted—but not vice versa. *Id.* at 96. See KUKLIN & STEML, *supra* note 1, at 169 n.145 (dividing public choice into interest group theory and agenda control or Arrow's Theorem branches).

18. MERCURIO & MEDEMA, *supra* note 1, at 86.

19. See *id.* at 96 (discussed in *supra* note 17); *id.* at 139 (neoinstitutionalists make some use of the contractarian paradigm—political institutions "reduce uncertainty by creating a stable structure of exchange"); RADIN, *supra* note 5, at 222 (quoted in *supra* note 5); *id.* (public choice theory is too crude because it "defines this particular feedback loop out of existence"—as, I would add, does the Chicago School); Paul H. Brietzke, *Review*, 25 VAL. U. L. REV. 51, 57 (1990) (Judge Posner, a Chicagoan, has successively claimed liberal and libertarian credentials, while the Virginian and "Nobel laureate James Buchanan . . . claims to be *simultaneously* classically liberal, neoclassically conservative, and libertarian in utopian and contractarian ways."); Brietzke, *Urban*, *supra* note 12, at 751 (a neoconservative law and economics proposes a new social contract, involving additional rewards for the wealthy and punitive sanctions for the poor); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359 & n.147 (1988) (attributing to Chicagoans, William Landes, Richard Posner, and George Stigler, ideas which Mercurio & Medema attribute to public choice theory); David A. Luigs, *Review*, 93 MICH. L. REV. 1559, 1565 (1995) (the "minoritarian bias" of the special interest theory of politics, from Chicago's Stigler and Virginia's Buchanan, obscures the "majoritarian bias" of larger groups imposing higher transaction costs on smaller groups); Nelson, *supra* note 1, at 7 (quoting Theodore Lowi) (under the new "interest-group liberalism," government's roles are to

One of the many creative things Mercurio and Medema do is briefly to discuss civic republicanism, as a criticism of the jaundiced view that public choice theory takes of human motivations. The republicans' emphases on the importance of history, on shared values and the ways in which civic virtue can discipline a self-interest, and on reasoned debate within the community as the main and preferred means of collective action, are the antithesis of the public choice approach.²⁰ The latter theory has proved more influential politically, perhaps because it rationalizes what cynical individualists want to do and believe anyway, and it serves as a check and balance to the rather naive optimism that is civic republicanism. Perhaps we can expect a fruitful jurisprudential (Hegelian) synthesis, growing out of the thesis of a neoconservative law and economics and a civic republican antithesis.

While neoconservative economists and civic republicans largely talk past each other, issues are well and truly joined by the institutional and noninstitutional species of law and economics that are detailed by Mercurio and Medema. Precisely because different economic conclusions are drawn from different economic assumptions, a synthesis between these theories and a neoconservative law and economics seems difficult to achieve. The reader can choose among schools, having been given much food for thought by Mercurio and Medema, although the "opportunity costs" of choice—the ideas and analyses foregone because a theory or theories have been rejected—are quite high. After Adam Smith and until late in the nineteenth century in the U.S., economists cared little about the lawyer's constant preoccupation: the institutional background to their theories. (This preoccupation is also neglected by most postmodernists). A distinctly American contribution, institutionalism was also part of a broadly Western revolt against formalism, pioneered by Picasso in art, Joyce in literature, Stravinsky in music, Freud in psychology, Dewey in philosophy, and such fellow-travellers of an economic and legal realist approach to law as Holmes, Cardozo, Jerome Frank, and Roscoe Pound.²¹

insure access to the effectively organized, and to codify their agreements and adjustments in all sectors of our lives); see *infra* notes 67-70 and accompanying text.

20. MERCURIO & MEDEMA, *supra* note 1, at 97-100. See KUKLIN & STEML, *supra* note 1, at 182; MERCURIO & MEDEMA, *supra* note 1, at 97-98 (civic republicanism is "a collectivist strain of American politics," "an alternative to Rawlsian liberalism," and more in line with the law and economics of the New Haven School—with an "aspiration for collective decision making that goes beyond the mere aggregation of individuals' preferences"); *id.* at 100 (Cass Sunstein's critique of a favorite technique of a neoconservative law and economics—using the *Lochner*-era Court's reliance "on self-described status quo, common law baselines," rather than analyze the consequences of social power).

21. MATTEI, *supra* note 1, at 42; MERCURIO & MEDEMA, *supra* note 1, at 101-23; see generally MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1957). See also *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo,

The essence of institutionalism (the Wisconsin/Michigan State School) is that, contrary to much of neoclassical economics, individuals and institutions can change the markets and other environments in which they operate—"Genes are Darwinian, but civilization is Lamarckian."²² Rejected is the abstract deductive reasoning of a neoclassical economics (such as was described for the Chicago School),²³ and the automatic neoclassical tendency toward equilibrium and the formation of consensus. Institutionalists emphasize the mutual interactions of economic structure, conduct, and performance, socio-economic conflict as the driving force of economic and legal activity, and a somewhat paradoxical optimism over our ability to restructure institutions so as to improve behavior and over the capacity of courts to eliminate destructive practices. In particular, institutionalists stand a Chicago School causation on its head by arguing that efficiency is a function of rights: "Legal decisions or changes can be said to be efficient only from the point of view of the party whose interests are given effect through the identification and assignment of rights."²⁴ This means that, as jurists know but Chicagoans like Ronald Coase neglect or ignore, rights really do matter. We can assign rights in the manner prescribed by Dworkin or Rawls, for example, and economists could then create one of many efficient outcomes for us.²⁵ The Chicago and Virginia Schools are unlikely to be interested in so subordinate and instrumental a role, however.

J.) ("The law has outgrown its primitive stage of formalism when the precise word was a sovereign talisman, and every slip was fatal."); MERCURO & MEDEMA, *supra* note 1, at 11 (legal realists had a close affinity with institutionalists); *id.* at 101 (leading institutionalists in the teens and '20s include John R. Commons and colleagues at the University of Wisconsin, Henry Carter Adams, Richard T. Ely, Wesley C. Mitchell, Thorstein Veblen, Walton Hamilton, Karl Llewellyn, and Robert Lee Hale); *id.* at 109 (more recent institutionalists come from Michigan State—Warren Samuels, A. Allan Schmid, Harry Trebing, and Robert Solo).

22. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 665 (1996). See Smith, *supra* note 1, at 91 (institutionalism as a reaction against treating institutions simply as the product of self-interested behavior); BELLAH ET AL., *supra* note 5.

23. See *supra* note 12 and accompanying text.

24. MERCURO & MEDEMA, *supra* note 1, at 118 (quoting Warren Samuels, who is also a "neoinstitutionalist" elsewhere in the book). See *id.* at 101-21; *id.* at 184 (if there is no unique efficiency solution, neoconservative law and economics "takes for granted what is at issue"—the difficulty of justifying different assignments of rights); *infra* note 48 and accompanying text.

25. See RONALD DWORKIN, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984) (rights trump everything else in law, especially something like efficiency/wealth maximization); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 91-92, 191-92 (1977) (judges should fill gaps in the law concerning rights, not through case-by-case analyses based on economics or the common law, but at a higher level of abstraction and based on a coherent political theory); MERCURO & MEDEMA, *supra* note 1, at 118 (rights are not a function of efficiency, since each structure of rights creates particular prices, costs, outputs, and thus different efficient resource allocations).

For a neoinstitutional law and economics, which is relatively easy to distinguish from an institutionalism, the state is a two-edged sword: essential to economic growth yet the “source of man-made decline.”²⁶ Neoinstitutional constraints on a self-interested economic rationality, such as imperfections in the information used for decisionmaking, are more numerous and severe than in a neoclassical economics. A macroeconomics (dealing with aggregate levels of employment, production, inflation, etc.) looms large in neoinstitutional economics, while Chicago and Virginia use a microeconomics (firm-level price theory) almost exclusively. Neoinstitutionalists also pay more attention to the precise nature and level of transaction costs.²⁷ The result is richer and less neoconservative (usually more classically liberal) analyses, many of which seem more directly useful to lawyers *qua* lawyers.

There is nothing liberal about critical legal studies, which inveighs against liberalism in its many forms and counters doctrinaire (even theological) claims that law is economics with no less doctrinaire assertions that law is really politics. While the Crits are hostile toward a Chicago-style empiricism and positivism, and agree that law’s ostensible fairness masks an exploitation and injustice, they lack common diagnoses and methodologies. They are effectively divided by Mercurio and Medema into a dominant critical Marxism, which shows “reality” to be a cultural construct and law to be radically indeterminate, and a scientific or deterministic Marxism, which has elites setting the legal “terms upon which others are to lead their lives.”²⁸

26. MERCURIO & MEDEMA, *supra* note 1, at 130 (quoting Douglas North). *See id.* at 138 (agreement through politics is a function of the size of gain, the number of parties and extent to which their interests converge, imperfections of information, and whether benefits are broadly or narrowly distributed).

27. *Id.* at 110, 130-56. *See id.* at 130 (listing as diverse neoinstitutionalists Armen Alchian, Steven Cheung, Ronald Coase, Harold Demsetz, and Oliver Williamson on property rights; Coase and George Stigler on the effects of transaction and information costs; and James Buchanan and Gordon Tulloch on collective choice issues); *id.* (neoinstitutionalists seek structures to enhance society’s wealth-producing capacity); *id.* at 155 (quoting Oliver Williamson—emphasis in the original) (“[o]rganize transactions so as to economize on bounded rationality while simultaneously safeguarding them against the hazards of opportunism.”) (alteration in original); *id.* (discussed in *infra* note 66); *id.* at 148 (neoinstitutional focus on the hold-up—an *ex post* opportunistic behavior in extracting quasi-rents, made possible by long-term relationships and contract-specific investments); *id.* at 174 (emphasis on “agents who have limited ability to process information and are procedurally rational and learning”). The hybrid nature of this school is illustrated by the fact that some of the named proponents are also Chicagoans (Coase and Stigler), Yalies (Williamson), or Virginians (Buchanan and Tulloch).

28. *Id.* at 164. *See id.* at 157-70; *id.* at 158-59 (critical legal studies or CLS has its roots in legal realism, Marxism, and the progressive historiography of Frederick Jackson Turner, Vernon Parrington, Charles Beard, etc.); *id.* at 163 (as a “necessary” player in the marketplace of ideas, “CLS” will have a direct bearing on the continuing development of law and economics); Peter Gavel, *Reification in Legal Reasoning*, 3 RES. IN L. & SOC. 25 (1980) (like religion, law is held

If legal analysts could be persuaded that much of this is true, most of a neoconservative law and economics would fall to the ground and the institutionalists would come to the fore.

II. A NEW, COMPARATIVE SCHOOL?

Ugo Mattei's book under review uses a thematic rather than a "schools of thought" approach because the various schools of law and economics have very little²⁹ to say that is relevant outside of the U.S. (Naturally, this did not stop the Chicago School from prescribing a great deal for East European states experiencing a thrust toward democracy.)³⁰ Teaching in Italy and the U.S. and researching in Eastern Europe and the Third World, Mattei concludes with abundant justification that law and economics is deeply ethnocentric. While economists "speak the same language all over the world," "political barriers" create the acute "cultural parochialism" among lawyers that infects law and economics.³¹

Chicagoans see *common-law* judges broadly reaching efficient solutions, while civilians (civil law lawyers in, say, France or Italy) usually see judges as mechanical appliers of code rules who should not be granted so much Chicago-style discretion. There are cultural impediments to transplanting a law and economics among Europeans: they remain more dazzled by the Keynesian dream and are thus more macroeconomic than American neoconservatives, and Europeans have less exposure to and interest in a social engineering or a legal realism. While Europeans face a jurisprudential

together by clusters of belief reproduced in doctrinal formulae, and influences the most ordinary and routine social interactions; I would add that the same can be said of economics); Minda, *supra* note 1, at 39 (self-consciously associated with the '60s counterculture, CLS tries to "trash" traditional legal thought); *id.* at 43 (as a syndicalist movement, CLS reflects individual rather than organizational initiative); *id.* (a mid '80s shift to deconstruction and post-structuralism alienated many older CLS progressives who had a political agenda).

29. See MERCURO & MEDEMA, *supra* note 1, at 121-26 (discussing comparative institutional analyses from the institutionalist school of law and economics); MALLOY, *supra* note 5 (discussing the schools of law and economics from the perspective of a comparative philosophy). These treatments are excellent and interesting. But they revolve around American definitions of American problems and solutions, and lack the breadth of approach Mattei envisions.

30. See Paul H. Brietzke, *Law, Democratization, and Markets*, in LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 31 (Robin Malloy & Christopher Braun eds., 1995) [hereinafter *Markets*].

31. MATTEI, *supra* note 1, at 77-78. See *id.* at xii (the "uncritical assumption of the American institutional background" in law and economics is treated as simply another variable by a comparative law); *id.* at 69 (law and economics presumes the need for "and immutability of a legal process patterned after the American one"); *id.* at 229 (citing Robert Cooter's study of Papua New Guinea in part, Western markets and individualism are widely seen as value-corrupting, ethnocentric, and inconsistent with Confucianism and Islam, but they nevertheless fare well in Japan and China).

vacuum like ours, it stems from a very different source: the collapse of a German-style dogmatic reasoning some fifty years ago. This vacuum, plus attempts to harmonize laws within the European Union, has generated *some* interest in the common law. This interest is seen most clearly in the new Dutch Civil Code.³²

So, one of our intellectual exports may be less attractive to Europeans than we thought, but can't a powerhouse like the U.S. rest secure in its allegedly provincial law . . . and economics? Certainly, but law and economics can be enriched by contact with a different reality in which to test its theories, enriched with historically-tested institutional alternatives that might force American theorists to revise cherished assumptions and analyses. For example, was A.C. Pigou wrong to argue that governmental redistributions will increase citizens' welfare? Neoconservative economists would answer with an emphatic "yes," but European social democrats would say "no"—with some empirical studies to back them up. After all, legal systems are going to vary in the degree to which public policy gets handled through private property rights: that is, systems vary in the degree of trust accorded to self-interested individuals. In the many countries where Wesley Hohfeld's right/duty dichotomies have not gripped the jurisprudential imagination, property rights have built-in liability rules. The person holding a right automatically and simultaneously bears a duty—a duty that need not arise from the "inefficient" regulatory "intervention" in "private" matters that is postulated by neoconservative Americans. Comparative law analyses show that property rights never followed the natural law models espoused by Ronald Coase and many other neoconservative economists.³³ Mattei thus lays an excellent foundation for important questions asked by an American

32. *Id.* at 78, 85-87, 251. *See id.* at 46-48 (compared to the U.S., marginal equilibrium analyses were never as successful in France or Germany, where the reformism of Pigou and the Lausanne School were more popular); *id.* at 79 (the distinction between common law and civil law judges described in the text is very real, but it may be based on superficial and outdated distinctions between types of legal systems); *id.* at 93 (comparative lawyers led the reception of law and economics in Italy, by comparing efficient solutions with existing institutional arrangements in Italy and elsewhere). (Perhaps needless to say, Europeans are ethnocentric too.) In no small measure, law and economics is driven by the need to justify and thus legitimate legal (especially judicial) decisions as, for example, efficient. The same need is not present in the civil law, where the application of code rules provides its own justification. *See* MERCURO & MEDEMA, *supra* note 1, at 6 (under the common law, the search is for justificatory moorings, where "ultimate ideas and principles" have eroded and perhaps disintegrated under postmodernism); *Remodeling Scandinavia*, THE ECONOMIST, Aug. 23, 1997, at 38 (renaissance in the success and popularity of the Scandinavian model—the "notion that sharing wealth is as important as acquiring it still shapes the way wages and working conditions are set, benefits are distributed and markets are regulated").

33. MATTEI, *supra* note 1, at 28, 44-46, 48, 50, 59, 65-66, 121. *But see id.* at 35 (quoted in *infra* note 37).

institutionalist, A. Allan Schmid: "How do the rules of property structure human relationships and affect participation in decisions where interests conflict or when shared objectives are to be implemented? How do the results affect the performance of the economy?"³⁴

Law and economics can also be used to rehabilitate comparative law, and this would ultimately benefit the U.S. as well. After all, our state and federal jurisdictions form a kind of laboratory of comparative law, but one lacking the range of alternatives that comparatists can develop. A much older "modern" discipline, comparative law has, like law and economics, been bedeviled by methodological quibbles and the feeling that it is often "superficial and unsystematic, dull and prone to error."³⁵ Like law and economics, comparative law typically involves a two-step process: examining what the law "is," and then what it "ought" to be. But unlike law and economics scholars, modern comparatists see law as a complex product of cooperating and conflicting, coherent and incoherent formative elements.³⁶

34. MERCURO & MEDEMA, *supra* note 1, at 110 (quoting Schmid).

35. Ewald, *supra* note 1, at 1891. See H.C. GUTTERIDGE, *COMPARATIVE LAW* 73 (2d ed. 1949) (the Montesquieuian notion that "like must be compared with like" causes problems since, I would add, we know that each country has a *sui generis* culture and level of development); Otto Kahn-Freund, *Comparative Law as an Academic Subject*, in 2 *INCHIESTE DI DIRITTO COMPARATO* 377, 379 (Mauro Rotundi ed., 1973) (comparative law has "the somewhat unusual characteristic that it does not exist"; it is a method rather than a topic—like, I would add, law and economics); MATTEI, *supra* note 1, at xi (comparative law excels at delineating the history and sources of law, but some feel it to be ethnocentric and limited—characteristics that can be ameliorated by examining, e.g., the law and economics of markets spreading into what were centrally-planned economies); *id.* at 59; *id.* at 224 (traditional comparative law classification of civil, common law, religious or traditional, and socialist legal systems); *id.* (this classification should be reconsidered, since socialist systems have virtually disappeared—many see China, North Korea, and Vietnam as traditional systems—and convergence and cross-transplantation are occurring between civil and common law systems); Ewald, *supra* note 1, at 1892 (quoting Arthur Taylor Von Mehren on the "dispersed" and "scattered" quality of comparative knowledge about law, and especially about its underlying assumptions); *id.* at 1896 (comparative law veers unpredictably between text and context as, I would add, does law and economics); *id.* at 2113 (like a neoconservative law and economics in my view, comparative law should pay more heed to context and ideas, but this requires understanding everything before anything can be understood).

36. MATTEI, *supra* note 1, at 9, 28, 50, 65, 98, 104-05. See Kahn-Freund, *supra* note 35, at 379 ("One of the virtues of legal comparison (which it shares with legal history and, I would add, the best of law and economics) is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics."); MATTEI, *supra* note 1, at 10 (discussed in *supra* note 5); *id.* at 27 (comparative law as the historically-based discerning of similarities and differences); *id.* at 36 (French law gives broad private law rights by statute, and courts then restrict their antisocial use as a matter of public law, while English courts announce their own, restrictive rights).

For Mattei, much more than complex analysis is required before law and economics and comparative law will play to each other's strengths. Economics would greatly aid in a comparative measuring and understanding of legal similarities and differences. The focus would be how different rules create (dis)incentives that translate into behavior, of course, but also how institutional alternatives develop in historical contexts and how rhetoric or ideology affects pluralistic and competitive legal discourses. This focus contrasts sharply with the hierarchical cooperation among the sources of law that is tacitly assumed by much of neoconservative law and economics, since legal solutions are imposed by fiat as well as developed through market-like processes of a mutual adaptation. Following Frederich Hayek, information and knowledge are the effects of competition rather than its causes; products and the taste for them are as diverse in law as in everything else.³⁷

Judges, legislators, and professors operate within different institutional constraints, cultural environments, realms of respect for weaker and stronger parties, and time horizons. For example, professors are more open to new and foreign influences, but much of their impact is delayed for the time it takes their students to become influential practitioners and judges. The relative and contextual power and prestige of these and other competing suppliers of legal rules exerts more influence on outcomes than do factors commonly cited by the Chicago School: the willingness to invest in a lawsuit, for example. The most efficient rule is unlikely to survive automatically, since transaction costs are far from zero and legal market failures (especially parochialism, an ignorance of superior alternatives) create opportunities for economic rents (I understand this weird stuff better than

37. MATTEI, *supra* note 1, at ix-xii, 5, 44, 103, 107, 109, 232. See MALLOY, *supra* note 5, at 5 (analytical outcomes will obviously differ if the economist pursues "morality, individual liberty and human dignity" rather than an "altruistic communitarianism"); MATTEI, *supra* note 1, at 35 (as an example of the ideology or "folklore" of the French Revolution, "it was unacceptable that property rights could become the source of obligations," since the aim was to destroy the feudal obligations linking person to property); *id.* at 76 (contrary to neoconservative theories of politics, there is little danger that civil law codes will be captured by organized special interest groups since, like Restatements, they are more the product of legal culture—debates among law professors—than of the legislative process); *id.* at 94-96 (comparative models should be complex enough to measure the gap between efficiency and reality, especially through transaction cost analyses and by taking the effects of rhetoric into account); *id.* at 119 ("Legal pluralism is the rule rather than the exception, even after the rise of the modern state" and especially given multinational interactions and complex conflict of laws rules); *id.* at 133 (multinational corporations and commercial contracts normally specify which forum's laws will prevail, creating a competition to provide the rules demanded); *id.* at 140 (ideologies and a lack of information as "irrational" constraints on competition in the market of legal doctrines); MERCURO & MEDEMA, *supra* note 1, at 121-22 (citing Warren Samuels, the essential normative choice is between alternative institutional structures/efficiency-distributional results). *But see also id.* at 175 (quoted in *infra* note 73).

you, so I'll impose it on you for my personal profit), path dependence (like cows following each other, judges eventually make peculiar paths through the legal wilderness), and a law created by accident.³⁸ (These observations presumably apply to Mercurio and Medema's "marketplace" of law and economics ideas as well.)³⁹

Rather than adopt Chicago's efficiency-is-justice axiom, Mattei usefully tries to discover a cheaper, faster, and more effective justice. His comparative law and economics shows the world's laws to have more in common than we might expect, after pondering the technicalities of various systems,⁴⁰ but also less in common than we might think in certain other areas. While many of Mattei's arguments seem to come from Chicago, his approach shows how this School can be effectively harmonized with institutionalism (and with neoinstitutionalism concerning the law of trusts, for example) so as markedly to increase the analytical power of law and economics.

III. THEMATIC APPERCEPTIONS

Some psychologists administer the Thematic Apperception Test, which consists of a series of ambiguous pictures. Like the ink blots of the Rorschach Test, these pictures are much less interesting than the themes that get interpreted (projected) into them by the viewer.⁴¹ So it is with the books under review: useful comments are made in passing on particular legal subjects, particularly on the private law trilogy of property,⁴² contracts,⁴³

38. MATTEI, *supra* note 1, at 113, 130. *See id.* at 108-09 (discussed in *infra* note 45); *id.* at 239 (law and economics shows that the transaction costs of displacing traditional laws with Western transplants are frequently too high in the Third World). Competition is intense and information rather easily available in the federal jurisdictions and the 50 states that are our laboratory of comparative law.

39. *See id.* at 140; *supra* note 37; *supra* notes 8-9 and accompanying text.

40. MATTEI, *supra* note 1, at 72, 73, 144, 147. *See id.* at 126 (discussing "convergence"—comparative law jargon for similar solutions reached by different legal systems and from different points of departure—as in the law of takings); *id.* at 147 (comparative law, law and economics, neo-legal process analysis, and institutional economics "have much in common and are presently facing similar problems").

41. MODERN THOUGHT, *supra* note 4, at 550, 632 ("Rorschach Test" entry by Renée Paton-Saltzberg and "Thematic Apperception Test" entry by Wendy Zerlin).

42. *See, e.g.,* MATTEI, *supra* note 1, at 30 (controls on externalities "need not be imposed in opposition to property rights but may be introduced *ex ante* in the distribution of property rights"); *id.* at 32, 57 (the contrary, Roman theory of the natural rights of property was abandoned by civilian lawyers out of practical necessity, given the need to deal with externalities, but neoconservative economists have not grasped this necessity); *id.* at 52 (most real-world property lies between a pure private good and a pure public good); *id.* at 129 (for governmental takings of private property, "the economic theory of public goods provides both a justification and a limit"—a taking should occur only up to the point where the bargain is one

that the parties cannot reach); *id.* at 131, 150-76 (trusts involve some of the most notable differences between the common and civil law, and cost-benefit analyses are given of the widespread transplantations of the more efficient common law concept); *id.* at 131 (the dual nature of the common law and equity precluded by the civil law theory of unitary property rights); *id.* at 134-40 (the economics of the diverse remedies given by various legal systems for building on another's land); *id.* at 143-44 (the oddities and inefficiencies of various ways of dealing with future interests, given the civilian hostility to fragmented property interests that formerly created an antipathy towards trusts); *id.* at 174 ("In contemporary society there is relatively little utility in multiple contingent interests"); *id.* (Coasian bargains are impossible because the grantor is dead, yet the common law continues to respect the grantor's interests because, I would add, of the putative *ex ante* efficiency of allowing her to rule from beyond the grave); *id.* at 201, 210 (post-socialist property laws in Eastern Europe necessarily implicate law and economics in the "critical mass of comprehensive reforms" needed to create the minimum conditions for markets, in understanding the realities of institutional arrangements, and in understanding conflicts between efficiency and justice); *id.* at 210 (property laws have grown quickly and changed radically over the last 50 years, to curtail owners' powers, commercialize private law in a recognition of new forms of wealth, and cooperate with public law); MERCURO & MEDEMA, *supra* note 1, at 22 (discussing a mixed economy of private, public, and communal sectors, structured by private property rights which exhaust gains from trade, status rights determining eligibility for the use of public resources, and non-exclusive and non-transferable communal property rights); *id.* at 112-13 (discussing John R. Commons' institutionalist transformation of property, from use-value to its value in exchange and as a means of access to markets); *id.* at 132-33 (neoinstitutionalists understand the many functions of property by examining the absence of private rights in such common-pool resources as oil or oysters, and the imperfections in information about the attributes of property); *id.* at 137 (for neoinstitutionalists like Furubotn and Richter, property rights change and new ones emerge because someone sees profit in bearing the costs of change—because of changes in relative prices, production or enforcement technology, individual preferences, or political parameters); RADIN, *supra* note 5, at 31-32 (property and contract form the legal structure for a *laissez faire*—alienability is treated as potentially separate from private property in a universal commodification); *supra* note 33 and accompanying text.

43. See, e.g., MATTEI, *supra* note 1, at 179-99 (a comparative analysis shows the civil law approach to penalty clauses in contracts to be more efficient than the common law's); *id.* at 181 (the "efficient" penalty is one high enough to ensure performance and to attract persons willing to pay a premium for reliability, but not so high as to scare the other party or the court away); *id.* at 188, 193 (later common law models reflect an erosion of freedom of contract because of its "ideological" abuse by the *Lochner*-era Court, and the perception thus grew that judges should be regulators of behavior); *id.* at 191 (the efficiency model may be dangerous when applied to penalty clauses, if judges lack "sufficient legal culture" to remedy hardships); *id.* at 197 (unconscionability doctrine used where one party unable to express stable preferences); *id.* at 196 (properly interpreted, penalty clauses preserve incentives to invest in proper and timely performance); MERCURO & MEDEMA, *supra* note 1, at 76 (by promoting efficient breaches and preventing inefficient ones, contracts remedies are an alternative to fully-specified contracts); *id.* at 140 (enforcement may be inefficient, so incentives are offered to go through with wealth-enhancing contractual exchanges); *id.* at 141 (neoinstitutionalism attacks the neoclassical/neoconservative assumption "that contracts are fully defined, instantaneously consummated, and perfectly enforced"); *id.* at 164 (citing the CLS view of Jay Feinman and Peter Gabel, contracts law amounts to ideologies justifying hierarchies and social divisions, while society moved from status and social responsibility, through free market capitalism and to an integrated, coordinated monopoly dominance).

and torts,⁴⁴ but these comments are subordinated to themes which illustrate the larger problems and potentials of law and economics.⁴⁵ Some of Mercurio and Medema's themes will be discussed in Section IV.⁴⁶ For Mattei, these themes are the perceived conflict between efficiency and equity, what happens when rules and institutions are transplanted from one legal system to another, and processes of legal change and an economic development.

Efficiency has no generic definition in Mattei's comparative law and economics, since efficiency can only emerge from comparisons of institutional contexts. The neoconservative tactic of placing an efficiency in resource allocation into opposition with an equity in resource distribution is thus incorrect and incoherent; both concepts play important roles in both contexts. Both concepts describe what "ought" to be as well as what "is," so that an outright ban on redistributions becomes an exercise in neoconservative politics rather than economics. "Equity" is a useful concept to ponder because it originally meant an Aristotelian moderation, a kind of justice achieved by avoiding an extreme result: from applying the common law or a strict command and control originally, and applying efficiency or a strict equality today. "Affirmative action" is a good example of an equity which lies between efficiency and equality. Efficiency loses some of its claimed scientific rigor and objectivity when it enters the practical realm of law, where there are usually tenable efficiency arguments on both (or all) sides of

44. See, e.g., MATTEI, *supra* note 1, at 109, 111 (since transaction costs are not zero, tort liability rules determine market behavior, and differences in interpretation among judges and academics defeat attempts to end competition among sources of law); *id.* at 112 (the meaning of "harm" in law is different from that in economics); *id.* at 117 (in 1960s American law and economics, a firm's inability to pay its pollution costs represents an inefficient allocation of resources that was subsidized by others); *id.* (shifts in legal standards thus occurred in Restatement 2d of Torts, which stimulated more cost-effective pollution abatement technologies and influenced European Union directives on a strict liability); *id.* at 223-56 (tort law in less developed countries, as indicative of whether law and economics has a future outside of the Western tradition, and whether it can avoid a cultural imperialism); *id.* at 251 (law and economics is "parochial" when it recommends the court system as the best way to approach environmental problems); MERCURIO & MEDEMA, *supra* note 1, at 70 (Calabresi's efficient liability rules assume that all losses can be compensated in money terms, undesirable effects can be reduced by using more resources, and participants are sensitive to costs); *id.* at 164 (citing Rick Abel's CLS view, tort law exploits and alienates victims by separating them from the means of redressing wrongs).

45. Unlike MERCURIO & MEDEMA, *supra* note 1, MATTEI, *supra* note 1, at x, discusses topics familiar to him and does not purport to cover the field. The contribution of law and economics "to public law is less impressive and . . . much work still has to be done." *Id.* Some law and economics scholars would likely disagree, and neither book devotes much space to the important field of corporations/companies law.

46. See MERCURIO & MEDEMA, *supra* note 1, at 171-90 (concluding chapter on "Continuous Development and Continuing Concerns"); see also *infra* notes 59-64 and accompanying text.

an issue. Like equity and, I would add, most other legal concepts, efficiency is an empty box to be filled with argumentative meaning by lawyers and economists. Some examples are given in the footnote.⁴⁷

To argue that law automatically tends toward “efficiency,” at least if legislatures and administrative agencies do not intervene, and that claims based on “equity” or “justice” should thus be excluded from consideration, comes across as errant nonsense, a cynical ideology, or likely both. In any event, and contrary to Judge Posner, such an argument violates citizens’ autonomy and a Kantian imperative, by treating people merely as means to the abstract end of some economist’s efficiency.⁴⁸

If transaction costs were zero, law would be freely transplantable and efficient (in different ways) around the world. According to Mattei, legal diversity (transplantation resistance) results from the transaction costs of legal tradition and legal ideology. For example, equity is best understood as a transplant from ancient Rome and into peculiar institutional conditions: English courts, which applied a canon law and were then secularized in the face of competing common law courts. These courts of equity were forced

47. MATTEI, *supra* note 1, at 1, 5, 7, 12, 14, 16, 22, 120. See *id.* at 16-17 (equity is not peculiar to common law systems—under a civilian “moral equity,” for example, “no single person should bear the entire burden of a course of action whose benefits are common to a large number of people”); *id.* at 29 (in contrast to the natural law that is the “imaginary legal background” for efficiency, applied law knows only complex mixtures of property and liability rules allocated in different ways, to different individuals, and by different institutions); *id.* at 147-77 (comparative efficiency analyses of private trusts in common law and civil law systems); *id.* at 191 (discussed in *supra* note 44); *id.* at 235 (generalizations like Walt Rostow’s “stages of economic growth” are wrong—the path to efficiency may change and be different for different countries); *supra* note 24 and accompanying text; text accompanying *infra* note 61. But see also MATTEI, *supra* note 1, at 15 (“complex regulation in the welfare state plays a role similar to that played by the forms of action in medieval common law, that of foreclosing the harmonious development of the law”); *id.* at 144 (the “common core of efficiency principles [are] hidden in the different technicalities of the legal systems”); *id.* at 189, 192 (judicial discretion has reduced the efficiency of clear French Civil Code rules, as part of the “fairness” urged by scholars and as a substituting of judicial rules for contracts as a scheme of social organization); *id.* at 201 (discussed in *supra* note 42); *id.* at 207-08 (efficiency of codification in decreasing information costs, especially when a fresh start is desired in Eastern Europe); *id.* at 208 (discussed in *infra* note 49); *id.* at 213-14 (while the privatization of Eastern European public enterprises ostensibly increases efficiency, weak legal controls in codes will reduce efficiency—as will the absence of rules for the emergence of sophisticated financial markets); MERCURO & MEDEMA, *supra* note 1, at 189 (quoting Landes and Posner) (“the language of justice and equity that dominates judicial opinions is to a large extent the translation of economic principles into ethical language”).

48. *Id.* at 60 (quoting Posner). See *id.* (quoting Posner) (efficiency consistent with “everyday moral intuitions,” and a Kantian autonomy blended with utilitarianism yields “an ethical concept” superior to both); Brietzke, *Urban*, *supra* note 12, at 788 (discussed *infra* at note 69); *supra* note 24 and accompanying text (institutionalist critique of efficiency); text accompanying *infra* note 61.

by competition with common law courts to develop the law of trusts that has recently been *retransplanted* (as transformed) into the civil law. In this and many other areas, transplantation is the most fertile yet least understood source of legal development, and something that jurisprudence as well as law and economics should come to grips with. Accounting for transplantations on the basis of the perceived prestige of the legal donor may be an empty idea, as Mattei concludes and as the example of the trust largely shows.⁴⁹

Nonetheless, I would argue that prestige is the best explanation we currently have, along with the fact of a brute power in some circumstances: if private investors, the World Bank, etc. expressly or tacitly condition needed funds on the adoption of American-style laws, or if the European Union tacitly conditions future EU membership on the adoption of European-style laws, then transplants *to the law in the books* will occur. To become the law in action, the transplant must not be rejected by the legal and general culture of the recipient. Latin American lawyers have accepted some transplants while rejecting others—law and economics, for example. Many Third World countries more broadly reject such fundamentals of Western jurisprudence as having law, politics, and religion occupy separate (if overlapping) domains. Transplants will then create a “fantasy law” (a yawning gap between text and context) which law and economics scholars would find fascinating: private (traditional and religious) laws continue to resolve most interpersonal disputes,⁵⁰ and (amoral, Coasian) bribes account for most of the other outcomes. Such vagueness and uncertainty offers growth points for future legal development, and it is not so very different

49. MATTEI, *supra* note 1, at xiii, 22-23, 123-24, 141. See *id.* at 123 (need to focus on why and how transplants are made, given that we do not understand even the basics of legal change); *id.* at 132 (transplants of trusts into Louisiana, Quebec, Scotland, Japan, Liechtenstein, and many Latin American countries bear out Coase’s admonition to remove impediments to private agreements where transaction costs are low); *id.* at 140 (what is commonly seen is “a mixture of transplants and autochthonous solutions . . . where comparative knowledge, if not totally absent, is much less developed than in the law of trusts”); *id.* at 148 (once a common European legal culture is reestablished, some scholars think transplants will readily follow); *id.* at 208 (given experiences with codifications in Eastern Europe during pre-Soviet and Soviet times, efficiency favors transplantation of the French Civil Code, a “relatively simple, yet broadly worded, document, open to interpretation in accordance with local circumstances and easy to comprehend”); *id.* at 212 (quoting M.A. Heller) (“in the early stages of transition, the pendulum has swung from one utopia to the other, from a Socialist to a nineteenth century vision of property rights”); *id.* at 219 (the prestige of the legal donor as a transaction cost—a very efficient Russian rule is less likely to transplant than a very inefficient German or French rule); *supra* notes 31-32 and accompanying texts. I would argue that historical patterns of influence and contemporary trade and investment patterns make transplants into Eastern Europe from Germany or Austria more likely. Also, an otherwise good and efficient transplant may impose heavy transaction costs, in the form of creating incoherence within the broader legal system.

50. MATTEI, *supra* note 1, at 225, 227, 245, 247. See *supra* note 31 and accompanying text.

from what prevails in the more “developed” United States.

Coping with disorienting changes and promoting an economic development are legal goals which loom much larger in Eastern Europe and the Third World than in the United States. A (comparative) law and economics which focuses on these desiderata would also prove relevant for the United States, where jurisprudence arguably accords these modernist goals less attention than they deserve. Many of the faults Merryman and Snyder attributed to the ethnocentrically American law and development “movement” of the 1960s are also attributable to much of law and economics today.⁵¹ By inference from some of Mercurio and Medema’s analyses, a neoconservative law and economics does not work very well, or at all, in less developed countries—or in the ghettos of American cities. The static equilibrium analyses of a neoclassical economics often perpetuate an economic stagnation. Change is less likely to be tied to economic causes, and more likely to involve radical discontinuities rather than the minor, efficiency-enhancing alterations in the status quo that can be handled by market processes.⁵² Markets, the robust health of which is explicitly assumed by neoconservatives, are commonly fragile, fragmented, thin (incapable of supporting more than one or very few producers at an efficient scale of production), or nonexistent.

Mattei can do little more than hint at the ways forward in this very new field. Theorists with an interest in development had better be sympathetic with the agendas of the institutionalist and neoinstitutionalist schools, and sensitive to the rigid structures of an economic dualism. As in American ghettos, these structures segregate many people from a viable livelihood and perpetuate the maintenance of separate layers of law. Mattei concludes that: “In a market affected by dualism, pecuniary externalities, and very deep

51. See MATTEI, *supra* note 1, at 223 (discussing the “cultural imperialism” of law and economics); Paul H. Brietzke, *Democratization and . . . Administrative Law* (forthcoming; manuscript on file with the author); Brietzke, *Markets*, *supra* note 30; Brietzke, *Urban*, *supra* note 12; John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Francis G. Snyder, *The Failure of “Law and Development,”* 1982 WIS. L. REV. 373 (reviewing J.A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980)). See also MATTEI, at xiv (the value of law and economics for market development in Eastern Europe severely hampered by a lack of comparative knowledge); *id.* at 210-11 (discussed in *supra* note 43); *id.* at 230 (discussing earlier conflicts between anthropologists and law and development theorists); *id.* at 232-33 (discussing underdevelopment as an extreme poverty, unequal distribution of wealth, uncontrolled demographic growth, insufficient calorie intake, short life expectancies, and poor health care, housing, and access to water).

52. See MERCURIO & MEDEMA, *supra* note 1, at 22, 140; *infra* note 69 and accompanying text.

disproportion in power relationships, there may be an argument for deep-pocket redistributive solutions."⁵³ Of particular relevance is something like the evolutionary and interdependence analyses of the institutionalists: the starting points of the various (non-)players, who get to play (by controlling government, for example), the kinds of conflict arising between the forces of continuity and of change, and what can be done where externalities cannot be internalized by neoclassical means. Instead of efficiency/wealth maximization, development economists emphasize improvements in human well-being.⁵⁴

IV. ENDS AS BEGINNINGS

Perhaps with her tongue firmly in her cheek, Joan Robinson concludes that: "It is the business of economists, not to tell us what to do, but to show why what we are doing anyway is in accord with proper principles."⁵⁵ (Could the same be said of much traditional jurisprudence?) The most common criticism is of "the conservative ideological element . . . attributed to the Public Choice and Chicago approaches,"⁵⁶ but Robinson would have us ask whether this ideology is a cause, an effect, or both, of the growing neoconservatism in a specifically American politics. The validity of a

53. MATTEI, *supra* note 1, at 238. See *id.* at 202 (codifications in Eastern Europe are senseless, in the absence of thorough institutional reforms); *id.* at 234-49; *id.* at 239 (discussed in *supra* note 38); MERCURO & MEDEMA, *supra* note 1, at 176 (law is not well enough understood for us confidently to predict the impact of change and development from a law and economics perspective).

54. See MECURO & MEDEMA, *supra* note 1, at 104 (rejecting the mechanistic view of a static equilibrium analysis, Thorsten Veblen's institutionalist focus was on economic development as an evolutionary process); *id.* at 110-14 (evolution, interdependence and conflict in other institutionalist analyses); *id.* at 155 (for neoinstitutionalists, adaptations to changed circumstances can occur through markets or through internal organization and hierarchy); RADIN, *supra* note 5, at 63-64 (influenced by Martha Nussbaum's Aristotelian essentialism, Amartya Sen combines developmental economics and moral philosophy, in an account of justice as "human functionings constitutive of a person's being"); *id.* at 72-73 (For Nussbaum, "the role of the polity is to structure social life and use of resources so that everyone can cross the threshold into capability to choose well."); *infra* note 69 and accompanying text.

55. Edward S. Herman, *The Economics of the Rich: The "Natural Order" of Money*, Z MAGAZINE, July/Aug., 1997, at 19 (quoting Robinson).

56. MERCURO & MEDEMA, *supra* note 1, at 82. See MATTEI, *supra* note 1, at 28 (economics "reinforces a misleading ideological (natural law) contradiction between property rights and regulation, which falls short of adequately reflecting the complex dynamics of the law"); *id.* at 48 ("ideological beliefs of marginalist economists were diverse and easy to detect"); RADIN, *supra* note 5, at 220 (law and economics scholars "want to consider economic regulation as rent-seeking, and hence tend to want to implement laissez faire markets, and even tend to want to bring back *Lochner*"). But see MATTEI, *supra* note 1, at 256 (when a value-skeptical and politically-neutral "law and economics recommends the free market, it is for reasons other than political ideology").

softer criticism by Mattei and others is easier to demonstrate: matters are simply too complex to draw blanket conclusions, like the common law consistently tends in the direction of efficiency.⁵⁷ Mary Jane Radin has recently accused the Chicago School of an “inappropriate commodification,” of treating children like commodities, for example.⁵⁸

Law and economics scholars frequently commit the logical fallacy of creating false dichotomies, by asking us to choose between unrealistically polarized alternatives and thus to ignore the sensible analyses and policies that usually lurk in the grey areas between black and white categories. Two of Mercurio and Medema’s “continuing concerns” in law and economics can be analyzed as such false dichotomies: positive vs. normative analyses, and resource allocation vs. resource distribution.⁵⁹

Much of the initial success of law and economics (and of David Hume’s philosophy) flows from assuming an ironclad distinction between positive and normative, between “is” and “ought” or fact and value, but jurists have a field day while showing that this distinction cannot long be sustained. Like lawyers, economists consistently sell the “ought” as if it were the “is,” by pretending merely to describe what they are in the process of creating. Economics assumptions and concepts (e.g., economic “freedoms”) inevitably smuggle value judgments and policy advocacy into ostensibly positivist analyses: that all relevant considerations are arbitrarily private according to the Chicago School, for example. In contrast, most of these considerations are arbitrarily public for New Haven, but only after a fairly explicit introduction of certain normative premises. Institutionalists take a peculiar position on this issue: their valuable contributions to making value premises explicit and raising the level of normative discourse are undercut by their claim to be relentless positivists who merely describe what is going on.⁶⁰

57. MATTEI, *supra* note 2, at 120. See *supra* notes 47-48 and accompanying text.

58. RADIN, *supra* note 5, at 4, 8. See *infra* notes 67-70 and accompanying text.

59. See MATTEI, *supra* note 1, at 57 (rather than develop new and interdisciplinary categories, law and economics borrowed simplistic and unrealistic models, in an attempt to overcome sterile doctrinal analyses); MERCURO & MEDEMA, *supra* note 1, at 183-89. See also *id.* at 176-83, 190 (the other “continuing concerns” are the need for more empirical studies, choosing the appropriate level of analysis—given that costs and benefits change as the level of analysis changes, and determining when and to what extent the rational actor model describes actual behavior).

60. MATTEI, *supra* note 1, at 6, 10; MERCURO & MEDEMA, *supra* note 1, at 61, 118, 119, 122, 126. See MATTEI, *supra* note 1, at 8 (scholarship which is original rather than merely descriptive and practitioner-oriented attracts a premium); *id.* at 9-10 (discussed at *supra* note 5 and accompanying text); *id.* at 48 (market failures arguably require a normative approach to a remedy, since they license the re-entry of lawyers and politicians); MERCURO & MEDEMA, *supra* note 1, at 183 (role of efficiency “decidedly unsettled” across the schools of law and economics); MERCURO & MEDEMA, *supra* note 1, at 55 (positivist economists frequently ignore ideology or

The Chicago argument that we *should* adopt the efficient solution is necessarily normative. Further, if Mattei and the institutionalists are correct and there is no unique efficiency solution, the pursuit of "efficiency" becomes a deeply normative task. A central issue in jurisprudence gets taken for granted nonetheless: how do we justify one assignment of rights rather than another?⁶¹ Inevitably normative considerations like justice, fairness or Mattei's equity will thus remain at the core of legal analysis, despite neoconservative attempts to expel them and "without the comfort of [a neoclassical economists'] Pareto-better cloak or any other formalism."⁶² If legal analysis is not the Crits' pure politics, it cannot be a purely positivist economics either, or else we surrender legal analysis to a determinism fully as jealous as an orthodox Marxism. So many real-world outcomes plausibly contradict such a determinacy that we may be tempted onto the other limb of a false dichotomy: something like the Crits' radical legal indeterminacy. The better way is to pass between the horns of the is/ought dilemma by investigating what "can" be done, in light of a country's history, culture, institutions, developmental problems and prospects, etc.—as Mattei and the institutionalists recommend.

A false dichotomy between resource allocation and distribution, described by Mercurio and Medema, grows from the is/ought dichotomy: at least for neoconservatives, the touchstone of a positivist efficiency addresses resource allocations only. Distributive issues are thus ignored or, what amounts to the same thing, relegated to the tender mercies of self-interested politicians. The horns of this dilemma are easier to pass between. Economists cannot abdicate responsibility for outcomes in this fashion, since distribution follows allocation as day follows night: efficiently allocating property rights to X necessarily distributes at least some of the wealth and income from the property to X rather than Y. The same law affects distribution as well as allocation and, to win a political, judicial and/or academic acceptance in a democracy, that law must encompass tolerable (if not desirable) distributions as well as efficient allocations.⁶³ A

use it to account for things economics cannot explain—voters or legislators acting against their self-interest, for example). Almost all of original scholarship is arguably normative; positivism has been so thoroughly mined in the past as to be nearly exhausted, while normative veins seem inexhaustible.

61. See MERCURO & MEDEMA, *supra* note 1, at 183 (quoted in *supra* note 60); see also *supra* notes 47-48 and accompanying text.

62. MERCURO & MEDEMA, *supra* note 1, at 119 (quoting A. Allan Schmid). See *id.* at 118; *supra* notes 47-48 and accompanying text (Mattei's false dichotomy of efficiency vs. equity).

63. MERCURO & MEDEMA, *supra* note 1, at 23 (citing Werner Hirsh); *id.* at 187-89. See *id.* at 189 (citing the effects of Posner's analyses, allocation vs. distribution leads to two unsatisfactory extremes—always adopt efficiency, or reject it and assume the burden of proving

neoconservative law and economics offers incomplete theories because it offers little guidance to politicians on this subject, beyond an unhelpful “do nothing or else succumb to your baser instincts.” Neoconservative descriptions of a political “entrepreneurship” are much less valuable than advice about attaining a political or judicial “statesmanship”⁶⁴—an old-fashioned ability, the current paucity of which is due (in small part) to the popularity of postmodernism as well as a neoconservative law and economics.

A final trilogy of false dichotomies plagues law and economics, especially among neoconservatives: the common law vs. regulatory systems of intervention, private law vs. public law, and microeconomics vs. macroeconomics. These dichotomies overlap so neatly as to create polarized worldviews reminiscent of the Cold War: the good, efficient, privatized common law bloc, evaluated under a sophisticated microeconomics, versus the dubious, inefficient, interventionist, public law bloc, evaluated under a problematic macroeconomics. These dichotomies are rooted so deeply that a synthesis is about as likely as a New World Order at present. Unfortunately, comparative law offers little hope for passing between (or transcending) these dichotomies. Like economists, comparatists have become prisoners of the private and public categories they originally created for a methodological convenience. It seems obvious that lawyers and economists could straddle their own conventions for mutual and public benefit. But cooperation is forestalled by a central polarity: between the privatized view that any public interest which exists is a simple sum of its private and self-interested parts, and the publicized view that the public interest whole is necessarily greater than, and otherwise different from, the sum of its parts. However you come out on this debate, you will likely conclude that our inability to define the public interest in coherent and compelling ways will exacerbate democratic crises.⁶⁵ Civic republicanism and some species of postmodernism offer constructive suggestions about what a synthesis might look like.

Mattei and Mercurio and Medema do not really discuss this dichotomous trilogy, or the needs to be described: for a more effective economics theory of market failure, for a more humanistic or people-centered law and

that justice, fairness, etc. is worth the avoidable costs that result); *Remodelling Scandinavia*, *supra* note 32 (quoted in *supra* note 32). Forcing your opponent to bear the burden of proof is a favorite lawyers' way of winning an argument. It assumes that Posner has already satisfied whatever burden of proof he bears.

64. See GARY JACOBSON, *PRAGMATISM, STATESMANSHIP AND THE SUPREME COURT* (1977); MERCURO & MEDEMA, *supra* note 1, at 126 (quoting A. Allan Schmid, an institutionalist) (if law and economics has “no dispositive answer to resolve policy arguments, what is it good for?”).

65. See MERCURO & MEDEMA, *supra* note 1, at 97-98 (discussed in *supra* note 20); *infra* notes 70-72, 80 and accompanying text.

economics, and for a better integration of law and economics into a general jurisprudence. My purpose in sketching these dichotomies and needs is not to reprove the authors for books they did not write—the ones they chose to write are excellent indeed—but to round out this review. “Market failure” is the *only* justification for governmental intervention, explicitly or by clear implication across the schools of law and economics. It is peculiar that so important a matter is usually allowed to pass by assumption, rather than through hard analyses of when and why particular failures occur.

Markets are assumed (almost) never to fail in the neoclassical economics of Chicago, while New Haven markets are assumed to fail regularly enough to license a fairly interventionist state. Ideology rushes in to fill this and other analytical vacuums. The problem is exacerbated where formal markets do not exist, and “market” gets used as a metaphor to explain nonmarket behavior: love, child rearing, racial discrimination, and other exposures to “risk,” for example. Political “markets” may differ significantly from formal economic markets precisely because they are political.⁶⁶ The fault

66. See MATTEI, *supra* note 1, at 48 (discussed in *supra* note 60); *id.* at 61; MERCURO & MEDEMA, *supra* note 1, at 64 (quoting Chicago’s Judge Posner on “a free market operating without significant externality, monopoly, or information problems”); *id.* (for Posner, behavior should thus be channelled through a market if possible; if not, the common law prices behavior so as to mimic the market); *id.* at 155 (for neoinstitutionalists and citing Fredrich Hayek and Chester Barnard, a coordinated adaptation to change can occur through the market or through internal organization or hierarchy); Brietzke, *Review, supra* note 19, at 56 (“The contingency and complexity of the real world makes ideologically-colored interpretations possible, of whether a particular market has failed for example.”); *id.* (“The indeterminacy of economics which (like law once again) is highly value driven and which often uses the weak logic of metaphors and arguments by analogy, is both a cause and effect of ideological manipulation.”); Brietzke, *Urban, supra* note 12, at 752-54; *id.* at 763 (poverty as a market failure, an externality of our chosen mode of social organization caused by barriers to entry, market fragmentation, and uncompetitive behavior); *supra* note 11 and accompanying text. Question: How many Chicago-School economists does it take to change a light bulb? Answer: None, because if the bulb needs changing, the market will have done it already.

An August 1997 crisis in Thailand offers food for thought. In the wake of the Mexican peso crisis of 1994, the IMF decided (as neoconservative economists would recommend) to provide global markets with more extensive and timely information on countries such as Thailand. Yet it is clear that investors there, lulled by a spectacular growth over the last decade, ignored information about mounting trade deficits, weakening banks, and other “small and medium” problems, and then developed “some big feet and legs to run on when the problems became quite serious.” Paul Blustein, *When Signs of Trouble Go Unheeded: Thai Crisis Exemplifies Trend in Emerging Markets*, WASH. POST, Aug. 17, 1997, at H1 (quoting Institute of International Finance Director Charles Dallara) (read off Internet). “Markets . . . are subject to delusions and sudden awakenings, of course. But what makes emerging markets especially vulnerable these days is the huge number of new participants” *Id.* (citing Dallara). Rather than process information, people look for the “magic indicator” and follow “herd instincts.” *Id.* (quoting Greg Fager in part). Government felt that it could not devalue the currency (baht) because this would anger corporate debtors inside Thailand, and Southeast Asian

lies with economists rather than with lawyers here, since an economics theory of market failure scarcely exists.

In 1932, A.C. Pigou wrote: "It is not wonder, but rather the social enthusiasm which revolts from the sordidness of mean streets and the joylessness of withered lives, that is the beginning of economic science."⁶⁷ The "mean streets" and "withered lives" we still have with us, particularly in the inner city and the Third World, but they generate little "enthusiasm" in law and economics or, indeed, elsewhere in a contemporary (I almost said Yuppie) jurisprudence.⁶⁸ Instead of the real problems of real people, dehumanizing abstractions get analyzed: "the economy," its "natural" rate of unemployment, and the advantages of a "balanced" budget, a "free" trade, and an abandonment of "welfare" for the poor; and the glories of efficiency and a corresponding "downsizing" and "trickle-down" distributions. Corporate and governmental bureaucracies prefer organizational needs to human needs when these conflict, and law and economics scholars find it difficult to resist this powerful influence. By way of contrast, a humanistic law and economics would emphasize an adequate number of jobs at living wages and under tolerable working conditions, and a meaningful recognition of the dignity interests involved in struggles over rights.⁶⁹ Perhaps a "street

countries and Brazil and Argentina are worried by what happened. *Id.* Is this a "market failure?" If so, was it caused by the IMF, the Thai Government, global markets, domestic markets, and/or individual investors? The pain for Thais, other governments, and investors is real, so what should be done—if anything? Are changes in Thai law, international economic law, etc. appropriate?

67. A.C. PIGOU, *THE ECONOMICS OF WELFARE* 5 (4th ed. 1962).

68. See also RADIN, *supra* note 5, at 216-17 (Bentham naively assumed human nature to be "that of a mercantile reckoner, just because the circumstances of the rising mercantile society brought forward these characteristics"); *id.* at 217-18 (liberalism cannot be frozen into this mold when historical circumstances no longer obtain for a "Hobbesian mechanistic self-interest maximizer in a laissez-faire market"); JOHN RAWLS, *POLITICAL LIBERALISM* 300 (1993) ("*Homo politicus, Homo oeconomicus, and Homo faber*" as attempts to "resolve the impasse in our recent political history"). Such partial (and some would add sexist) pictures and philosophies help to form the slender philosophical underpinnings of law and economics.

69. RADIN, *supra* note 5, at 79; Brietzke, *Urban, supra* note 12, at 745-46, 775; Herman, *supra* note 55, at 19-25. See MALLOY, *supra* note 5, at 64 (neoconservatives advance the *de facto* morality of "protecting the market model and in promoting efficient (wealth maximizing) outcomes."); MATTEI, *supra* note 1, at 233 (no country has a complete development—consider homelessness in the United States and poor health care in Southern Italy); *id.* at 236-37; *id.* at 238 (quoted in text accompanying *supra* note 53); MERCURO & MEDEMA, *supra* note 1, at 64 (quoted and discussed in *supra* note 66); *id.* at 114-15 (institutionalism discussed in ways consistent with a humanistic law and economics); *id.* at 117 (the need for choice in assigning rights—deciding who imposes gains and losses on others); *id.* at 118 (maximizing "output" can be an aggregate social well-being or the value of goods from the consumers' or producers' perspective); RADIN, *supra* note 5, at 85 ("cost-benefit analyses involving people's subjective well-being is difficult to get right when many different people are involved and we are talking about interests they hold dear"); *id.* at 86 (illustrating the previous argument with Posner's

economics” should supplement the “street law” popular some years ago, to reflect the legal and economic dualism that exacerbates inequality here and in the Third World.

If you are willing to consider some brief sociology, a dehumanizing economics contributes, in many small and some fairly large ways, to a growing anomie and alienation⁷⁰ in America, in family and in personal

analysis of rape); Brietzke, *Review, supra* note 9, at 58 (“The poor would likely continue to ‘sell’ (to the police, social workers, etc.) and the rich to ‘buy’ (e.g., private guards for their condo foyers) privacy and the many other alienable rights.”); Brietzke, *Urban, supra* note 12, at 741 (the ghettos of the United States as an entrenched Third World, with barriers to entering the more lucrative markets and relations with police and other officials that smack of an underdeveloped authoritarianism); *id.* at 750 (“Rapid increases in catastrophic joblessness and homelessness, teen pregnancies, female-headed families, . . . serious crime, and the outmigration of middle and working class families that further concentrates poverty . . .”); *id.* at 751 (discussed in *supra* note 19); *id.* at 763 (discussed in *supra* note 66); *id.* at 787 (the minimal physiological integrity that is a precondition to the bargaining stressed by neoconservatives); *id.* at 788 (citing Frank Michelman, some of law and economics holds that markets sacrifice the well-being of identifiable individuals for the benefit of the majority); *id.* at 797 (in a “throw-away” society, where people are less likely to be recycled than soft drink cans, huge sums are spent to police the crime, drugs, and despair of the ghetto, and almost nothing is spent to integrate markets and increase the productivity of less skilled labor); Herman, *supra* note 55, at 19 (the “let-the-fur-fly” economics of the Chicago School, as a counterrevolution to a “Keynesian economics . . . disturbing in its stress on the inherent instability of capitalism, the tendency toward chronic unemployment, and the need for substantial governmental intervention to maintain viability”); Louis Uchitelle, *What Goes up Must Usually, Well, Stop Going up*, N.Y. TIMES, Aug. 10, 1997, at E1 (wage increases have not kept pace with increases in productivity, corporate profits, and managerial compensation); Patricia M. Wald, *Whose Public Interest Is It Anyway? Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 33 (1995) (“Good law must improve the lot of mankind, not denigrate it.”); *Remodelling Scandinavia, supra* note 32 (quoted in *supra* note 32); *supra* notes 52-54 and accompanying text.

The tendency in mainstream economics and statistics is the equivalent of sound bites, “tak[ing] a hundred-dimensional problem like welfare reform and reduc[ing] it to one number.” John M. Broder, *Big Social Changes Revive the False God of Numbers*, N.Y. TIMES, Aug. 17, 1997, at E1 (quoting Bruce Levin). Such a sound-bite economics obscures the important questions:

Who benefits most from the North American Free Trade Agreement? What are the social costs of affirmative action? Has the quality of health care deteriorated under managed care? How bad is corporate streamlining . . . [o]r wage stagnation at a time of low inflation and technology-driven improvements . . . ? [D]o the growing numbers of women in the work force mark the American family’s effort to stay afloat in a time of falling wages—or the professional liberation of millions of women? . . . [Have we] become a nation of temps doing piecework for heartless corporations for want of better jobs? Or do the figures reflect decisions . . . to trade full-time work and benefits for more freedom and family time?

Id. at E1, E4.

70. “Anomie” was resurrected from the Greek (literally, “without law”) by Emile Durkheim to describe the disorientation of individuals and a society which lost the traditional moorings of a commonly-accepted normative code. MODERN THOUGHT, *supra* note 4, at 25

relations as well as in civic and political relations. As Sondra Myers puts it, we have become “a nation unnerved by rampant violence, creeping intolerance, visible poverty, schools and family often unequal to the challenges of a rapidly changing society.”⁷¹ Despite the efforts of law and economics scholars and earlier trust busters, there is no economic constitution corresponding to our political one and able to come to grips with the disputes that arise. Markets are certainly inadequate to (they fail at) this task—exhausting gains from trade does not contribute much to a public order—and a neoconservative law and economics calls for additional deregulations because it lacks the methodological means for showing how a genuinely public interest can be derived from private ones. Efficiency is nice but insufficiently compelling for this purpose. Soldiers would not voluntarily fight and die for it, for example. What we need is “new institutional ways of realizing an old vision of the good society, . . . and institutionally detailed accounts of a new social vision”⁷² This is something that

(anomie entry by Daniel Bell). A related concept, “alienation” means both a transfer of ownership and feelings of estrangement, powerlessness, and depersonalization. *Id.* at 16 (alienation entry by Daniel Bell). Marx also used it as a key concept for his analysis of capitalism as reification and exploitation. *Id.* at 17. See MERCURO & MEDEMA, *supra* note 1, at 164 (discussed in *supra* note 44); *infra* note 71 and accompanying text.

71. Sondra Myers, *The Power of Conversation*, THE KEY REP., Autumn, 1994, at 6. See MICHAEL PERRY, LOVE AND POWER: THE POWER OF RELIGION AND MORALITY IN AMERICAN POLITICS 8 (1991) (discussing “a breakdown in understanding how personal and communal beliefs should be reached in public life”); Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 MICH. L. REV. 1539, 1558 (1995) (“If the contemporary debate . . . is any indication, representative democracy faces a crisis.”); *id.* (“No one defends the system as it now stands,” and we should go “back to first principles”); Liz McMillan, *A Select Group of Scholars Gathers to Ponder the State of U.S. Democracy*, CHRON. HIGHER EDUC., Oct. 11, 1996, at A16 (discussing symposium on “whether democracy can survive in the face of deepening mistrust, increasing pluralism, . . . widening economic inequality,” and a cynicism growing from plummeting confidence in public institutions and ideals such as justice and equality); *id.* (citing James Davison Hunter) (a survey shows “that the most disaffected group in the country is not the poor or any minority groups, but the white middle class, especially on the religious right”); *id.* (quoting Hunter) (“They are fearful, bewildered, and very angry”); *id.* (quoting Richard Merelman) (“There’s no serious attention . . . to the virtually uncontrolled growth of the market that continues to stratify people and makes people at the bottom feel common values don’t apply to them.”); *supra* notes 65, 70 and accompanying text.

72. Stephen Elkin, *Conclusion: Judging the Good Society*, in THE CONSTITUTION OF GOOD SOCIETIES 186, 203 (Karol Soltan and Elkin eds., 1996). See MERCURO & MEDEMA, *supra* note 1, at 93 (quoted in text accompanying *supra* note 16); *id.* at 94-95 (focus in contractarian public choice or catallaxy on spontaneous coordination of collective interactions); *id.* at 98-99 (civic republican responses to democratic crises); *id.* at 99 (government is “a creative force; it is both a moral teacher and a reflection of public opinion” which can be re-formed through debate); *id.* at 114 (institutionalist approach to the problem of order); *id.* at 138 (discussed in *supra* note 26); RADIN, *supra* note 5, at 5 (for Chicagoans, “[p]olitics reduces to ‘rent seeking’ by logrolling selfish individuals or groups,” and the “social ideal reduces to efficiency”); *id.* at 27 (citing a Yalie, Susan Rose-Ackerman, on the incompatibility of unfettered market processes with “the responsible functioning of a democratic state”); WILLIAM M. SULLIVAN, RECONSTRUCTING

institutionalist law and economics, civic republicanism, and communitarianism can provide, especially if these approaches are integrated.⁷³

A better integration of diverse insights into legal analysis could and arguably should begin among the fractious tribes of law and economics. Economists should try to return to the broader "political economy" approach of Adam Smith, Bentham, Mill, and the Physiocrats, *perhaps* shorn of the classical liberalism that may no longer suit conditions. This approach rather seamlessly integrated economic, political, legal, sociological, historical, and philosophical considerations. (As Professor of Moral Philosophy, Adam Smith also taught Jurisprudence.) We abandoned such interdisciplinarity when we succumbed to Langdell's legal "science" and to German blandishments about the productivity increases that result from an extreme division of scholarly labor within strict disciplinary boundaries.⁷⁴ As a result, we know more and more about less and less, and can scarcely communicate with each other about general legal concerns.

Jurisprudence used to provide much common ground for legal analysis, but the dissensus that is a cause and effect of postmodernism put paid to this valuable function—and to some of the elitism it engendered.⁷⁵ Jurisprudence also spawns false dichotomies: cycles of "intense excitement and enormous

PUBLIC PHILOSOPHY 179 (1982) ("A recovery of democratic politics in America must start with reawakening a living sense of the social and historical relationships within which we stand."); *id.* (this involves "a struggle for a more inclusive community" and a civic virtue rather than merely a liberal civility); Minda, *supra* note 1, at 33 (the "mundane but important task of reconciling judicial lawmaking with democratic principles"); *supra* notes 12, 15-16, 19 and accompanying text.

73. See Gardbaum, *supra* note 2; *supra* notes 20-25 and accompanying text.

74. See MATTEI, *supra* note 1, at xii (need for economics to understand law as a "boundaryless phenomenon of social organization"); *id.* at 33-55 (discussed in *supra* note 12); Brietzke, *Review*, *supra* note 18, at 58 (for MALLOY—see *supra* note 5, at 93—classical liberals hope to hold the balance among fractious schools of law and economics, but they would have to rebuild the political and analytical middle ground pragmatically); Brietzke, *Urban*, *supra* note 12, at 792. *But see* BECKER, *supra* note 7 (quoted in *supra* note 7); MERCURO & MEDEMA, *supra* note 1, at 175 ("[l]egitimate critiques of Law and Economics can only come from comparing competing methodologies or approaches" for describing the interrelations of law and the economy, and for predicting the impact of legal change and development).

75. See Kelley, *supra* note 2, at 269 ("The basic institutional reason for the self-confidence and intellectual imperialism of jurisprudence was an elitism accompanied by a sense of rank that often bordered on the ridiculous."); *id.* (quoting Odofredus, 1550, this is because lawyers "antecede other professors in learning and virtue"); *supra* notes 1-3 and accompanying text. *But see also* MATTEI, *supra* note 1, at 4 (in comparison with lawyers' relations with economists, their relations with philosophers are superficial and never reach into the daily fare of legal reasoning).

ennui";⁷⁶ "rational vs. mystical; religious vs. secular; patrician vs. plebeian; . . . formalism vs. realism";⁷⁷ understanding society vs. working to change it; and truth vs. ideals.⁷⁸ Passing between the horns of these and other dilemmas would be a monumental task, and few jurisprudes can now identify something like a "canon"—much less defend it. Nonetheless, jurisprudence could be restored in partial and more modernist ways, while continuing to reduce the intellectual gulf separating law from economics and the many other forms of social thought.⁷⁹

We could begin with something given little attention in law and economics, the "process of discerning and articulating the common project of a society and those things which make that project deserving of loyalty and commitment."⁸⁰ This process of defining the public interest would likely be based on the pragmatism that is said to be America's distinctive contribution to philosophy, and on an Aristotelian practical reason; even Judge Posner has recently confessed that this is a necessary adjunct to economics in legal analysis.⁸¹

76. Philip Soper, *Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law*, 22 CREIGHTON L. REV. 67, 68 (1988).

77. KUKLIN & STEMPL, *supra* note 1, at 191.

78. Gunnar Myrdal, *Objectivity in Social Research*, in INTRODUCTION TO JURISPRUDENCE 16 (3d ed., Denis Lloyd ed., 1972). See MATTEI, *supra* note 1, at 20 (debate since 15th century about whether the lawyers' role concerns theory or practice).

79. MERCURO & MEDEMA, *supra* note 1, at 13. See MATTEI, *supra* note 1, at 24 ("Continental lawyers have managed to cast themselves as political problem solvers by developing connections with the intellectual and cultural leadership of their society."); *id.* at 147 (discussed in *supra* note 40); MERCURO & MEDEMA, *supra* note 1, at 191; JUDITH N. SHKLAR, LEGALISM vi (1964); Hamilton, *supra* note 71 (quoted in *supra* note 71). Such a restoration cannot simply revert to older ways of doing jurisprudence: autonomous legal analyses through a doctrinalism or a jurisprudence of values, for example. See MATTEI, *supra* note 1, at 285; Smith, *supra* note 1, at 89-90.

80. SULLIVAN, *supra* note 72, at 90 (describing a "public philosophy"). See RADIN, *supra* note 5, at 222 (law both expresses and forms cultural commitments); *supra* note 65 and accompanying text. The chances for a jurisprudential integration are aided by the fact that the two extremes, law and economics and critical legal studies, are based on traditions which have gone out of style: a Benthamite utilitarianism and a Marxism/banal legal realism respectively. See George P. Fletcher, *Why Kant*, 87 COLUM. L. REV. 421, 427 (1987). See also KUKLIN & STEMPL, *supra* note 1, at 169 (discussed in *infra* note 81).

81. MERCURO & MEDEMA, *supra* note 1, at 187; SULLIVAN, *supra* note 72, at 90 (stating that the "process" quoted in text accompanying *supra* note 80 is based on a practical reason in a classical sense, a philosophy at odds with liberal interpretive principles). See Elkin, *supra* note 72, at 199-200 (practical problems are best approached through a practical reason, which includes changing the rules of political judgment if we do not like the way we are); KUKLIN & STEMPL, *supra* note 1, at 169 (given its need to deal with the complexities and "glitches of reality," the Chicago School is now "less like a self-standing scheme of jurisprudence and more like a variant and descendant of realism"); Brietzke, *Review*, *supra* note 19, at 57 (pragmatism plays no role among the many economists and jurisprudes who are True Believers); Minda,

Until we agree over what to do when we disagree in economics or in jurisprudence, the best we can hope for is a legal analysis of the "second best."⁸² Such an analysis would incorporate messy compromises, in the way New Haven incorporates market failures or the neoinstitutionalists incorporate a bounded rationality into law and economics. We can choose to apply some economic, philosophical, etc. theories to some problems, and other theories to other problems, on the pragmatic basis of "what works." The "opportunity costs" of the analytical incoherence that results can be attributed to the absence of a consensus jurisprudence. From this perspective and echoing the neoinstitutionalists,⁸³ government is neither (nearly) all-bad (Chicago) nor (nearly) all-good (New Haven), but the problem and the solution in roughly equal measures. We should thus work both to suppress the governmental mischief and to advance its remedy as creatively as possible.

Jurisprudence and law and economics are like building a ship on the open sea or a cathedral: we learn, decide, remodel, and die without finishing the task. Just as we must redesign the theory of market failure, a new logic of public life is needed to replace the many false dichotomies we have accumulated over the years. As Robert Bellah and his colleagues put it: "Paradise on this earth, we have learned, is beyond our capacities. But we can, if we are modest and hopeful, possibly establish a reasonably livable purgatory and escape the inferno."⁸⁴ Our cultural angst over such tasks is much like the one occurring at the end of other centuries: the old ways are seen to be exhausted, but this is a spur to creative efforts. After all, "the

supra note 1, at 37-38 (now less confident that an efficient solution can always be found, Posner uses a judges' pragmatic admixture of intuition and common sense).

82. There are many reasons why the demanding assumptions made by a particular law and economics—perfect competition within an equilibrium for Chicagoans, for example—cannot be realized in the real world. The theory of the second best (or of a workable competition) then argues that it is by no means certain that we should come as close as possible to the results attainable purely in theory, especially when we take context and the need to maintain an overall coherence into account. See JAMES V. KOCH, INDUSTRIAL ORGANIZATION AND PRICES 53, 314, 322, 347 (1974); ROGER L. MILLER, INTERMEDIATE MICROECONOMICS: THEORIES, ISSUES, AND APPLICATIONS 445-46 (1978). More generally, the theory of the second best argues that the perfection sought through a particular economic or jurisprudential theory should not be set up as the enemy of practical policies which are merely good in terms of the public interest. See also Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 502 (1996) ("we have no method for choosing between these approaches, no metatheory of the human sciences," so we can apply theories seriatim).

83. See Elkin, *supra* note 72, at 201-02 (need to resist the temptation to exaggerate the importance of logical coherence, when we deal with uncertainty in a world of multiple values); MERCURO & MEDEMA, *supra* note 1, at 130 (quoted in text accompanying *supra* note 26).

84. Myers, *supra* note 71, at 1 (quoting BELLAH ET AL.). See Elkin, *supra* note 72, at 198-99; George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971); *supra* note 66 and accompanying text.

future of jurisprudence remains in our hands, . . . to build the legal world we wish to inhabit.”⁸⁵ The books under review offer many useful suggestions about the directions our creativity should take.

85. Minda, *supra* note 1, at 59. See MERCURO & MEDEMA, *supra* note 1, at 176 (an “eclectic received doctrine . . . will incorporate a healthy dose of . . . Law and Economics”); Minda, *supra* note 1, at 29 (jurisprudence will have a new energy and be “without fixed foundations and formal boundaries”); *id.* at 55 (otherwise, “jurisprudence is showing signs of exhaustion,” with “new twists, new words, new emphases” in a “postmodern aesthetic”).

